

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY

JUDICIAL REVIEW MISC. APPLICATION NO. E002 OF 2024
IN THE MATTER OF ARTICLES 1(1), (2) & (3), 10, 20, 21(1),
22, 23, 27, 36, 47, 48, 50 & 232(1) & (2) OF THE
CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 4 OF THE FAIR
ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF SECTIONS 37, 136 & 208 OF THE
FISHERIES MANAGEMENT & DEVELOPMENT ACT, NO. 35 OF
2016

AND

IN THE MATTER OF REGULATIONS 4(a) & (b), 9, 14, 17, 20
& 23(1)(h) OF THE FISHERIES (BEACH MANAGEMENT UNIT)
REGULATIONS

BETWEEN

REPUBLIC.....
APPLICANT

VERSUS

THE COUNTY GOVERNMENT
OF HOMA BAY.....1ST
RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE
MEMBER FOR BLUE ECONOMY & FISHERIES
COUNTY GOVERNMENT OF HOMA BAY.....2ND
RESPONDENT

THE COUNTY DIRECTOR, FISHERIES.....3RD
RESPONDENT
SUB-COUNTY FISHERIES OFFICER,

**SUBA NORTH SUB-COUNTY.....3RD
RESPONDENT**

AND

**GEORGE OTIENO ORACHA.....1ST EX PARTE
APPLICANT**

**LORNA ACHIENG OKOTH.....2ND EX PARTE
APPLICANT**

**RAPHAEL OREWE.....3RD EX PARTE
APPLICANT**

**JOSEPH ONYANGO OLOGI.....4TH EX PARTE
APPLICANT**

JUDGMENT

[1] The Notice of Motion dated 15th May 2024 was filed by the *ex parte* applicants (hereinafter, the applicants) pursuant to the provisions of **Section 3A** of the Civil Procedure Act, CAP 21 Laws of Kenya and **Order 53 Rule 3 & 4** of the Civil Procedure Rules, 2010. They prayed for the following orders:

[a] THAT the applicants be granted an Order of Certiorari to bring into this Court and quash forthwith the decision by the 3rd respondent dated 25th March, 2024 purporting to dismiss and/or remove from the office, the Executive Committee of Ng'ou/Dhogunda Beach Management Unit (BMU) and instructing and/or directing the 4th respondent to embark on the process of conducting fresh elections to replace the Executive Committee within Ninety (90) days and the decision to appoint Interim Executive Committee of Ng'ou/Dhogunda by the 4th respondent vide letter dated 26th February, 2024.

[b] THAT the applicants be granted an Order of Prohibition directed at the respondents in particular the 3rd and 4th respondents prohibiting and restraining them from implementing the decision of the 3rd respondent dated 25th March 2024 purporting to;

[i] dismiss and/or remove from the office, the Executive Committee of Ng'ou/Dhogunda BMU and appointing the Interim Executive Committee of Ng'ou/Dhogunda BMU dated 26th February, 2024.

[ii] embark on the process of conducting fresh elections to replace the Executive Committee within Ninety (90) days.

[c] THAT in the alternative, the Court do grant a Conservatory Order of Injunction restraining the 3rd and 4th respondents from implementing the decision made on 25th March, 2024 by the 3rd respondent.

[d] THAT the Honourable Court be pleased to grant such other or further relief as it may deem fit in the circumstances.

[2] The application was premised on the grounds set out on its face and in the Supporting Affidavit sworn by the 1st applicant, **George Otieno Oracha**. The key grounds relied on by the applicants are that:

[a] THAT the proceedings, findings and decision dated 25th March, 2024 are a gross travesty of injustice as they have offended all possible principles of law, the Constitution, the

Fisheries Management & Development Act Cap 378 and the Fisheries (Beach Management Unit) Regulations 2007.

[b] THAT the 3rd and 4th respondents' conduct in the process leading to the impugned decision is manifestly malicious, unlawful, unconstitutional, unprocedural, inconsistent, contradictory and *ultra vires* the provisions and procedure of the law in particular the Constitution of Kenya, 2010, the Fisheries Management & Development Act and the Fisheries (Beach Management Unit) Regulations 2007, notably **Regulation 23(1) (h)** of the Fisheries (Beach Management Unit) Regulations 2007.

[c] THAT the decision of the 3rd respondent is *ultra vires*, illegal, unlawful, null and void as the responsibility and power to dismiss an elected Executive Committee member rests with the electoral authority namely the Assembly of Ng'ou/Dhogunda BMU.

[d] THAT the 3rd respondent's decision is unfair, discriminatory, arbitrary, inconsistent, contradictory, malicious and capricious and offends the presumption of innocence as enshrined in the Constitution in that one of the Executive Committee member of the dissolved Executive Committee, namely, **Charles Ochieng Okoso**, has been appointed as one of the Interim BMU Committee of Ng'ou/Dhogunda BMU thereby confirming the prejudice, malice, vendetta and discrimination by the 3rd and 4th respondents against the other members of the Executive Committee.

[e] THAT the 3rd and 4th respondents' decision is irrational, an abuse of power, draconian, harsh, discriminative, oppressive, punitive, grossly unlawful, actuated with malice, bias and vendetta and against the legitimate expectations of the registered members of Ng'ou/Dhogunda BMU and the applicants and epitome of procedural impropriety.

[f] THAT the 3rd and 4th respondents' decision was made for an illegal, improper motive and/or for selective extraneous purpose by failing to take into account relevant factors and provisions of the law on due process and the right to a just and fair hearing.

[g] THAT consequently, the illegal, unlawful and unconstitutional acts of the 3rd and 4th respondents in commencing the implementation of the decision of the 3rd respondent has denied the registered members of Ng'ou/Dhogunda BMU who elected the applicants to represent them in the matter pertaining to fishing activities at Ng'ou/ Dhogunda BMU.

[h] THAT as a result of the foregoing, it is imperative, necessary and appropriate that this instant application be heard and disposed of in accordance with the law and in particular, in accordance with **Articles 48 and 50** of the Constitution of Kenya, 2010.

[3] The respondents opposed the application. They relied on the Replying Affidavit sworn on their behalf on 13th June 2024 by the 1st respondent's Chief Officer, Blue Economy, Fisheries, Mining

and Digital Economy, **Joshua Orero**. The respondents averred that the applicants violated the provisions of **Section 21 (1) and (2)** of the Fisheries (BMU) Regulations 2007, when they engaged in acts that condoned unprescribed fishing modes while they were mandated to prohibit the same. They further contended that, on numerous previous occasions the applicants were served with warning letters as well as show cause letters as to why they persistently allowed uncontrolled illegalities at Ng'ou/Dhogunda beach.

[4] According to the respondents, after having failed to discharge their mandate for which they were elected, the applicants were duly served with a warning letter dated 12th April 2022. The letter was annexed to the respondents' affidavit and marked as Annexure JO-01. The respondent added that the applicants willfully disregarded the letter and deliberately failed to respond thereto.

[5] The respondents further deposed that the 18th August 2023 the Sub-County Fisheries officer, **Mr. Michael Akoko**, having noted repeated acts of illegal fishing in the applicants' area of jurisdiction once again flagged the applicants and informed them to initiate control measures with immediate effect. They added that the instructions were again ignored by the applicants. The 2nd warning letter was also annexed to the respondents' Replying Affidavit and marked as JO-02.

[6] It was therefore the contention of the respondents that, given the aforementioned breaches of the Fisheries Management

and Development Act, and lack of respect for the office held by them, the 4th respondent issued a show cause letter dated 4th February 2024. A copy thereof was annexed to the Replying Affidavit and marked as Annexure JO-03. They added that, the applicants having failed to sufficiently and convincingly respond to the show cause letter, an open assembly meeting was convened in which a resolution was passed to suspend the them. The decision was effected vide a letter dated 26th February 2024 (see Annexure JO-04 to the Supporting Affidavit).

[7] The respondents further deposed that they acted in accordance with the law and followed due process in handling the suspension of the applicants. They also averred that the applicants were granted leave to appeal the decision of the 4th respondent within 14 days to the Director Fisheries as prescribed by **Section 20(4)** of the Fisheries (Beach Management Unit) Regulations 2007; and that the Director of Fisheries upheld the 1st respondent's decision in line with **Section 21(4)** of the Fisheries (Beach Management Units) Regulations. A copy of the decision was annexed to the Replying Affidavit and marked Annexure JO-05.

[8] The respondents explained that, upon the conclusion of the appeal process, they called for the election of new office bearers for the Beach Management Committee to be conducted within 90 days from the date decision. They added that in the interest of continuity of office, an interim committee was appointed by the 4th respondent in accordance with the Fisheries (Beach

Management Unit) Regulations 2007. This averment is supported by the document marked Annexure JO-06).

[9] The respondents therefore reiterated their stance that they followed due process in handling what they deemed to be the applicants' gross violation of the law. They urged for the dismissal of the Notice of Motion dated 15th May 2024 with costs.

[10] The application was urged by way of written submissions, pursuant to the directions given herein on 15th October 2024. Consequently, the applicants relied on their written submissions dated 29th October 2024. They replicated the background facts and submitted that they are registered members of Ng'ou/Dhogunda Beach Management Unit (hereinafter referred to as **"the BMU"**). The applicants explained that the subject BMU is one of the BMU'S operating along the shores of Lake Victoria in Suba North Sub-County; and that it was established in accordance with the Fisheries (Beach management Unit) Regulations 2007 Legal Notice 402, 2007 (the 2007 Regulations) made under the Fisheries Act Cap 378 Laws of Kenya.

[11] The applicants submitted that they were nominated along with others by their respective membership groups; namely, Traders, Crews, and Boat Owners, respectively, to represent members in Ng'ou/Dhogunda BMU. They then vied for the membership of the Executive Committee of Ng'ou/Dhogunda BMU and were elected in December 2020 by the registered members of the BMU amongst other office committee members. They submitted that the Executive Committee constituted the

Assembly for a 4-year term in office and commenced that they commence work in January, 2021. Accordingly, their term of office was due to expire in in December, 2024.

[12] The applicants further submitted that, as members of the Executive Committee, they carried out their mandate and duties in accordance with the 2007 Regulations till February, 2024, when the 1st applicant, as their chairman, received a letter dated 13th February, 2024 from the 4th respondent's office, written by **Michael Ogembo Akoko**, dissolving Ng'ou/Dhogunda BMU on the allegations of condoning illegal fishing activities within the beach areas of the BMU. They stated that they promptly lodged an appeal in accordance with the Regulations vide Appeal dated 17th February, 2024, which Appeal was duly determined by the 3rd Respondent vide his letter dated 21st February, 2024 containing his decision reinstating the Executive Committee of the BMU.

[13] The applicants were aggrieved that, hardly four days after the said decision to reinstate the Executive Committee, the 4th respondent through his letter dated 26th February, 2024 wrote to the 1st applicant suspending the Executive Committee of the BMU and attached a letter dated 26th February, 2024 appointing Interim BMU Executive Committee to run fishing activities at the BMU. They urged the Court to note that the list of interim officials included member of the dissolved Executive Committee, namely, **Mr. Charles Ochieng Okoso** (No. 6 in the List of Interim BMU Executive Committee).

[14] On the basis of the foregoing facts, the applicants submitted that, since their appeal was allowed, the 4th respondent's appointment of an Interim Executive Committee of the BMU vide letter dated 26th February, 2024 is ultra vires. They reiterated the grounds set forth in their application and Supporting Affidavit. In the premises, the applicants proposed the following two issues for determination:

[a] Whether the 3rd Respondent has the statutory mandate to remove from office the members of the Executive Committee elected by the Assembly of the BMU; and,

[b] Whether the orders prayed for by the applicants are merited.

[15] On whether the 3rd respondent has the statutory mandate to remove members of the Executive Committee from office, the applicants relied on **Sections 37, 136 and 208** of the Fisheries Management and Development Act and **Regulations 21(4) and 23(1)(h)** of the Fisheries (Beach Management Unit) Regulations to anchor their argument that the Executive Committee of the BMU having been duly elected in accordance with the 2007 Regulations, could only be removed from the office by the Assembly under **Regulation 23(1)(h)** and not otherwise as purportedly done by the 3rd Respondent.

[16] The applicants made reference to the decision of the Supreme Court in **Dande & 3 Others v Inspector General National Police Service & 5 Others: Petition NO 6 (E007) 4**

(E005) & 8 (E010) OF 2022 (CONSOLIDATED) [2023] KESC 40 (KLR) 16 June 2023) Judgment to support their argument that the scope of judicial review has been expanded by dint of **Article 47** of the Constitution from a process review to encompass a consideration of the merits of the decision complained of. They reiterated their position that the 3rd and 4th respondents' actions were discriminatory, oppressive, and malicious and were driven by bias, improper Motive and vendetta.

[17] The applicants urged the Court to note that one of the members of the Executive Committee, **Charles Ochieng Okoso** who was also dismissed alongside them by the 3rd and 4th respondents, was appointed by the 4th Respondent as one of the members of the Interim BMU Committee of Ng'ou/Dhogunda BMU vide a letter dated 26th February, 2024. In their submission the re-appointment of the said **Charles Ochieng Okoso** is proof enough of prejudice, malice, vendetta and discrimination by the 3rd and 4th respondents as against them as no justification for his re-appointment was given in the Replying Affidavit sworn on 13th June, 2024.

[18] The applicants also submitted that the decisions of the 3rd and 4th respondents went against the legitimate expectations of the registered members of Ng'ou/Dhogunda BMU, who had elected them. They relied on **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others**, Petition No. 14 of 2014 [2014] KESC 53 (KLR) for the proposition that the principle of legitimate expectation imposes a duty to act fairly and to honour reasonable expectation raised by the conduct of a public authority.

[19] Lastly, the applicants submitted that they were unlawfully bounded out of office in February, 2024 before the expiry of their term in December 2024. They urged the Court to exercise its discretion and inherent power in the interest of justice by extending their term of office to last the four years provided for in the Regulations. They accordingly prayed that their Notice of Motion dated 15th May, 2024 be allowed and orders granted as prayed.

[20] In their written submissions dated 10th February 2025, the respondents reiterated the background facts in respect of which they were by and large in agreement with the applicants. The point of departure is the suspension and whether it was lawfully done. While the applicant's contended that the respondents acted *ultra vires*, the respondents were of the conviction that they followed due process of the law in handling the dissolution of the Executive Committee of the BMU. Accordingly, the respondents proposed the following issues for determination:

[a] Whether the applicants were procedurally dismissed from office.

[b] Whether an Order of Certiorari should issue as prayed for by the applicants.

[21] On the removal from office of the applicants, the respondents insisted that their actions were in accordance with the Fisheries Beach Management Regulations, 2007. They submitted that they duly served the applicants with warning letters as well as a show cause letter as to why they persistently

allowed illegalities at Ng'ou/Dhogunda beach in disregard of their mandate. They submitted that the applicants did not adduce any evidence to challenge the accusations of abuse of office and violation of their mandate. They urged the Court to consider the steps they took as set out in their Replying Affidavit dated 13th June 2024.

[22] In the circumstances, the respondents posited that the prayers sought by the applicants have been overtaken by events and engaging the courts further is an act of in futility and a waste of judicial time. They made reference to **Republic v Kenya National Examination Counsel Ex Parte Gathenji & Others**, Civil Appeal No. 266 of 1996, in which it was held that Prohibition looks to the future and is therefore ineffectual where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice.

[23] The respondents submitted that for a writ of Certiorari to be issued, the applicant must first of all establish *locus standi*. On the authority of [Law Society of Kenya v Commissioner of Lands & Others](#), Nakuru High Court Civil Case No 464 of 2000 and **Alfred Njau & others v City Council of Nairobi** [1982] KAR 229, the respondents urged the Court to find that the applicants are not entitled to an order of Certiorari. They therefore prayed for the dismissal with costs of the Notice of Motion dated 15th May 2024.

[24] The parties are in agreement that the applicants were elected as some of the members of the Executive Committee of Ng'ou/Dhogunda BMU in December 2020 by the registered

members of the BMU. From among the membership, the 1st applicant was elected the Chairman. The team was to serve for a term of four years and were therefore to remain in office until December of 2024. It is also common ground that, by dint of the letter dated 13th February 2024 (Annexure GOO 1 to the Supporting Affidavit), written by the Sub-County Fisheries Officer, **Michael Ogembo Akoko**, who is the 4th respondent herein, the Executive Committee of Ng'ou/Dhogunda BMU was dissolved with immediate effect. The letter was addressed jointly to the 1st applicant as the Chairman of the BMU together with all the members of the Executive Committee of Ng'ou/Dhogunda BMU.

[25] At paragraphs 2, 3 and 4 of the said letter, the 4th respondent gave the reasons for the dissolution of the Executive Committee as follows:

- [a]** Failure to eradicate illegal gears and activities within the breeding areas under the jurisdiction of the BMU;
- [b]** Failure to maintain proper financial data and/or records since inception; and,
- [c]** Failure to submit fish catch data to the Fisheries Office.

[26] The averments of the parties further show that indeed, in the letter dated 13th February 2024, the 4th respondent informed the applicants of their right of appeal in the following terms with reference to the Fisheries (Beach Management Unit) Regulations, 2007:

“Any person aggrieved by the decision may appeal to the director of fisheries within 14 days pursuant to part IV section 20(4)...”

[27] An appeal was promptly filed by the 1st, 2nd and 3rd applicants in their respective capacities as Chairperson, Secretary and Treasurer of the BMU. The appeal was made to the 3rd respondent and a copy thereof was annexed to the applicants’ Supporting Affidavit and marked Annexure GOO2. By a letter dated 25th March 2024, the 3rd respondent dismissed the appeal and confirmed the decision of the 4th respondent. He accordingly authorized the 4th respondent to embark on the process of conducting elections at Ng’ou/Dhogunda BMU. In the circumstances, the contention by the respondents that the applicants lack the requisite *locus standi* to file the instant application is baseless and requires no further elaboration.

[28] In the light of the foregoing, the issues for consideration are as follows:

[a] Whether, in the circumstances, the applicants are entitled to the reliefs sought; and

[b] What orders ought to issue on costs.

[29] The applicants seek judicial review orders of Prohibition and Certiorari. In **Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 others**

[1997] eKLR, the Court of Appeal held:

“...These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings - See HALSBURY’S LAW OF ENGLAND, 4th

Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.”

[30] To the extent that the impugned decision had been made by the time of the filing of the instant application, the remedy of Prohibition is untenable, and I so find. As for Certiorari, the Court of Appeal held added:

“...Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons...”

[31] Ordinarily, judicial review is concerned with the decision-making process as opposed to the merits of the decision itself. Accordingly, in **Republic v Attorney General & others, Ex Parte Diamond Hasham Lalji & another** [2014] KEHC 3713 (KLR) it was held:

91. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.

It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved...”

[32] The position changed fundamentally with the constitutional anchoring of the remedy under **Article 47** of the Constitution. In

this respect the Supreme Court had occasion to pronounce itself in the **Dande case** (supra) and held:

“Judicial review was introduced to Kenya from England in 1956 through sections 8 and 9 of the Law Reform Act, Cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court. Under that system, the High Court could issue orders of *mandamus*, prohibition, and *certiorari*. The grounds for the issuance of such orders were borrowed from common law. Prior to the promulgation of the Constitution of Kenya, 2010, there were two legal foundations for the exercise of the judicial review jurisdiction by the Kenyan courts found in sections 8 and 9 which constituted the substantive basis for judicial review of administrative actions on the one hand, and, order 53 of the Civil Procedure Rules which was the procedural basis of judicial review of administrative actions, on the other hand.

The entrenchment of judicial review under the Constitution of Kenya, 2010 elevated it to a substantive and justiciable right under the Constitution. Accordingly, judicial review was no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the Constitution. Thus, article 47 of the Constitution provided that every person had a right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.

...

When a party approached a court under the provisions of the Constitution then the court ought to carry out a merit review of the case. However, if a party filed a suit under the provisions of order 53 of the Civil Procedure Rules and did not claim any violation of rights or even violation of the Constitution, then the court could only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision *per se*.”

[33] In its subsequent decision in **Saisi & 7 others v Director of Public Prosecutions & 2 Others** the Supreme Court cautioned that:

“76. Be that as it may, it is the court’s firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Action Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the [Fair Administrative Action Act](#). The merits of a case

are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of [*Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah*](#), SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.

[34] It is now trite therefore that some measure of merit review is acceptable to enable the Court properly adjudicate a judicial review matter. The Supreme Court acknowledged as much in the **Saisi** thus:

“For the court to get through an extensive examination of section 7 of the FAAA, there had to be some measure of merit analysis. That was not to say that the court had to embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly in the circumstances of the case without examining those circumstances and measuring them against what was reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. It was to be limited to the examination of uncontroverted evidence. The controverted evidence was best addressed by the person, body or authority in charge. There was nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review was limited to a dry or formalistic examination of the process only led to intolerable superficiality. That would be against article 259 of the Constitution which required the courts to interpret it in a manner that inter alia advanced the rule of law, permits the development of the law and contributes to good governance.”

[35] Since the applicants approached the Court under various provisions of the Constitution, including **Article 47** as well as **Section 4** of the Fair Administrative Action Act, a merit analysis based on uncontested facts is permissible. They likewise relied on the applicable provisions of the Fisheries Management and Development Act as well as the Regulations made thereafter for the administration and control of the Beach Management Units.

[36] **Section 37** of the Fisheries Management and Development Act provides that

(1) The Cabinet Secretary may for purposes of ensuring structured community participation in fisheries management, make regulations setting out standards for the management of beach management units established by the county governments.

[37] Accordingly, the Cabinet Secretary, Ministry of Mining, Blue Economy passed the 2007 Regulations vide Legal Notice No. 402 of 2007. The said Regulations were replaced by the Fisheries Management and Development (Beach Management Units) Regulations, 2024 which were gazetted vide Legal Notice No. 49 of 2024. The 2007 Regulations were accordingly revoked with effect from 1st March 2024 by dint of Regulation 75 of the 2024 Regulations. Although counsel for the applicants addressed the Court on the relevant provisions of the 2024 Regulations, the impugned decision having been taken in February 2024, the applicable regime is the Fisheries (Beach Management Unit) Regulations, 2007.

[38] In the submission of the applicants, the 4th respondent had no statutory mandate or power under the 2007 Regulations to dismiss a member or Executive Committee of “BMU”. In they contended that, under the 2024 Regulations, the dismissal can only be done by the Assembly, with a right of appeal to the County Executive Committee Member for Fisheries, who has the final decision. The applicants augmented their submissions by citing **Regulation 20 of** the 2007 Regulations, which provides that:

(1) The assembly may dismiss a member of the executive committee, or any subcommittee, on the grounds that he—

- (a) is proven to be of unsound mind;**
- (b) has failed without reasonable cause to attend three consecutive scheduled meetings;**
- (c) has engaged in or condoned illegal fishing activities;**

- (d) **has failed to perform the duties required of his office as specified in these regulations or the by-laws; or**
- (e) **is convicted of a criminal offence.**
- (f) **An assembly to consider the dismissal of any member of the executive committee shall be convened in response to a written request signed by one-third of the beach management unit members, citing the grounds for dismissal.**

(2) **A decision to dismiss a member of the executive committee shall be taken by secret ballot requiring a simple majority of votes in favour of dismissal, and shall be confirmed by the authorised fisheries office in writing.**

(3) **A member of the executive committee who has been dismissed pursuant to subsection (1) of this regulation may within 14 days of the relevant assembly appeal in writing by notice to the Director stating the basis for the appeal.**

(4) **The Director shall determine any such appeal within 14 days by receipt of the notice of appeal and shall promptly inform the beach management unit and the authorised fisheries officer.**

In the event that two-thirds or more of the executive committee is dismissed from office by the assembly, then the entire executive committee shall stand dissolved and the authorised fisheries officer shall appoint an interim committee and call for fresh elections within ninety days of the dismissal.

[39] Accordingly, the applicants submitted at length to demonstrate that no meeting of the Assembly was constituted as per the strictures of **Regulations 20(2) and (3)** above. However, as correctly pointed out by the respondents, dismissal through the Assembly was just one of the options available under the 2007 Regulations. **Regulation 21**, offers another option, which is what was employed in this instance. It states:

(1) The Director or an authorized fisheries officer, having reason to believe that an executive committee or any of its members are engaged in or are condoning proscribed fishing practices, shall immediately in writing suspend the committee or the member and in their place appoint an interim committee or an interim committee member.

(2) When an authorized fisheries officer, other than the Director, makes such suspension, the officer shall report the case in writing detailing reasons for the suspension to the Director.

(3) Any committee or committee member aggrieved by the decision of an authorized fisheries officer may, within fourteen days of communication to them of such suspension, appeal so the Director.

(4) The Director may confirm, vary or reverse the decision, and shall accordingly issue instructions to the authorized fisheries officer.

(5) The decision of the Director under paragraph (4) shall be final.

(6) If the Director recommends dismissal then the authorized fisheries officer shall call for fresh elections to replace the committee or committee member so removed within ninety days of the Director's decision. (7) The dismissed executive committee or individual committee thereof member shall return the authority card issued under these Regulations to the issuing officer.

[40] In this instance, the process was initiated by the 4th respondent who was, no doubt an authorized officer for purposes of **Section 3** of the Act. In his letter dated 13th February 2024, he was explicit that he acted pursuant to **Regulation 21(1)** of the 2007 Regulations; and although he purported to dissolve the entire Executive Committee of Ng'ou/Dhogunda BMU, he made it clear that his decision was not final; and the affected individuals had the right to appeal to the Director of Fisheries within 14 days. Under **Regulation 21(4)**, the Director had the powers to confirm, vary or reverse the decision of the authorized officer.

[41] It was common ground herein that the applicants duly appealed to the County Director of Fisheries on 15th February 2024 and that vide his letter dated 21 February 2024, the Director communicated his finding that the Executive Committee of Ng'ou/Dhogunda BMU was erroneously dissolved by the 4th respondent. He accordingly directed that the members be reinstated forthwith. This decision was followed by a suspension letter dated 22nd February 2024 by the 4th respondent; which the Regulations permitted of him. Again, the applicants appealed vide their letter dated 7th March 2024. The decision of the County Director of Fisheries on the second appeal was as follows:

"After carefully studying your appeal, especially taking into account points number 1, 2, 3, 4 and 5, I have to the following ruling to make. The Fisheries (BMU) Regulations,

2007 with regard to Regulation 21(4), where the Director may confirm, vary or reverse the decision of the authorized fisheries officer, I hereby confirm the decision of the Sub County Fisheries Officer to suspend the Ng'ou/Dhogunda Executive Committee.

The decision has been arrived at after studying the previous warning letters by both the former and current Sub County Fisheries Officers, where the officers invariably warned your office against condoning illegalities at the beach.

[42] In line with **Regulation 21(6)**, the Director proceeded to instruct the 4th respondent to embark on the process of conduction elections at Ng'ou/ Dhogunda BMU. In the premises, it cannot be said that the respondents acted illegally, irrationally or improperly.

[43] In the case of **Pastoli v Kabale District Local Government Council & Others**, [2008] 2 EA 300, in which it was held:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR). Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”. Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

[44] The applicants also claimed that, by virtue of their election, legitimate expectation was created in their favour that they would serve a full four-year term. They argued therefore that the

decisions of the 3rd and 4th respondents went against the legitimate expectations of the registered members of Ng'ou/Dhogunda BMU, who had elected them. They relied on **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others**, Petition No. 14 of 2014 [2014] KESC 53 (KLR) for the proposition that the principle of legitimate expectation imposes a duty to act fairly and to honour reasonable expectation raised by the conduct of a public authority.

[45] The Supreme Court of Kenya took the following view in the above case:

“[263] “Legitimate expectation” is a doctrine well recognized within the realm of administrative law, as is clear from the English case, In re Westminster City Council, [1986] A.C. 668 at 692 (Lord Bridge):

“...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation”.

[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has *locus standi* to make a claim on the basis of legitimate expectation.”

[46] Upon reviewing both local and comparative jurisprudence on the point, the Supreme Court concluded thus at paragraph [269] of its Judgment:

“The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;**
- b. the expectation itself must be reasonable;**

c. the representation must be one which it was competent and lawful for the decision-maker to make; and

d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”

[47] There was no assurance or promise given by the respondents that the applicants would serve a full term. As a matter of fact, the respondents were incapable of providing such an assurance granted the imponderables attendant to the applicants’ respective positions as members of the Executive Committee and the duties entailed thereby. Indeed, that Act and the Regulations thereunder envisaged the applicants’ removal either by way of dismissal, dissolution or suspension as provided for in **Regulations 20 and 21** of the 2007 Regulations. Moreover, valid reasons were given for their removal. In the circumstances they cannot claim legitimate expectation.

[48] In the light of the foregoing, I find no merit in the application dated 15th May 2024. The same is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF FEBRUARY 2026

.....
OLGA SEWE
JUDGE

ORIGINAL