



**Gor v County Public Service Board Of Homa Bay & 7 others (Constitutional
Petition E004 of 2021) [2022] KEHC 13419 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CONSTITUTIONAL PETITION E004 OF 2021**

KW KIARIE, J

SEPTEMBER 28, 2022

BETWEEN

EVANS OTIENO OLOO GOR PETITIONER

AND

**COUNTY PUBLIC SERVICE BOARD OF HOMA BAY & 7
OTHERS RESPONDENT**

JUDGMENT

1. Evans Otieno Oloo Gor, the petitioner herein filed a petition dated August 10, 2021 on August 11, 2021. He is seeking the following orders:
 - a. A declaration that the 1st respondent is illegally constituted and thus its actions and decisions are null and void.
 - b. A declaration that appointments made by the 8th respondent are unconstitutional, invalid and thus void ab initio.
 - c. An order compelling the 8th respondent to retract all its advertisements and letters of appointment issued.
 - d. An order prohibiting 1st respondent from carrying out any further business until it is properly constituted.
 - e. An order prohibiting the respondents, whether by themselves, their employees or agents, or any person claiming to act under their authority from appointing any person to the County Government until a properly constituted Public Service Board is put in place.
 - f. Costs of this suit together with interest at such rate and for such period of time as this honorable court may deem fit.



- g. Any such other relief as this honorable court may deem appropriate.
2. The petition was premised on the following grounds:
- a. The petitioner asserts that the board has no sitting or acting Chief Executive Officer/Secretary as required by law. At all times since the current Board was formed, the 8th respondent has and continues to perform duties mandated to the Executive Officer of the Board.
 - b. The petitioner avers that the 2nd – 7th respondents have allowed this without giving any form of justification for the same. Further to this, the 2nd and 3rd respondents have allowed the 1st respondent to continue to procure business on behalf of the County despite legally inadequate composition.
 - c. The petitioner avers that the 8th respondent has and continues to advertise job vacancies within the County Government, carry out interviews and sign letters of appointment without following due process. In which manner he had denied other persons the opportunity to apply for the jobs.
 - d. The petitioner state that the irregular and inexplicable actions of the respondents have led to serious doubts over their conduct, and have exposed the people of Homa Bay County to undue unfairness and explanation.
 - e. The petitioner wish to state that by making arbitrary decisions without adequate involvement of the public, he respondents have blatantly ignored the sovereign power of the people of Kenya enshrined under article 1 of the Constitution.
 - f. The petitioner avers that the respondents have contravened article 2 of the constitution as they have exercised their authority in a manner contrary to the provisions of the Constitution as further stated hereunder.
 - g. The petitioner maintain the profound position that the respondents are in violation of article 4(2) of the Constitution as read with article 10 of the Constitution which jointly require that Government be guided by the national values including inter-alia the rule of law, democracy, equity and public participation.
 - h. The petitioner is of the founded view that the respondents violated article 201 of the constitution because they failed to ensure openness and accountability including public participation in the discharge of the functions of the County Public Service Board.
 - i. The petitioner avers that the respondents contravened article 231(1)(d) of the constitution which sets down involvement of the people in policy making as a principle of public service.
 - j. The petitioner wish to state that the respondents went against section 12 of the Public Service (Values and Principles) Act No 1A of 2015 by failing to give the Public adequate opportunity to review, comment on, be heard over and notified about policies.
 - k. The petitioner avers that the respondents are in violation of article 201(d) of the constitution as their actions exposes Homa Bay County to loss of tax revenue. This extends to a violation of article 232(1) (b) of the constitution and section 6(2) of the Public Service (Values and Principles) Act No 1A of 2015.
 - l. The petitioner avers that the respondents have abused their power contrary to article 73(1) of the Constitution which vests in the respondents the responsibility to serve rather than the power to rule.



- m. The petitioner further state that the respondents violated article 73(2) which sets out the guiding principles of leadership among which are objectivity and impartiality in decision making ensuring decisions are not influenced by nepotism, favoritism, other improper motives or corrupt practices, selfless eservice based solely on public interest, and accountability to the public for decisions and actions.
 - n. The petitioner asserts that the respondents went against article 129 of the Constitution which decrees that the executive authority derives from the people of Kenya and shall be exercise in accordance with the Constitution, and in a manner, compatible with the principle of service to the people of Kenya and for their well-being and benefit.
 - o. The petitioner avers that the respondents contravened article 27 of the Constitution as their actions fell short of equality of every person.
 - p. The petitioner avers the respondents violated article 259(1)(d) which requires the Constitution to be interpreted in a manner that contribute to good governance.
 - q. The petitioner wish to state that there is no other suit pending and that there have been no previous proceedings in any court between the petitioner and the respondents in respect of the subject matter of this suit.
3. The petition was opposed by the respondents who raised the following grounds:
- a. The petitioner is neither an employee nor a member of Homa Bay County Assembly. He has failed to demonstrate his linkage to the interested party. He therefore lacks locus standi to file this petition.
 - b. The functions of the interested party are governed by strict constitutional edifice and should not be paralyzed unwarrantedly.
 - c. The petitioner’s petition is premised on unsubstantiated assertions thus fails the probative test. The petition should be dismissed with costs.
 - d. In totality, the petitioner has completely misconstrued the role of the interested party under the Public Appointment County Assembly Approval Act, 2017.
4. After perusing the petition, the supporting affidavit thereof, the response by the respondents and submissions by the parties the following issues emerge and which require my determination:
- a. Whether the 8th respondent is discharging the duties of the chief to the Executive Officer of the Board illegally or not;
 - b. What are the functions of the County Public Service Board; and
 - c. What is the Quorum requisite for the said Board to conduct business?
5. The position of county secretary is an important one. This office holder is the head of the County Public Services and is an *ex-officio* member of the county executive committee with no voting rights. The functions of the County Secretary is provided for under Section 44(3) of the County Government Act as follows:
- The county secretary shall—
- (a) be the head of the county public service;



- (b) be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of the executive committee;
 - (c) convey the decisions of the county executive committee to the appropriate persons or authorities; and
 - (d) perform any other functions as directed by the county executive committee.
6. In the absence of a substantive holder of the office, the Act provides for an appointment of the office bearer in an acting capacity. Section 64 provides:
- (1) A person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding that public office.
 - (2) Acting appointments shall be made only by the lawful appointing authority and for a specified period.
 - (3) Nothing in this section shall prevent a public officer from—
 - (a) delegating a duty for which the law does not prohibit delegation; or
 - (b) deploying another officer to perform duties vested in another office during a temporary absence.
 - (4) Any delegation or deployment under subsection (3) shall—
 - (a) be made by an officer who is qualified and competent to perform the duty; and
 - (b) not undermine the expeditious appointment or deployment of a competent person to the public office concerned.
 - (5) If it comes to the attention of the County Public Service Board that a public officer has purportedly made an acting appointment, delegation or deployment as the case may be, contrary to the provisions of this section, the County Public Service Board shall take the necessary corrective action.

In order for a person to be appointed acting secretary, he/she must be qualified to hold such an office as is prescribed in the Act. Section 59(2) of the [County Governments Act](#) provides:

- (2) 2) In appointing a person as a secretary to a board of a city or an urban area under subsection (1) (b), the County Public Service Board shall ensure that such person is a certified public secretary of good professional standing.

The petitioner herein has not demonstrated that the 8th respondent does not meet the requirements. I have no basis to make a finding that he holds the position illegally.

- 7. The functions of the board are enumerated under section 59 of the [County Governments Act](#). Such appointments include that of the secretary to the Board.
- 8. One of the complaints which was raised by the petitioner is that the board has no substantive or acting chief executive officer/secretary as required by the Law. This, was argued was contrary to the provisions of the [County Governments Act](#). This was as at August 10, 2021 when the petition was filed. At the time of hearing of the petition, none of the parties addressed the obtaining position. The petitioner having not proved that the 8th respondent was not qualified to hold the office albeit in acting capacity, I find this complaint unproven.



9. Section 58 of the *County Governments Act* provides for the composition of the County Public Service Board as follows:

1. The County Public Service Board shall comprise— (a) a chairperson nominated and appointed by the county governor with the approval of the county assembly; (b) not less than three but not more than five other members nominated and appointed by the county governor, with the approval of the county assembly; and (c) a certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board.

This therefore means that the board must have a minimum of 5 members and a maximum of 7 members inclusive of the secretary. The Board in this case has 5 members and therefore had quorum to conduct business.

10. The petition has not been proved and the same is dismissed. Each party to bear own costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF SEPTEMBER, 2022

KIARIE WAWERU KIARIE

JUDGE

