



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. E024 OF 2021**

**(Originally Bungoma Petition No. 9 of 2021)**

**IN THE MATTER OF ARTICLES 22, 23, 27, 47, 162(2)(a), 184, 232 AND 235 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED VIOLATIONS OF ARTICLES 1, 2, 10, 27, 41(1), 47, 232 AND 259(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 4, 5, 6 AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF SECTION 37 OF THE NATIONAL EMPLOYMENT AUTHORITY ACT NO. 3 OF 2016**

**AND**

**IN THE MATTER OF SECTIONS 3, 12, 19, 20 AND 27 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, NO. 20 OF 2011**

**AND**

**IN THE MATTER OF SECTIONS 3 AND 5 OF THE EMPLOYMENT ACT, NO. 11 OF 2007**

**AND**

**IN THE MATTER OF SECTIONS 8, 48, 49, 55, 56, 57, 59A, 60, 65, 67, 68, 68A, 87 AND 97 OF THE COUNTY GOVERNMENTS ACT NO. 12 OF 2012**

**AND**

**IN THE MATTER OF SECTIONS 12, 13, 14 AND 20 OF THE URBAN AREAS AND CITIES ACT, NO. 13 OF 2011**

**AND**

**IN THE MATTER OF SECTIONS 6, 7, 8 THE FIRST AND SECOND SCHEDULES OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT NO. 5 OF 2017**

**AND**

**IN THE MATTER OF ADVERTISEMENT FOR MUNICIPALITY (MALABA)**

**AND**

**IN THE MATTER OF APPOINTMENT OF CHAIRPERSON OF MUNICIPAL BOARD (MALABA MUNICIPALITY)**

**AND**

**IN THE MATTER OF APPOINTMENT AS A MEMBER OF THE MUNICIPAL BOARD (MALABA CONSTITUENCY)**

**BETWEEN**

**BENARD ETYANG..... 1<sup>ST</sup> PETITIONER**  
**SULEIMAN ADOW.....2<sup>ND</sup> PETITIONER**  
**TIMOTHY ADOKA .....3<sup>RD</sup> PETITIONER**  
**HADDAI ESHALI EMASE.....4<sup>TH</sup> PETITIONER**  
**IBRAHIM KASSIM MOHAMUD.....5<sup>TH</sup> PETITIONER**  
**JAMES NJIHIA..... 6<sup>TH</sup> PETITIONER**  
**ALTAF BACHU KWEYU .....7<sup>TH</sup> PETITIONER**  
**ABDIKADIR SAID.....8<sup>TH</sup> PETITIONER**  
**KIZITO OTAET.....9<sup>TH</sup> PETITIONER**  
**JAMES MWANGI KANGARA.....10<sup>TH</sup> PETITIONER**  
**MUINAMO JOHN.....11<sup>TH</sup> PETITIONER**  
**FARAH HAJIR..... 12<sup>TH</sup> PETITIONER**

**VERSUS**

**COUNTY PUBLIC SERVICE BOARD, BUSIA ..... 1<sup>ST</sup> RESPONDENT**  
**SPEAKER, BUSIA COUNTY ASSEMBLY .....2<sup>ND</sup> RESPONDENT**

**AND**

**IMMACULATE AMOIT IDEWA NAFULA ....1<sup>ST</sup> INTERESTED PARTY**  
**BISHOP MICHAEL KIOO.....2<sup>ND</sup> INTERESTED PARTY**  
**SOLOMON AKADAKU ABWAKU.....3<sup>RD</sup> INTERESTED PARTY**  
**STEPHEN OMUSE INJANJA.....4<sup>TH</sup> INTERESTED PARTY**  
**JULIUS TOM EKWENYA.....5<sup>TH</sup> INTERESTED PARTY**  
**ROSE MERCY OMOIT .....6<sup>TH</sup> INTERESTED PARTY**  
**PROF OLUBAYI OLUBAYI.....7<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

1. On or about 12 October 2020, the County Public Service Board, Busia (the Board) advertised for position of chairperson and 2 members of the Malaba Municipal Board (the municipal board).

2. Interested persons applied and on 27 November 2020, the Board shortlisted 7 of them for the position of Chairperson and 8 for the position of member (the Interested Parties).

3. The Interested Parties were interviewed and on 23 March 2021, the Governor notified the Clerk of the County Assembly of the nomination the 7<sup>th</sup> Interested Party as chair of the municipal board and the other Interested Parties as members.

4. The Interested Parties were vetted and approved by the County Assembly on 15 April 2021.

5. The 12 Petitioners were aggrieved and on 19 April 2021, they sued the Board and the Speaker of the County Assembly (the Speaker) alleging that the recruitment and appointment of the Interested Parties as members of the municipal board was unlawful as the same was contrary to the provisions of section 17 of the Urban Areas and Cities Act, No. 13 of 2011, sections 4 and 5 of the Fair Administrative Actions Act and Articles 2, 10, 27(4) & (8), 41, 47, 233, 235 and 259 of the Constitution.

6. Filed with the Petition was a Motion under a certificate of urgency.

7. When the Motion was placed before the Court on 19 April 2021, the Court issued an interim order staying the appointment of the Interested Parties as members of the municipal board pending hearing and determination of the Motion and Petition.

8. The Speaker filed a Response and replying affidavit on 3 May 2021. He also filed a Notice of Preliminary Objection challenging the jurisdiction of the Court.

9. The Chief Executive Officer of the Board filed a Response to the Petition and replying affidavit on 13 May 2021.

10. On 21 June 2021, the Speaker filed a Motion seeking to be struck out from the proceedings.

11. The Petitioners filed their submissions on 22 June 2021.

12. On the same day, the 1<sup>st</sup> Petitioner filed a replying affidavit in reply to the Notice of Preliminary Objection.

13. However, the Speaker withdrew the Notice of Preliminary Objection on 22 June 2021 and on the same day, the Court directed that his Motion to be removed from the proceedings would be addressed together with the Petition.

14. Pursuant to further Court directions, the following were also filed:

i. The Speaker's submissions in support of his Motion and Petition on 21 July 2021.

ii. The Board's submissions on 7 September 2021.

15. The Court has considered the Motions, Petition, affidavits and submissions.

16. The Court will not consider the preliminary points which were raised by the Petitioners but were not submitted on or were not urged by the Respondents.

#### **Joinder of the Speaker**

17. The Speaker challenged his joinder to the Petition by asserting that apart from communicating to the County Assembly the nomination of the Interested Parties and forwarding the names to the relevant Committee and presiding over the approval sittings as contemplated by law, he did not contribute to the vetting and approval of the Interested Parties and that the Petitioners had not demonstrated any impropriety on his part and therefore he was not a proper party to the Petition.

18. According to the Speaker, apart from the Board, the proper parties should have been the Governor and the County Assembly.

19. The Speaker further argued that by virtue of section 11 of the County Assemblies Powers and Privileges Act, No. 6 of 2017, he was immune from legal proceedings such as the one currently under determination.

20. The Petitioners, responding to the Objection took the view that no suit should be defeated because of a failure to join a necessary or proper party (or joinder of a party) and that at any rate, the office of Governor could not be sued under the Laws of Kenya.

21. The Petitioners also contended that the immunity enjoyed by the Speaker and members of the County Assemblies was not absolute and could be limited in terms of Article 3 of the Constitution.

22. The Speaker presides over sessions of a County Assembly and while playing the role is enjoined to ensure that the Assembly upholds the norms established by the Constitution.

23. While in the instant case, the Petitioners did not assail any conduct or decision on the part of the Speaker, the Court finds that while the joinder of the Speaker was not necessary, the same was/is not fatal.

#### **Lawfulness of recruitment and appointment of the Chairperson and board members**

24. The Petitioners challenged the process leading to the appointment of the Interested Parties as members of the municipal board on the grounds that it was contrary to the national values and principles of governance and those governing the public service.
25. The Petitioners also asserted that the recruitment process ignored the requirements of section 17 of the Urban Areas and Cities Act, 2011 which provided that the members would elect one of themselves as Chairperson and Vice-chairperson.
26. It was also asserted that some of the Interested Parties were not residents of the municipality and therefore did not qualify for appointment.
27. The Petitioners further urged that the process was discriminatory because the local residents could not access the website, the disabled and marginalised groups were left out and that the 2/3 gender equilibrium was not factored.
28. In short, the Petitioners were asserting that the process was not underpinned by public participation because apart from the website of the County Government, which was not accessible to every person, the vacancy announcement was not published anywhere else.
29. The Board took the position that section 14 of the Urban Areas and Cities Act, 2019 established a 9-member municipal board and that the proviso vested the appointment power upon the Governor. It was also urged that the Governor had the power to appoint 3 of the members with the approval of the County Assembly.
30. Advancing the argument, the Board submitted that the Governor was mandated by section 14(6) of the 2019 Act to appoint the chairperson of the municipal board.
31. According to the Board, its decision to advertise and recruit for the position of chairperson and members of the municipal board was anchored in section 14(6) of the Act.
32. The Board nevertheless noted that there appeared to be an inconsistency between section 14 of the 2019 Act and section 17(2) (or is it 17(3) of the 2011 Act which provided that the Chairperson and Vice-Chairperson would be elected by the members from amongst themselves.
33. On the question of public participation, the Respondents contended that the names of the nominees were published in a newspaper.
34. The Court has looked at sections 14 and 17 of the Act.
35. There is an inconsistency.
36. Section 14 of the Act which provides for the appointment rather than election of the Chairperson from amongst the members of the municipal board was introduced via amendments enacted in 2019 while the proviso on election of the chairperson was in the initial 2011 Act (Revised in 2012).
37. Under cannons of interpretation, the 2011 provision ought to yield to the provisions of the 2019 Act as it is presumed that the legislature was aware of the status of the 2011 proviso when it was enacting the 2019 amendment, and in this regard, the Court does not find any unlawfulness in the decision of the Board to advertise for the position of the Chairperson of the municipal board.
38. With respect to public participation, it is not in dispute that the Respondents did not publicise the vacancies in any other media apart from the County website.
39. Section 95(2) of the County Governments Act requires the organs at the devolved level of government to encourage and facilitate use of other media of mass communication.
40. The Respondents did not utilise any other media of mass communication apart from its website to alert the residents of the vacancies for members of the municipal board.
41. The Respondents therefore failed the public participation test.
42. The Petitioners did not place any evidence before the Court to support the contention that the Interested Parties did not meet the residency qualification for appointment.

### **Conclusion and Orders**

43. From the foregoing, the Petition succeeds on the ground of lack of public participation and the Court orders:

- (a) A declaration is hereby issued that the recruitment of the Interested parties was illegal, improper, and unconstitutional for lack of public participation.
- (b) An order of certiorari is hereby issued quashing in its entirety the recruitment process, nominations for appointment of the Interested Parties as members of the Malaba Municipal Board.

(c) An order of mandamus is hereby issued directing the Respondents to commence the recruitment of members of the Malaba Municipal Board afresh.

44. The Petition was in the public interest. Each party to bear own costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN MOMBASA ON THIS 2<sup>ND</sup> DAY OF MARCH, 2022**

**RADIDO STEPHEN**

**JUDGE**

**Appearances**

For Petitioners Ojienda & Co. Advocates

For 1<sup>st</sup> Respondent Rodgers Sekwe, County Solicitor

For 2<sup>nd</sup> Respondent J.O. Juma & Co. Advocates

Court Assistant Chrispo Aura