

1. On or about 19 June 2018, the office of the Governor, County of Homa Bay (the Governor), advertised vacancies for members of the Board of Homa Bay Municipal Board. The advertisement was made by dint of the Urban Areas and Cities Act, 2011.
2. On 14 March 2019, mid-way the process, the Urban Areas and Cities (Amendment) Act, 2019 was gazetted with a commencement date of 28 March 2019.
3. Around the same time, on 27 March 2019, the Homa Bay Municipality Charter was gazetted. It established the Board of Homa Bay Municipality (the Board), provided for the composition of the Board and term of the Board.
4. Interested candidates responded to the advertisement of 19 June 2018 by applying.
5. In the meantime, on 27 March 2019, the Homa Bay Municipality Charter was gazetted. It established the Board of Homa Bay Municipality (the Board), provided for the composition of the Board and term of the Board.
6. The candidates who responded to the advertisement for Board membership were eventually shortlisted, and on 27 April 2019, the Clerk of the County Assembly of Homa Bay published a notice in the Standard newspaper notifying the public of the approval hearings for the nominees and inviting the public to the hearings.
7. On 6 September 2019, the Petitioners moved the Court alleging that the process of recruiting and appointing the members of the Board was unlawful.
8. Filed with the Petition was a motion under a certificate of urgency, and the Court issued directions on 10 September 2019 and 24 September 2019, including filing and exchange of submissions ahead of scheduling a Ruling date.
9. The directions were not complied with fully.
10. The Court gave fresh directions on 20 January 2020 with mention set for 30 March 2020 to confirm compliance. However, COVID19 disrupted normal court proceedings, and the Court did not sit as expected.
11. The file was next placed before the Court on 23 November 2020, and upon the parties confirming compliance with previous Court directions, the Court fixed delivery of judgment to today.
12. On record were:
 - (i) Replying affidavit sworn by the Clerk of the County Assembly and filed on 15 October 2019.
 - (ii) Replying affidavit sworn by Principal Legal Counsel of the County Government and filed on 15 November 2019.
 - (iii) Further affidavit and a supplementary affidavit sworn by 1st Petitioner and filed on 20 January 2020.
 - (iv) Submissions by the Petitioners filed on 20 January 2020.
 - (v) Submissions by the 1st and 2nd Respondents filed on 16 June 2020.
13. The Petitioners identified the following Issues:
 - (i) Whether there was effective public participation relating to the recruitment and appointment of municipal board members?
 - (ii) Whether the appointments and the municipality charter complied with the amended Act and should be revoked?
 - (iii) Whether the Petition has merit?
 - (iv) Whether the Constitution was violated and the Court should intervene?
14. The 1st and 2nd Respondents, on the other hand, identified the Issues for determination as:
 - (i) Whether due process was followed before appointing members of the board?
 - (ii) The validity of the Homa Bay municipality charter.
 - (iii) Whether the appointments ought to have been done subject to section 14 of the Urban Areas and Cities (Amendment) Act, 2019.
15. The Court has considered the Petition, affidavits and submissions.

The validity of the Homa Bay municipality charter

16. The Petitioners did not expressly address the question of the validity of the Homa Bay Municipally Charter in their submissions.
17. Nevertheless, the Court is of the opinion that the validity of the Charter may not be within its jurisdictional competence and therefore declines to determine the question.

The validity of appointments of Board members

18. The process of appointment of members of the Board started in 2018 under the Urban Areas and Cities Act, 2011.
19. Under the 2011 Act, the Board was to consist of 11 members. 4 of the members were to be appointed competitively and 5 nominated/elected members. The Act did not set out the qualifications one needed to be appointed as a Board member.
20. Therefore at the time the Governor advertised for interested persons to apply on 19 June 2018, there were no minimum qualifications required.
21. The Interested persons who applied and were interviewed and had their names sent to the County Assembly by the Governor through a letter dated 27 December 2018 were processed under the 2011 Act.
22. However, on 14 March 2019, a gazette notice was published. It was the Urban Areas and Cities (Amendment) Act, 2019, and it was to commence on 28 March 2019.
23. Under the Amended Act, the Board was to consist of 9 members being, the County Executive in charge of urban areas, 3 members appointed by the Governor, 4 members nominated by an association (these were to be subjected to approval by the County Assembly) and the Chief Officer for Urban Development and a Municipal Manager.
24. The Amendment Act expressly provided at section 13A (6) for the qualifications one needed to serve as a Board member.
25. Despite the change in the law, on 27 April 2019, the Clerk of the County Assembly notified the public of approval hearings for the nominees. The public was called upon to submit memoranda/information on the nominees and/or to attend the approval hearings, and the hearings were conducted on 2 May 2019.
26. The County Assembly approved 8 out of the 9 nominees, and the Governor was accordingly informed through a letter dated 10 June 2019. The Governor appointed 7 out of the 8 nominees on or around 19 July 2019.
27. The appointments prompted the Petition herein in which the validity of the appointments was challenged on the ground of the amended law.
28. The Respondents did not deny that the law changed mid-stream the appointment process. However, they asserted that the appointments were still governed by the 2011 Act. In the Respondents' view, the amendments did not affect the process that began under the 2011 Act.
29. The Petitioners took a contrary view and contended that once the law changed, then it applied immediately.
30. The amended Act commenced on 28 March 2019, just a day before the approval hearings were set. The Respondents did not consider its implications on the appointment process, and they proceeded under the 2011 Act.
31. By proceeding under the 2011 Act, the qualifications of the nominees were not on the table. It is only after the approval hearings that the nominees were requested to provide copies of their certificates.
32. The Respondents did not deny that the Amended Act came into operation on 28 March 2019. They did not deny knowledge of the Act.
33. In the Court's view, the Respondents should have halted or aborted the appointment process since it was incomplete. It was still inchoate and should have been started under the new law.
34. In so far as the Respondents proceeded with the appointment process under an old provision of law, the process became tainted. The appointments became invalid.

Conclusion and Orders

35. From the foregoing, the Court finds and orders that:
- (i) A declaration be and is hereby issued that the Respondents violated sections 13A and 14 of the Urban Areas and Cities (Amendment) Act, 2019.
- (ii) The Respondents to commence afresh the appointment of members of the Homa Bay Municipality Board with liberty to the current Board members to apply if qualified.
36. The litigation was in the public interest. Each party to bear their own costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 24th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

Petitioners in person

For 1st and 2nd Respondents Orego & Odhiambo Advocates

3rd Respondent Wendy Winnie Opar, Advocate

Court Assistant Chrispo Aura