



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 10 OF 2020

JOHN KWOPA.....1st CLAIMANT

MARY MAGERO.....2nd CLAIMANT

VICTOR KHADONDI.....3rd CLAIMANT

v

GOVERNOR, BUSIA COUNTY.....1st RESPONDENT

BUSIA COUNTY.....2nd RESPONDENT

JUDGMENT

1. On an undisclosed date, the County Government of Busia advertisement vacancies for membership of the Municipal Management Board (the Board).
2. John Kwoba, Mary Magero and Victor Khadondi (the Claimants) were interviewed and nominated to serve as the Board members. The County Assembly approved the nominations.
3. The Governor, County of Busia (the Governor) issued appointment letters to the Claimants on 23 August 2019 for a term of 5-years each.
4. On 10 September 2019, the County Executive Committee member of Lands invited the Claimants and also notified them that the Board would be inaugurated on 13 September 2019.
5. Shortly thereafter, on 13 January 2020, the Governor wrote to each of the Claimants informing them of the termination of their appointments. The reason given by the Governor was the need to comply with the provisions of the Urban Areas and Cities (Amendment) Act, 2019. The Claimants had not been sworn by the date of the termination(s).
6. On 14 January 2020, the County Government advertised vacancies for members of the Board, and this prompted the Claimants to move the Court on 4 February 2020 alleging breach of contract and that the decision of the Governor was unlawful.
7. The Claimants sought the following reliefs:
 - (i) A declaration that the Respondents decision terminating the appointment of the 1st, 2nd and 3rd Claimants to the position of member, Busia Municipality Board as contained in the letter dated 13th January 2020 offends the Constitution, the Employment Act, the Urban Areas and Cities Act and therefore is unlawful, irregular, un-procedural and null and void and void *ab initio*.
 - (ii) An award of damages for unlawful and unfair termination.
 - (iii) An order reinstating the Respondents (sic) herein back to their position as members of the Busia Municipality Board.
 - (iv) An order reinstating the 2nd Respondent (sic) back to her position as a Vice-Chairperson Busia Municipality Board.
 - (v) An order to pay the Respondents (sic) allowances and benefits they would have earned for such meetings, the Board would have sat by the time of determination of this suit to be computed as prayed under paragraphs 14 and 16 hereinabove. And in the

alternative and/or should prayers 2 and 3 become spent at any given time.

(vi) An order to pay/compensate the Claimants such sums of money for all such meeting the Board held for its five-year term to be computed as prayed under paragraphs 14 and 16 hereinabove.

(vii) Costs of this suit and interest.

(viii) Any other relief the Honourable Court deems just and expedient.

8. Simultaneously filed was a Motion under a certificate of urgency seeking interim injunctions.

9. When the Motion was placed before the Court on 10 February 2020, it issued an injunction stopping the Respondents from replacing the Claimants.

10. On 27 February 2020, the Court directed the parties to file and exchange submissions with mention set for 30 March 2020 to confirm.

11. The Respondents filed a Statement of Defence on 2 August 2020.

12. Due to COVID19, the file was next placed before the Court on 19 November 2020.

13. The Court directed that the Cause be set down for hearing, and the parties were directed to file and exchange documents and Agreed Issues ahead of hearing on 25 January 2021. The interim orders were extended.

14. On 25 January 2021, the parties informed the Court that they had agreed to proceed by way of the record and submissions to be filed.

15. The Claimant filed their submissions on 29 March 2021 (should have been filed before 25 February 2021), while the Respondents filed their submissions on 6 April 2021.

16. Although the Court had directed the parties to file Agreed Issues, the directive was not complied with. The parties also failed to explicitly identify the Issues for determination in their submissions.

17. The Court has considered the pleadings, affidavits, documents and submissions and identified one primary Issue for determination:

(i) Whether the termination of the appointments of the Claimants as Board members was lawful

Lawful termination

18. At the time the Governor was purporting to terminate the appointment(s) of the Claimants on 13 January 2020, the operative law was the Urban Areas and Cities (Amendment) Act, 2019.

19. Section 18 of the Act provides for the removal of a member of the Board. The section provides:

18 Removal from office

(1) A person may be removed from the office of chairperson, vice chairperson or a member of the board on any of the grounds provided under section 16(a), (b),(c), (e), (f), (g), (h), (i) and (j).

(2) A person may be removed under subsection (1) —

(a) by the county governor;

(b) by the board, supported by the vote of at least two-thirds of the members of the board; or

(c) upon petition by the residents of a city or municipality.

(3) A resident of a city or municipality may file a writing petition with a board for the removal of a chairperson or vice chairperson.

(4) The procedure for the removal or petition for removal of a chairperson or vice chairperson under subsections (1) and (2) shall be provided by regulations.

20. In justifying the decision of the Governor, the Respondents raised 3 principal grounds.

21. The first ground was that the appointments of the Claimants were terminated because they did not meet the qualifications set out in section 14 of the Urban Areas and Cities (Amendment) Act, 2019.

22. In terms of particulars, the Respondents asserted that the 1st Claimant did not possess the minimum academic qualifications, the 2nd Claimant was not a resident of the County, while the 3rd Claimant did not meet the age condition (youth representative).

23. Citing *Magerer Langat & Ar v Paul Kiprono Chepkwony & 2 Ors* (2020) eKLR, the Respondents were of the view that the appointment(s) of the Claimants had lapsed by operation of the law (provision setting qualifications).

24. The Court in the *Magerer* case had stated:

Where one written law amends another law, the amending written law shall so far as it is consistent with the tenor thereof, and unless a contrary intention appears, be construed as one with the amended law.

With the changes to the composition of the Board, under section 14 of the Urban Areas and Cities (Amendment) Act, 2019, the members of the board serving then and did not meet the set criteria, their term of service where unqualified automatically lapsed by operation of the law.

25. Secondly, the Respondents contended that the Claimants had not taken the oath of office as contemplated by clause 10.1.1 of the Municipal Charter for Busia Municipality.

26. In this regard, the Respondents submitted that the appointment process had not been completed/formalised.

27. Lastly, the Respondents argued that the Claimants were not employees under the Employment Act, 2007, and therefore the Act did not apply to them.

28. Section 16 of the Urban Areas and Cities Act sets out the grounds upon which a member of the Board may be removed from office and in brief these are: inability unable to perform the functions of the office by reason of mental or physical infirmity; is a declared or becomes bankrupt or insolvent; is convicted of a criminal offence and sentenced to a term of imprisonment of six months or more; resigns in writing to the county governor; without reasonable cause, the member is absent from three consecutive meetings of the board or committee within one financial year; is found guilty of professional misconduct by the relevant professional body; is disqualified from holding a public office under the Constitution; is convicted of an offence and is sentenced to imprisonment for a term of six months or more; in any particular case, the member fails to declare his or her interest in any matter being considered or to be considered by the board or committee; engages in any gross misconduct; or dies.

29. In the view of the Court, because section 16 of the Act has outlined the grounds upon which a member of the Board may be removed from office, there was a duty on the part of the Governor to set out the grounds and particulars in the letters terminating the appointment of the Claimants.

30. The letters by the Governor gave vague and generalised grounds for his decision, and the Court finds the test required by section 16 of the Act was not met.

31. According to the Court, the giving of reasons under the Act has inbuilt therein the need to afford the member of the Board an opportunity to respond before removal.

32. Apart from the giving of reasons, a member of the Municipality Board is a public officer and by dint of Article 236 of the Constitution is entitled to due process.

33. The Court has also considered the *Magerer* decision and come to the view that it does not assist the case of the Respondents because it did not consider the provisions of section 23(3) of the Interpretation and General Provisions Act which provides:

23(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not –

(a) ...

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed;

34. Since the Claimants had already been appointed, the 2019 amendments could not apply to disqualify them.

35. The amendments would have applied if the appointment process had not been concluded.

36. The Respondents also made the argument that the Claimants had not taken the oath of office under the Municipality Charter.

37. In the view of the Court, the oath of office was an important ceremonial gesture, and because it was not provided for in the parent Act but rather in the Charter, it could not be used by the Respondents to terminate the appointments of the Claimants.

Conclusion and Orders

38. From the foregoing, the Court orders:

(i) A declaration be and is hereby issued that the Respondents decision terminating the appointment of the 1st, 2nd and 3rd Claimants to the position of member, Busia Municipality Board as contained in the letter dated 13th January 2020 offends the Constitution, the Urban Areas and Cities Act and therefore is unlawful, irregular, un-procedural and null and void and void *ab initio*.

(ii) An order be and is hereby issued reinstating the Claimants back to their positions as members of the Busia Municipality Board.

39. Because of the anticipated ongoing relationship between the parties, the Court orders each party to bear own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 21ST DAY OF APRIL 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimants	J.P. Makokha & Co. Advocates
For Respondents	Rogers Sekwe, County Solicitor, County of Busia
Court Assistant	Chrispo Aura