



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRCJR/2/2020

CITATION: REPUBLIC VS COUNTY GOVERNOR OF WEST POKOT AND COUNTY GOVT OF WEST POKOT AND OTHERS

JUDGMENT

1. By an application dated 4th May, 2020 the ex-parte applicant sought orders among others that: -

(i) An order of Certiorari to remove into this Honourable Court and quash the decision of the Governor of West Pokot County made on 30th March, 2020 or thereabouts to appoint /Gazette new members of the Board of Kapenguria Municipality and to degazette the Applicants and all consequential actions based on the said decision.

(ii) An order of prohibition restraining the Respondents and /or their savants' agents and /or employees from doing any act to the detriment of the applicants, in furtherance of the Gazette Notice No 3011 dated 30th March, 2020.

(iii) An order of mandamus compelling the Respondents and/or their servants, agents and/or employees to reinstate the applicants to their respective positions as well as to allow them to exercise this mandate and duly without any adverse interference whatsoever.

(iv) A DECLARATION that the decision taken on or about the 30th March, 2020 or thereabouts to appoint/Gazette new members of the Board of Kapenguris Municipality and to degazette the Applicants and all consequential actions based on the said decision is null and void abinitio.

1. The application was supported by the statement and verifying affidavit of Night Cherop Chongorio sworn on 21st April, 2020 accompanying the application for leave.

2. In the verifying affidavit Ms. Chongorio stated among others that

(i) THAT the applicants are part of the members of the Board of Kapenguria Municipality who were duly appointed vide Gazette Notice No, 8394 Vol CXX No 99 dated 17th August, 2018. The applicants were part of the members of the old Board which was scheduled to serve for a term of five years from the date of appointment that is 17th August,2018.

(ii) THAT the 1st Respondent is Governor for West Pokot County mandated to perform the functions under the Constitution and all relevant statutes and in the process of discharging his functions, he is to uphold the rule of the law at all times and ensure that all administrative actions taken uphold the constitutional values and principals of governance which include fairness, equity, transparency, accountability and integrity.

(iii) THAT state officers including the respondents herein must respect, uphold and defend the Constitution.

(iv) THAT vide a Gazette Notice No 3011 dated 30th March 2020 the Respondent notified the public that it had appointed Benson Ririmpoi Logaritom , Christine Apolokereng , Wilson Losuron Ngoroko, John Tulei, Selina Chesang Lodengo, Zakarias Odero Mbeda, Philip Magal Ambole, Mercy Chemsoo Achokor and Obadiah Koech Kosgei as members of the Kapenguria Municipality Board and de gazette the old members of the Board .

(v) THAT On 20th April,2020 Benson Einimpol Logarihom, Christine Apokokereng, Wilson Losuron Ngoroko, John Tulei , Selina Chesang Lodengo, Zakarias Odero Mbeda , Philip Magai Ambole , Mercy Chemsoo Achokor and Obadiah Koech Kosgei were sworn in as the members of the Kapenguria Municipality Board.

(vi) THAT I am advised by my advocates on record which advice I verily believe to be true that under Section 15 of the Urban Areas and Cities Act, 2011, our term runs for five years and a Board member can only leave office on the grounds contemplated in section 16 of the same Act. These provisions were not a subject of the 2019 amendments to the Act and they remain in force.

(vii) THAT we are aggrieved by the said decision for three principal reasons.

(a) The same was made in total disregard of pertinent/relevant facts that were available to the Respondent and or without taking into account relevant factors that the Respondent ought to have taken into account.

(b) The same decision was made without consultation with the relevant stakeholders as constitutionally and statutorily mandated and/or

(c) The decision is otherwise unfair, unreasonable, biased and unlawful.

(viii) THAT the decision to gazette new Board members and degazette the previous Board to exclude the Applicants was made in contravention of the Constitution the Urban Areas and Cities Act, 2011 and the Fair Administrative Actions Act and the County Government Act.

(IX) THAT I am advised by my advocate on record which advice I verily believe to be true that the Respondent did not have powers to degazette the Board established on 17th August, 2018 in the manner he did that and his actions amount to abuse of power.

(x) THAT THAT I am advised by my advocate on record which advice I verily believe to be true that the Respondent took advantage of the absence of a transitional clause especially on the fate of the existing Boards under the Urban Areas and Cities (Amendment) Act, 2019 to unfairly end the term of the Applicants in the Board, yet he had the opportunity to interpret and apply it in a manner that does not prejudice the Applicants.

(xi) THAT THAT I am advised by my advocate on record which advice I verily believe to be true that notwithstanding the above, section 11 of the Urban Areas and Cities (Amendment) Act, 2019 prescribes and /or envisages a specific criterion for appointment of members to the Board and that this criterion was not followed in the appointment of the new Board members.

(xii) THAT the relevant stakeholders including myself and the other Applicants who are directly and adversely affected by the impugned decision were not consulted and /or involved in the process leading to the said decision.

(xiii) THAT it is of grave concern that the Respondent gazette members of a new Board and only incorporated two members from the previous Board without a clear justification of how he chose only two out of the previous nine members to the Board.

(xiv) THAT only John Tulei and Zakaria Odero Mbede have been reinstated in the new Gazette Notice and it remains unclear which criteria was used to retain them and omit the Applicants.

(xv) THAT in the circumstances the Applicants are concerned that Respondent's decision was unfair, illegal and unprocedural as it amounted to their removal from the Board without any justifiable cause.

3. The respondents filed a replying affidavit through one Michael Lokitam who depended among others that: -

(i) THAT I am the County Attorney of West Pokot County government duly authorized and competent to swear as follows" =

(ii) THAT I have read and had explained to me the substantive Notice of Motion dated 4th May 2020 by my advocates on record and I wish to respond as follows: -

(iii) THAT Article 184(1) of the Constitution provides that National Legislation shall provide for the governance and management of urban areas and cities among other things. The legislation contemplated therein is the Urban areas and cities Act, 2011. Recently, Parliament enacted the Urban Areas and Cities (Amendment) Act 2019 to amend some sections in the 2011 Act.

(iv) THAT one of the key amendments introduced by the Urban Areas and Cities (Amendment) Act 2019 is the qualification requirements for members appointed into the Municipal Boards. This change has been incorporated under section 14 of the Urban Areas and Cities Act, 2011.

(v) THAT sometimes in 2018 before the amendment Act was enacted by Parliament the Respondents placed an advert for the public to apply for the position of being a Member of Kapenguria Municipal Board. Thereafter, the Respondents herein followed the requisite procedures and provisions of the law than and appointed the ex-parte applicants through the Gazette Notice No 8394 dated 17th August, 2018 for a term of five years.

(vi) THAT in March 2019, Parliament made some amendments to the Urban Areas and Cities Act 2011. Section 14 of the Urban Areas and Cities Act, 2011 (Revised 2019) outlines the composition, appointment, and qualifications of municipal Board members.

(vii) THAT the ex parte Applicants herein were appointed to the Kapenguria Municipality Board under the Urban Areas and Cities Act, 2011. However, upon the Act being amended in 2019 by the Urban Areas and Cities, (Amendment) Act No 3 of 2019, new qualifications were introduced for the appointment of the Municipal Board Members necessitating the change effected the

Respondents to comply with the operative statute Section 14(6) of the Urban Areas and Cities Act 2011 (Rev. 2019) provides that:-

(viii) THAT due to concerns from various counties, I am well aware that on 8th April, 2019 the Council of Governors sought an advisory from the office of the Attorney General on the implementation of section 14 of the Urban Areas and Cities (Amendment) Act 2019.

(ix) THAT I am also aware that in a letter dated 16th May, 2019 the Attorney General responded and advised as follows: -

(i) The effect of the amendment renders the Board members who do not meet the requisite requirements of the Act, unqualified and therefore not fit to serve the Board.

(ii) The membership of the unqualified members came to an end upon the effective date of the law that is 28th March, 2019.

(iii) The appointing authority of Board members affected by the amendments specified under section 14 ought to appoint the requisite (new) members in accordance with the Amendment Act immediately.

(iv) All members who do not qualify therefore cease to be members of the Board by operation of law. Those who meet the criteria set out in the law can complete their remaining terms and any further appointments should be undertaken in accordance with the amendment Act.

(XX) THAT prior to the 2019 amendment the 2011 Act did not provide for these qualification requirements for board members. Thus, the change in law rendered the Board members who do not meet the requisite requirements as unqualified and unfit to hold offices.

(XXi) THAT moreover, the ex-parte Applicants herein are not qualified to hold the positions of Municipal members pursuant to the change in law. Thus, they cannot claim that the Respondents abused office when indeed they were indeed upholding the rule of law and ensuring that they do not promote an illegality by retaining unqualified members such as Janet Chebet who has a KCPE certificate, Lokali Catherine, Alice Kwaramoi and Cherop Night Chongorio possession KCSE certificates.

(XXIII) THAT when the amendment was passed on 28th March, 2019 the said Act did not contain any savings and transitional provisions in relation to the current board members. Therefore, I am advised by my advocates that the membership of the unqualified members came to an end upon the effective date.

(XXIV) THAT I am further advised by my advocates on record which advice I verily believe to be true that the Attorney General's opinion from the Attorney General did not amend the law, but it was persuasive and advisory in nature. That notwithstanding, the operative law leading to the appointment of the ex-parte Applicants had been revised.

(XXVI) THAT consequently, the decision to de-gazette the ex-Parte Applicants through Gazette Notice No. 3011 on 30th March, 2020 was in accordance with the operative law.

(XXVII) THAT subsequently, on 26th March, 2020 the 1st Respondent herein forwarded the names of 9 nominees for Kapenguria Municipality Board to the Speaker of the County Assembly for Approval. Upon confirming that all the statutory obligations had been complied with the County Assembly approved the names. The members appointed had met all the qualifications.

(XXVIII) THAT contrary to the ex-parte Applicant's allegations, the relevant stakeholders were consulted and /or involved in the process leading to the decision of appointing new members. The Respondents were keen in ensuring that the members meet the threshold qualifications, the two third gender rule is upheld, the minority group as well as the youth represented and residential locality appointments. In fact, the Applicants were aware of this process. For instance, Rev, Mark Lotee Akonge and Catherine Lokali, some of the Applicants herein participated in the consultation as evidenced in the minutes by the KNCCI West Pokot Board of Directors held on 12th March, 2020 where he chaired the meeting.

(XXIX) THAT the rationale behind incorporating two members from the previous Board was because the two members met the threshold under the Urban Areas and Cities (Amendment) Act, 2019.

4. In the submissions in support of the application Ms Jeruto for the applicants submitted in the main that the decision by the respondent to appoint new board members through gazette notice No. 3011 dated 30th March, 2020 was illegal, biased and amounted to unfair administrative action. The decision was further made in breach of the Constitution, the Urban Areas and Cities Act and the County Government Act. Counsel further submitted that bias on the part of the respondent was demonstrated by the decision to gazette members of a new Board only incorporating two members from the previous Board without clear justification of how the 1st respondent chose only two out of the previous nine members to the Board.

5. By degazetting the applicants, the respondents acted in contravention of the provisions of the constitution particularly provisions concerning values and principles of rule of law, participation of the people, equity, social justice, inclusiveness, non-discrimination and good governance. The 1st respondent lacked the power to degazette the Board established on 17th August, 2018 in the manner it did and that the action amounted to abuse of power. According to Counsel the respondent took advantage of the absence of a transitional clause in the Urban Areas and Cities (Amendment) Act, 2019 to unfairly end the term of the applicants in the Board yet it had the opportunity to interpret and apply it in a manner that did not prejudice the applicants.

6. At least the 1st respondent ought to have notified the applicants of the impending decision and allowed the applicants to participate in the

fresh recruitment exercise by applying afresh. The applicants were instead kept in the dark as they were not aware of how the new Board members were recruited yet the process ought to have been public.

7. Ms Jeruto further submitted that the 1st respondent ignored and or failed to take into account relevant considerations such as the fact that the applicants were entitled to serve for a term of five years, and the same had not lapsed and further that the applicants still met the qualifications to serve in the Board under the Constitution and the Urban Areas and Cities Act, 2011. Further that the Urban Areas and Cities (Amendment) Act, 2019 did not decree that members of the previous Boards be removed immediately.

8. By removing the applicants without considering the above factors, the 1st respondents' decision was in bad faith and abuse of discretion and unreasonable.

9. Counsel further submitted that the decision by the 1st respondent violated the applicant's legitimate expectation under section 15 of the Urban Areas and Cities Act, 2019 which provided that the applicant's term of office was to run for five years. In support Counsel relied on the cases of Keroche Industries Limited .v. Kenya Revenue Authority of 5 Others (2007) eKLR and Republic.v. Attorney General and Another Ex Parte Waswa and 2 Others (2005) eKLR.

10. The applicants had been appointed under section 14 of the Urban Areas and Cities Act, 2011. This section was repealed by section 11 of the Urban Areas and Cities (Amendment) Act 2019 which outlined new mode appointment of members to Boards of Municipalities. The said Act did not contain transitional clause to guide the fate of boards that were in place before the effective date. Without such a transitional clause, it was incumbent on the 1st respondent to ensure that any decision he was to make to the detriment of the applicants ought to have followed due process and rules of natural justice. Section 15 of the Urban Areas and Cities Act, 2011 which was never amended hence still applicable provide that a member of a Board shall hold office for a term of five years on a part time basis.

11. Further that a member of a Board could only leave office on grounds contemplated in section 16 of the 2011 Act which was not subject of the 2019 amendments.

12. Ms Sitati for the respondents on her part submitted that pursuant to article 184(1) of the constitution, Parliament enacted the Urban Areas and Cities (Amendment) Act, 2019. Section 14 of the said Act provided for the composition, appointment and qualification of Municipal Board members. Initially the Principal Act never provided for the qualification of Board members. In that regard and aware of the Attorney General's response to Council of Governors on the issue of applicability of the new Act, the respondent decided to reconstitute Kapenguria Municipal Board to give effect to the amendment. The advisory letter by the Attorney General was that Board members who did not meet the requirements of the Act were not fit to continue serving in the Board.

13. Ms Sitati further submitted that the AG's advice was not law however it was persuasive and none of the respondents had misinterpreted the said advice. Instead, they embraced it. Further, the reconstitution was necessary to ensure effective and efficient service delivery to the constituents of West Pokot County.

14. Ms Sitati further submitted that the ex parte applicants were not salaried employees of the institutions they served. Their term of office was dictated by statute. The Act stated that the term ought to have been five years. However, this was not cast in stone and in the circumstances, the law changed and their membership to the board immediately got affected by the change in the law hence there was no legitimate expectation that the ex parte applicants would serve for a full term of five years.

15. Ms Sitati further submitted that the amendment to the Act did not contain any savings and transitional provisions in relation to current Board members hence the membership of the ex parte applicants was subject to the operative statute. In support of this submission, counsel relied on the case of Magerer Langat and Another vs Paul Kiprono Chepkwony , the Governor, County of Kericho and 2 Others (2020_ eKLR.

16. The ex parte applicants were appointed as members of the Kapenguria Municipality Board prior to the amendment of the Urban Areas and Cities Act, 2011 therefore by operation of law, their contracts automatically lapsed and further since most of them did not meet the requisite qualification, they ought not to be accorded audience by the court

17. Regarding public participation, Ms Sitati submitted that the respondent conducted meaningful and adequate participation from relevant stakeholders when making the decision to appoint and degazette some of the former members of Kapenguria Municipal Board. There was evidence of signed minutes in the replying affidavit sworn by Michael Lokitam evidencing consultations the respondents conducted prior to the forwarding the names of the nominated to the County Assembly.

18. It was not contested that the applicants were members of Kapenguria Municipality Board having been appointed vide Gazette Notice No 8394 dated 17th August, 2018. They were to serve for a period of five years from the date of appointment. The appointment was in accordance with section 14 read together with section 13 of the Urban Areas and Cities Act, 2011.

19. Section 13(4) of the Urban Areas and Cities Act, 2011 provided that

(a) A person shall not be appointed a member of the board unless that person: -

(i) Is a citizen of Kenya

(ii) Is ordinarily resident or has a permanent dwelling in the city

(iii) Carries on business in the city.

(iv) Has lived in the city for at least five years.

20. This section was extensively amended and a section 14 enacted repealing the previous section 14 of the 2011 Act, subsection (6) provided that –

(a) A person shall be qualified for appointment as a member of the board if that person

(i) Holds at least a diploma from an institution recognized in Kenya.

(ii) Has a distinguished career in a medium level management position in either the private or public sector?

(iii) Holds at least five years post qualification experience and (iv) Satisfied requirements of chapter six of the Constitution.

21. The effect of the new section 14 was the introduction of minimum academic and professional experience which one must possess to qualify for appointment. This was not the case in the 2011 Act.

22. The amended Act however did not include transitory provisions hence the Council of Governors vide a letter dated 5th April, 2019 sought advisory opinion from the Honourable Attorney General on the implementation of section 14 of the amended Act. The AG in response advised among others that the effect of the amendments rendered Board members who did meet the requisite provisions unqualified and therefore not fit to serve in the Boards. The membership of the unqualified members therefore came to an end upon the effective date of the law that is on 25th of March, 2019.

23. The AG further stated that those members who meet the criteria set out in the law could complete their remaining terms. It was pursuant to this advisory opinion that the 1st respondent appointed new Board members except two from the previous Board who were reappointed on the basis of the fact that they met the criteria set in the new law.

24. Section 23(2) of The Interpretation and General Provisions Act (Cap 2) provides that:

“ Where a written law repeals and re-enacts, with or without modification, a provision of a former written law, references in another written law to the provisions so repealed shall, unless a contrary intention appears, be construed as references to the provision so re-enacted”.

In other words, unless stated to the contrary, the amended law overwrites the previous written law. This position was adopted by the Court of Appeal in the case of Justice Kalpana Rawal v Judicial Service Commissioner and 4 others Civil Appeal No 1 of 2016 where the Court Appeal stated: -

“the High Court did not err in holding that the Constitution did not preserve and save the retirement of Judges prescribed by Section 62(1) of the former Constitution as read together with section 9 of the Judicature Act and section of 31 of the sixth Schedule to the Constitution and that with effect from effective date, the retirement age of all judges is 70 years.”

25. To this extent the Court is persuaded that the reconstitution of the Boards as was done by the respondents was not unlawful or unconstitutional. The Court however takes note of the fact the applicants were appointed for a term of five years and their premature removal must have interfered with their livelihood. They had a legitimate expectation that their membership to the Kapenguria Municipality Board would run to full term. The legislative amendment therefore disrupted their expectation through no fault of their own. The respondent therefore ought to have worked out an exit arrangement with the applicants to cater for their raptured expectation. Some sort of monetary compensation ought to have been considered and paid to the applicants, neither party has delved into this issue if exit package. Nothing was tabled before me on the matter of exit arrangements for the Board Members adversely affected by the change in legislation. Besides this being a Judicial Review application, the reliefs which can be granted are limited to orders of mandamus certiorari and prohibition. Judicial Review does not contemplate an order for monetary compensation. This may be pursued through a Constitutional petition if appropriate or an ordinary claim, subject to law of limitation.

26. In conclusion the Court finds the application unsuccessful and disallows the same.

27. The court will not make any order on costs since the applicants genuinely believed their term of service to the Kapenguria Municipality Board was unlawfully brought to an end. The absence transitional provision to the 2019 amendment to the Urban Areas and Cities Act created a grey area which they genuinely felt required the court's interpretation.

28. It is so ordered.

Dated at Eldoret this 19th day of May, 2021

Delivered at Eldoret this 19th day of May, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORÉT ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-05-20 09:05:53+03