



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. E008 OF 2020

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF ALLEGED VIOLATION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER
ARTICLES 27(1) & (2), 28, 29(d) & (f), 41(2)(b), 47(1) & (2) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ARTICLES 10, 46, 48, 162(2)(a), 165(3)(b) AND 235(1) OF THE
CONSTITUTION OF KENYA, 2010, SECTIONS 11, 13, 15, 16, 18, 19 AND 60 OF THE
URBAN AREAS AND CITIES ACT NO. 13 OF 2021, SECTIONS 30 AND 31 OF THE
COUNTY GOVERNMENTS ACT NO. 17 OF 2012, SECTIONS 2, 4(1), 5(b) OF THE
FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015, SECTION 12(1)(a) OF
THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT (CAP24B)**

AND

IN THE MATTER OF MEMBERSHIP OF THE CITY BOARD OF THE CITY OF KISUMU

BETWEEN

LAWRENCE GUMBE

PETITIONER

v

GOVERNOR, COUNTY OF KISUMU

1st RESPONDENT

COUNTY GOVERNMENT OF KISUMU

2nd RESPONDENT

AND

PAUL OTIENO AKEYO

INTERESTED PARTY

JUDGMENT

1. The delivery of this judgment was rescheduled from 17 March 2021, after the Governor, County of Kisumu and the County Government of Kisumu (the Respondents) successfully moved the Court on 6 May 2021 to re-open the proceedings and allow them to file responses and submissions.

2. Lawrence Gumbe (the Petitioner) was appointed as a member of the Kisumu City Board (the Board) on or around 9 July 2018 (gazetted on 17 July 2018) under the provisions of the County Governments Act and the Urban Areas and Cities Act, 2011. The appointment was to last for 5 years.
3. On or around 20 November 2020, the Governor of the County of Kisumu (the Governor) caused to be published a gazette notice revoking the Petitioner's appointment as a member of the Board.
4. The Petitioner was replaced by one Paul Otieno Akeyo (the Interested Party).
5. The Petitioner was aggrieved, and he lodged a Petition in Court on 24 November 2020, alleging that the revocation of his appointment was unlawful as it was in breach of sections 16 and 18 of the Urban Areas and Cities Act.
6. The Petitioner further asserted that the appointment of the Interested Party to replace him had no legal foundation as the Governor did not possess any such power(s).
7. Filed together with the Petition was a Motion under a certificate of urgency which sought interim conservatory orders.
8. The Court directed that the Motion and the Petition be served, but despite service (see affidavit of service filed on 26 November 2020), the Respondents/Interested Party did not enter an appearance or respond to the Motion and the Petition.
9. Upon being satisfied that service had been effected, the Court issued interim conservatory orders on 26 November 2020.
10. At the same sitting, the Court indicated that it would give directions on the hearing of the Petition on 2 December 2020.
11. Despite further service, the Respondents and the Interested Party did not attend the Court on 2 December 2020.
12. The Court, therefore, directed the Petitioner to file submissions on or before 30 December 2020.
13. Due to the order reopening the proceedings, the Respondents caused to be filed on 27 May 2021, a replying affidavit to the Petition sworn by the acting City Manager.
14. As a result, the Petitioner filed a further affidavit and further submissions on 10 June 2021. The Respondents filed their submissions on 4 August 2021.
15. The Court has considered the Petition, affidavits and submissions on record.

The lawfulness of the Petitioner's removal

16. To support the contention that his removal was unlawful, the Petitioner cited sections 16 and 18 of the Urban Areas and Cities Act to urge that there was a procedure contemplated for the removal of the chairperson of the Board and that the Governor did not follow any procedure.
17. In defending the removal of the Petitioner, the Respondents contended that the same was lawful because the Petitioner had failed to declare a conflict of interest on the hiring of a consultant who was his business partner to develop a strategic plan for the city and for causing monies meant operations of a Committee of the Board to be sent to his personal account.
18. The conduct of the Petitioner, the Respondents asserted, breached section 16(1) of the Urban Areas and Cities Act.
19. Section 18(4) of the Urban Areas and Cities Act envisages the existence of regulations to govern the removal from office of a chairperson or vice-chairperson of a Board.
20. The parties did not disclose whether such regulations have been prepared or are in existence.
21. This Court was also unable to find such regulations in the database kept by the Kenya Law Reports.
22. The Court must therefore turn its attention elsewhere.
23. The position of a member of a City or Municipality Board is a public office, and the officeholder is entitled to the protections assured all public officers by Article 236 of the Constitution before removal from office.
24. The said constitutional protections mirror what has long been held as the rules of natural justice or procedural fairness within the employment law arena.
25. There is nothing on record to show that the Governor followed any due process or afforded the Petitioner an opportunity to make representations on the allegations of conflict of interest or financial impropriety before revoking his appointment.

26. Apart from the constitutional protection extended to public officers, section 18(2) of the Urban Areas and Cities Act empowers a Governor to remove a City Board member if the grounds set out in section 16 of the Act exist.

27. There was no demonstration by the Respondents that any of the outlined grounds existed in the case of the Petitioner since even the gazette notice did not set out the reasons for the revocation of appointment.

28. The revocation of the Petitioner's appointment to the Board, the Court finds, was unlawful.

The lawfulness of the appointment of the Interested Party

29. When the Governor was appointing the Interested Party to replace the Petitioner, the operative law was the Urban Areas and Cities (Amendment) Act, 2019.

30. Section 13(1A) of the Act expressly requires that appointments made by the Governor must be competitive and subjected to approval by the County Assembly.

31. The Respondents did not provide any evidence that the appointment of the Interested Party was through a competitive process or that it was subjected to approval by the County Assembly of Kisumu.

32. The appointment was arbitrary and unilateral and not transparent or accountable as expected of such public office.

33. The Court finds the appointment unlawful.

Conclusion and Orders

34. From the foregoing, the Court makes the following orders:

(i) A declaration is hereby issued that the revocation of the Petitioner's appointment as a chairman or member of the Kisumu City Board was in breach of Articles 47 and 236 of the Constitution as read with the Urban Areas and Cities Act and therefore null and void.

(ii) A declaration is hereby issued that the Interested Party's appointment as a member of the Kisumu City Board was in breach of sections 16 and 18 of the Urban Areas and Cities Act.

35. The Petitioner is still in a contractual relationship with the Respondents. No order on costs.

36. The Court regrets that it had to reschedule the delivery of this judgment from 27 October 2021, due to other intervening official engagements.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 25TH DAY OF NOVEMBER 2021.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Petitioner Behan & Okero Advocates

Respondents Otieno, Yogo, Ojuro & Co. Advocates

Interested Party did not participate

Court Assistant Chrispo Aura