



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. E026 OF 2021**

**MICHAEL KOJO OTIENO** **1<sup>st</sup> PETITIONER**

**EVANCE OTIENO OLOO GOR** **2<sup>nd</sup> PETITIONER**

**v**

**COUNTY PUBLIC SERVICE BOARD** **1<sup>st</sup> RESPONDENT**

**HOMA BAY COUNTY GOVERNMENT** **2<sup>nd</sup> RESPONDENT**

**GOVERNOR, HOMA BAY COUNTY** **3<sup>rd</sup> RESPONDENT**

**SARAH WASWA** **4<sup>th</sup> RESPONDENT**

**DR LAWRENCE KOTENG** **5<sup>th</sup> RESPONDENT**

**ELIJAH ODONDI KODOH** **6<sup>th</sup> RESPONDENT**

**THOMAS CHARIGA** **7<sup>th</sup> RESPONDENT**

**LAMECK OTIENO OGOT (DEPUTY DIRECTOR,  
RECRUITMENT & SELECTION** **8<sup>th</sup> RESPONDENT**

**JUDGMENT**

1. Michael Kojo Otieno and Evance Otieno Oloo Gor (the Petitioners) moved the Court on 23 April 2021, alleging that since the County Public Service Board, Homa Bay (the Board) was not validly or fully constituted, the recruitment process for some 6 positions of Chief Officers and call for applications to in the health department were null and void.

**Remedies sought by the Petitioners**

2. It is important to set out the remedies which were pleaded by the Petitioners to put into context the orders which will ultimately be issued by the Court.

3. The reliefs sought by the Petitioners were:

An Order

(a) Quashing the any (sic) adverts issued by the 2<sup>nd</sup> Respondent dated 8<sup>th</sup> July 2020 in the Standard Newspapers for the six positions of Chief Officers and the 8<sup>th</sup> Respondent's letters of appointments issued on 15<sup>th</sup> January 2021, appointing persons to serve as Environmental Officers and the undated advert issued by the 2<sup>nd</sup> Respondent inviting applications to the Department of Health Services which were to be delivered on 5<sup>th</sup> March 2021/21<sup>st</sup> April 2021 is illegal, null and void.

(b) Prohibiting the Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from appointing any persons on contract/permanent terms/promotions until a proper Board is fully constituted.

(c) The costs of this suit be provided for.

(d) Any other relief the Court may deem just to grant.

4. The Court issued directions on 26 April 2021 and 3 May 2021, and the 6<sup>th</sup> Respondent, a member of the Board filed a replying affidavit in opposition to the Petition on behalf of the Respondents.

5. The replying affidavit prompted the 2<sup>nd</sup> Petitioner to file a further affidavit on 21 May 2021.

6. The Petitioners filed their submissions on the same day whilst the Respondents filed their submissions on 10 June 2021.

7. The Petitioners identified 5 Issues for adjudication:

(i) Whether the 1<sup>st</sup> Respondent has the requisite quorum to conduct the Board meetings?

(ii) Whether the 8<sup>th</sup> Respondent herein is allowed in law to act as Secretary to the Board?

(iii) Whether the Petitioners have established a *prima facie* case against the Respondents?

(iv) Whether the Respondents have threatened or violated the Constitution and statutes?

(v) Whether costs are payable?

8. The Respondents, on their part, identified 4 Issues, to wit:

(i) Whether the 1<sup>st</sup> Respondent has the requisite quorum to conduct its affairs as per the law and the Constitution?

(ii) Whether the 8<sup>th</sup> Respondent is acting as Secretary of the 1<sup>st</sup> Respondent based on the facts on record?

(iii) Whether any law has been or threatened with violation by the Respondents?

(iv) Who bears the costs?

9. The Court will address the issues as identified by the parties.

#### **Appointment of Environmental officers on 15 January 2021**

10. Although the Respondents did not raise the issue of a previous challenge to the appointment of the Environmental Officers, this Court is aware that the Petitioners herein had challenged the recruitment and appointment of the Environment Officers in Kisumu Petition No. E004 of 2021, *Michael Kojo Otieno & Ar v Lameck Otieno Ogot & Ors*.

11. The Court delivered judgment on 10 March 2021 in which it dismissed the Petition for lack of merit.

12. The Petitioners had in the aforesaid Petition sought an order quashing the appointment of the Environmental Officers through letters dated 15 January 2021 by the 8<sup>th</sup> Respondent.

13. The Petitioners by surreptitiously bringing up the issue again are in abuse of the court process, and the Court declines to revisit the question of the appointments.

#### **Delegation to the 8<sup>th</sup> Respondent**

14. The Petitioners had also raised the question of the alleged unlawful delegation of functions by the Board to the 8<sup>th</sup> Respondent in the Petition referred to hereinabove.

15. In the judgment delivered on 10 March 2021, the Court examined the Issue and addressed its mind to and made a determination on the allegation.

16. The Issue is therefore caught up by the principle of *issue estoppel*, and this Court would be sitting on appeal over an issue it had already addressed its mind to and made a determination on.

#### **Advertisement for positions in the Health Department with a deadline of 5 March 2021.**

17. The Petitioners further sought an order quashing an advertisement for positions in the Health Department which had an application deadline of 5 March 2021.

18. The Court has scoured through the Petition and the supporting affidavit.

19. There is absolutely no reference to the said advertisement in the body of the Petition or in the supporting affidavits.

20. Simply put, the Petitioners did not place before the Court any evidence upon which it could determine whether the advertisements were unlawful to warrant the same being quashed.

21. If by any chance it was on account of the Board not being validly constituted, then the findings on composition and quorum of the Board will apply to this particular claim.

### **Position of the 8<sup>th</sup> Respondent**

22. The Petitioners challenged the legal capacity of the 8<sup>th</sup> Respondent to serve as Secretary of the Board because he was not a certified public secretary (the Petitioners had also earlier challenged the delegation to this Respondent in Kisumu Petition No. E004 of 2021).

23. In the view of the Petitioners, the 8<sup>th</sup> Respondent was not competent to perform the functions allegedly delegated to him because he was neither a member of the Board nor the Secretary of the Board.

24. The Court has looked at section 86 of the County Governments Act. It allows the Board to delegate in writing any of its functions to among others chief officer, sub-county or ward administrator, village administrator or city administrator.

25. The 8<sup>th</sup> Respondent's substantive office was that of the Director of Recruitment.

26. On or around 30 April 2020, the Board resolved to delegate to him the authority as envisaged under section 86 of the County Governments Act.

27. At the time of delegation, the Board did not have a Secretary. The office of the 8<sup>th</sup> Respondent was not one of those enumerated under section 86 of the County Governments Act and therefore the delegation was irregular.

28. Despite the irregularity, the 8<sup>th</sup> Respondent was acting on the instructions of the Board and the Court is of the view that quashing the actions taken at the behest of the Board would adversely affect parties who have acquired accrued rights thus prejudicial.

### **Quorum**

29. Quorum and composition are distinct concepts.

30. According to Black's Law Dictionary, quorum is defined as:

The smallest number of people who must be present at a meeting so that official decisions can be made; ... the minimum number of members (a majority of all the members, unless otherwise specified in the governing documents) who must be present for a deliberative assembly to legally transact business.

31. According to the Petitioners, at least 5 members of the Board were required at any one meeting for decisions of the Board to be valid.

32. Further, the Petitioners argued that for the Board to be quorate, a Chairperson appointed by the Governor and approved by the County Assembly had to be present for transactions of the Board to be legal.

33. The Respondents on their part contended that the Board had 6 members at all material times and that the Court had in Kisumu Petition No. 42 of 2019, *Daniel Omondi Ogada & Ors v County Assembly of Homa Bay & Ors* (2020) eKLR issued an order directing 3 of the members to stay from office and this did not vitiate and decisions made by the 3 remaining members.

34. In the view of the Respondents, the Board only needed a quorum of 3 to run its affairs.

35. Despite asserting that the Board lacked quorum, the Petitioners did not disclose to the Court any particular document or instrument which set the minimum number of members of the Board required for meetings of the Board for resolutions thereof to be legal or valid.

36. Since more than half of the Board members were in attendance, the Court will not disturb decisions taken during such meetings.

37. Again, the Court observes that the Petitioners herein had challenged the quorum of the Board in Kisumu Petition No. E004 of 2021 and the Court made a determination thereof.

### **Composition of the Board**

38. According to the Petitioners, the Board had only 4-members at the material times, and because the Chairperson had not been appointed by the Governor and approved by the County Assembly, it was not validly constituted.

39. The Petitioners were challenging the composition of the Board as of 8 July 2020 and 15 January 2021.

40. The Petitioners also challenged the composition of the Board on the ground that it did not have a Vice-Chairperson of the opposite gender and because the 8<sup>th</sup> Respondent was not a certified public secretary and could not serve as the Secretary.

41. For the Respondents, the position was taken that the Board had 6 members (named) until the County Assembly recommended the removal of 3 members, but that the Court had only ordered the 3 to keep off the affairs of the Board pending determination of a pending appeal and since the quorum was not less than a third, the remaining 3 could validly transact on behalf of the Board.

42. Initially, the Board had 6 members but at some point, the County Assembly recommended the removal of 3 members (Daniel Omondi Ogada, Collins Odhiambo Ogutu and Tobias Odundo).

43. When the removal of the 3 was challenged, the Court ordered that they stay out of the office until the conclusion of the litigation in Kisumu Petition No. E004 of 2021 (the decision was stayed pending appeal).

44. Section 58 of the County Governments Act provides for the composition of the Board. At the very minimum there must be 5 members and at the outer edge, a maximum of 7-members.

45. The section also requires that a county public service board shall comprise of a chairperson, not less than 3 and not more than 5 persons nominated and appointed by the Governor and a certified public secretary to serve as the Secretary to the Board.

46. As regards the date of 8 July 2020, the Petitioners did not provide any records or documentation which could assist the Court to determine who the Board members were and who had been removed from office by that particular date.

47. The Court is, therefore, unable to determine whether the composition of the Board was valid as of that date.

#### **Conclusion and Orders**

48. From the foregoing, the Court finds that the Petition is not only without merit but caught by the doctrine of *issue estoppel* as most of the Issues identified for adjudication had been the subject of determination by this Court on the application of the Petitioners.

49. Costs to the Respondents.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF DECEMBER 2021.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

#### **Appearances**

Petitioners in person

For Respondents Otieno, Yogo & Ojuro Advocates

Court Assistant Chrispo Aura