



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT KERICHO
PETITION NO.6 OF 2019

MAGERER LANGAT.....1ST PETITIONER

CHARLES LANGAT.....2ND PETITIONER

VERSUS

PAUL KIPRONO CHEPKWONY,

GOVERNOR COUNTY GOVERNMENT OF KERICHO.....1ST RESPONDENT

KERICHO COUNTY EXECUTIVE COMMITTEE MEMBER

FOR LANDS, HOUSING & PHYSICAL PLANNING.....2ND RESPONDENT

KERICHO COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

RULING

The petitioners filed application and Notice of Motion dated 15th October, 2019 and under the provisions of articles 10, 19, 20, 21(1), 22(1), 23(1), 27, 47(2), 231, 258 and 259 of the constitution and section 4 of the Fair Administrative Act and Rules 23 and 24 of the constitution of Kenya (Protections of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2010 and seeking for orders that;

1. ...

2. ...

3. ...

4. *The respondents be restrained and prohibited from employing replacement labour in the same positions to perform similar work as that of the petitioners;*

5. *The court be pleased to declare that the respondents violated the petitioner's or applicant's member's rights to fair labour practices by not complying with due process in their move to advertise for non-vacant positions as protected under Article 47(2) of the Constitution and the provisions of the Urban Areas and Cities (Amendment) Act No.3 of 2019;*

6. *An order that all world projects administered by the Kericho Municipal Board be suspended till the hearing of the main petition is heard and determined and the office of the 1st and 2nd respondents be compelled to provide audit report of the sum dispensed which is not within the knowledge of the Kericho Municipal Members;*

7. *Costs of the petition [application].*

The application is supported by the affidavit of the 1st petitioner and the grounds that the petitioners were appointed to Kericho Municipal Board of the respondents office effective 1st December, 2018 for a period of 5 years pursuant to section 14 of the Urban Areas and Cities Act and upon taking the oath of office on 30th November, 2018. Upon such appointment, removal from such office should only be by resolution of the Board supported by a 2/3 of the members or a petition by the residents of the municipality.

The petitioners have served for only one (1) year in the board.

On 8th April, 2019 the Council of Governors requested for an advisory opinion on the implementation of section 14 of the Urban Areas and Cities (Amendment) Act and particular the fate of the members already constituted and who do not meet the qualifications set out in the amended Act. The members who met the qualifications were to be allowed to complete their remaining term and any further appointment if any be undertaken in accordance with section 14 of the Amended Act.

Mr Magerer also avers that the 1st and 2nd respondents misinterpreted the advisory and purported to use it as a law and send a memo dated 27th September, 2019 declaring existing members as caretaker members. The respondents have also gone ahead to advertise for the positions held by the petitioner well aware there is no vacancy and such is with intent to remove the petitioners from office.

The petitioners are aggrieved by the actions of the respondents to advertise for the positions they hold and such is insubordinate of their functions without due process and effectively termination of employment contrary to constitutional provisions.

The decision to advertise for the positions held by the petitioners is discriminatory to the extent that the office of the 1st respondent and that of the 2nd respondents acted as law and decreed that the existing board be declared a caretaker board and be replaced through an advertisement contrary to the advisory opinion issued by the office of the Attorney General.

Mr Magerer also avers that the actions of the 3rd respondent to advertise for the positions the petitioners hold is without due process, premature and unlawful and fails to meet the ends of justice. There shall be prejudice suffered if the orders sought were not allowed.

The respondents filed Grounds of Opposition that under 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 and the contemplated legislation is the Urban Areas and Cities Act, 2011. Parliament has now enacted the Urban Areas and Cities (Amendment) Act, 2019. Under section 14 it provides for the composition, appointment and qualifications of municipal board members. The repealed Act did not provide for these guidelines and the change now renders the Board members without the requisite qualifications as unqualified and unfit to hold office.

The amendment to the law took effect on 28th March, 2019 and does not contain savings and transitional provisions in relation to the current board members. Therefore the membership of unqualified members took effect immediately in accordance with the interpretations and general provisions act.

Other grounds in opposition to the petitioner's application is that the board members once appointed are not considered as employee and the office they hold is a creation of the law. They serve within a set term on a part time basis and there is no employment to be accorded protection under the Employment Act, 2007 which at section 2 define who an *employee* and an *employer* are. Section 25 of the Urban Areas and Cities Act, 2011 provided that the board members are to be remunerated in accordance with a determination and advisory from the Salaries and Remuneration Commission. The claim that there is termination of employment which is discriminatory is misleading the court.

The petitioners were duly informed of the new changes in law and the steps the County Government was taking to ensure that the municipal boards are in conformity with the law. There was an internal memo sent to all members of Kericho/Litien Municipal Boards.

On 8th April, 2019 the Council of Governors sought an advisory opinion on the interpretation of section 14 of the Act in relation to the fate of the members already constituted municipal boards who do not meet the qualifications set out in the Act and in response the office of the Attorney General opined that all members who do not qualify cease to be members of the board by operation of the law and those who meet the criteria to complete their remaining term.

On this basis the 3rd respondent advertised for suitable candidates to apply for board members and noted that the current board members will remain in office until the newly recruited members were sworn in office. The respondents have a legal duty to ensure that the board is fully constituted in accordance with the law.

The application seeking conservatory orders is premature and in abuse of court process as held in the case of **Gatirau Peter Munya versus Dickson Mwendwa Kithinji & 2 others [2014] eKLR** where the court is required to look at the public interest, constitutional values and the proportionate magnitude and to ensure that the principles set out in the **Giella versus Caseman Brown case** for the issuance of injunctive orders are met.

In the interests of justice the application should be dismissed with costs.

Both parties filed written submissions.

The petitioners submitted that section 14 of the Urban Areas and Cities (Amendment) Act, 2019 repealed and replaced section of the principal Act introducing the composition, appointment and qualification of municipal board which had not been provided for in the Urban Areas and Cities (Amendment) Act, 2011.

Under the set criteria under the Urban Areas and Cities (Amendment) Act, 2019 the petitioners qualified since they were competitively recruited through the office of the 3rd respondent and appointed by the office of the 1st respondents and approved by the County Assembly of Kericho.

The petitioners also submitted that the application by the respondents of the Urban Areas and Cities (Amendment) Act, 2019 to oust them

from the membership of the board contrary to the principles that the law applies proactively as held in the case of **Pauline Anna Bernadette Onyango versus Kenya School of law [2017] eKLR**. A new Act affects future appointment after the commencement of the Act and section 14 of the Urban Areas and Cities (Amendment) Act, 2019 should be applied in that respect.

Section 9(1) of the Employment Act, a contract of service should provide for the term of employment and the terms of service. Upon appointment parties are bound by the term therefrom and the petitioners were appointed for a term of 5 years.

The petitioners also submitted that the advisory opinion of the Attorney General with regard to the interpretation of section 14 of the Urban Areas and Cities (Amendment) Act, 2019 should be appreciated in terms of article 47 of the Constitution as every person has the right to fair administrative action as held in **JSC versus Mbalu Mutava Musyimi [2015] eKLR**. The advisory opinion by the Attorney General was to the effect that the board members already serving should be allowed to complete their term and at the end be allowed to be recruited competitively.

The respondents submitted that the petitioners are not protected under the Employment Act, 2007 as they are not employees but board members through an Act of parliament. Section 25 of the Urban Areas and Cities (Amendment) Act the board members are paid allowances and not a salary. The petitioners do not have a contract of service and thus the court lacks jurisdiction.

The issues which emerge for determination can be summarised as;

Question of jurisdiction;

Whether the respondents should be stopped from replacing and or employing other persons to replace the petitioners; and

Whether the projects of the respondents should be suspended pending the hearing and determination of the petition.

Before delving into the above issues, the respondents in reply filed Grounds of Opposition to the petitioners' application. Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires a party filing a Notice of Motion to file an Affidavit stating the general terms and grounds and giving reasons thereof. In reply, a respondent thereto is required to file *Grounds of Opposition* and a *Verifying Affidavit*.

(8) A notice of motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the notice of motion and a copy of the affidavit shall be served on the other party.

(9) A party may respond to an application by filing grounds of opposition verified by an affidavit.

This is to ensure the court effectual and final determination of the matters at hand. The failure to file a Replying Affidavit thus denies the court an essential and relevant and vital material for the effectual determination of the claims herein.

A Replying Affidavit thus gives the court material necessary in order to enable the Court effectually and competently adjudicate upon and settle all the questions involved in the cause or matter. Rule 21 read together with Rule 25(3) of the Court Rules allow the court to determine the entire suit based on the filed affidavits.

The filing of affidavits whether or not a party has filed Grounds of Oppositions becomes very crucial. In this regard, the failure by the respondent in not filing any Replying Affidavit denies the court material in the eventual determination of the matters herein.

On the question of jurisdiction, In the case of **Wilbert Kipsang Choge & 6 Others versus Communication Authority of Kenya & Another (2016) eKLR** the court held that the jurisdiction of the Employment and Labour Relations Court is not confined by the narrow path that employer-employee relationship must exist for it to have jurisdiction. That the Court is granted jurisdiction by the Constitution and Employment and Labour Relations Act, 2011 over employment and labour relations and connected purposes and not employer-employee disputes only. See also **Celina Atieno Ogutu versus Undugu Society of Kenya [2019] eKLR** that;

In the case of Naqvi Syed Qmar versus Paramount Bank Limited & another [2015] eKLR the court observed as follows:

The 1st Respondent's view narrows the jurisdiction of the Court while both the Constitution of Kenya, and the Employment and Labour Relations Court Act, broaden the jurisdiction. Article 162[2][a] of the Constitution which contemplates the creation of this Court, defines the material jurisdiction of the Court to include all disputes relating to employment and labour relations. The Article does not say contractual disputes, between Employers and Employees; it states all disputes relating to employment and labour relations. Section 12 of the Employment and Labour Relations Court Act refers to Article 162[2] [a] of the Constitution and " the provisions of this Act, or any other written law which extends jurisdiction to the Court relating to employment and labour relations including ...

Therefore the all purposive component of *employment and labour relations and connected purposes* should not be lost. These remains the core jurisdictional areas for the court. the element of *connected purposes* is emboldened in the preamble of the constitutive Act for the court, the Employment and Labour Relations Court Act, 2011.

The petitioners' claims being pegged on what they assert to be employment and labour relations, the termination of which is now threatened by the respondents and also their claim being premised on their appointment as Board members and which is now under threat following the enactment of Urban Areas and Cities (Amendment) Act, 2019 are on matters appropriate for the court.

The question of jurisdiction above addressed, the petitioners agree they were appointed under the provisions of Urban Areas and Cities Act to serve in the Kericho Municipal Board for a term of 5 years. section 14 of the repealed Act, the Urban Areas and Cities Act, the appointed Board members were to serve for a term of 5 years and section 25 of the Act with regard to remuneration, the Board members are;

... shall not receive a salary from the board or the town committee but shall be paid such allowances and benefits as the county executive committee shall, with approval of the county assembly, and on the advice of the Salaries and Remuneration Commission, determine.

Therefore, the Board members such as the petitioners were appointed are not salaried and receive an allowance. This is upon sitting in the board as required under the provisions of section 23 of the repealed Act thus;

(1) A board shall hold its sittings to transact the business of the board once every three months.

(2) Notwithstanding subsection (1), the chairperson may, and upon request in writing by at least one-third of the members of the board shall, convene a special meeting to transaction any urgent business of the board.

The orders sought with regard to stopping the respondents from advertising, replacing, declaring vacant positions held by the petitioners and calling the court to quash the letter dated 27th September, 2019 and the alleged failure to follow fair administrative action and that the treatment of the petitioners has been discriminatory being the core matters outlined in the main petition, to determine these issues without a Replying Affidavit by the respondents, and noting the petitioners once appointed were only paid an allowance for the allocated sittings of the board to issue interim orders at this instance would not aid justice.

Further to address the various interpretations of the parties with regard to the application of the Urban Areas and Cities Act (repealed) and the Urban Areas and Cities (Amendment) Act, 2019 at this instance would deny the court important information which can only be sourced and secured by addressing the main petition.

Accordingly, application dated 15th October, 2019 is declined. The petition shall be heard on priority basis at Kericho. Costs in the cause.

Delivered at Nakuru this 23rd day of January, 2020.

M. MBAR?

JUDGE

In the presence of: