



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO**

**Petition no.6 of 2019**

**MAGERER LANGAT .....1<sup>ST</sup> PETITIONER**

**CHARLES LANGAT .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**PAUL KIPRONO CHEPKWONY, THE GOVERNOR**

**COURTY GOVERNMENT OF KERICHO.....1<sup>ST</sup> RESPONDENT**

**THE KERICHO COUNTY EXECUTIVE COMMITTEE MEMBER**

**FOR LANDS, HOUSING & PHYSICAL PLANNING.....2<sup>ND</sup> RESPONDENT**

**KERICHO COUNTY PUBLIC SERVICE BOARD.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

The petitioners are seeking the following orders;

- a) *A declaration that the actions of the respondents seeking to terminate the petitioner's positions as members of Kericho Municipal Board by advertising their positions not declared vacant by operation of the law is malicious, illegal, unfair, unlawful and therefore null and void.*
- b) *A declaration that the petitioners are serving a 5 year term expiring in the year 2023 and are entitled to finish their term of office.*
- c) *An order of certiorari to remove into court and quash the letter dated 27<sup>th</sup> September, 2019 and consequential proceedings of advertising their positions as infringement on the petitioner's right to fair hearing contrary to Article 47 of the constitution, 2010.*
- d) *A declaration that the acts of the respondents amounts to unfair administrative action contrary to article 47 of the constitution, 2010.*
- e) *An order of prohibition restraining the respondents from discriminating against the petitioner contrary to article 27 of the constitution, 2010.*
- f) *An order against the removal of the petitioners as the members of the Kericho Municipal Board till their term of 5 years.*
- g) *Costs of the petition.*

**The petition**

The petition is that the petitioners are senior citizens and career civil servants, businessmen and hold Master's degree in Business and serving members of the Kericho Municipal Board having been appointed to such office on 1<sup>st</sup> December, 2018 for the a term of 5 years and sown into office on 30<sup>th</sup> November, 2019.

The petition is against the 1<sup>st</sup> respondent pursuant to article 176(1) of the constitution, the 2<sup>nd</sup> respondent and officer appointed by the 1<sup>st</sup>

respondent responsible for the coordination of Urban Development within the County, the 3<sup>rd</sup> respondent established under section 57 of the County Government Act.

The petition is that the petitioners were appointed to the Kericho Municipal Board by the 1<sup>st</sup> respondent which board is domiciled in the department of the 2<sup>nd</sup> respondent. they took office effective 1<sup>st</sup> December, 2008 for a period of 5 years pursuant to section 14 of the Urban Areas and Cities Act, 2011 having taken oath on 30<sup>th</sup> November, 2018 and in line with the Charter for Kericho Municipal Board and removal if any should be by resolution of the Board and supported by a 2/3 of the members of the Board or through a petition by the resident of the municipality under the Charter the petitioners have served for a year under the Urban Areas and Cities Act and following an amendment of the same, they qualify to continue in service.

On 8<sup>th</sup> April, 2018 the Council of Governors upon the amendment of the Urban Areas and Cities Act requested for an advisory opinion on the implementation of section 14 of the same particularly on the fate of the members already constituted and who did not meet the qualifications set out in the amended Act.

Contrary to the advisory opinion by the Attorney General dated 16<sup>th</sup> May, 2019 to the COG stated that those members who met the criteria set out in the amended Act can be allowed to complete the remaining term and any further appointment should be undertaken in accordance with section 14 of the amended Act. The 2<sup>nd</sup> respondent misinterpreted the advisory opinion given and sent an internal memo dated 27<sup>th</sup> September, 2019 declaring existing members as caretaker Kericho County Municipal Board and advertising the said position while their contracts were still valid and not vacant.

It was unlawful for the 2<sup>nd</sup> respondent to decree that the petitioners were a caretaker board which had no basis in law or under the constitution.

The petition is that the respondents have advertised for their positions being then a removal as members of the Kericho Municipal Board despite complying with the amended Act since the petitioners are holders of master's degrees and minimum qualifications as envisaged under the amended Act.

The letter informing the advertisement of board positions and reconstitution of the Kericho and Litein Municipal Boards following the amendment to the Urban Areas and Cities Act on 28<sup>th</sup> March, 2019 was contrary to the Attorney General Advisory opinion with regard to already constituted board.

The petition is that the petitioners are aggrieved by the conduct of the 2<sup>nd</sup> respondent by virtue of directing the 3<sup>rd</sup> respondent to advertise their positions when they qualify to serve under the Urban Areas and Cities Act, 2019. There is a breach of the petitioner's rights in the grounds that the actions by the respondent have purported to terminate the petitioners' service without due process; there is removal from office without a justifiable cause and contrary to the rules of natural justice.

The advertisement of the positions held by the petitioners by the respondents is contrary to fair administrative action and contrary to article 47 of the constitution and contrary to right to dignity as the advertisement of such position was motivated following allegations that the petitioners had participated in stealing World bank grants meant for projects within Kericho Municipality and have been branded as thieves yet they were not signatories to the account domiciled under the Kericho Municipal Board accounts. These allegations have affected the inherent dignity of the petitioners.

The petition is also that there is a violation of article 10, 47, 27, 28 and 259 of the constitution and section 14 of the urban Areas and Cities (Amendment) Act, 2019. The petitioners were not allowed a fair hearing and fair administrative action to serve the term of their appointment to the Board by the actions of the respondents. The petition should be allowed.

The petition is supported by the petitioners Affidavit.

## **Response**

In response, the respondent's case is that article 184(1) of the constitution provides that national legislation shall provide for the governance and management of urban areas and cities. The legislation contemplated is the Urban Areas and Cities Act, 2011 and which Parliament amended by enacting the Urban Areas and Cities (Amendment) Act, 2019.

Section 14 of the Urban Areas and Cities (Amendment) Act, 2019 outline the composition, appointment and qualifications of board members. Prior to the amendment of the Act these guidelines were not provided and thus the change renders the Board members who do not meet these requirements unqualified and unfit to hold office.

The Urban Areas and Cities (Amendment) Act, 2019 came into force on 28<sup>th</sup> March, 2019 and does not contain transitional provisions in relation to current board members. The membership of the unqualified members came to an end on the effective date and in accordance of section 22 of the Interpretation and General Provisions Act.

Board members are not employee and the office they hold is a creation of the law. They serve within a set term and on part term basis. The board members cannot claim for rights under the Employment Act. The petition that there was no notice, hearing or reasons given does not apply. However, the petitioners were informed of the changes to the operative law as admitted in the affidavit of the 1<sup>st</sup> petitioner sworn on 27<sup>th</sup> September, 2019 that the County Government sent a memo to the members of the Kericho/Litein Municipal Boards informing them of the amendment and the intended reconstruction of the Boards.

On 8<sup>th</sup> April, 2019 the COG sought the Attorney General's advisory opinion on the interpretation of section 14 of the Urban Areas and Cities (Amendment) Act, 2019 in relation to the fate of members serving and who do not meet the qualifications in the

Act. The Attorney General in response gave the opinion that all those who do not qualify ceased to be members of the Board by operation of the law and those who met the set qualifications can complete their remaining term and any further appointment should be undertaken in accordance with section 14 of the Urban Areas and Cities (Amendment) Act, 2019.

An advertisement for suitable candidates to apply for municipal board members was done. The current board members were to remain in office until the newly recruited members were sworn into office and the current members who qualify were encouraged to apply. This was an indication that the respondents had no intention to remove the petitioners from the board membership as alleged. The requirement to advertise is a requirement under the amended law. Such legal requirement to advertise and receive applications from qualified candidates is not discriminatory or a violation of the right to fair administrative action and human dignity.

The respondents have legal duty to ensure that the municipal boards are lawfully constituted. Allowing the composition to remain as it is would be in violation of the constitution and section 14 of the Urban Areas and Cities (Amendment) Act, 2019.

There is no infringement of the petitioner's rights as alleged and the allegations that the petitioners were to serve for 5 years fixed term is misconceived as there was an amendment to the law requiring strict compliance by the respondents. The petition should be dismissed with costs.

### **Written submissions**

The petitioners submitted that they were employees of the respondent and seek protection under the provisions of the Employment Act. An employee is defined under section 2 of the Act and as held in the case of **Christine Adot Lopeyio versus Wycliffe Mwathi Pere [2013] eKLR**, the petitioners were under the control and directions of the respondents. The petitioners were entitled to remuneration and allowances paid by the respondents who had given them a job description.

The petitioners also submitted that under section 14 of the repealed Urban Areas and Cities (Amendment) Act, 2019 it brought qualifications of municipal board members which was not provided for earlier. Under section 14(6) and (7) and the provisions thereof, an advisory was sought by the Council of Governors from the office of the Attorney General and who advised that all counties that, those who satisfy the provisions of section 14 of the new Act be allowed to complete their term and those who do not to cease holding office immediately. This met the principle that the law does not operate retrospectively as held by the Supreme Court in the case of **Samuel Kamau Macharia & another versus Kenya Commercial Bank & 2 others, SCK application No.2 of 2011 [2012] eKLR**.

The petitioners as holders of Masters Degrees met the threshold of section 14 of the new Act. They applied for the positions held with the Board and secured employment contracts for 5 years. To advertise for the same positions and remove the petitioners is unlawful. This is contrary to the advisory opinion from the Attorney General.

The respondents are in violation of Article 47 of the Constitution on fair administrative action by denying the petitioners a fair opportunity to a hearing before taking an adverse action with regard to their employment and 5 years term of service. The Court of Appeal in the Case of **Judicial Service Commission versus Mbalu Mutava & another [2015] eKLR** held that fair hearing under the common law, the right to administrative action is wide in scope and encompasses the duty to act expeditiously, act fairly, lawfully, reasonably and in specified cases there is a duty to give written reasons for the decision taken. The petitioners were denied such due process and fair administrative action. Such is in breach of the law and the constitution. The petition should be allowed as prayed.

The respondents submitted that they were appointed to serve the Board for a term of 5 years under the provisions of Article 184(1) of the constitution read together with the Urban Areas and Cities Act, 2011. Upon the enactment of the Urban Areas and Cities (Amendment) Act, 2019 section 14 provided for the composition, appointment and qualification of municipal board members which requirements had not been provided by the amended Act.

The advisory opinion by the Attorney General though notes law is persuasive with regard to the interpretation of the Urban Areas and Cities (Amendment) Act, 2019. Where the petitioners felt aggrieved they ought to have enjoined the Attorney General for the enforcement of their rights as held in the case of **Fairmont the Norfolk Hotel versus the Industrial Court of Kenya [2012] eKLR**.

In this case, the Urban Areas and Cities (Amendment) Act, 2019 does not have transitional provisions with regard to board members serving under the amended Act and the respondents were bound to advertise and reconstitute the Board under the provisions of section 14 of the Urban Areas and Cities (Amendment) Act, 2019.

The respondents also submitted that there are no constitutional rights violations as alleged by the petitioners. The decision to reconstitute the board was lawful, procedural and under the provisions of the Urban Areas and Cities (Amendment) Act, 2019.

The petitioners were informed of the reconstitution of the board through an internal memo dated 27<sup>th</sup> September, 2019 and which they seek to quash. The internal memo gave the reasons for the reconstitution of the board and that the petitioners would be in a caretaker capacity and therefore were at all material times aware of the reasons leading to the advertisement for application for board members and cannot allege that their right to fair administrative action was violated and that this was in discrimination against them.

The reconstitution of the board is meant to ensure that the new board was properly constituted for effective functioning. Such should not be interfered with for proper governance and accountability as held in **Justus Kariuki Mate & another versus Hon. Martin Nyaga Wambora & another [2017] eKLR**. The petitioners are aware of the legal changes and cannot be found to allege that the reconstitution of the board violates their right to dignity or is discriminatory. The petition is without merit and should be dismissed with costs.

Determination

On the petition and the responses thereto and the written submissions filed by the parties, the issues for denervation can be summarised as follows;

Whether the petitioners positions as board members has been terminated with malice, unlawfully and if so null and void;

Whether the petitioners were to serve for a term of 5 years;

Whether the court should quash letter dated 27<sup>th</sup> September, 2019;

Whether the right to fair administrative action and non-discrimination have been violated; and

Who should pay costs.

It is common cause that the petitioners were appointed as members to Kericho Municipal Board vide letters dated 29<sup>th</sup> November, 2018 effective 1<sup>st</sup> December, 2018 pursuant to the provisions of Urban Areas and Cities Act, 2011. The petitioners were to serve for a term of 5 years. The positions of Board members were on terms outlined in the referenced letter that;

*... you shall be paid allowances and benefits as determined and reviewed by the Salaries and Remuneration Commission. Your duties and responsibilities are elaborated in the Act and the Kericho Municipal Board Charter, 2017. You shall be guided by the existing law, code of conduct and other relevant regulations as you perform your duties.*

The membership of the petitioners was therefore subject to statute and guided by existing law.

It is also common cause that Parliament enacted the Urban Areas and Cities (Amendment) Act, 2019 and which came into force on 28<sup>th</sup> March, 2019. Such was during the tenure and term of the petitioner's membership with the Board.

Through the enactment of Urban Areas and Cities (Amendment) Act, 2019 the existing law and Urban Areas and Cities Act, 2011 was effectively amended. Section 14 thereof made provision to the effect that to qualify for appointment as member of the board one had to meet a set threshold in terms of qualification and upon which the board composition and appointment would follow.

On whether the petitioners board membership with Kericho Municipal board has been terminated with malice and unlawfully, upon the amendment of the Act leading to their appointment to serve in the board for a term of 5 years, the enactment of Urban Areas and Cities (Amendment) Act, 2019 coming into force on 28<sup>th</sup> March, 2019 effectively changed the operative statute, the Urban Areas and Cities Act, 2011.

The rationale is article 184 of the Constitution, 2010 read together with section 22 of the Interpretation and General provisions Act that;

*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 amendment of Urban Areas and Cities Act, 2011 and the enactment of Urban Areas and Cities (Amendment) Act, 2019 a new section was introduced under section 14 requiring the composition, appointment and qualification of board members to be commensurate with the amended Act which was not a requirement before.

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.

The Advisory opinion for the Attorney General did not amend the law. It was *advisory* in nature. The operative law leading to the appointment of the petitioners had been repealed.

Whether the petitioners met the requirements of section 14 of the Urban Areas and Cities (Amendment) Act, 2019 became subjective based on the set criteria and whether they each met the same and upon application and consideration for the position applied for.

the Court of Appeal in addressing the application of the repealed constitution and amendment of the law in the case of **Justice Kalpana H. Rawal versus Judicial Service Commission & 3 others [2016] eKLR**

*A claim based on mere legitimate expectation, without anything more in the form of suffered detriment, cannot ipso facto sustain an action founded on the doctrine of legitimate expectation. (See **Sethi Auto Service Station & Another v. Delhi Development Authority & Others, (2009) 1 SCC 180**).*

*In the final analysis, we are satisfied that even if the High Court did not determine the issue of legitimate expectation (which we have found it did), in the circumstances of this appeal the appellant's claim founded on legitimate expectation was not sustainable. For the same reasons, the appellant's claim of violation of her right to fair labour practices, which is founded on decisions of the 1<sup>st</sup> respondent that it was not competent to make, is unmeritorious? ...*

*Under the former Constitution, a judge was appointed to a specific judicial office either, as Judge of the High Court or Judge of Court of Appeal. There is and was no constitutional office to which a judge could be appointed known as “the Judiciary”; the Judiciary is an institution that has both constitutional office holders and non-constitutional office holders.*

Consequently, under the amended Act, the petitioners were appointed without any requirements for qualification and with the amendment of the Act, Urban Areas and Cities (Amendment) Act, 2019 there were set criteria. The respondents by letter dated 27<sup>th</sup> September, 2019 informed the members of the Kericho/Litein Municipal Boards of the amendment and the intended reconstruction of the Boards. To allow for continuity, the existing members were to serve as caretaker Kericho County Municipal Board and proceeded to advertise the board members position.

In the case of **Samuel Kamau Macharia & Another versus Kenya Commercial Bank Ltd & 2 Others (2012) eKLR**, as correctly submitted by the petitioners, the Supreme Court held that the Constitution does not apply retrospectively unless expressly stated but that such retrospectively could not apply if it would have the effect of divesting an individual of their rights legitimately accrued before the effective date.

The enactment of the Urban Areas and Cities (Amendment) Act, 2019 at section 14 does not apply retrospectively. The court reading of these provisions is that they took effect as of 28<sup>th</sup> March, 2019 retroactively.

Therefore, a retroactive provision in a law enacted by Parliament is neither unlawful, with malice nor unfair as the Petitioner seems to suggest.

The actions of the respondents are therefore lawful, pursuant to section 14 of the Urban Areas and Cities (Amendment) Act, 2019 and the letter/memo dated 27<sup>th</sup> September, 2019 the petitioners were dully informed. The notice advertising for the board members positions through a public notice gave every person qualified a fair chance to apply and receive consideration.

The court finds no violation of the constitution as alleged or any law cited by the petitioners.

The averments that the petitioners were being removed from office with malice and following complaints that there were missing funds from the World Bank funded project, these are matters introduced by the petitioners without foundation or evidence and are extraneous to the application of Urban Areas and Cities (Amendment) Act, 2019 with regard to the reconstitution of the municipal Board, Kericho.

The term of service for the petitioners terminated by operation of the law. Such cannot be visited against the respondents. To do so would be contrary to the provisions of Article 184 of the Constitution, 2010 read together with the Interpretation and General Provisions Act with regard to application of an amended law.

The letter dated 27<sup>th</sup> September, 2019 calling for the reconstitution of the Board by the respondents is lawful and procedural. To quash such letter would be contrary to the rule of law.

**Accordingly, the court finds no violation of the constitution and the petition is without merit and is hereby dismissed. The petitioners raise an important matter of law with regard to the application of Urban Areas and Cities (Amendment) Act, 2019 and therefore shall not be penalised in costs.**

**Dated and delivered electronically this 30<sup>th</sup> July, 2020.**

**M. MBARU**

**JUDGE**