Case Number:	Petition E053 of 2021
Date Delivered:	30 Mar 2022
Case Class:	Civil
Court:	Environment and Land Court at Kisumu
Case Action:	Judgment
Judge:	Christine Noontatua Baari
Citation:	Mwita John David & 3 others v Migori County Public Service Board & another [2022] eKLR
Advocates:	Mr. Odeny Present for the Petitioners Mr. Mango h/b for Mr. Otieno for the Respondents
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. E053 OF 2021

MWITA JOHN DAVID

JOBANDO LARRY NEVILE

PHILIP OUMA ODERO

MUSA OLWALO….....PETITIONERS

VERSUS

MIGORI COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

MIGORI COUNTY SECRETARY.....2ND RESPONDENT

JUDGMENT

1. The petition herein is dated 17th September, 2021 and filed on 20th September, 2021. The Petitioners seek a declaration that the 1st Respondent's decision contained in her letter of 6th September, 2021 deeming the Services of the Petitioners as Municipal Managers of the County Government of Migori dismissed on 28th March, 2019, by operation of the Urban Areas and Cities Act, 2019, unlawful and a violation of the Petitioners' rights under Articles 41, 47, 48 and 50 of the Constitution.

2. The Petitioners further seek an order of Judicial Review in the nature of *certiorari* to remove into this court for purposes of being quashed, the 1st Respondent's letter dated 6th September, 2021 that deemed the services of the Petitioners as Municipal Managers of the County Government of Migori dismissed on 28th March, 2019, by operation of the Urban Areas and Cities Act, 2019. The Petitioners finally seek a prohibitory order, prohibiting the Respondents from terminating the services of the Petitioners unless as provided for by law.

3. The Petitioners' case is that they were employed by the 1st Respondent as Municipal Managers of the County Government of Migori on permanent and pensionable terms of service. It is their further case that the 1st Respondent notified them of changes introduced in the amended Urban Areas and Cities Act, 2019, that required more qualifications for them to continue holding their positions as Municipal Managers, and for reason that the Petitioners were said to lack the new qualification, they were deemed dismissed on 28th March, 2019, by operation of law.

4. The Petitioners state that none of them had disciplinary issues or were in breach of their contracts of employment. It is their petition that their rights under the Constitution were infringed upon, as they were condemned unheard.

5. The Petitioners state that the Respondents misconstrued the law by applying the new amendment to the Urban Areas and Cities Act retrospectively, which misconstruction, violates their rights under Articles 41, 47, 48 and 50 of the Constitution.

6. It is the Petitioners' assertion that the amendments in the Urban Areas and Cities Act, 2019, only apply to new recruits, and not to persons already holding the positions by virtue of the old Legislation.

7. The Petitioners submit that their issue herein is not the amendment of the Act but the application of the new Act. They pray that the petition is allowed and orders granted as prayed.

8. The Respondents opposed the petition and adopted the replying affidavit sworn by one **Jared Odhiambo Opiyo** on 25th October, 2021, and another by **Mr. Christopher Rusana**.

9. The Counsel for the Respondents submitted that Petitioners were employed under the previous Urban Areas and Cities Act, 2011, which has since been amended vide the Urban Areas and Cities Amendment Act, 2019. It is their case that by dint of the amendment, the Petitioners are no longer qualified to hold the positions of Municipal Managers which they were appointed to under the old Legislation.

10. The Respondents' position is that where a position is established by law, and there is a change to that law, the position is immediately affected by the changes in that law. It is their case that as soon as the Urban Areas and Cities Amendment Act, 2019, was assented to, the Petitioners did not meet the requirement for the positions they held, and stood unqualified and not fit to serve.

11. It is the Respondents' further argument that the amended Urban Areas and Cities Act does not apply retrospectively, but instead, takes effect retroactively on the 28th March, 2019, being its commencement date. They argue that a retroactive provision in a law enacted by Parliament is neither unlawful nor unfair.

12. It is the Respondents' submission that the amended Act increased the years of qualification for Municipal Managers to 10 years from the 5 years provided in the 2011 law, and that the new law also introduced new responsibilities for the position. The Respondents further states that the amended law created a requirement that the managers be certified public Secretaries of good professional standing, and which qualification the Petitioners do not possess.

13. The Respondents case is that the essence of the changes in the law, is to improve governances in line with the requirements of Article 184 (1) of the Constitution. It is the Respondents' assertion that the Petitioners do not meet the new qualifications and stand terminated by operation of law.

14. The Respondents contend that by reason that the Urban Areas and Cities Amendment Act, 2019 does not have transitional clauses, leaves the Petitioners with no rights accrued or legitimate expectation. The Respondents cited ***Civil Appeal No. 1 of 2016, Kalpana Rawal v JSC & Others*** to support this position. The Respondents further relied on the Halsbury Laws of England, 4th Edition Vol. 44 paragraph 133 that states: -

"It is a principle of legal policy that an amending enactment should be assumed to change the law from the time of amendment."

15. The Respondents further contend that the petition as framed has not established constitutional violation. They rely on the holding in **Anarita Karimi Njeru**, for the holding that a petitioner must plead with particularity the provisions in which he claims and how they have been violated.

16. The Respondents further aver that the Petitioners have not produced any evidence to show that they are qualified to be appointed under the new Act. It is further argued that the Petitioners have not proved how the amendments have infringed on their rights.

17. The Respondents pray that the petition be dismissed and interim orders vacated.

Analysis and Determination

18. I have considered the petition; the Respondents' replies and the parties' oral submissions. The issue for this court to determine is whether the interpretation of the Amended Urban Areas and Cities Act, 2019, translates to termination of the Applicants by operations of law.

19. To determine this issue the court has to address itself to the question of whether or not the Petitioners have vested rights that cannot be taken away by changes in the law. As a matter of fact, it is within an employer's right to adopt a new policy to fix, change or alter the conditions of service of the employees. The power to amend or change the conditions of service is however subject to the provisions of the Constitution. In the case of ***Union of India & Anr vs D.P. Singh & Ors on 21 November, 2016,*** the court held:

"The power to amend or change the conditions of service is subject to the provisions of the Constitution and the amendment or change cannot offend Fundamental Rights guaranteed by the Constitution, or be arbitrary, unreasonable or otherwise objectionable on account of being contrary to any applicable statute."

20. In this case, the Petitioners have not challenged the amendment of the Urban Areas and Cities Act, 2019, but rather the retrospective application of the same by the Respondents. The Petitioners herein, were appointed on the basis of qualifications provided for by the law in force at the time. They have accrued rights based on those appointments, and which rights, cannot in my view be taken away for the sole reason that there is now in force a new law which prescribes qualifications other than those possessed by the Petitioners at the time they were appointed. In ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others SC Application No. 2 of 2011,*** the Supreme Court of Kenya had this to say on retrospective application of the law:

"However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provision, a court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retroactivity, the court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately accrued before commencement of the Constitution."

21. Further, Parliament did not provide transitional clauses which would have clearly spelt out the fate of the Petitioners upon commencement of the amended Urban Areas and Cities Act, and neither did it prescribed a compensation mechanism in the face of imminent job losses. If Parliament indeed intended that people lose jobs by amendment of the law, nothing would have been easier than to say so; needless to say, that it would be grossly unfair that employees would lose their jobs every time there is a change in the law.

22. The amendments to the Urban areas and Cities Act, 2019, can only in my opinion, operates prospectively, unless it is made retrospective by express provision or necessary intendment, which is not the case. Retrospectivity is not to be inferred by way of surmises and conjectures. Retrospective amendment taking away the benefits already acquired under the Urban Areas and Cities Act, 2011, can be challenged under Articles 41 of Constitution, as being arbitrary, unilateral and an unreasonable change in an employee's terms of service, hence amounting to unfair labour practices and hence unconstitutional.

23. The Respondents have had reliance on the holding in the case of ***Magerer Langat & another v Paul Kiprono Chepkwony, the Governor Courty Government of Kericho & 2 others [2020] eKLR*** amongst others. Although the case arose out of similar circumstances, the holding therein though is persuasive, and not binding on this court and is distinguished by the reasons foregone.

24. Further, it is necessary that construction of amending laws should be made in a reasonable manner to avoid unnecessary hardship to those who have no control over the subject-matter. In ***Nirmal Chandra Bhattacharjee v. Union of India [1991 Supp (2) SCC 363: 1992 SCC (L&S) 236 : (1992) 19 ATC 302]*** the Court observed as under:

"3. .... No rule or order which is meant to benefit employees should normally be construed in such a manner as to work hardship and injustice specially when its operation is automatic and if any injustice arises then the primary duty of the courts is to resolve it in such a manner that it may avoid any loss to one without giving undue advantage to other."

25. I find and hold that the amendments to the Urban Areas and Cities Act, 2019, are not retrospective, and could not adversely affect the existing rights of the Petitioners who already held the position of Municipal Managers, as they possessed the requisite qualifications prescribed by the law before amendment.

26. Consequently, I make orders as follows:

i. A declaration that the 1st Respondent's decision contained in her letter of 6th September, 2021, deeming the Services of the Petitioners as Municipal Managers of the County Government of Migori dismissed on 28th March, 2019, by operation of the Urban Areas and Cities Act, 2019, unlawful.

ii. An order of Judicial Review in the nature of *certiorari* be and is hereby issued to remove into this court for purposes of being quashed, the 1st Respondent's letter dated 6th September, 2021 that deemed the services of the Petitioners as Municipal Managers of the County Government of Migori dismissed on 28th March, 2019, by operation of the Urban Areas and Cities Act, 2019.

iii. An Order of Prohibition be and is hereby issued prohibiting the Respondents from terminating the services of the Petitioners unless as provided for by law.

iv. The Costs of the Petition shall be borne by the Respondents.

27. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 30TH DAY OF MARCH, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Odeny Present for the Petitioners

Mr. Mango h/b for Mr. Otieno for the Respondents

Christine Omollo – C/A