



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 116 OF 2013**

JANET NDAGO EKUMBO MBETE.....PETITIONER

AND

THE INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER, MOMBASA COUNTY.....2ND RESPONDENT

HON. HASSAN ALI JOHO.....3RD RESPONDENT

**JUDGMENT**

**Introduction**

1. The Petitioner, Janet Ndago Ekumbo Mbete is a registered voter in Likoni Constituency situated within Mombasa County. She is aggrieved by the issuance of a nomination certificate to the 3rd Respondent by the Returning Officer of the Independent Electoral and Boundaries Commission (IEBC) (the 2nd Respondent herein) to contest for the position of Governor of Mombasa County. She claims that under **Articles 180 and 193** of the **Constitution** and **Section 22(1)** of the **Elections Act 2011**, candidates for the position of Governor and Deputy Governor must *inter alia* be holders of a degree from a University recognized in Kenya. She alleged that the 3rd Respondent does not hold a valid degree from a university recognized in Kenya.
2. She also claims that under **Article 38** of the **Constitution**, she is entitled to be represented by a Governor who is qualified and the candidature of the 3rd Respondent violates her constitutional rights under that **Article** of the **Constitution**.
3. The Petitioner further adds that the 3rd Respondent has used unorthodox and fraudulent means to procure a university degree in order to pretend that he is a qualified holder of a degree from a University recognized in Kenya when in fact he is not so qualified.
4. It was her position that she had earlier on vide a letter dated 25th January 2013, lodged her objection over the candidature of the 3rd Respondent and also that of Ms Hazel Katana through her Advocates, M/s Kinoti and Kibe Co. Advocates which objection was overlooked by the 2nd Respondent. Subsequently, on 29th January 2013, she lodged a Petition, ***Nairobi High Court Petition No. 39 of 2013, Janet Ndago Ekumbo Mbete v Hon. Attorney General & 3 Others***, where she sought declarations *inter alia* that the 3rd Respondent and Hazel Katana did not meet the basic academic qualification of holding a degree from a university recognized in Kenya to vie for the position of Governor and Deputy Governor of Mombasa

County. And further, that the nomination of the 3rd Respondent and Hazel Katana would be null and void *ab initio* for failure to hold valid academic qualifications. She also sought a declaration that the nomination of the 3rd Respondent and Hazel Katana violated the Petitioner's rights under Article 38 of the Constitution.

5. That by a decision made on 31st January, 2013, the Court dismissed the said Petition and held that the Petitioner's objection constituted a nomination dispute which was within the mandate of the 1st Respondent, the IEBC and which the IEBC is mandated by **Article 88(4)(3)** of the **Constitution** and **Section 74** of the **Elections Act**, to resolve. The Petitioner now claims that the IEBC has refused, neglected and failed to conduct its statutory duty of hearing and determining the Petitioner's objection despite the directions of this Court.

6. That notwithstanding all her objections above, the 1st and 2nd Respondents went ahead to accept and acted on the nomination papers presented by the 3rd Respondent without paying due regard to the allegations raised by the Petitioner that the 3rd Respondent was not duly qualified. She thus claims that the nomination certificate issued to the 3rd Respondent by the 2nd Respondent upon the presentation of his papers is a nullity and one that ought to be quashed by this Court. She now seeks the following final reliefs;

***(a) That a declaration be issued to declare that the Certificate of the 2nd Respondent dated 30/1/2013 and issued to Hassan Ali Joho is null and void ab initio.***

***(b) That the Honourable Court be pleased to issue an order to quash the Certificate of the Returning Officer (2nd Respondent) dated 30/1/2013 issued to the 3rd Respondent.***

***(c) That a declaration be issued to declare that any ballot papers containing the names of the 3rd Respondent – Hassan Ali Joho – are invalid to the said extent.***

***(d) That an order of prohibition be issued to bar the 3rd Respondent from contesting for the position of Governor, Mombasa County.***

***(e) That an order of mandamus be issued to compel the 1st Respondent to print and/or reprint ballot papers excluding the names of Hassan Ali Joho as the Orange Democratic Movement Candidate for the Governor seat, Mombasa County.***

***(f) That the costs of this Petition be borne by the Respondents.***

### **Respondent's case**

7. The 1st and 2nd Respondents filed grounds of objection dated 25th February 2013. They both claim that the Petition lacks merit and is frivolous, vexatious and is an abuse of the Court process.

8. In opposing the Petition, the 3rd Respondent filed a Preliminary Objection and Grounds of Opposition dated 22nd February 2013. He also filed a Replying Affidavit sworn on 26th February 2013. In the Preliminary Objection and Grounds of Opposition, the 3rd Respondent raises points of law *inter alia* that the Petition is *res judicata* as the issues raised herein have been litigated upon in Petition No. 39 of 2013 between the same parties. And further that this Petition is a collateral attack and a disguised appeal against the judgment delivered on 5th February 2013. In addition, he claims that the Petition does not disclose any violation of the Petitioner's rights under the Constitution or at all.

9. In his affidavit, the 3rd Respondent contends that the matters raised by the Petitioner constitute a nomination-related dispute concerning his academic qualifications and eligibility to be nominated to contest for the Mombasa gubernatorial seat. He claims that the jurisdiction and the mandate to determine eligibility or qualification to contest for the elective position is within the exclusive domain of the IEBC which is constitutionally mandated under **Article 88(4)** of the **Constitution** to resolve such disputes. He further claims that the mandate to determine the validity, recognition or otherwise of his academic

qualifications is the preserve of the Commission of Higher Education. It is thus his submission that this Petition by-passes, without any valid justification, legally established mechanisms for dealing with the issues raised and he urged me to dismiss it for want of jurisdiction and also for being an abuse of the Court process.

10. He submitted that in any event, the 1st Respondent and the Commission of Higher Education having satisfied themselves that he was duly qualified, he was cleared to contest for the Mombasa seat and the matter should have rested there.

11. The 3rd Respondent also contends that he holds a degree in Business Management (Human Resource Management Option) from Kampala University having enrolled as a student in the year 2009. He produced a copy of his student identification card number 2009/AU/KU/BBA/120HT as evidence of his attending the University. He stated that he completed all the requisite study units as required for the award of the degree in 2012 and was cleared for graduation by the said Dean of the School of Business Management Studies. He produced in evidence a copy of his clearance letter from the said Dean. He also claims that the graduation ceremony was scheduled to be held in Kampala on 28th February 2013 whereupon he was to be awarded with the degree certificate.

12. He alleges that the requirement to possess a degree recognized in Kenya under section **22(2) of the Elections Act** does not connote physical possession of a degree but requires one to prove that he has concluded the process leading to the award of the degree. It was his further assertion that the law has not defined a degree qualification and that in any event the holding of a degree is not the physical possession of a certificate but the certification thereof which is intangible. It was his position that the graduation ceremony is a mere formality to confirm that one has qualified for a particular degree, and that lack of a degree certificate is not fatal and cannot be a ground for disqualification.

13. He has also alleged that Kampala University is recognised by the Commission of Higher Education to offer degree courses and the Commission has categorically stated so in writing and in advising that his degree is recognized in Kenya. That the Petition ought therefore to be dismissed with costs.

### **Determination**

14. Having set out the respective parties arguments as above, I am of the view that I am called upon to determine two issues. First, whether this Petition is *res judicata* as argued by the 1st and 2nd Respondents. If it is then the matter ends there. If it is not, then I must determine whether the 3rd Respondent holds the academic qualification envisaged by **Section 22(2)** of the **Elections Act** in order to qualify and to contest the gubernatorial seat for Mombasa County.

15. The 3rd Respondent has argued that this matter is *res judicata* as the same issues raised herein have been litigated upon in **Petition No. 39 of 2013** which was also between the same parties as in this Petition. The provisions in our law with regard to the doctrine of *res judicata* are to be found in **Section 7** of the **Civil Procedure Act (Cap 21)** which provides as follows;

***'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'***

The above is the Law and the question is, does the doctrine of *res judicata* apply to the instant matter? I do not think so.

16. Even if the parties and the issues are the same in this matter as were in **Petition No. 39 of 2013**, I am clear in my mind that the issues herein were not adjudicated and determined to conclusion. The court in that case referred the Petitioner to the IEBC which is the body mandated to resolve the nomination dispute. However, the IEBC has not to date resolved the issue raised by the Petitioner and so this case was

filed. I therefore find that the matter is properly before the Court and as was held in Narok County Council vs Transmara County council [2000] 1 EA 161 at page 164;

***“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision Page 15 of 24 can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis.” (Emphasis mine)***

I agree that since IEBC did not determine the matter, then this Court can now properly do so.

17. For *res judicata* to apply as stated above the following conditions must be met; the issue in the first suit must have been decided by a competent court; the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar and the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. These principles have now been settled in by various judicial precedents. For example In **Karia and Another -v- the Attorney General and Others (2005) IEA 83;** the court upheld the decision in **Karshe -v- Uganda**

**Transport Limited** where the court held as follows;

***‘once a decision has been given by a court of competent jurisdiction between two persons over the same subject matter, neither of the parties would be allowed to re-litigate the issue again or to deny that a decision had in fact been given, subject to certain conditions’.***

In **Omondi -v- National Bank of Kenya ltd and Others (2001) EA 177**

Ringera J, stated that;

***‘doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in or parties who could have been enjoined were not enjoined.’***

And in **Njangu -v- Wambugu and Another Nrb HCCC No. 2340 of 1991,** it was held that the essence of the doctrine of *res judicata* is to bring

litigation to an end.

All the above decisions apply to this case but only to the finding that the case is not *res judicata*.

18. Having found that the matter is properly before me, I will now turn to examine whether the 3rd Respondent holds the requisite academic qualifications as provided for by **Section 22(2)** of the **Elections Act**. In my view, in determining this question, I will need to address my mind to the provisions of **Articles 180 and 193 of the Constitution**. **Article 180(2)** provides that **'to be eligible for election as County Governor, a person must be eligible for election as a member of the County Assembly.'** **Article 193 (1)** states that **'a person is eligible for election as a member of a County Assembly of the person (b) satisfies any education, moral and ethical requirements prescribed by this Constitution or an Act of Parliament'**.

19. **Section 22** of the **Election Act** provides that;

***“(1) A person may be nominated as a candidate for an election under this Act only if that person-***

***(a) is qualified to be elected to that office under the Constitution and this Act; and***

**(b) holds a post Secondary school qualification recognized in Kenya.**

**(2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, County Governor or Deputy President, County Governor or Deputy County Governor only if the person is a holder of a degree from a university recognised in Kenya.”**

20. The question to pose at this point is therefore whether under the law above 3rd Respondent holds a recognised degree. In Kenya, the relevant institution charged with the responsibility of recognising a degree is the Commission for Higher Education which conducts this exercise by reference to accreditation. **Section 5 (1)(g) of the Universities Act, 2012** mandates the Commission for Higher Education to recognise and equate degrees awarded by foreign universities and institutions in accordance with the standards and guidelines set by it from time to time.

21. From the material before me, it is apparent that the 3rd Respondent was a student at Kampala University since 2009 and he completed his Degree in Business Administration (Human Resource Management Option) and was scheduled to graduate in February 2013. The Commission of Higher Education in its letter dated 8th January 2013, confirmed that Kampala University is a recognized University in Uganda and by convention in Kenya. It also confirmed that it recognizes any degree awarded by the said institution.

22. However, that is not the end of the matter. It was the 3rd Respondent's submission that a degree does not connote a physical possession of a certificate but refers to the certification process which is intangible. It was his position that the graduation ceremony and a degree certificate are a mere formality which confirms that one has qualified for a particular degree. The issue I am however called upon to determine is whether the 3rd Respondent held a degree at the time of nomination to contest for the gubernatorial position.

23. The Blacks Law Dictionary, 8th Edition defines a degree as;

***'A title conferred on a graduate of a school, college or university either after the completion of required studies or in honour of special achievements' (emphasis mine)***

The Concise Oxford English Dictionary, 10th Edition defines a degree as;

***'an academic rank conferred by a college or university after examination or after completion of a course, or conferred as an honour'. (emphasis mine)***

24. Clearly, both definitions envisage a situation where a degree would be conferred on a student who has completed his exams or studies upon which he attends a ceremony known as a graduation. It is not in dispute that the 3rd Respondent has finished his studies and has passed the exams required for the conferment of a degree in his area of study, being Business Management (Human Resource Management Option) notwithstanding that he has not formally graduated.

25. I am therefore in agreement with the 3rd Respondent that a degree is not a physical connotation but is a process whose pinnacle is the graduation. Indeed the Concise Oxford English Dictionary, 10th Edition, defines a graduate as one who has '**successfully completed a degree**' and a graduand as a '**person who is about to receive an academic degree**'. It is therefore clear to me that, the graduation ceremony cannot be used as a measure to determine whether one has a degree or not. In my view, what matters is that a person has attended school, undertaken the studies envisaged and has passed all the requisite exams for the conferment of the degree.

26. Having found as above, I am therefore satisfied that the 3rd Respondent holds the qualifications envisaged by **Section 22(2) of the Elections Act** and the Petitioner, despite all her spirited efforts, has failed to bring evidence that the 3rd Respondent used fraudulent means to obtain his degree. How can this Court uphold her objections when Kampala University and the Council for Higher Education have said that he is qualified?

27. In a recent case involving a candidate for the position of Governor of Kajiado County, where the Commission for Higher Education was unable to verify a degree, this Court properly upheld its position and the candidate was unable to run for that position – see Musa Tipape Naini vs Tom Mboya & Others, Petition 65/2013.

28. Having resolved the one issue that the Petition resolves around, i must now advert to the prayers set out in the Petition and I note that once the General Elections were held on 4th March 2013, it follows that all the prayers have been spent and there is nothing left to grant and it follows therefore that I see no merit in it and I hereby dismiss the Petition with costs to the Respondents.

29. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 15TH DAY OF MARCH, 2013**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

*Irene – Court clerk*

*Mr. Nyamondi for Respondent*

*Mr. Wanyaga holding brief for Mr. Kibe for Petitioner*

*Mr. Mosota for Interested Party*

**Order**

*Judgment duly read.*

**ISAAC LENAOLA**

**JUDGE**