



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ELECTION PETITION NO. 5 OF 2013

WILSON NGINGA KIMOTHOPETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

ESTHER MURUGI MATHENGE.....2ND RESPONDENT

MARGARET LORNAH KARIUKI (NYERI CONSTITUENCY

RETURNING OFFICER).....3RDRESPONDENT

RULING

Following a consent between the Petitioner and the Respondents in this petition which consent was duly endorsed as an order of the court on 14th June, 2013 the parties herein agreed to file and exchange written submissions on the main petition by 15th July, 2013 and highlight them on 19th July, 2013. They substantially complied with the consent order except that a few days before the parties appeared in court for highlighting of their submissions, the Respondents filed affidavits to the effect that counsel for the Petitioner, Mr Douglas Ogeto Ombongi does not hold a current practising certificate.

This issue was immediately brought to the attention of the Petitioner’s counsel since it is clear from the record that the affidavits were served upon him long before the 19th July, 2013 when counsel were expected to be in court for highlighting of their submissions. That being the case, It would have been easier for Mr Ombongi to carry along his practising certificate when he finally appeared in court on 19th July, 2013 to discount the aspersions cast on his status as an advocate duly qualified to represent a petitioner in a matter of such gravity as the petition herein. Instead, on the eve of the material date, counsel filed an application under certificate of urgency in which he sought from the court orders to strike out from the record the Respondents’ affidavits on the ground that they were filed without leave of the court and when he appeared in court on 19th July, 2013 he sought to have the court dispense with that application before dealing with any other issue.

The court informed counsel for the Petitioner that even if the affidavits are expunged from the court records, he would still have to demonstrate that he has a valid practising certificate now that doubts had been raised as to whether he held one. Counsel insisted that he had a practising certificate and when the court sought to know from him when he paid for it he said he could not remember. At this point the court asked counsel to avail in court the receipt for payment and the certificate itself and for this reason the court adjourned for half an hour to enable him avail these documents.

When the court resumed the Petitioner's counsel presented copies of receipts for payment for the practising certificate and the certificate itself. It emerged from these documents that the certificate was paid for on 24th June, 2013 and the certificate itself was issued on 1st July, 2013. The inescapable conclusion from the information in these documents is that as the time the petition was drawn and filed in April, 2013 the Petitioner's counsel did not have a practising certificate; indeed he also took and participated in subsequent proceedings pertaining to this petition without the certificate until 1st July, 2013 when he finally obtained one.

The law governing legal practice in this country is the **Advocates Act Chapter 16 of the Laws of Kenya. Section 9** of the Act provides the qualifications of practising as an advocate. It says;

9. Subject to this Act, no person shall be qualified to act as an advocate unless-

- a. **He has been admitted as an advocate; and**
- b. **His name is for the time being on the Roll; and**
- c. **He has in force a practising certificate; and**

for the purposes of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of Section 27 or by an order under section 60(4).

It is clear from this provision, more particularly part (c) thereof one is only qualified to act as an advocate if, amongst other requirements, he has in force a practising certificate. This certificate is issued by the Registrar under **Section 21** of the Act on an application made under **Section 22** of the same Act. Without this certificate he would be an unqualified person who, under **Section 2 of the Advocates Act**, is defined as a person who is not qualified under **Section 9** of that Act to act as an advocate. For avoidance of doubt **Section 34** of the Act is clear on what an unqualified person cannot do. It is to the effect that:

34. (1) No unqualified person shall either directly or indirectly take instructions or draw or prepare any document or instrument:-

- a. **relating to the conveyancing of property; or**
- a. **for, or in relation to, the formation of any limited liability company, whether private or public; or**
- a. **for, or in relation to, an agreement of partnership or the dissolution thereof; or**
- a. **for the purpose of filing or opposing a grant of probate or letters of administration; or**
- a. **for which a fee is prescribed by any order made by the chief justice under section 44; or**
- a. **relating to any other legal proceedings; nor any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument.**

There is a proviso to the subsection which exempts certain persons from the foregoing provision on account of the nature of their employment. The Petitioner's counsel does not fall into this category.

The Petitioner's counsel fits the description of an unqualified person as defined in **Section 2** of the Act because he did not have a practising certificate to qualify to act as an advocate at the time he drew and filed the Petition herein until the 1st July, 2013 when he obtained the requisite certificate. It follows that under **Section 34** of the Act he could not directly or indirectly take instructions or draw or prepare any document or instrument relating to a legal proceeding such as the petition herein. Accordingly, the instructions he took, the instruments or documents he drew or prepared relating to this petition are all illegitimate and deficient of any force of law. In the decision of the Court of Appeal in **Nyeri Civil Appeal No. 148 of 2004 Kenya Power & Lighting Company Ltd versus Mabinda t/a Nyeri Trading**

Centre, the Court (Omolo, O’Kubasu and Deverell JJA as they then were) struck out a notice of appeal, a memorandum of appeal and a record of appeal because the advocate who prepared these documents did not have a practising certificate at the time he prepared them. In the light of that decision and in the light of the relevant provisions of the law that I have referred to, the Petitioner’s purported petition dated 9th April 2013 is hereby struck out with costs to the Respondents. In the result, in the absence of a valid petition challenging the election of Esther Murugi Mathenge as Member of National Assembly for Nyeri Town Constituency, I find that she was validly elected to that seat in the 4th March, 2013 general elections.

For avoidance of doubt on costs payable and pursuant to **Rule 34 (1) (a) (b)** of the **Elections (Parliamentary and County Elections) Petition Rules, 2013**, the costs shall be paid by the Petitioner to the Respondents and subject to taxation by the registrar, they shall be capped at Kshs. 1 Million. It is so ordered.

Signed and delivered in open court at Nyeri this **15th day of August, 2013**

Ngaah Jairus

JUDGE

IN THE PRESENCE OF:

Court clerk: - Ndungu/Njiru

Counsel for the Petitioner: - Mr. Kahiga holding brief for Mr. Ombongi

Counsel for the 1st and 3rd Respondents:- Mr. Munge

Counsel for the 2nd Respondent: - Mr. Wahome