



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
PETITION NO.10 OF 2012

IN THE MATTER OF ARTICLE OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE LAW SOCIETY OF KENYA ACT CAP 18 LAWS OF KENYA

BETWEEN

KEROSI ONDIEKI APPLICANT

AND

THE LAW SOCIETY OF KENYA 1ST RESPONDENT

INDEPENDENT ELECTORAL THE

BOUNDARIES COMMISSION AND
..... 2ND RESPONDENT

RULING

1. On the 7th February 2012, the Petitioner herein Kerosi Ondieki, through his lawyers, M/s Minda &

Co. Advocates of Golf Arcade, 1st Floor and of Post Office Box Number 3572-40200 Kisii filed the following pleadings:-

(a) Petition dated 8th February 2012.

(b) Supporting Affidavit dated 8th February 2012 sworn by the Petitioner herein on 8th February 2012.

(c) Notice of Motion pursuant to Articles 22 and 23 of the Constitution of Kenya, 2010.

(d) Certificate of Urgency dated 8th February 2012.

2. The Notice of Motion seeks the following orders:-

1. That this application be certified urgent and be heard on priority basis.

2. That pending the hearing of this application inter parties an order of temporary injunction do hereby issue restraining the holding or conduct of the 1st respondent elections by the 2nd respondent on the 16th day of February 2012.

3. That pending the hearing and determination of the petition an order of temporary injunction for issue (sic) restraining the holding or conduct of the 1st respondent's elections by the 2nd respondent on the 16th day of February 2012.

4. That cost of this application be provided for.

3. The application is supported by the Petitioner's Affidavit (dated 8th February 2012) and by the

following 8 grounds:-

1. The petitioner/applicant is a member of the 1st respondent of 20 years standing and yet not legible to stand as a candidate in the oncoming 1st respondent's elections slated for the 16th day of February 2012.
2. The provisions of sections 13 (3) of the Law Society Act Cap 18 of the Laws of Kenya bar the applicant's/petitioner who has never held a council seat at the 1st respondent.
3. The 2nd respondent which is due to conduct the 1st respondent's elections on the 16th day of February 2012 by secret ballot will contravene the provisions of **section 13 (3)** of the **Law Society [of Kenya] Act Cap 18 Laws of Kenya**. The elections will in that event be illegal.
4. The provisions of **sections 13 (3)** of the **Law Society [of Kenya] Act** offend the provisions of **Article 27** of the **Constitution**.
5. The applicant/petitioner has established a *prima facie* case.
6. The members of the 1st respondent who are to participate in the elections slated for 16th day of February 2012 ought to know better than to participate in elections riddled with discriminative requirements.
7. The Law Society of Kenya Act Cap 18 Laws of Kenya does not contain enactment that caters for the gender requirements provided for in the Constitution of Kenya 2010. The elections results will therefore be subject to challenges and hence be an exercise in futility.
8. The rule of Law would require that the Law Society of Kenya Act be amended to accord with the constitutional provisions.

4. The application is opposed vide the 1st Respondent's Replying Affidavit sworn on its behalf by Apolo Mboya, the Secretary/Chief Executive Officer of the said 1st Respondent. In addition to the Replying Affidavit, the 1st Respondent also filed a Notice of Preliminary Objection dated 9th February 2012. This ruling relates to the said preliminary objection which is based on grounds that:-

1. The application for injunction and the entire petition is utterly illegal and abusive of the court process in that the same has been presented by a person not entitled to present it hence it ought to be struck out with costs.

2. The petitioner has lied on oath that he has Current Practicing Certificate a fact that depicts him as being not honest with the court and to grant the orders sought would be to bless and reward breach of Law and abuse of the court process.

3. The application as presented is with utmost *mala fides* and inordinate delay in that the Law sought to be impugned was enacted in the year 2007, as not been challenged by the petitioner since, the current electoral process was initiated in December 2011, massive financial and other resources have been invested by the society, candidates and members.(sic)

4. The petitioner/applicant having not given undertaking as to damages cannot be entitled to temporary injunction.

5. The effect of granting the orders sought would be to perpetuate the incumbency of the current office itself elected under the same Law and the Electorate who are the Society Members shall have been denied their right to participate in the Governance of Their Society.(sic)

6. The application is premature as the Society has crafted a Bill circulated to all members with intention to align its statute with the constitution which action is permissible within 5 years from the effective date and this petition is designed to preempt legislative authority of Parliament.

5. At the hearing of the Preliminary Objection, counsel for the 1st Respondent based his preliminary objection mainly on the first ground thereof and argued that the notice of motion together with the petition herein must fall together because the said documents have been presented to court by a person not entitled to present it hence the pleadings ought to be struck out. Counsel relied on two cases, namely **Nairobi HCC Petition No.37 of 2001 – Willis Evans Otieno –vs- Law Society of Kenya & 2 others**

In both cases, preliminary objections were raised against all the documents filed in court for reason that the same had been filed by persons who were unqualified to practice as Advocates of the High

Court of Kenya pursuant to the provisions of **section 9** of the **Advocates Act, Chapter 16** of the **Laws of Kenya**.

6. In both of the cited cases, the courts held that under **section 9** of the **Advocates Act, Cap 16, Laws of Kenya**, “the absence of a practicing certificate meant that the person filing the affected documents was unqualified and as such he had no right to file such documents. Other relevant cases referred to in the **Raphael Kawai Maitha case** (above) were **Orao-Obura –vs- Martha Koome – Court of Appeal Civil Appeal No.146 of 2000** and **Belgo Holdings Limited –vs- Akber Abdullah Kassam Esmail – Nairobi HCCC No.244 of 2004.**

7. In the instant case, counsel for the 1st respondent submitted that if the documents filed herein by Mr. Minda Advocate are allowed to remain on the record, such an action by the court would amount to condoning impropriety and contempt of court on the part of advocates.

8. Mr. Otieno was supported in his views by Mr. Murugu, counsel instructed to appear for the 2nd respondent. Mr. Murugu also contended that the pleadings herein were incompetent because there was no affidavit in support of the petition as provided by **article 262** of the **Constitution of Kenya** and **rule 11** of the **Constitution of Kenya**

(Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual High Court Practice and Procedure Rules, 2006, Legal Notice No. 6 of 2006 (popularly known as the Gicheru Rules). Counsel submitted that the omission to file an affidavit to support the petition was fatal to the Petition as filed herein. Reliance was placed on the case of **Alice Mugechi Mwicigi –vs- The Attorney General & another – HC Petition No.584 of 2008 [2009] e KLR.**

9. In the **Mwicigi case** (above), Wendoh, J held that where allegations of constitutional breaches are made, such allegations must be specific and supported by evidence. The learned judge also held that the Gicheru Rules and in particular Rule 11 thereof touching on contravention of fundamental rights and freedoms are couched in mandatory terms and that they are “**meant**” to guide the public on how to approach the court, to save costs and the court’s time, and that the said rules “**are not for decoration of the books but must be put to use as intended.**”

10. Finally, Mr. Murugu submitted that though **article 159** of the **Constitution** is generally against the practice of courts allowing themselves to be shackled by legal technicalities and procedures, he contended that if the petition herein is allowed to pass as a proper pleading then the same would run counter to the constitutional provisions and the respondents' legitimate expectations that bad pleadings would not be left standing on the court records. He urged this court to sustain the objection and strike out the petitioner's pleadings.

11. In response, Mr. Minda submitted that the preliminary objection had no basis. Regarding the respondents' allegation that he had no practicing certificate, he submitted that no evidence was placed before this court showing that he had no practicing certificate and that in any event, he had applied for a practicing certificate, though he did not provide proof to the court of such an application having been made. He relied on **section 30** of the **Advocates' Act**. Mr. Minda also questioned by what authority Apolo Mboya, the Secretary/Chief Executive of the 1st respondent wrote a letter to him on 9th February 2012 requiring him to appear for plea in Disciplinary Committee cause No.19 of 2012 when the said Apolo Mboya was not a member of the Disciplinary Committee. Mr. Minda relied in the provisions of **section 57** of the **Advocates Act**, which establishes the Disciplinary Committee to which Mr. Minda has been summoned.

12. Mr. Minda also took issue with Mr. Murugu's submissions and argued that the spirit of the Constitution of Kenya, 2010 favours simplified court procedures, and that the yet-to-be formulated rules under **article 22 (3)** of the **Constitution** will of necessity have to take into account that same spirit. He also submitted that **article 22** of the **Constitution of Kenya** behoves courts to observe the rules of natural justice and to avoid unnecessary emphasis on technicalities. Mr. Minda made special reference to the provisions of **Article 159 (2) (d)** of the **Constitution of Kenya 2010** and said that courts must endeavour to administer justice without undue regard to procedural technicalities. He urged the court to dismiss the preliminary objection and to allow the petitioner to proceed with his case.

13. In reply, Mr. Otieno submitted that **section 57** of the **Advocates Act** must be read together with **section 58 (3)**. **Section 58 (3)** provides as follows:-

“The Secretary of the Society shall be the secretary of the

Committee and his remuneration, if any, shall be paid by the Society.”

14. To put the preliminary objection into perspective and in particular, the first ground thereof which formed the basis of the objection, **section 9** of the **Advocates Act** provides as follows:-

“9. Subject to this Act no person shall be qualified to practice

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 practicing certificate;

and for the purpose of this Act, a practicing certificate shall be deemed not to be in force at any time while suspended by virtue of section 27 or by an order under section 60(4).”

15. While responding to allegations that he did not have a practicing certificate, Mr. Minda submitted that the only way in which the respondents could prove that he did not have a practicing certificate was by presenting a certified copy of the Roll. In my humble view however, that position cannot possibly be correct because a reading of section 9 shows that to qualify to practice as an advocate, a person must meet all the three conditions as set out under the section.

16. I have now carefully considered the submissions by counsel against the backdrop of the authorities cited to me and also the provisions of section 9 of the Advocates Act. On the basis of the above, I am satisfied that Mr. Minda who filed the pleadings in this matter did not have a practicing certificate as at 7th February 2012 when he filed the same. Mr. Minda argued very vehemently that he has applied for a practicing certificate, but unfortunately or surprisingly, he did not avail a copy of the application or payment receipt for the same. I do not see the difficulty that Mr. Minda had in availing such evidence. What is on record is a copy of the practicing certificate for the petitioner herein, Mr. Kerosi Ondieki for the year ending 31st December 2011. Under **section 22** of the **Advocates Act**, Mr. Minda would be required to submit such an application in duplicate, evidence satisfactory to the Registrar that he has paid to the 1st respondent the fee prescribed for a practicing certificate and a written approval signed by the Chairman of the 1st Respondent stating that there is no objection to the grant of the certificate. The court expected Mr. Minda to produce copies of these very documents to support his contention that he had indeed applied for a practicing certificate. He did not do so. He therefore did not meet the conditions of **section 9** of the **Advocates Act**.

17. It follows therefore that all the documents filed by Mr. Minda as at 8th February 2012 (although the date stamp for filing is 7th February 2012 while the documents are dated 8th February 2012) were filed by a person who was not qualified to practice as an advocate. The entire pleadings in this case are thus incompetent and if the same are allowed to remain on the record, this court would be condoning contempt of court and would render the provisions of the Advocates Act useless. In the result, I agree with the decisions cited to me by counsel for the 1st respondent, and with the submissions anchored on those authorities.

18. I have also considered the provisions of **article 159** of the **Constitution of Kenya, 2010** and **section 57** of the **Advocates Act**. Though it is true, the court is not to be overly concerned with the issue of technicalities, Mr. Minda and all qualified lawyers are not on the same level with the Wanjikus and Nafulas of this country. Mr. Minda knows the law and as an officer of the court, he must uphold that law and not try and bend it to suit his interests.

19. As regards Mr. Murugu's argument on the petition which is not supported by an Affidavit, I agree with the position taken by Mr. Murugu. The affidavit on the file is the one in support of the notice of motion.

20. On the basis of the above, I am persuaded that both the notice of motion and the petition are incompetent pleadings having been filed by a person who was not qualified to practice as an advocate. Accordingly both the notice of motion and the petition are struck out with costs to both respondents. Such costs shall be borne by the Petitioner.

21. It is so ordered.

Dated and delivered at Kisii in open court this 14th day of February, 2012

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Mr. Minda (present) for Petitioner

Mr. G.M. Nyambati for P.J. Okemwa (present) for 1st respondent

Mr. Murugu (present) for 2nd Respondent

Mr. Bibu - Court Clerk

RUH NEKOYE SITATI

JUDGE.