



REPUBLIC OF KENYA

**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KIGUMO PETITION NO. 1 OF
2013**

**IN THE MATTER OF ELECTIOPN OF THE ELECTION OF THE COUNTY ASSEMBLY OF
KANGARI WARD IN KIGUMO CONSTITUENCY**

THE PETITION OF FRANCIS MANGI KAHORO..... PLANTIFF

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

JOHN NGUTAI SUED IN HIS CAPACITY AS

THE RETURNING OFFICER.....2ND RESPONDENT

ANDERSON MUCHEMI WAWERU3RD RESPONDENT

RULING

This is a ruling of an application by the 1st and 2nd Respondents dated 7/5/2013 brought by way of Notice of Motion. For one to understand this matter better the chronology of this case should be given.

The Petitioner one Francis Mwangi Kahoro through his counsel Nyoike & Associates moved this Honourable Court by way of Petition filed on the 12/3/2013 seeking for the following orders.

- a. *That the court orders a recount of the votes cast in respect of Kangari ward representative.*
- b. *That the Court declares the Petitioner as the duly elected ward of Kangari after recount.*
- c. *Any other or further relief that the Court may deem just and expedient in the circumstances.*
- d. *Costs*

Upon being served with the pleadings, the 1st, 2nd and 3rd Respondents filed their responses for the Petition denying the allegation as contained in the petition and prays for the dismissal.

The Petitioner again through his counsel Nyoike Associates by Notice of Motion dated 19/4/2013 alleged that the responses by the respondents were filed out of time and therefore should be struck out. He sought the following orders in his said application.

1. *That the Court scrutinizes its registry receipt books containing receipt number 4966197 and 4966380*
2. *That Kenya Post and Telecommunication Corporation Kigumo Post Office delivers to the Court*

- the registered mail register for 19/3/2013 and 29/3/2013.*
3. *That the Court scrutinizes its registry stamps used for stamping Court documents on filing particularly for the 13/3/2013 and 25/3/2013.*
 4. *That the 1st and 2nd Respondents do furnish the Court with formal responses/communication exchanged pertaining to this petition.*

This application dated 19th April, 2013 was fixed for hearing on the 9/05/13. On the said date all the parties were in Court and before the application could be heard, counsel for the 1st and 2nd Respondent raised a Preliminary Objection which had been filed dated 7/5/2013 on the ground that the petition is incompetent having been filed by an unqualified person.

Mr. Nyoike J. M. counsel for the Petitioner prayed for an adjournment to respond to the allegation. By consent the application dated 7/5/2013 was fixed for hearing on the 14/5/2014.

On the 14/5/2013, Mr. Nyoike J. M. counsel for the petitioner did not turn up. The firm of Mwakio Kirwa Advocates filed Notice of Appointment Mr. Nyoike having been challenged on his qualification. Stepped aside to allow a new firm of advocate to take over the conduct of the matter.

The application by 1st and 2nd Respondent by way of Notice of Motion dated 7/5/2013 and filed on the 9/5/13 was canvassed on the 14/5/2013 by Mr. Gachugi learned counsel for the respondents and Mr. Mwangombe learned counsel for the Petitioner.

The 1st and 2nd Respondents sought to have the petition filed by the petitioner and the application dated 19/4/2013 struck out.

It is founded on the ground that the petition is incompetent having been filed by an unqualified person. The respondents refers Court to section 9 and 34 of the Advocates Act (chapter 16) Laws of Kenya which provides that...*subject to this Act no person shall be qualified to act as an advocates unless:-*

- A. *he had been admitted as an advocate and*
- B. *His name is for the time being on the roll and he has inforce a practicing certificate and for the purposes of this act a practicing certificate shall be deemed not being in force at any time while he is suspended by virtue of section 27 or by an order under section 60(4)*

The 1st and 2nd Respondent's counsel submitted that prior to the filing of the petition Mr. J. M. Nyoike who filed it did not have in force a practicing certificate which are the key words in section 9 of the Advocates Act Cap 16 Laws of Kenya. He went ahead to state that such a pleading is incompetent is it was drawn and filed by an Advocate who was not qualified to practice law before any Court for lack of practicing certificate that is current.

It was his further submission that by drawing and filing the petition and application dated 19/4/2013 when he had no practicing certificate, the said counsel committed an offence under section 34 (1) of the Advocates Act. Mr. Nyoike did not only draw and file the petition and the application dated 19/4/2013 thereby contravening section 34 (1) of the Advocates Act but also appeared before this Court on the 9/5/2013 and conducted the proceedings on behalf of the Petitioner. It was his further submission that the application dated 19/5/2013 bears at the foot of it having been drawn and filed by Nyoike Associates who went ahead to give his physical address for the service. The supporting affidavit annexed to the application is sworn by Mr. Nyoike and at Paragraph 1 he deponed that he is an Advocate of the high Court of Kenya and that he was been duly instructed by the Petitioner and therefore competent to swear the affidavit.

The counsel for the 1st and 2nd Respondents annexed a print out from the Law Society of Kenya website and a letter dated 3/5/2013 signed by the deputy Secretary of Compliance and Ethics one Mercy Wambua. All these confirmed that the said Mr. Nyoike did not hold a practicing certificate for the year 2013. He urged this Court to find that the petition filed herein and the application dated 19/4/2013 were

drawn and filed by Mr. Nyoike who was an unqualified hence incompetent and proceed to strike out both with costs.

In his short reply Mr. Mwangombe learned counsel for the Petitioner submitted that Mr. Nyoike only assisted in formulating of the petition on the advisory capacity and not as an advocate for the Petitioner. That anything done by Mr. Nyoike besides formulation was without the authority of the petitioner.

He admitted that the said Mr. Nyoike assisted in drawing the petition but and did not sign it. The Petition dated 12/3/2013 as signed by the petitioner himself.

Nyoike was not instructed other than drafting the petition. He further distanced the Petitioner from the application dated 19/4/2013 in which Mr. Nyoike swore the affidavit saying that he had full instructions to appear on behalf of the petitioner. He prays for the dismissal of the preliminary objection by the 1st and 2nd Respondents

I having carefully considered the submissions by the two counsels appearing before me. From the submission two things stands out clearly and are not disputed by both parties. The fact that the petition filed herein and the application dated 19/4/2013 were drawn by Mr. Nyoike who practiced as Nyoike Associates. Another issue is that the petition was signed by the Petitioner himself.

The issues that now remains for this Court to determine are as follows:-

1. *Whether Mr. Nyoike acting as Nyoike Associates had full instruction of the Petitioner to draw file and appear on his behalf.*
2. *Whether the petition filed herein drawn and filed by Mr. Nyoike who apparently had no practicing certificate for the year 2013 and therefore an unqualified person is competent and properly before the Court.*

The Petitioner from the submissions of his new counsel on record is trying to disown Mr. Nyoike and arguing that he only helped in drafting on advisory capacity. It must be remembered that when the said Nyoike addressed this Honourable Court on the 9/5/2013 introducing himself as an advocate of the High Court of Kenya and that he was acting for the petitioner, the petitioner was in Court and he did not object to that. The record of this Court is very clear that the petitioner requested the Court to place the matter aside to wait for his advocate Mr. Nyoike who was running late on the 9/5/2013. And indeed the Court adjourned the matter for over 20 minutes to wait for Mr. Nyoike. When Mr. Nyoike finally arrived, he proceeded to introduce himself as the advocate for the Petitioner and conducted the proceedings. This position only changed when Mr. Nyoike's qualification was challenged by the counsel for the Respondents. Mr. Nyoike did apply for an adjournment to be able to reply to the allegations about his qualification. He was not seen again in Court opting to step aside to allow a new advocate to take over the conduct of the case.

In view of all these coupled with the conduct of the Petitioner, this Court finds that Mr. Nyoike had full instructions by the Petitioner. All that he did in respect to the petition filed herein and the application dated 19/4/2013 was with full blessings of the Petitioner.

The other issue is the status of the pleadings drawn and filed by an unqualified person.

I am well aware of the provisions under Article 159 2(d) of the constitution which states and I quote

...Justice shall be administered without undue regard to procedural technicalities...

In the **PETITION NO. 37/2011, WILLIS EVANS OTIENO VS THE LAW SOCIETY OF KENYA AND TWO OTHERS**, Justice Musinga held that this is a substantive questions of law which goes to the root of the matter. The provision of article 159 2 (d) of the constitution cannot be relied upon as a panacea for incompetent pleadings filed by an unqualified person. The petition and the chamber summons were struck out.

When his qualification was questioned, Mr. Nyoike stepped aside to allow a new firm of advocate to take over the conduct of the case, the question therefore arises whether the deficiency can be cured by another advocate taking over?

In the case of *Kenya Power and Lighting company vs. Mahinda (2005) 1 KLR 753*, It was held that deficiency cannot be cured by the notice of intention to act in person that the petitioner filed. As long as the documents on records had been filed by an unqualified person, they cannot be validated by the petitioner, withdrawal of the instructions from the unqualified persons who had filed the same.

This is exactly what the petitioners in this case is trying to do by withdrawing the instructions from Nyoike and bringing on board the firm of Mwakio Kirwa advocates.

Having resolved the two issues; I now come to the conclusion that Mr. Nyoike was an unqualified person hence all the pleadings drawn and filed by him are incompetent. The petition filed herein and dated 12/5/2013 and the application dated 19/4/13 were all incompetent and must therefore be struck out.

Consequently the 1st and 2nd Respondents application dated 7/5/2013 is granted with costs to be borne by the Petitioner.

D. ORIMBA

AG. SENIOR PRINCIPAL MAGISTRATE

21/5/2013