



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT OGEMBO

ELECTION PETITION NO.2 OF 2013

AND

IN THE MATTER OF ELECTION ACT 2011

AND

IN THE MATTER OF ELECTION FOR COUNTY REPRESENTATIVE,

BASSI CHACHE

WARD IN KISII COUNTY, IN BOBASI CONSTITUENCY,

AND

IN THE MATTER OF ELECTION PETITION CONTESTING THE ELECTION HELD ON

4TH DAY OF MARCH 2013

AND

IN THE MATTER OF ELECTION ACT 2011

AND

IN THE MATTER OF ARTICLES 32,38,47&87(2) OF THE CONSTITUTION OF

KENYA 2010

-BETWEEN-

JAPHETH OMARI

OMBEO _____ PETITIONER

-VERSUS-

ROBERT NYAMACHE SIOCHA _____ 1ST RESPONDENT

OFFICER, BOBASI

THE RETURNING

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION_
RESPONDENT

3RD

RULING

The petitioner herein presented this petition to the court on 10-4-2013 and upon service of the same the Respondents duly filed their respective answers to the petition. The pre-trial conference herein was done on 29-5-2013, by which date, the first Respondent had already filed an Application dated 28-5-2013. Directions were given on the parties. The court also directed that any party wishing to do so was at liberty to file any interlocutory application for determination well in advance of the main hearing date already fixed to commence on 15-7-2013. The 2nd and 3rd Respondents proceeded to file an application dated 17-6-2013.

The 2 applications i.e. the one dated 28-5-2013 and 17-6-2013 were both fixed for hearing on 21-6-2013. And because of their similarity and the fact that the applications were seeking the same orders the parties agreed that the 2 applications be consolidated and be heard as one. Both accordingly proceeded to hearing on 21-6-2013

Mr. Odhiambo for 2nd and 3rd Respondent addressed the court first. He submitted that the 2 applications seeks orders that the petition filed herein be struck out on the basis that it is incompetent and incurably defective as the Advocate who was on record for petitioner and who signed the petition one Japheth Osoro was unqualified to act as an Advocate as per Section.9 of the advocates Act. The the said Advocate did not have in force a current practicing certificate for 2013. Counsel referred to Section. 2 of Advocates Act that describes a non-qualified person as one not qualified under Section.9 of the Act which in itself states that no person shall be qualified to Act as an Advocate unless he has in force a practicing certificate.

Counsel was further to refer to section 31(1) of Advocates Act, that no unqualified person shall act as an Advocates or institute or defend any suit on behalf of another, and that any person who contraves this rule shall be deemed to be in contempt of the court. Also S.34 of the Act which prohibits any unqualified person from either directly or indirectly taking instructions or draw or prepare any document or instrument relating to any legal proceeding.

Counsel submitted that Japheth osoro practiced in the name and style of Moriasi Osoro & CO Advocates and that the question is whether the Advocate was authorized to practice at the time he signed and filed the petition in court. That the advocate has not denied having signed the documents.

Counsel went on that the attached records of the LSK website (Attached to the replying Affidavits) clearly States that Moriasi Osoro & CO Advocates, based in Homa-Bay is owned by Moses Moriasi Kaosa and Japheth Osoro Kaosa (JOO_01) whereas (JOO-2) shows that Moriasi, Moses Kaosa works at Kaosa & CO Advocate in Kitale. Counsel referred the court to the records from LSK Website attached to the Affidavit of 17-6-2013 (Gmp-1) which confirms that Kaosa Japheth Osoro has been inactive in 2013. And that Gmp-3 shows that the said Advocate has not held a practicing certificate from 2008 to date except for 2010. He maintained that the Advocate has had time to correct things as reflected in JOO-2 dated 18-6-2013. But that the issue is however if he had the certificate at the time he signed the document. Counsel noted that the Advocate has not annexed the certificate if he indeed has it, and that the website details can only confirm that he has since paid. That this defect can not be cured. He referred to the authorities of KPLC vrs MAHINDA t/a Nyeri Trade Centre (2005)/KLR 757 that a practicing certificate can not operate retrospectively, and also C.A 507/03 Raphael Karai maitha others vrs Jays Syndicate ltd & Ano. In which the court held that this irregularity can not be cured. Also petition 37/011, Willis Evans Otieno vrs LSK, where again the court held that if an Advocate did not hold a practicing certificate at the time of drawing the petition, the Advocate was not qualified to Act and that the deficiency can not be cured even by filing notice to act in person. And that similarly the introduction of new Advocates herein can not cure the defect.

Mr.Ochoki for the 1st Respondent supported the submissions of Mr.Odhiambo.He maintained that this petition was drawn and filed by Moriasi Osoro & Co Advocate and was signed by one Mr.Kaosa Japheth Osoro who did not have a practicing certificate.He urged the court to disregard the argument that the firm has 2 partners with ones Moses Moriasi Kaosa ,Since JOO-2 clearly shows that Moriasi Moses Kaosa trades as Kaosa & CO Advocates at Kitale,and that there is no affidavit filed by the said Moriasi Moses Kaosa.That the issue is that the Advocate was not qualified at the time he signed the petition and that same should be struck out for being incompetent.

Counsel also submitted that whereas the certificate of registration (JOO-1) is of Osoro,Moriasi & Co, the pleadings herein are signed by Moriasi Osoro & Co Advocates which is a totally different entity.That this makes JOO-1 irrelevant as it is of firm not connected with this petition.He urged the court to struck out the petition.

In opposing the 2 applications,Mr.Miencha submitted that Respondent relies on the affidavits filed on 18-6-2013.That the issue is which law firm filed the petition. That it was Moriasi Osoro & CO advocates and that JOO-1 was misspelted as Osoro Moriasi instead of Moriasi Osoro & CO and the mistake was of the Registrar.That the firm has 2 partners Japheth Osoro Kaosa and Moses Moriasi Kaosa and that tar-getting Japheth Osoro Kaosa alone is like going for a short cut.

That the information from the LSK website Shows that Japheth Moriasi Osoro is active and that no proof has been shown of who signed the petition. He maintained that these applications are brought only to embarrass the advocate and that the authorities cited all relate to sole proprietors.

Counsel also challenged the motive of 2nd and 3rd Respondents in filling the 2nd application by invoking Section.6 of the Civil Procedure Rules.

I have considered the submissions of the 3 learned counsel for the parties herein. I have also perused the 2 applications dated 28-5-2013 and 17-6-2013 and the affidavits and annexures to both of them. I have also perused the replying affidavits of the Respondent filed herein on 18-6-2013.The application of 1st Respondent dated 28-5-2013 seeks only 1 order that the petition dated 2-4-2013 be struck out for being incompetent.The only other prayer therein is one of costs.It is exactly the same prayers sought in the 2nd and 3rd Respondents Application dated 17-6-2013. It is for reason of the similarities that the parties consented to the 2 Applications being consolidated and heard as one.The 2 Applications are also brought basically under the same laws,principally Sections 9,31,33 and 34 of Advocates Act,CAP 16.

Section.9 of the Advocates Act states;

Section.9 subject to this Act, no person shall be qualified to act as an Advocate unless.

(c)He has in force a practicing certificate.

S.31 of the same Act States;

S.31(1) Subject to S.83 no unqualified person shall act as an Advocate,or as such cause any summons or other process to issue,or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

At Section.2(a) a person who contravenes this provision is in contempt of the court and may be punished.

And at S.33 any unqualified person who willfully pretends to be or takes or uses any name,title addition or description implying that he is qualified or recognized by law as qualified to act as an advocate shall be guilty of an offense.

And S.34 of the Act prohibits any such unqualified person acting as an Advocate in legal

proceedings amongst others listed.

The above provisions clearly ,give directions that for one to qualify to act as an Advocate,one must have taken out a practicing certificate and that purporting to act as such without a practicing certificate constitutes an offence. These were basically the submissions of both learned counsel for both Applicants.And in their submissions,the petitioners Advocates did not challenge these submissions, demonstrating their agreement with these clear provisions of the Advocates Act.

On the issue of consequences of one acting as an advocates while with no practicing certificate (unqualified person), the Applicants referred this court first to case of KPLC vrs Mahinda t/a Nyeri Trade Centre (2005) /KLR 759 CIV.APP 148 /2004 at page 757 that the notice of appeal and memorandum of appeal signed by an Advocate who had not taken out a practicing certificate were incompetent. In the said case the court of appeal also held that a practicing certificate does not act retrospectively.

The court was also referred to NAI HCCC 507/2003 , Raphael kavoi maitha & 3 others-vs-Joy Syndicate & 3 others (2004) e-KLR in which the court held that absence of practicing certificate is an irregularity that can not be cured and that allowing to remain on record documents which an unqualified person files,would be condoning contempt of court. And finally the court was referred to NAI HCCC Petition no.37/011,Willis Evans Otieno vs LSK & others (2011) eKLR , in which the High court again held that documents drawn and filed by an Advocate with no practicing certificate are incompetent and that deficiency cannot be cured even by filing of notice of intention to Act in person. And that it is not just a technical issue but one that goes to the root of the matter.

The petitioner has not disputed this point of law. This court is bound by the above decisions of a superior court. In effect therefore, there is no dispute as to who an unqualified person is, the competence or otherwise of any documents drawn and filed by such a party and consequences of the same.

The only issue that the parties herein have disagreed on is whether the Advocate who drew and filed the petition herein had a practicing certificate as at the date of 10-4-2013 when the petition was presented to court. It is clear from the record that the petition herein was drawn and filed by M/s Moriasi Osoro & Co advocates,KNUT Hall, Ground Flour, P.o.Box 813-40300 Homa-Bay.Whereas the applicants have submitted that these documents were drawn and filed by one Japheth Osoro Kaosa who had no practicing certificate, it was contended by the petitioner that the firm has in fact 2 partners Moses Moriasi Kaosa and Japheth Osoro Kaosa, and that the former has a practicing certificate.They have also annexed an extract from the LSK website confirming as at 18-6-2013 that even Japheth Osoro Kaosa is active. So who of the 2 parties has given the more truthful and cogent evidence? The answer to this lies on the evidence presented to court.

First it is noted that attached to the application of 1st applicant dated 28-5-2013, is an extract from the LSK website giving the profile of Kaosa Japheth Osoro.The address shown of the Advocate is same that used in filing the petition herein.The same document has been attached to the affidavit in support of 2nd and 3rd Applicants Application dated 17-6-2013. In that document,it is clearly shown that as at 28-5-2013,Kaosa Japheth Osoro was inactive and unpaid to LSK.This court has no reason to doubt the authenticity of this document as it is in this Public domain in the website of the society.The letter of 31-5-2013 of the Advocates for 2nd and 3rd Respondents (GMP-2) went further to make inquiries and as to the status of the said advocate from 2009.Indeed a written statement dated 5-6-2013 in reply has been attached confirming that Kaosa Japheth Osoro Advocate has not held (GMP-3) a practicing certificate from 2008 to 2013 except for 2010 which he paid for on 23-2-2010.Again this court has no reason to disbelieve this letter from the deputy secretary (compliance and ethics) of the society as it is clearly in response to the inquiry made by the Advocate for 2nd and 3rd Applicants to this Application.The petitioner has also not challenged this letter in any way

From the evidence presented by the Applicants,it is clear that Kaosa Japheth Osoro had no practicing certificate for 2013, and certainly not as at of 10-4-2013

In challenging this application, the petitioner Respondent, has ride his affidavit sworn on 18-6-2013 attached a certificate of registration of Osoro, Moriasi & Company issued on 27-8-1998. I have perused this document carefully. It is for the registration of Osoro Moriasi & company. The law firm which drew and filed this petition is however noted as Moriasi Osoro & Co. The petitioner has not attached the certificate of registration of the firm of Moriasi Osoro & Co, which in my view is clearly a different firm from Osoro Moriasi & Co whose certificate has been attached. On this, I agree with the Advocate for 1st Applicants that this certificate annexed is not relevant to this case as Osoro Moriasi & company did not present this petition. It is not enough to explain the same that this is a mistake of the Registrar since this certificate was issued on 27-8-1998. Had it been a mistake, the said Advocates obviously have had enough time to have the same corrected. There is nothings on record to show that they have ever taken any steps on this at all.

The respondent has also attached an extract from the LSK issued on 18-6-2013 (JOO-2) confirming that Kaosa Japheth Osoro is active with the society for 2013, and that the said advocate practices under the name and style of Moriasi Osoro & CO Advocates. This note issued on 18-6-2013 clearly comes much later than the one issued earlier and attached to the Application dated 28-5-2013. The said Advocate has not attached copy of his practice certificate for 2013. Similarly he has not attached any proof of when he paid up for same. In the absence of proof of when he took out the said certificate and in view of the information earlier gathered from the society, I firmly agree that if at all this Advocate is now active, he must have regularized his status after these Applications were filed. Obviously, this came well after the date of filing the petition on 10-4-2013, our material date.

I have also considered the other document produced by the petitioner to show the status of Moriasi Moses Kaosa (JOO-2). With respect, I do not think that this document can aid the petitioner in any way. Whereas the petitioner had shown that the firm of Moriasi Osoro & co has 2 partners Moses Moriasi Kaosa and Japheth Osoro Kaosa, this document (JOO-2), shows that in fact the said Moriasi Moses Kaosa is an active member who has taken out practicing certificates consistently from 2009, but that he practices under the name and style of Kaosa & CO Advocates, Magero Building, 1st floor, Moi Avenue, Box 43327 - 30200, Kitale. I do not see how the same Advocate would practice as a partner in 2 different law firms. This being the last known contacts of Moriasi Moses Kaosa and in the absence of any affidavit from this advocate stating the facts, I do not believe that the same advocate still practice as a partner in Moriasi Osoro & CO Advocates, Homa-Bay as claimed. This being the case, I convinced that the petition herein dated 2-4-2013 and filed on 10-4-2013 was drawn and filed by Kaosa Japheth Osoro, and that as at the date of filing this petition, Kaosa Japheth Osoro was an unqualified person to act as an Advocate.

As already stated above, this court is bound by the decisions of the superior courts cited by the Applicants. Having found that this petition was drawn, presented and or filed by Kaosa Japheth Osoro while he was unqualified, I accordingly find that this petition and all other and or subsequent documents of pleadings filed by the said Kaosa Japheth Osoro are incompetent. This is an issue that goes to the root of this matter and this defect can not be cured by the petitioner now appointing another firm of Advocates to also act for him in the same matter. In view of the above findings, I allow the applications of the 1st applicant dated 28-5-2013 and 2nd and 3rd applicants dated 17-6-2013 and accordingly struck out the petitioners petition dated 2-4-2013 and filed herein on 10-4-2013. I award costs of the petition and of the 2 Applications to the 1st, 2rd and 3rd Respondents (applicants in the applications). Orders accordingly.

Daniel Ogolla

Ag CHIEF MAGISTRATE

8/7/2013