



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT NYAMIRA**

**ELECTION PETITION NUMBER 2 OF 2013**

**JUSTUS NYARIBO.....PETITIONER**

**-VERSUS-**

**CLERK TO NYAMIRA COUNTY ASSEMBLY.....RESPONDENT**

**RULING**

The Respondent's grounds of objection to the petition herein were argued on 7/08/2013 interpartes. The grounds of objection is dated 12/06/2013 and was filed on the same date. The following grounds are raised therein;

- 1) *The Petition is frivolous, vexatious and utterly misconceived*
- 2) *The Petition has been overtaken by events.*
3. *The Petition lacks merit.*
4. *The Petition lacks evidence or statutory provision in support of the allegations set forth.*

Mr Bosire for the Respondent argued that the petition is misconceived because there is no provision in law that a candidate for the office of county assembly speaker must be a registered voter in one of the wards which is within the county for whose assembly the said candidate is contesting to be the county assembly speaker. He urged that the provision for election of a county assembly speaker is found in Article 178(1) of the constitution, which states that;

***“Each county assembly shall have a speaker elected by the county assembly from among persons who are not members of the assembly”***

Mr. Bosire also argued that upon election of speaker the court does not have power to remove him, that the procedure for removal of speaker from office is given by section 11 of the County Governments Act.

Mr. Bosire also urged that this petition has been overtaken by events because the speaker was elected on 22/03/2013 and therefore nothing is left as the petitioner seeks injunction against the election of Nyamira County Assembly Speaker.

Mr. Soire for the petitioner on his part submitted that when the petition was filed on 22/03/2013, the speaker of Nyamira County Assembly had not been elected. Therefore the relief being sought in the petition had not been overtaken by events at the time of filing this petition (emphasis mine). He submitted

that Article 178(1) of the constitution should be read together with Article 193 of the constitution because the speaker is one of those who constitute county assembly. He argued that Article 177 of the constitution is clear as to the membership of county assembly. He stated that the petition was not challenging the election of the speaker in which case the court would go into an order for removal of the speaker. The petition according to him was challenging the procedure that was used to elect the speaker .

In reply, Mr. Bosire submitted that Mr. Soire did not explain where the procedure for electing the speaker is coming from. He stated that Article 193 gives qualification only for election as a member of county assembly, and not as speaker. He urged that membership of the county assembly is given under section 7 of County Governments Act which only include members duly elected under Article 177(a) or nominated under Article 177 (b) of the constitution, and six (6) nominees under Article 177(c) of the constitution.

I have considered the submissions made by counsel for the petitioner and respondent, and I find that the following three (3) issues for determination arise;

- Whether a candidate for election as speaker to the county assembly must be a registered voter in one of the wards within the county concerned.
- Whether this court has jurisdiction to nullify election of a speaker of county assembly.
- Whether this petition is overtaken by events.

**(i) Whether a candidate for election as speaker to the county assembly must be a registered voter in one of the wards within the county concerned.**

The Petitioner's argument is that a candidate for the office of the speaker must be a registered voter within the county in which he aspires to be the speaker of the county assembly. Paragraph 4 and 5 of the Petition state thus;

***“4. That for the purposes of Nyamira County the following have been cleared by the Respondent herein to contest the seat of the speaker namely :***

1. **PETER KINGOINA ESQ**
2. **DUKE OMWENGA ESQ**
3. **MOSE NYAMBEGA ESQ**

***“5. That the said clearance especially for one DUKE OMWENGA contravenes the clear provisions of the law as to the mandatory requirements that he should be the registered voter in one of the wards within the county.”***

According to Mr. Soire a candidate for the office of the county assembly speaker is subject to qualifications for elections as a member of county assembly stipulated under Article 193 of the constitution. His position is that this should be the case as Article 177(1) of constitution which defines membership of county assembly includes speaker as an *ex-officio* member. Article 177(1) (d) of the constitution states that;

**“ (1)A county assembly consists of-**

**(a).....**

**(b).....**

**(c).....**

**(d) the Speaker, who is an *ex-officio* member”**

I am in agreement with Mr. Soire that the qualifications under Article 193 of the constitution for election as a member of county assembly apply to the candidates for the office of county assembly speaker. The reason for my finding is that Article 193 concerns itself to elective positions in the county assembly, and the office of the speaker is an elective position. The speaker being a member of county assembly pursuant to Article 177(1) (d) of the constitution acquires membership to the county assembly only after being elected in accordance with Article 178(1) of the constitution.

My finding is further buttressed by section 21(1) of the Elections Act No. 24 of 2011 which states that;

***“The speaker of a county assembly shall be elected by each county assembly in accordance with the standing orders of the county assembly, from among persons who are qualified to be elected as members of a county assembly but are not such members.”***

Having established that the requirements under Article 193 bind the candidates for the office of the speaker, it is noteworthy that the requirements do not require that the candidate must be a registered voter in one of the wards within the county concerned. It only requires that a candidate must be a registered voter, period. The relevant provision which is Article 193(1) (a) states that;

***“(1) Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person-***

***(a) is registered as a voter:...”***

ii. **Whether this Court has Jurisdiction to Remove the Speaker of County Assembly from Office.**

It was Mr. Bosire's argument that this court does not have power to remove speaker from office once he is elected. That it is only the county assembly which has power to remove speaker from office pursuant to section 11 of the County Governments Act No. 17 of 2012. Section 11(1) of the said Act states as follows;

***“ A speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly.”***

I am not persuaded by Mr. Bosire's argument. In my view there are two (2) ways of removing a county assembly speaker from office; the first one is the county assembly process as stipulated by section 11(1) of the County Governments Act, while the second one is the judicial process. The courts as custodians of the law will not hesitate to nullify the election of speaker of a county assembly where there is a breach of the law, for instance, where a person elected as speaker does not meet the requirements of Article 193 (1) of the constitution, or is disqualified under Article 193 (2) of the constitution.

iii. **Whether this Petition is overtaken by events.**

It is my finding that this Petition is overtaken by events. The petitioner prays for the following reliefs;

***(a) An order of injunction against the Respondent from holding the election of the speaker of Nyamira County on 22/03/2013.***

***(b) Costs of this Petition be provided for***

***c. Any other order this court may deem fit to grant***

The court takes judicial notice of the fact that the election for the speaker of the Nyamira County Assembly was held on 22/03/2013 where one **PETER KINGOINA** was elected speaker. I agree with Mr. Bosire that in the circumstances this court is left with nothing to determine if this petition is to go to full hearing. I also agree with Mr. Soire for the Petitioner that at the time of filing this petition, it had not been

overtaken by events. However as at now, it stands overtaken by events because the election which the petition seeks to stop by way of an injunction has already been held. Secondly, the candidate who was the target of injunctive relief , that is, **DUKE OMWENGA**, was not elected as speaker (see paragraph 4 and 5 of the petition as quoted verbatim above).

To proceed with the hearing will be an exercise in futility as the injunction sought is not capable of being enforced. This court cannot issue orders in vain.

Upon my finding that this petition has been overtaken by events, I make the following orders

- (i) *The Petition is hereby dismissed.*
- (ii) *The petitioner to pay costs of the petition to the Respondent.*

**DATED SIGNED AND DELIVERED AT NYAMIRA THIS 13<sup>TH</sup> DAY OF AUGUST 2013**

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**NORBERT OKUMU**

**RESIDENT MAGISTRATE**

**Present**

**Mr. Masese holding brief for Mr. Bosire instructed by the firm of Bosire Gichana & Co. Advocates for the Respondent.**

**No appearance for the Petitioner.**

**Court Clerk- Albert**