



**REPUBLIC OF KENYA**

**IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT MUTOMO**

**ELECTION PETITION NO. 1 OF 2013**

***-BETWEEN-***

GEOFFREY MULI MWALIMU =====PETITIONER

***-AND-***

HUSSEIN MWANDIA =====1<sup>ST</sup> RESPONDENT

RETURNING OFFICER KITUI SOUTH CONSTITUENCY ===== 2<sup>ND</sup> RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION =3<sup>RD</sup> RESPONDENT

**RULING**

This ruling is with respect to the Notice of motion dated 23/08/2013 filed by the firm of **J.K MWALIMU & CO.ADVOCATES**, for the first respondent. The applicant therein is seeking that the entire petition herein be struck out with costs, for having been filed by an incompetent and unqualified person, among other orders.

The application is based on the grounds on the face of it and the same is supported by the supporting affidavit sworn by Japheth Kiteme Mwalimu, the learned counsel for the first respondent on 23/08/13 and annexure therein marked "JKM1". The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed grounds in support of the application dated 10/09/13.

Both the counsels for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed written submissions dated 10/09/13 together with the list of authorities which they relied upon. The application was not opposed by the petitioner or his learned counsel Mr. Joseph Mutinda Muinde.

Before addressing the current application, I wish to set out the brief history of the petition.

The petitioner, Geoffrey Muli Mwalimu filed his petition through the firm of J.M MUIINDE & CO.ADVOCATES on 8/4/13 against the first respondent, Hussein Mwandia, the second respondent, the returning officer, Kitui South Constituency and the third respondent, Independent Electoral and Boundaries Commission concerning the election for the member of county assembly for Ikutha ward in which the first respondent, Hussein Mwandia was declared by the second respondent as the duly elected member of the aforesaid ward in the general election held on 4<sup>th</sup> March , 2013.

**PETITIONER'S CASE**

The petitioner sought the following prayers against the three respondents namely:-

- a. A determination that election offences and irregularities were committed in the election for the member of County Assembly of Ikutha ward in Kitui south constituency,
- b. A determination that the first respondent, Hussein Mwandia was not duly and validly elected,
- c. An order that there be a fresh election for the member of county assembly for Ikutha ward in Kitui South constituency.

The petitioner relied on the five facts and grounds on the face of the petition and his supporting affidavit and annexures therein which included his national identity card, IEBC acknowledgement slip, clearance certificate from the Wiper Democratic Movement (WDM)-Kenya certificate of nomination of candidate for county assembly and the Kenya Gazette No.3160 dated 13/3/2013 on the declaration of election results of persons elected as members of the county Assemblies. The petitioner also relied on the supporting affidavit of his five witnesses.

### **THE 1<sup>ST</sup> RESPONDENTS REPLY TO THE PETITION**

The 1<sup>st</sup> respondent stated that the elections held on 4<sup>th</sup> March, 2013 for the member of county Assembly of Ikutha ward was conducted in accordance with the constitution of Kenya and the relevant statutes governing elections hence there were no breaches that occurred during the process.

The 1<sup>st</sup> respondent also stated that the petition failed to satisfy the evidential threshold to validate the factual assertions made by the petitioner and hence the petition must fail in its entirety. The first respondent further denied all the allegations as contained in paragraph 2(a) to 2(f) of the petition and prayed that the court determines that the said Hussein Mwandia was duly elected and the election was valid hence the petition should be dismissed with costs.

The first respondent relied on his supporting affidavit and annexure form 36 on the declaration of county Assembly Results at Kitui south constituency for Ikutha ward. He also relied on the affidavits of his five witnesses together with their respective annexures.

### **THE 2<sup>ND</sup> & 3<sup>RD</sup> RESPONDENTS' REPLY TO THE PETITION**

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents' filed a joint reply to the petition in which they stated that the elections held on 4<sup>th</sup> March, 2013 for the member of county Assembly for Ikutha ward was conducted in accordance with the constitution and the relevant statutes governing elections hence there were no breaches that occurred during the process.

They also stated that the petition failed to satisfy the evidential threshold to validate the factual assertions made by the petitioner hence the petition ought to fail. They further stated that the assertions in the petition are unsupported by concrete facts and law and therefore such assertions cannot be the basis for invalidating the election.

They further denied all the allegations contained in paragraph 2(a) to 2(f) of the petition and prayed that the petition be dismissed with costs and the first respondent, Hussein Mwandia be determined as having been duly elected and the election valid. They relied on the joint replying affidavit sworn by Reuben Mutua Mbuu, the returning officer, Kitui South Constituency and annexures therein namely forms 36, 35 and several polling day diaries.

The petition was scheduled for Pre-trial conference on 17/5/2013 and during that conference, the learned counsels for both the petitioner and the respondents agreed that the petition would be disposed of by way of written submissions and they agreed on the following issues for trial:-

1. Whether the election of the member of county Assembly for Ikutha ward in Kitui South constituency in the March 4<sup>th</sup>, 2013 general elections was conducted in a free, fair, transparent and credible manner and in compliance with the provisions of the constitution and all relevant provisions of the law.

2. Whether the 1<sup>st</sup> respondent engaged in election malpractices that could render his election invalid.
3. Whether there is sufficient basis in view of (1) and (2) above for the court to grant the reliefs sought in the petition and if not what orders should the court issue.

The parties filed their written submissions by 21/6/13 and on 19/07/13, the learned counsels Mr.Muinde for the petitioner, Mr.Mwalimu for the 1<sup>st</sup> respondent and Mrs.Wambua for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent highlighted on the same and closed their respective cases hence the petition was set judgement on 6/9/13.

On 27/8/2013, Mr.Mwalimu the learned counsel for the 1<sup>st</sup> respondent moved this court with the current application which was brought under certificate of urgency under sections 1A, 1B and 3A of the civil procedure Act, order 51 rule 1 of the civil procedure rules 2010, sections 9 and 34(1) of the Advocates Act. The application was certified urgent and heard *ex parte* in the first instance and the same set down for interparties hearing on 11/9/13. The judgement which was scheduled for delivery on 6/9/13 was also deferred to 20/9/13.

On 11/9/13, the petitioner and his counsel never turned up in court although they were duly served with the current application. Mr.Mwalimu and Mrs.Wambua, the learned counsels for the respondents went ahead and prosecuted the application.

Mr.Mwalimu, the learned counsel for the 1<sup>st</sup> respondent sought that the election petition be struck out with costs because it was filed by an incompetent and unqualified person as envisaged in section 9 and 34 of the Advocates

Act cap 16 laws of Kenya. He argued that the advocate for the petitioner Mr. Joseph Mutinda Muinde who practised as J.M Muinde did not have a current practising certificate for the year 2013 and as at the time of filing the petition did not have such a certificate. He said that a confirmation had been done by the Law Society of Kenya (LSK) through a letter dated 28/8/13 which formed the authority of the 1<sup>st</sup> respondent and from online search marked "JKM1" annexed to the supporting affidavit of his application. He stated that the proceedings filed by a lawyer who does not have a practising certificate were incompetent, null and void from the onset.

He further stated that a party who instructs such an unqualified person cannot be heard to complain because it amounts to negligence for one to fail to exercise due diligence before one appoints an advocate. He also stated that the status of every advocate in Kenya has been made available by LSK and is a matter of checking the website of LSK. He contended that the challenge to the first respondent was filed by an unqualified person hence there was no valid petition before the court challenging the election of Hussein Mwandia, 1<sup>st</sup> respondent as a member of county assembly for Ikutha ward.

He prayed that the entire petition be struck out with costs to the 1<sup>st</sup> respondent as provided for under section 84 of the Election Act 2012. He relied on three rulings in support of the application in which the courts struck out the petitions filed by the advocates who had no valid practising certificate.

Mr.Mwalimu annexed the following authorities in support of his application:-

1. Dobson Chiro Mwahiga-vs-IEBC and 2 others , EP 16 of 2013(Malindi),
2. Nelson Bikindo Apima –vs-Robert Apiemi Ongwamo & 2 others, EP 4 of 2013(Nyamira),
3. Francis Mangi Kahoro-vs-IEBC & 2 others, EP 1 of 2013(Kigumo),

Mrs.Wambua, the learned counsel for the second and third respondents supported the application and asked the court to strike out the petition for having been filed by an unqualified person. Mrs.wambua argued that Mr. Joseph Mutinda Muinde was not competent and not qualified to draw the petition dated 8/4/13 and the deficiency could not be cured, salvaged or validated as the same raises substantial issues of law which goes to the root of the petition and not even article 159(1) (d) of the constitution and section 80(1)(d) of the Election Act could redeem it. In support of her arguments, Mrs.Wambua relied on the

following authorities:-

1. National Bank Ltd –vs-Ayah, CA No.119/2002
2. Raphael Maitha & 3others –vs-Jays syndicate ltd & 3 others
3. Willis Evans Oyero –vs-LSK & 2 others Pet.No.37 of 2011.
4. Chris Mahinda –vs-KPLC (2005) Eklr.

Having stated the argument in favour of the application I find that the only issue for determination is whether or not the petition, having been drawn and filled on 8/4/13 by Mr. Joseph Mutinda Muinde, an advocate who apparently had no practising certificate for the year 2013, was valid and competent before court.

In Kenya the law governing the legal practice is the advocate Act, Chapter 16 laws of Kenya. Section 9 or the said Act thereof provides as follows:-

“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 .....

On the same note, section 34 of the aforesaid Act stipulates as follows:-

“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
- b. ....
- c. ....
- d. ....
- e. ....
- f. 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 instructions or for the drawing or preparation of any such document of instrument ”

From the two sections quoted above, it is quite clear as to who is qualified to act as an advocate and what an unqualified person cannot do. An unqualified person is defined under section 2 of the Advocates act as a person who is not qualified under section 9 of that Act to act as an Advocate.

From the materials placed before me by the learned counsels for the Respondents including the written submissions and the authorities they relied upon, I find that at the time of drawing and filing of the petition on 8/4/13, during the pre-trial conference on 17/5/13, the highlighting of submissions on 19/7/13 and even up to now, the petitioner’s counsel did not have and does not have a valid current practising certificate for the year 2013. The same is clearly confirmed by the letter dated 28/8/13 from LSK which shows that petitioner’s advocate does not hold a current practising certificate for the year 2013. Therefore, this means that the petitioner’s counsel perfectly fits the description enunciated in section 2 of the Advocates Act of being an unqualified person, subsequently, anything that the petitioner’s counsel did in terms of drawing filing and prosecuting the current petition was null and void ab initio since he was unqualified to act and practise as an advocate for his lack of current practising certificate for the year 2013.

There are several authorities in support of this view. In the case of **National Bank of Kenya Ltd – VS- Wilson Ndolo Ayah**, the court of Appeal stated that, “A failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal act”. The court of Appeal went ahead and invalidated the charge and instrument of guarantee prepared by an unqualified advocate.

Similarly, in the case of **Chris Mahinda t/a Nyeri trade Centre – VS – Kenya Power and lighting Co. Ltd.** (2005) Ekler, the court of Appeal struck out a notice of appeal, 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.

On the same note, in the case of **Dobson Chiro Mwahinga – VS – Independent Electoral & Boundaries Commission & 2 others,** the high court at Malindi while quoting the Wilson Ndolo Ayah's case (supra), struck out an election petition for having been filed by an unqualified person terming it a nullity ab initio and the same could not be salvaged.

In light of the above mentioned decision and in the light of the relevant provisions of the law referred to above, I hold that the petitioner's petition dated 8<sup>th</sup> April, 2013 be and is hereby struck out with costs to the Respondents for the sole reason that the said petition was drawn and filed by an unqualified person. As a result in the absence of a valid petition challenging the election of Hussein Mwandia as a member of County Assembly for Ikutha ward, I return the verdict that the said Hussein Mwandia was duly and validly elected as the member of county assembly for Ikutha Ward in Kitui south Constituency, Kitui county in the 4<sup>th</sup> March, 2013, general elections. Orders accordingly.

Dated, delivered and signed in an open court at Mutomo this 20th day of September, 2013.

**S.K MUTAI**

**Ag. PM**

**IN THE PRESENCE OF:**

Court clerk – Wambua

Petitioner – present

Respondents 1<sup>st</sup>

2<sup>nd</sup> present

3<sup>rd</sup>

Muinde for petitioner – absent

Mwalimu for 1<sup>st</sup> Respondent – present

Mrs. Wambua for 2<sup>nd</sup> & 3<sup>rd</sup> Respondents -Mwalimu H/b for Mrs.Wambua.

