



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELECTION PETITION APPEAL NO. 1 OF 2017

PIUS NJOGU KATHURI.....APPELLANT

VERSUS

JOSEPH KIRAGU MUTHURA.....1ST RESPONDENT

JULIUS MAINGI MUTHUSI.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....3RD RESPONDENT

(An appeal from the ruling and order of the Chief Magistrate's Court Chief (S.M.S. Soita, (C.M.) in Kerugoya, Petition No. 1 of 2017 delivered on 27th October, 2017)

JUDGMENT

1. The appellant **Pius Njogu Kathuri** filed this appeal against the ruling and order of the Chief Magistrate in Election Petition No. 1 of 2017. He raises the following grounds:

i. That the Appellant/Applicant herein is the member of County Assembly-Thiba Ward of Kirinyaga County having been duly elected on 8th August, 2017 General Elections but whose election is being challenged by the 1st Respondent herein vide Chief Magistrate's Election Petition No. 1 of 2017 still pending in the lower court.

ii. That vide an application dated 9th October, 2017, the Appellant/Applicant moved the Court seeking for Orders of striking out the Petition on grounds of being fatally defective/incompetent in law amongst other orders.

iii. That vide a ruling/Order of the court dated 27th October, 2017, the Honourable Chief Magistrate partially allowed the application dated 9th October, 2017 but dismissed the prayer for striking out of the Petition against the Appellant, the 2nd and 3^d Respondents herein.

iv. That the Applicant is aggrieved by the Orders dated 27th October, 2017 and has preferred this Appeal which raises crucial points of law and has high chances of success.

v. That the proceedings in the lower court are still on going to the extent of having the votes and ballots scrutinized and counted while this Appeal is pending.

vi. That the continuation of proceedings in the High Court shall highly prejudice the Applicant herein and render his Appeal nugatory unless stay orders are granted.

vii. That due to statutory time limitations on the hearing and determination of election Petitions, there is need to certify this Appeal as urgent and have the same determined expeditiously.

viii. That its in the interest of justice that orders herein be granted as the respondent will not be prejudiced.

2. The Appellant prays that the orders of the Chief Magistrate dated 27th October, 2017 in respect of the application dated 9th October, 2017 refusing to strike out the entire petition be set aside. That the 1st respondent's Election Petition dated 6th September, 2017 and filed in the lower court be struck out in entirety with costs to the Applicant.

3. The respondent, Joseph Kiragu Muthura opposed the appeal and prayed that it be dismissed.

4. The background of this appeal is that the Petitioner was elected as member of County Assembly Thiba Ward in the elections of 8th August, 2017 and was issued with a certificate by 3rd respondent. The Respondent filed a petition in the Chief Magistrate's Court challenging the election of the Appellant on the ground that he was not validly elected. The Respondent had also served the Independent Electoral and Boundaries Commission as the Respondent. The Respondent had filed his supporting affidavit sworn before Robinson N. Mugo. The Respondent had listed eight witnesses and filed their affidavits. These were:-

- Jackson Mwangi Gathuna
- Ester Wawira Kabura
- Grace Muthoni Kariuki
- Cyrus Njagi Mugo
- Joseph Muriuki Muchomba
- Susan Wawira Kago
- Agnes Wanjiru
- Lilian Wawira Wachira

These witnesses had sworn affidavits before Robinson N. Mugo Advocate and Commissioner for Oaths of P. O. Box 2236 Nyeri.

5. The Appellant filed an application dated 9th October, 2017 seeking orders inter alia that the petition filed by the petitioner in respect of the general elections conducted on 8th August, 2017 for the seat of member of County Assembly Thiba Ward of the Kirinyaga County be declared as fatally defective in law and be struck off accordingly. The main ground in support of the prayer was that the affidavits in support of the petition were attested by a person not authorized by law to practice as such by virtue of not holding a practicing certificate since year 2011.

6. The Chief Magistrate in a ruling delivered on 27th October, 2017 dismissed the application on the ground that it lacked merits. The Appellant was aggrieved and filed this appeal.

7. The Counsel for the appellant submitted that the affidavit of the petitioner and his witnesses were commissioned by an advocate Robinson Ndata Mugo who at the time of commissioning did not have a practising certificate as shown by Annexure PNK1, a letter from the Law Society of Kenya showing that the advocate last took a practising certificate in 2011 and if he is practising he is doing so unlawfully and

disciplinary action should be taken. That this letter was brought to the attention of the Chief Magistrate who refused to grant the prayer by the Appellant. He contends that the magistrate was wrong to allow the petitioner to proceed with a petition which did not comply with the **Oaths and Statutory Declarations Act, Order 19 Civil Procedure rules and Rule 12 of the Elections (Parliamentary and Gubernatorial Elections) Petitions Rules.** That such a petition cannot be allowed to overturn the declaration of the petitioner as duly elected.

8. He submits that Section 2 of oaths and Statutory Declarations Act requires that a Commissioner of oaths be appointed by the Chief Justice in order to administer a proper oath. Others who can administer oaths are provided under **Section 4.** That the Appellant wanted the Court to determine the legal status of an oath administered by a person who is not a holder of practicing certificate; the legality of the document and admissibility under **Section 24** and **30** of the **Advocates Act** which states that only an advocate who is a holder of a practicing certificate from January to December of each year has capacity to administer oath. The advocate who commissioned the affidavits had practiced for seven years without a certificate and has not been punished. He had no capacity to administer oath with the consequence that the affidavits are not valid, the petition was not compliant and could not be cured under **Article 159 (2) (d)** of the **Constitution.** The **Election Petition** being special proceedings, there must be strict compliance with the law and the Rules. He prayed that the appeal be allowed and the petition be struck out.

9. The Appellant relied on the case of **Kenya Power and Lighting Co -V- Chris Mahinda; Court of Appeal Nyeri Appeal No 148 of 2004** where the Memorandum of Appeal was struck out on the ground that it was signed by an Advocate who had no practicing certificate. This decision was however, overturned by the Supreme Court in the case of **National Bank of Kenya Limited -V- Naraj** which I will consider later.

10. The Appellant also relied on the decision of the Supreme Court of Uganda in the case of **Prof Syed Hug -V- Islamic University of Uganda C.A. No. 47 of 1995** where the Court considered the effect of Commissioning Oaths without a practicing certificate and held that the actions were illegal as it was done while perpetrating an offence which cannot be considered by a court of law. He also cited a **High Court of Kenya Decision in Election Petition No. 21 of 2017 Omusotsi -V- the Returning Officer and Another** where the petition was struck out on the grounds that the affidavits were not commissioned by an advocate permitted to practice law.

11. For the Respondent, it was submitted that what has come out clearly is that Mr. Ndata Mugo has not been struck out of the roll and that it is not denied he is a Commissioner for Oaths. That the Appellant had enjoyed the discretion of the Court when Court allowed him to file response out of time. However there was no appeal on this holding by the trial Court. That the person who had drawn the affidavits and the petition was a competent Advocate.

12. He further submits that the case of **Omusotsi (Supra)** is distinguishable from the present case. He relied on the Supreme Court decision in **National Bank of Kenya -V- Anaf Warehouse Limited Petition No. 36 of 2014** where the Court held that documents drawn by an advocate who has no practicing certificate are binding upon the client. He further submits that the Court cannot interfere with exercise of discretion by the Magistrate and that the defect is curable under **Article 159** of the **Constitution** and **Order 19 rule 7 Civil Procedure Rules** which allows Court to receive affidavits notwithstanding defects and technicalities. Reliance was had on **Court of Appeal decision in C.A. 142B of 2015 Heritage Insurance Co. Ltd -V- Patrick K. Kisulu** where it was stated that appellate court will not interfere with exercise of discretion by the trial court. He prays that the Appeal be dismissed.

13. I have considered the grounds of appeal. I have also considered the submissions by counsels on record for the parties. There are two issues which arise for determination. The first issue is whether 'affidavits' commissioned by an advocate who has no practicing certificate are valid. Secondly, whether the Court should strike out the petition.

14. On the issue of affidavits in support of the petition, there is no dispute that they were sworn before Robinson N. Mugo who at the time he signed the affidavits had no practicing certificate and had not obtained one since the year 2011. The law requires that only practicing advocates may be appointed as commissioners for oaths. **Section 2** of the **Oaths and Statutory Declaration Act** provides that only practicing advocates may be appointed as commissioners for oaths by the Chief Justice. It provides:

“The Chief Justice may by commission signed by him, appoint persons being practicing advocates to be commissioners for oaths and may revoke any such appointment.”

The Act provides for the powers of Commissioners of Oaths. **Section 4** provides:

“A commissioner for oaths may, by virtue of his commission in any part of Kenya administer any oath or take any affidavit for the purpose of any court or matter in Kenya for the purpose including any matter ecclesiastical and matters relating to the registration of any instrument whether under an Act or otherwise and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any sub-ordinate court.”

Thus it is a Commissioner of Oaths who has powers to administer oaths. Under **Section 9** of the **Advocates Act** a person cannot be a practicing advocate unless:

- a. He has been admitted as an advocate.
- b. His name is for the time being on the Roll.
- c. He has in force a practicing certificate.

The appellant in his affidavit at page 77 of the record of appeal deponed that the advocate Robinson Ndata Mugo is not qualified to practice law as he does not have a valid practicing certificate. He introduced annexture PNK -1- a letter from the Law Society of Kenya stating that the said Robinson Ndata Mugo last took a valid practicing certificate in the year 2011. He is therefore not certified to practice law. The letter is dated 17th September, 2017.

15. The said Robinson N. Mugo was not a practicing advocate as required above as he had no practicing certificate and could not exercise the powers of a commissioner. It is doubtful whether having not obtained the certificate for six years he is still in the roll of advocates.

16. The **Elections Act** and rules requires that an election petition shall be supported by an affidavit. **Rule 12 (1) Election (Parliamentary and Count Election) Petitions Rules 2017** provides:

“A petition shall be supported by an affidavit which shall:-

- a. Set out the facts and grounds relied on in the petition and***
- b. Be sworn personally by the petitioner or by at least one of the petitioners if there is more than one petitioner”***

Affidavits are therefore important documents in an election petition as they form the substance of evidence to be adduced by witnesses. They are crucial evidence and more so because witnesses will only be cross-examined and it is crucial that they comply with the law. Such affidavits must as a matter of fact comply with the provisions of the Oaths and Statutory Declarations Act and Order 19 of the Civil Procedure Rules 2010 as provided under **Rule 12 (14)** of the **Election (Parliamentary and County Elections) Petitions Rules 2017**.

17. The **Wikipedia Dictionary** defines an affidavit as follows:

“An affidavit is a written sworn statement of fact voluntarily made by an affiant or deponent under an oath or affirmation administered by a person authorized to do so by law. Such statement is witnessed as to the authenticity of the affiant's signature by a taker of oaths, such as notary public or commissioner of oaths.”

The ‘affidavits’ by the petitioner and his witnesses are not affidavits as they were not administered by a person authorized to do so. They have not complied with the **Oaths and Statutory Declarations Act**. The person who administered them was not appointed by the Chief Justice as required. The affidavits amounts to mere statements of facts which do not attain the threshold of affidavits as they are not commissioned by a person authorized under the **Oaths and Statutory Declarations Act**.

18. The person who purported to commission the affidavits is a quack who has not held a practicing certificate for the last six years Section 24 and 30 of the Advocates Act states that it is only an advocate who is a holder of a practicing certificate from January to December of each year who has capacity to administer oath. The person who purported to administer oath had no capacity to administer oaths.

19. The **Supreme Court in Petition No. 36 2014 National Bank of Kenya -V- Anaf Warehouse Limited at Paragraph 46** stated:-

“The facts of this case and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34 (1) (a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates whose names have been struck off the roll of advocates, shall be void for all purposes.”

The Court dealt with **Section 34 (1) (a) of the Advocates Act** provides:

“No unqualified person shall either directly or indirectly take instructions or draw or prepare any document or instrument_ -

a. Relating to conveyance of property, or

b. For or in relation to the formation of any limited liability company whether private or public.

c. For or in relation to an agreement of partnership or the dissolution thereof

d. For the purpose of failing or opposing a grant of probate or letters of administration

e. For which a fee is prescribed by any order by the Chief Justice under Section 44.

This is what the Supreme Court was dealing with but not the issue of commissioning documents by unqualified person. The persuasive decision by the Supreme Court of Uganda shows the way to go where unqualified person commissions an affidavit.

20. The issue before this Court is commissioning of documents unlike what was dealt with by the Supreme Court which was on instrument or document of conveyance. A practising advocate can sign documents and instrument of conveyance as a witness which in my view is different from administering oaths. This is because for an advocate to administer oaths he must be appointed as such by the Chief Justice and must be a practising advocate.

21. In a persuasive decision by the High Court in the case of **Omusotsi -V- The Returning Officer Mumias East Constituency, Independent Electoral and Boundaries Commission and Benjamin Washiali Jomo, Election Petition No. 9 of 2017, High Court Kakamega** it was held that:

“An affidavit can only be commissioned by a commissioner for oaths and officials of the court allowed to do so under the Act.....the petition as filed is not supported by the affidavit of the petitioner as required by rule 12 (1) (b), of the Elections Rules.” The petition does not comply with the mandatory provisions of the law. The petition filed without the said documents is not a competent petition. The petition is a still birth that should not be allowed to see the light of day. The petition is accordingly struck out with costs.”

22. The Court was stating that the affidavits which were not commissioned by a Commissioner for Oaths were not affidavits. I agree with the holding as affidavits which are not commissioned by a commissioner of Oaths appointed as provided by the **Oaths and Statutory Declarations Act** are not affidavits but mere statements.

23. The Chief Magistrate held that Robinson Ndata Mugo is still not struck off the roll and there is some latitude to excuse the affidavits as they were drawn by Maina Kagio whose capacity competence and validity in legal practice has not been questioned. He further ruled that the Court could apply the Oxygen Principle in **Rule 4** of the **Elections Rules**. This rule provides:

“The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions.

-An election Court shall in exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these rules seek to give effect to the objective specified in sub-rule 1.”

Two issues arise. The trial Court relied on the case of **National Bank of Kenya Ltd. -V- Anaf Warehouse (Supra)**. The advocate who had drawn and filed the affidavits is based in Kerugoya. The stamp of Robinson Ndata Mugo shows that he is based in Nyeri. The petitioner in reply to the application for striking out filed grounds of opposition which are at Page 72 and 73 of the record of Appeal. There was no affidavit by the petitioner explaining why himself and his witnesses had to travel all the way to Nyeri to have the affidavits ‘commissioned’ by an advocate who was not a practising advocate when there are qualified commissioners of Oaths in Kerugoya. The circumstances under which the affidavits were signed by Robinson Ndata have not been disclosed. The trial magistrate did not enquire the circumstances under which the affidavits were allegedly commissioned.

24. It would seem that the petitioner knowingly submitted to a quack outside the jurisdiction of this Court. He seeks to rely on the Supreme Court decision and yet he does not fit in the circumstances

stated in the Supreme Court decision. In the case of **Omusotsi (Supra)** stated:-

“The petitioner did not use due diligence to ensure that the documents were commissioned by a person authorized to do so. He cannot claim that he was a victim of circumstances. He just fell victim to what many Kenyans unflinchingly fall to on daily basis – service by quacks. The petitioner used short cuts to have the documents commissioned. He has to bear with the consequences of his own self-created misfortune.”

I would say the same of the petitioner. He went all the way to Nyeri for unknown reasons. He has himself to blame. The Chief magistrate missed the issue which was before him. The issue was not who had drawn and filed the impugned documents but commissioning of an affidavit which is very crucial to an affidavit as it is the commissioning of an affidavit by a competent commissioner for Oaths which makes it an affidavit. Failure to commission the affidavit is not what is envisaged under **Article 159 2 (d)** of the **Constitution**. The defect is incurable. The Supreme Court in **National Bank of Kenya Ltd. Case (Supra)** talked of documents and stated that documents drawn by advocates who are non-advocates and advocates struck out of the roll are void. I emphasize the words ‘prepared’. The issue before the trial magistrate was commissioning. The magistrate erred in holding that the affidavits were proper as the advocate who had drawn and filed them was competent.

25. In the Supreme Court of Uganda in **Prof Syed Hug -V- Islamic University in Uganda C.A. No. 47 of 1995** where the court considered the effect of commissioning of oaths by a non-practising advocate under a provision similar to our Section 2 of **Oaths and Statutory Declarations Act**, held:-

“An advocate who practices after the period of grace without a valid practicing certificate commits an offence and is liable to prosecution under Section 14 (1) of the Advocates Act. Therefore the documents he prepares, signs, and files are illegal as he does so in perpetration of an offence under Section 14 (1) of the Advocates Act. Accordingly such documents are invalid and of no legal effect as no Court can sanction or condone an illegality which is brought to its notice.”

26. Our own **Advocates Act** makes it an offence for an Advocate to practice without a practicing certificate. The letter from the Law Society at Page 79 of the record states as much, that the Advocate would face disciplinary proceeding for practising without a practicing certificate. The Advocates Act makes it an offence for an Advocate to practice without a practicing certificate from January to December of each year, **Section 24** and **34** of the **Act**.

27. In the case of **Hosea Mundui Kiplagat -V- Sammy Komen Mwaita & 2 Others (2013)eKLR High Court** it was stated:

“An affidavit commissioned by unqualified advocate is as good as an affidavit not commissioned at all.”

In the case of **Abraham Mwangi Njihia -V- Independent Electoral and Boundaries Commission & 2 Others (2013) eKLR** – the High Court in holding that the general principle is that pleadings drawn, signed and presented by unqualified persons cannot stand and ought to be struck out, stated;

“The use of the word ‘and’ at the end of section 9(a), (b) and (c) of the Act requires a conjunctive reading of the requirements so that all the requirements have to be met for an advocate to be regarded as being qualified under the Act. This was the finding in Belgo Holdings Ltd v Esmail [2005] 2 EA 28 where the court said of section 9 that; “It is instructive that these four

qualifications are not to be read to the exclusion of each other. The use of the word ‘and’ means that for one to be qualified to act as an advocate.....one must have all of the four qualifications above. If one does not have one or all, he is thereby rendered an unqualified person and section 34 aforesaid operates to stop him from doing any of the things therein enumerated, including drawing documents in legal proceedings.”.....

Muchelule J., in the case of John Langat v Kipkemoi Terer & 2 Others, Kisumu H.C. Civil Appeal No. 21 of 2013 (Unreported) considered the application Article 159(2)(d) of the Constitution in the context of an election petition. In that case, the advocate who had filed the appeal did not have a practicing certificate. The learned judge concluded as follows; “Mr. Anyoka sought to persuade the court that his client was innocent. He further sought to rely on Article 159(2)(d) of the Constitution of Kenya 2010 to argue that now that the court was dealing with a petition, a serious matter, the acts that may be deemed illegal or unprocedural should be excused. The Article enjoins the court to do justice to all technicalities. There is a simple answer to Mr. Anyoka. It is criminal under Section 34 of the Advocates Act for an Advocate to practice without a practicing certificate. The Section is not a procedural technicality. It is a substantive stator provision. The court is enjoined not only to protect the Constitution but all laws enacted by Parliament. It has the duty to protect the Advocates Act and its provisions. To ignore the clear provisions of section 34 of the Advocates Act is to perpetuate an illegality. Article 159(2) (d) does not condone such an act.”

Order 19 rule 7 Civil Procure Rules provides:

“The Court may receive any affidavit sworn for the purpose of being used in any suit not withstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or any technicality thereof.”

28. For the Court to admit the affidavit it must be an affidavit. It must have been sworn. The affidavits cannot be said to have been sworn. It is sworn when it is commissioned by a person authorized to administer oaths. The defect is not on form nor is it a technicality. The Supreme Court in the case of **National Bank of Kenya** found that documents made by advocates who are not on the roll are void. An advocate without a practising certificate for six years cannot be said to be on the roll of advocates. He falls under what Supreme Court held that documents prepared by such an advocate are void. It is even worse in this case as the advocate commissioned documents. My view is that there was no affidavit by the petitioner and his witnesses in the first place and so **Order 19 rule 7** was not applicable.

It is clear that the affidavit of the petitioner and his witnesses were ‘commissioned’ by an advocate who was not authorized to practice law. He was operating illegally and in contravention of the provisions of the **Advocates’ Act** and **Oaths and Statutory Declarations Act**. The affidavits allegedly commissioned by Robinson N. Mugo are not affidavits but mere statements. There was no legal basis for the trial magistrate to hold that the application to strike out the petition had no merits.

29. The petition was not supported by valid affidavits as required under the **Elections Act** and the rules.

30. I must now consider the effect of the petition which was supported by defective or void affidavits. In the case of **Hosea Mundui Kiplagat (Supra)** it was stated:-

“That being the case, what is the effect on the election petition” Rule 10 (3) (b) of the Election Petition Rules 2013 requires that an election Petition shall be “supported by an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on

by the Petitioner.”

Rule 12 on the other hand requires the Petitioner to file Affidavits of witnesses the Petitioner may wish to rely on simultaneously with the Petition. Thus, the Petition would not be complete without, most importantly, the valid supporting Affidavits of the Petitioner himself. Similarly, the matters deponed to by the witnesses would have no effect where the same were not commissioned by a qualified advocate. An Affidavit commissioned by an unqualified advocate is as good as an affidavit not commissioned at all, it is not complete without the attestation clause and is therefore void.

Had the issue of the validity of the Affidavits been raised early on in the proceedings, the Court would have made the appropriate orders then. The other party will also have no opportunity to respond to the matters alleged. Furthermore, the deponents of the impugned Affidavits did testify and were cross-examined on their Affidavits. Having come this far, I will render the Court’s finding on the issues affecting each party’s case”.

In this case the issue was raised at a very early stage. The petition was not competent. The **Elections Act** makes it mandatory for a petition to be supported by an affidavit of the petitioner/s **Rule 12 (1)** of the **Election (Parliamentary and County Election) Petition Rules 2017 (Supra)**. **Rule 12 (3)** provides:-

“Each person who the petitioner intends to call as a witness at the hearing shall swear an affidavit.”

Rule 8 (4) (b) provides that the petition shall –

“be supported by an affidavit sworn by the petitioner containing the particulars set out under rule 12”

Rule 14 provides:

“The Oaths & Statutory Declarations Act (Cap 15) and Order 19 Civil Procedure Rules 2010 shall apply to affidavits under these rules”.

The purported affidavits are defective. The petition is not supported by affidavit as mandatorily provided under the rules. An affidavit forms part of the pleadings. Where pleadings are defective the petition cannot stand. The petitioner cannot talk of having a competent petition if the affidavits are defective. The affidavits ought to have complied with **Oaths and Statutory Declarations Act** and **Order 19 Civil Procedure Rules**. In the case of **Gatiaru Peter Munya -V- Dickson Mwenda Kithinji & 2 Others Supreme Court Petition No. 2 B of 2014:**

“It was stated that the affidavit in support of an election petition and any documents annexed thereto are deemed to be part of the petition and therefore part of the pleadings.”

It is a mandatory requirement that a petition be supported by affidavit of the petitioner. Having found that the petition is not supported by affidavits as mandatorily required under the Rules, the petition cannot stand. This is not a defect which can be cured under **Article 159 (2) (d)** of the **Constitution** which deals with procedural technicalities. It has been stated in **Zacharia Okoth Obanado -V- Edward Akong’o Oyugi & 2 Others:-**

“Article 159 (2) (d) of the Constitution simply means that a Court of Law should not pay undue

attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

The affidavits of the petitioner ought to be struck out for not being affidavits as envisaged by the law. The petition has not complied with the mandatory requirements with regard to affidavits. Failure to support the petition with affidavits goes to the root and content of the petition. The petition as it stands is fatally defective.

31. The next consideration is whether the petition should be struck out. The preliminary objection was raised at an early stage. The issue raised by the Appellant, that is, the affidavits were commissioned by an advocate who had no practicing certificate was not in dispute. It was a point of law which was not in dispute. The objective of the Rules as was clearly stated by the magistrate, *supra* is *inter alia* for the expeditious disposal of electoral disputes. Where the circumstances under which the petitioner and his witnesses swore the affidavits was not explained, the trial magistrate ought to have found that the purported affidavits were not commissioned and strike them out with the consequence that there was no competent petition before him. In the case of **Ismail Suleiman & 9 Others -V- Returning Officer Isiolo County, (2013) eKLR High Court**, Makau J., dismissed a petition where the supporting affidavits were not commissioned as required under **Oaths & Statutory Declarations Act**.

32. In the case of **Flystar Limited -V- The Delphis Bank Limited (under Statutory Management, C.A. 58 of 2006 the Court relying on the decision of Kenya Commercial Bank Ltd & Another -V- Kenya Hotels Ltd.** where it was held:

“Being a practising advocate is a condition precedent to being appointed a commissioner of Oaths, the latter position attaches to the practice of law and cannot exist independently on its own if the condition precedent to its acquisition has disappeared.”

On this authority, having found that L. W. Mwangi did not have a practising certificate as at time she purported to commission the verifying affidavit I hold that what purports to be a verifying affidavit is as their Lordships said in the Kenya Commercial Bank Ltd.& Another -V- Kenya Hotels Ltd., “no affidavit at all, it is null and void as having been commissioned by a person not authorized by the law to do so.”

The Court of Appeal held that the Judge exercised its discretion fairly by allowing the respondent to file a compliant verifying affidavit. The trial magistrate in this matter though finding that the advocate had no practicing certificate and the affidavits were no affidavits went ahead to allow the impugned affidavits to remain on record. Such exercise of discretion was a misdirection and the trial magistrate arrived at a wrong decision. It amounted to proceeding with a petition which was incompetent. He ought to have exercised discretion in a manner that gave the petition some life. The Court must therefore interfere with exercise of discretion.

33. Rules are not made in vain. Where the issue of non-compliance on a requirement which goes to the root of the petition, the Court in line with the objective of the rules on expeditious disposal must strike out the petition. This would save judicial time and resources. It should be noted that compliance with the rules would achieve the objectives of the rules. In **M’Nkoria Petkay Sheu Miriti -V- Ragwa Samuel Mbae & 2 Others J** stated:

“Rule 10 (now rule 8) are not mere technical requirements, laying down procedural form and content of intended election petitions but are substantive as they go to the root and substance of

the issues and matters prescribed upon. Since the Rules like the Elections Act are special legislation created to give effect to the overriding objectives mentioned in Rule 4 which is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act. Every rule is intended to achieve a required result geared towards inter alia, expedition in the resolution of petitions.”

The petition which has failed to comply with the rules is fatally defective. The trial magistrate had the material laid before him to allow the preliminary objection. The discretion was not exercised judicially as the petitioner was clearly to blame as I have earlier stated for the circumstances he found himself in. He should suffer the consequences. I find that the order by the Chief Magistrate erred to find the application by the appellant to strike out the petition had no merit. I order that the order be set aside. It substituted with an order that the affidavits and the petition were defective and ought to be struck out. I allow the appeal as prayed with costs. The appeal has been heard expeditiously. I cap the costs at Ksh.50,000/- to be taxed by the Deputy Registrar.

Dated and delivered at Kerugoya this 13th day of December, 2017.

L. W. GITARI

JUDGE

Read out in open Court, Mr. Kahiga for appellant, Mr. Maina for Respondent, M/S Mwiria for 2nd and 3rd Respondent; court assistant Naomi Murage this 13th December, 2017.

L. W. GITARI

JUDGE

13.12.2017



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