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Case Class:	Civil
Court:	Election Petition in Magistrate Courts
Case Action:	Ruling
Judge:	M.I.G. Moranga - PM
Citation:	Okwemba Milsadeck Elisaphan v Independent Electoral & Boundaries Commission (I.E.B.C.) & 2 others [2013] eKLR
Advocates:	Mr. Mutubwa for the 1st and 2nd Respondents Mr. Getanda Advocate for the 3rd Respondent M/s Anziya & Co. Advocates for the Petitioner
Case Summary:	-
Court Division:	Civil
History Magistrates:	none
County:	Kakamega
Docket Number:	-
History Docket Number:	none
Case Outcome:	Petition struck out
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	none
Advocates Against:	-
Sum Awarded:	none
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**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO. 2 OF 2013**

OKWEMBA MILSADECK ELISAPHAN ..... PETITIONER

VERSUS

1. INDEPENDENT ELECTRAL AND BOUNDARIES COMMISSION

(I.E.B.C.) .....1ST RESPONDENT

2. RETURNING OFFICER, LUGARI CONSTITUENCY.....2ND RESPONDENT

3. TITUS MARACHI KWOMAH .....3RD RESPONDENT

**RULING**

Before this court are two applications that were heard simultaneously on the 26th June 2013 due to time constraints that all election petition courts face currently.

The court had conducted a pretrial conference on 11th June 2013 when all the parties stated that various intentions to file interlocutory applications.

On 20th June 2013, the court ordered the 1st and 2nd respondents Preliminary Objection dated 19th June 2013 and the petitioners Notice of Motion dated 11th June 2013 be heard. On 20th June 2013 at 9.00 a.m. Notices did issue to M/s Akwala & Co Advocates but they did not attend court. The petitioner was in person and his advocates application for adjournment was rejected for the reasons stated on the file.

The 1st and 2nd respondents preliminary objection dated 19th June 2013 stated this:-

1. That the petition contravened the mandatory provisions of the election, Parliamentary and County elections petition Rules 2013.
2. That the petition was effectively filed through M/s Anziya & Co. Advocates whose principal parties or owner did not hold a valid practicing licence for the year 2013
3. The said Anziya & Co. Advocates have abused the licence granted to M/s Akwala & Co. Advocates by filing the said petition in the name of M/s Akwala & Co. Advocates.

The petitioner has also filed a Notice of Motion under Rules 33(1) of the Elections(Parliamentary) court Elections petition rules 2013. It is dated 11th June 2013 and seeks for the issue for scrutiny and/or recounting of votes cast at the Chekalini, Mwivona, Mapengo, Angayu, Baharini and Itumbu Primary Schools. The grounds upon which the application is based is that firstly sufficient reason to warrant the

recounting as the petitioner and the witnesses observed glaring irregularities during the voting, counting and tallying which irregularities can be addressed by a process of scrutiny and recounting.

Secondly, there were stations in which he was given less votes than he had actually garnered.

Thirdly, that the 3rd respondent is in agreement that the votes announced at Mwirona Polling station are not the actual votes garnered by the two contestants.

In his supporting affidavit the petitioner claims that there were anomalies and irregularities during the voting, counting and tallying process of the elections held on 4th March 2013.

He refers to the fact that at the Mwivona Polling Station, he got 126 votes as opposed to the one vote announced. At Mapengo polling station he noted there were irregularities.

He gives an example of Angayu polling station where he got 273 votes yet only 173 were announced.

At Chekalini he says his agent Benjamin Sabuni Luchizia witnessed polling clerks reject several of his said votes as well as consider the 3rd respondent's spoilt votes as genuine. He further noted at Baharini which 3rd respondent was given 205 votes yet he got 203 votes.

The 3rd respondent's Replying Affidavit denies any irregularities or anomalies and instead state that the elections were free and fair and the results lawfully declared in his favour.

The 3rd respondent, observed that the claims by the petitioner's agent one Mr. Benjamin Sabuni Luvisia were false and designed to mislead the court. He further observed that Itubu Primary and Baharini Primary Schools polling stations were not among those stations mentioned in the petition which regard to disputed results hence introducing new matters.

It was his observation that in no station has there been a mention of the petitioner garnering less votes than those counted and hence raising no sufficient grounds for the said scrutiny that is being sought. He invites the court to dismiss the said application with costs.

The court directed that both be heard simultaneously due to time constraints. It was anticipated that in the event the Preliminary Objection is not upheld then the notice of motion could be determined and a date fixed for trial.

I will deal with the petitioners notice of motion dated the 11th June 2013 first.

In his oral submissions to the court, the petitioner points out that in the case of Angayu Primary School those have two form 35's bearing different results.

He submits that at Chekalini polling station, his agent was locked out of the vote counting for 5 hours.

In another class, stream 2 at the Chekalini Primary School his agent was locked out for being intoxicated and hence he had no representation at the time the cast votes were counted.

Further he claims that at Mwivona Polling station, his agent was not given the form 35 to sign. The form he got he noted had erasures and the count was not clear.

At Itumbo Poling Station he also said his agents did not sign the form 35 in order to authenticate the

results(page 38 of the bundle by the 1st and 3rd respondents)

The petitioner also pointed out that at Baharini Primary School station No. 052) Pg 32 pf bundle) no agent signed the results. He raises similar sentiments about Angayu polling station at pg 35 of the said bundle where the agents did not sign.

The petitioner also pointed out that at the Koromaiti polling station no 046 results were omitted at the time of declaring the results as set out at page 12 of the bundle.

## **RESPONSES**

Mr. Mutubwa for the 1st and 2nd respondents objected to the said scrutiny of the votes cast. His main reason being that the same was not sought by the petitioner at the time the petition was filed on 8th April 2013. He referred to Rules 32 and 33 which provide for the petitioner to seek a specific prayer and that proper basis ought to have been laid for the same.

He referred to the case of **Joho Vs Nyange petition no. 4 of 2008 volume 2 of the Compendium on elections petition** in which the court held that the specific polling station where scrutiny was sought must be set out and it is only after evidence was adduced.

For the same reasons that he had raised a preliminary objection he stated that the petition was a non starter and the application therefore is premised on a defective petition.

He went ahead to point out that the Baharini and Mwivona Primary Schools were not mentioned in the petition and termed the prayer for scrutiny at the two station as a fishing expedition meant to build up his case and manipulate the case in his favour.

He referred to regulation 80 of the election act that provides for appointment of agents who shall request for a recount of the votes at the polling stations wherever necessary but which he noted was never done.

He quoted Section 120 of the Evidence Act stating that the petitioner was thus estopped from raising the issue at this point.

On the issue of absence of the petitioner's agent at the Chekalini ward the 1st and 2nd respondent's counsel said the respondent had no control over the conduct of the petitioner's agent who was found to have been intoxicated at the polling station(stream 2). He further noted that that this cannot be a valid reason for a scrutiny.

Mr. Getanda Advocate for the 3rd respondent associated himself with the submissions by Mr. Mutubwa for the 1st and 2nd respondent and went on to point out that the Baharini and Itumbu Primary School polling stations were not mentioned in the petition and the petitioner was to be confined only to the stations he had set out in the petition.

## **ANALYSIS**

The court has gone through all the filed applications, preliminary objections and replying affidavits including the list of authorities filed and quoted by the 1st and the 2nd respondents.

On the issue of scrutiny, I must point out that the Baharini and Itumbu Polling stations were not mentioned in the main petition filed on 8th April 2013.

In his submissions the petitioners pointed out the absence of signature of the his agent on form 35.

I have looked at the said page 32 and I note there are 3 signatures only. It is worth noting that none of the agents disclose the party to which they belong so it is not easy to confirm the allegations.

Further I note that the presiding officer did not record the reasons for the absence of the agents, or the reasons for refusal or failure by the candidates or agents to sign if any as provided for under Section 79(3) and (5) of the Elections Act No. 24 of 2011.

Although the Act at Section 79(6) states that such absence or failure to sign shall not invalidate results the sections presiding this case does provide the mandatory requirements which the presiding officer was under a duty to perform.

The petitioner pointed out that at the Itumbu Primary School polling station, the scenario was the same.(see page 33) of the 1st and 2nd respondents bundle).

In that station no agents signed and only the initials N/A appear. Giving the impression that simillary the presiding officer did not fully appreciate the mandatory duty of stating why the agents over candidates did not sign the form 35 as provided for under the Elections Act 2011.

Unfortunately, I agree with Mr. Getanda that the 2 stations were not part of the earlier ones set out in the petition and that no recount was sought.

The other concerns raised about Angayu polling stations and Mwivona and Chekalini have been considered as well.

At Angayu Primary School voting station Stream 1 at pg 28 of the bundle he has raised similar concerns of lack of a signature. At the said station, the form 35 had 5 names but no signatures. The presiding officer in that station did not give the reasons for their absence or refusal to sign the form 35 instead in the statutory comments section he says the polling was fair with no bad incident. It is not signed as should have been the case.

At Angayu Primary School, polling station stream 2 (pg 29 of the 1st and 2nd respondent) bundle 3 agents have signed. No reasons are given for the failure by the rest of the candidates or the agents to sign. At the statutory remarks section, the only statement is "All was well. The Presiding officer does not sign the same.

However, I note that despite those observations at the results as set out in the I.E.B.C. Tallying sheet are the same in terms of the votes in the petitioner's favour as well as the 3rd respondent. The petitioner or his agents did not call for a recount at the stations which was his right.

At the Mwivona Primary School polling station (pg 27 of the 1st and 2nd respondent's bundle) the form 35 shows only three names and signatures. The presiding officer's remarks was that " All reached a consensus" It is neither signed nor signed by the presiding officer.

Similarly no reasons are given for the absence or failure or refusal by the agents or candidates to sign.

At chekalini primary school,(047) stream one, I note all the 8 agents signed against their names.

In stream 2 of the same Chekalini Primary School 9 agents signed the form 35. The results were also in

line with the I.E.B.C. Print out annexed to the petition as exhibit "DMC 3C".

At Mapengo Primary School, polling station 045, the petitioner has observed that form 35 indicated that there were 595 registered voters. 2 ballot papers spoilt - total votes cast as 509 and 7 as the rejected votes. The total valid votes was indicated as 502 which was not the case in the final results which indicated the final results as 499 as total valid votes cast and 3 votes not accounted for.

I have compared both the I.E.B.C. Tallying sheet and the form 35 and I note that the petitioner's observations to be true. It would confirm that three(3) votes are unaccounted for and hence call for a scrutiny of the forms 35 and any other records relevant.

At Koromaiti Primary School polling station no. 046. The petitioner noted the results were omitted in the final tally. But a reading of the I.E.B.C. Tally sheet annexed to the petition I note they are included.

I am not sure whether the 1st and 2nd respondents saw the I.E.B.C. Tally sheet results. The petitioner was referring to as the I.E.B.C tally sheet. It appears to confirm the final tallies by 2nd case by the 1st and 2nd respondents.

## **FINDINGS**

I have carefully considered the petitioners observations on the various polling stations and in my view would require evidence by the petitioner to show how the absence of the agents affected the outcome of the polls on 4th March 2013 of course this is bearing in mind that the election's regulations act 2012 is very categorical. Rules 79(6) that the absence of agents in itself does not invalidate the results.

After considering the documents filed, I note that more would be required in order for the court to order a scrutiny, recount of the votes as sought by the petitioner.

Of course, my observations are only based on what is on the record but perhaps it is possible that after both parties have been heard that the 1st and second respondents included as well as the 3rd respondent then only would the court be in a position to determine whether the orders sought are really warranted. The issue of his agents intoxication in my view has not been attributed to the 3rd respondent either.

In my considered view the prayer for scrutiny is therefore premature and may be revisited after the evidence is taken and before judgement has been set down by the court.

I have of course noted that in past decisions by the court, judges have held a similar view. The 1st and 2nd respondents have attached the case of **HASSAN ALI JOHO VS HOTHNM NYANGE & ANOTHER(2006) e KLR. The Hon. Justice D.K. Maraga** J(as he then was) in similar circumstances held that "An order for scrutiny can be made when it is prayed for in the petition and when reason for it exists. It's stated in 15 Halsbury's Laws of England 4th Edition paragraph 846, it is not made as a matter of course. It is made where there is ground for believing that there were irregularities in the election process if there was a mistake or mistakes on the part of the returning officer or other election officials.

I have observed that in the instant petition before me the margin of about 168 is not too wide if indeed the petitioner can lay a basis by way of evidence that there is need for scrutiny.

I have also read the case of **Khaoya Vs Lubeki & Another(2008) 1 KLR E.P. Pg 590**

It was after hearing of the evidence that the Hon. Justices Okubasu, Mbito and Mwera, it found that sufficient basis had been laid to warrant scrutiny and recount of the ballot papers.

This court is alive to the fact that the petitioner did not request for a scrutiny in the petition itself. But I am also aware that the court has discretion to order for scrutiny in order to achieve just and speedy results in an election petition.

A reading of the petition however clearly brings out the petitioners sentiments. It is my considered view that it would cause injustice at this preliminary stage to deny him the said prayer. The safer position would be for the court to let him lay the basis for the same. The case of **Masinde Vs Bwire & Another Election Petition No. 9 of 1993** is a case in point that supports my view. The Hon. Justices Okubasu, Mbito and Mwera declined to allow scrutiny at a preliminary stage and for avoidance of doubt held that after hearing evidence from the petitioner and his witnesses the court could be at liberty to order for scrutiny.

In deciding if a scrutiny was necessary, I do find that it is only after evidence has been tendered that the court is in a position to find if indeed any irregularities could be excused, ignored or followed to be of such a nature as to affect the outcome of the election.

**Election 82(1 of the Elections Act 2011** does give the court wide discretion with regard to scrutiny of votes. It states “ An election court may on its own motion or an application by a party to the petition during the hearing of an election petition order for scrutiny of votes to be carried out in such a manner as the election court may determine”

It is my further view that in giving the court such powers, it implies that even in cases where no scrutiny was sought the election court may so order on its own motion but of course basis must be laid in all cases as provided for under **Rules 33 of the Election(Parliamentary and County Elections) petition Rules 2013.**

I have had the benefit of reading the case of **William Kamanda Vs Margaret Wanjiru Nairobi Election petition No. 5 of 2008(2008) e KLR** where the Honourable Justice Kihara Kariuki summarised the importance and purpose of scrutiny and similarly the Hon Justice Warsame in the Election petition case No 1 of 2008 for **Dickson Daniel Karaba Vs Hon Ngala Kariuki and others Nairobi.**

In the cases like **Onamu Vs Maitisi election petition No 2 of 1983** where the margin was 30 and **Kirwa Vs Mutivo election petition no. 13 of 1988** where the margin was 7

and **Hamed Said Vs Ibrahim Mwaruiwa petition no. 1 of 1983** where the margin was 62. It is observed that the courts ordered a scrutiny without a foundation being laid.

The more recent cases that have served as a guide in my view are **Richard Kalembe Ndile & Another Vs Dr. Patrick Musimba Mwau and 2 Others Election Petition no. 1 of 2013** consolidated in election petition no. 7 of 2013 in which the Hon Justice D.S. Manjanja ordered a recount.

Similarly, **petition no. 1 of 2013 Busia Philip Osore Ogutu Vs Michael Onywa** Amingo & two others. The Honourable Judge ordered a recount of votes too.

After considering the objections raised and the particulars set out by the petitioner, I find that the prayer for a recount is premature for the stations cited but the same may be revisited after the matter is heard.

For this application, I order that costs shall be in the cause.

### **RULING ON PRELIMINARY OBJECTION**

I now proceed to the preliminary objection raised.

The counsel for the 1st and 2nd respondents pointed out that

1. The petitioner did not have the results of the election annexed to the petition as provided for under Rule 10(1) (c) of the election(Parliamentary and County Elections) petition rules 2013.

He stated that the requirement was a mandatory hence the failure by the petitioner to annex the same was fatal to the petition as it formed the basis upon which the court would determine if the 3rd respondent was validly elected or not.

The 1st and 2nd respondents rely on case No. 2 on the list of authorities, **Amina Hassan Ahmed Vs Returning Officer Mander County, I.E.B.C. and others unreported Garissa petition No. 4 of 2013.** On this issue he filed more authorities namely **Mututho V Kihara and 2 Others(Omolo Bosire and Okubasu JJA)(2008) KLR Pg 11.** In this case it was held that since the petitioner had failed to state the results, any findings on the issue raised would serve no useful purpose. Any evidence adduced or to be adduced would be intended to show that certain irregularities affected the outcome of the election hence without the result it would be impossible to relate the irregularities to the result.

.....likewise if the date of the election is omitted that omission would be fundamental his nature and would render the petition incurably defective.

2. The petition the 1st and 2nd respondents claim was effectively filed through the firm of M/s Anziya & Co. Advocate whose principal partner or owner does not hold a valid practicing licence for the year 2013.

Further

3. That the said Anziya & Co Advocates has abused the licence granted to M/s Akwala & Co. Advocates by filing the said petition in the name of Ms. Akwala & Co. Advocates.

In support of the two issues the 1st and 2nd respondent have relied on case of **Lukas Njuguna S. Kariobia Vs Consolidated Bank(K) Ltd E KLR**

In this case the Honourable Justice Fred A. Ochieng held that the application before him dated 20th June 2005 was incompetent on the grounds that it was drawn and signed by an unqualified person. The judge further found that it was not sufficient that Mr. Karuga Wandai was an advocate to the roll of advocates but that he ought to have had a current practicing certificate as at 20th June 2005 to be

deemed to be a qualified person. In arriving at that decision, the Judge distinguished the same from *Kajwang Vs Law Society of Kenya(2002) KLR 846* where the court held that the society\*(LSK) was guilty of selective concealment and utilization of information.

The society should have raised the issue at the earliest opportunity and not at the time the case had been heard fully.

The said Hon Justice Ochieng, referred to the cases of **Obura Vs Koome(2001) IEA 175 at 177 and Delphis Bank Ltd Vs Behal & others(2003) E.A 4.2 at 414.**

In all the above cases the applications/suits filed by unqualified advocates were struck out with costs.

The 1st and 2nd respondents also observed that the petition was never served as provided for under the law. Rule 13 of the petition rules. He relied on the case of **Kumbatha Naomi Sidi Vs The County Returning Officer Kilifi County Petition No. 13 of 2013.**

When alerted that indeed service was by way of advertisement in the standard Newspapers he abandoned the idea.

The security of costs Mr. Mutubwa also noted was deposited on 19th April 2013 out of time stipulated, within 10 days of filing the petition. He noted that no effort was made to seek enlargement of time.

He relied **on Malindi petition no. 13 of 2013(Supra).** Mr. Mutubwa has also appointed out that the mention notice dated 12th June 2013 served upon his firm bears a signature of semblance to that on the petition and the notice of motion dealt with earlier.

He produced a letter from the Law Society of Kenya dated 25th June 2013 which confirmed that the advocate Anziya Laban Akwala Advocates last held a valid practicing advocate certificate in the year 2011.

Mr. Getanda associated himself with Mr. Mutubwa's submissions. The petitioner in his response that he deposited monies at Nakuru on 18th April 2013 and attained a receipt on 19th April 2013.

He provided a photocopy of the deposit slips to the court. He maintained that Mr. Munyendo was his advocate and not Mr. Anziya.

## **FINDINGS**

I have carefully considered the issues raised. I will decide on the issues not in the order raised to deal with complexity issue last on the list.

**On the issue of securing of costs.** I am satisfied the petitioner paid Kshs.90,000.00 He paid on 18th April 2013 at Flamingo Branch Nakuru of the Kenya Commercial Bank. It was paid into account for the Judiciary Kakamega deposited account No. 1103767461. A further sum of Kshs.10,000.00 was paid on the same date 18th April 2013.

A receipt was then issued by the court on 19th April 2013 for a sum of Kshs100,000.00

After considering the deposit slips, I am satisfied that the costs were paid in good time and that is really what matters. The issuance of the receipt a day later did not change the fact that the money was paid in

good time. i.e. within 10 days from the date of filing the petition on 8th April 2013 as provided for under Rules 11(1) of the elections petition rules 2013.

**ON THE ISSUE OF SERVICE**

I have perused the court file and I can confirm that indeed there was service on 13th April 2013. A copy of the digger classified page was attached which I have carefully studied. |Whereas the issue was laid to rest, I have observed that the advertisement did not comply with the requirements of Rule 13(3) of the election Petition rules 2013. The same was on the Standard Newspapers of 13th April 2013. The font size instead of being size twelve appears to be less than six. Probably 3 or less.

The dimensions were to be a minimum of 10 x 10 centimetres but on measuring the same is 8 by 4 cm which falls far below the required font. I am not even certain it was legible or recognizable to the parties as it could easily escape ones attention.

A response was not filed by the respondents within 14 days as provided for under Rules 14(1) of the election rules. My reading of the Section for service are couched in mandatory terms and ought to have been adhered to by the petitioner and it would explain why it was not easily captured in the digger classified page on 13th April 2013.

If the issue had been pursued further, I would note that both parties were already on board and I would in exercise of my discretion under rule 4(1) rely on the principle of the overriding objective to order to facilitate. The just expectations and proportionate and affordable resolution of the election law, the constitution and the Act.

I would find that no prejudice would be suffered by the respondents since the overall objective was to give a verdict that touches on so many other people of Chekalini ward and give effect to their wishes.

I have also considered the issue of **non attachment of the results of the election.**

What the petitioner has annexed as exhibit 3 is an I.E.B.C. Tally sheet. I have not heard the I.E.B.C., the 1st respondent to say it was not a true reflection of the results of the Chekalini County Assembly ward. Already on paragraph 7 of the affidavit by Mr. James Owuor Akando at pg 12 clearly sets out the same results in the final tally.

However, the petitioner elected not to file any replying affidavit in response. The question the court has to grapple with is therefore whether the results as per the I.E.B.C. Tally suffice as the results of the declared election for member of county assembly.

I do take Judicial Notice of the fact that the contents of the I.E.B.C. Tally sheet annexed to the petition has not been objected to by the I.E.B.C. As not being a true reflection of the results of 4th March 2013.

Indeed I form 36 is a tally sheet of the result of the election save for the form that varies with what I note is the I.E.B.C. Tally sheet. Otherwise it is true reflection of the results that were declared at the Chekalini ward(code 0994) Lugari Constituency Kakamega County.

My reading of rules 10(1) (c ) is as follows. An election petition filed under rule shall

a .....

b.....

c “the results of the election if any and however declared”

My understanding of the phrase “if any” is that that the result “if available are to form part of the petition.

My further understanding of “however declared” also in my understanding is that in whatever form the result were declared”

Since I do not have the benefit of a response from the petitioner, I want to presume that the I.E.B. Tally sheet is what he was able to obtain at the time of filing the petition. If transposed to form 36 my view is that the results would not be altered in any way and I am therefore quick to point out that the submissions that there were no results cannot be true.

I have considered Mombasa Election **petition no. 1 of 2013 Philip Munge Ndolo Vs Omar Mwinyi Shimbura and 2 others.**

The Honourable Justice M. Odera dealt with the same issue as the one before this court and in line with her findings I also rely on Rule 4 of the Elections Rules which provide for the **“Overriding objective”** Rule 4(1) It is my view that no prejudice has been suffered by any party due to failure to annex to the petition the form 36 in any event the form 35 are on the file.

The I.E.B.C. Tally sheet attached to the petition is in my view reflects what ought to have been at the form 36's relating to the Member of County Assembly Chekalini ward and none of the parties is in doubt of the result that are subject to a challenge in this court.

In the circumstances I find that the petitioner did comply with the said legal requirement under Rule 10(1) (c) and the objection to this issue fails since I find no merit in the case.

**The last and major issue** is the submission by the respondents that the petition and all subsequent application were addressed by Mr. Anziya.

Mr. Mutubwa in his submission claimed that although M/s Akwala & Co. Advocates were on record, the signatures on the documents were by Mr. Anziya who does not have a current practicing certificate for the year 2013.

Although none was on the court file, the counsel drew my attention to a mention notice dated 12th June 2013 drawn by M/s Anziya & Co. Advocates for the petitioner applicant.

The heading on the notice clearly refers to the current petition and so there is no doubt it was with regard to this case.

What is worth noting is that the said firm had not been placed on the record for the petitioner applicant at the said time.

The said mention notice in my view is what may have triggered the objection and this was after comparisons of the signatures had been made.

The court has perused the following.

1. petition dated 21st March 2013
2. Two(2) notice of motion dated 5th April 2013 and filed on 8th April 2013 under Certificate of Urgency by the petitioner(The certificate of urgency however bears a different signature)
3. Notice of Motion dated 11th June 2013 filed on 12th June 2013.
4. Mention Notice dated 12th June 2013 by M/s Anziya & Co. Advocates. An observation of all the signature leads this court to conclude and hence concur with the respondents that indeed the signatures were by one and the same person.

I would have expected that in the face of such serious allegations, a replying affidavit would have been filed by Mr. Anziya Advocate, Mr. Akwala Advocate or Mr. Munyendo Advocate who has all along appeared for the petitioner.

As it stands today even in the absence of expert evidence on the signature is that the allegations have not been rebutted and hence remain unchallenged.

I have considered the cases cited by the petitioner(1st and 2nd) on this issue. I have further considered **Kenya Power and Lighting Co. Vs Chris Mahinda T/A Nyeri Trade Centre** -Nyeri Civil Appeal (Appl) No. 148 of 2004. The Honourable Justices Omolo, Okubasu and Deverell JJA held that when the Notice of Appeal and Memorandum of Appeal were filed the advocate in that case had not been issued with a certificate for the year 2004 making the two documents incompetent. [They (both) were struck out with costs to the applicant.

More recently in the case of **Willis Evans Otieno Vs Law Society of Kenya and 2 Others(2011) e KLR** The Hon. Justice D. Musinga held that withdrawal of instant case could not validate the petition as long as they were filed by an unqualified person.

I have considered whether **Section 159(2) (a) of the Constitution and Rules 4(1)** of the Election Rules that deals with the overriding objective would apply but did that in cases of incompetencies that arise the same cannot be relied on. This is because **Section 9 of the Advocates Act Cap 16** states inter alia. 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 Roll and
- c. He has in force a Practicing certificate and
- d. He has in force an annual license

The Law Society of Kenya in their letter of 25th June 2013 by Mercy K. Wambua, Deputy Secretary(Compliance and Ethics) has confirmed that according to their records Anziya Laban Akula Advocate does not hold a current(2013) Practicing certificate. He has held one in the year 2011.

In the absence of any responses to this very serious allegations of incompetencies, this court has no option but believe the same to be true. I find that he was an unqualified person by dint of Section 931 and 34 of the Advocates Act.

Notwithstanding the Advocate's absence at the hearing of this application, the relevant affidavits ought to have been on the file to consider so as to arrive at a decision.

I further find therefore that indeed the petition was signed by the said Anziya Advocate as well as the Notice of Motion dated 12<sup>th</sup> June 2013. The said advocate has in effect abused the license granted to M/s Akwala & Co. Advocates by filing the said petition in the name of M/s Akwala & Co. Advocate.

Effectively, the court's findings on the Notice of Motion dated 12th June 2013 are effected by the said findings and incompetency and is struck out with costs.

It is unfortunate that save for this aspect of incompetence, the petitioner and of course all the residents of Chekalini ward, Lugari Constituency would have had their day in court.

The petition dated 12th May 2013 and filed on 8th April 2013 is also struck out with costs to the respondents.

**M.I.G. MORANGA - P.M.**

25/7/2013



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