



**Wasike v Lusenaka & another (Election Petition Appeal  
E002 of 2022) [2023] KEHC 3671 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3671 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
ELECTION PETITION APPEAL E002 OF 2022**

**REA OUGO, J**

**APRIL 25, 2023**

**BETWEEN**

**RICHARD JESOME WASIKE ..... APPELLANT**

**AND**

**ANTHONY LUSENAKA ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

*(Being an Appeal from the Order and Ruling of Hon. P. N. Gesora  
the Chief Magistrate in Bungoma Chief Magistrates Court  
Election Petition No. 2 of 2022 delivered on 15th November 2022)*

**JUDGMENT**

1. This appeal emanates from the ruling of Hon. P.N. Gesora on a notice of motion filed by the 1<sup>st</sup> respondent challenging affidavits and amended petition that had been filed by the appellant and sought that the affidavits and amended petition be expunged and or be struck out. The application was on grounds that the affidavits were not properly commissioned as envisioned by law as the affidavits were commissioned by an advocate who had not at the time of commissioning the affidavits renewed his practicing certificate.
2. The 1<sup>st</sup> respondent also pointed out that the amended petition was filed without leave of court, nor concurrence of the parties. He alleged that the amended petition introduced new material, raised election offences outside the confines and in violation of Article 87 (2) of the Constitution and section 76 (1) (a) of the Elections Act.
3. The appellant opposed the application on grounds that an advocate practicing without a practicing certificate amounts to professional misconduct but the same does not affect the validity of documents prepared by such an advocate including affidavits.



4. The trial magistrate after considering the application, the response thereto and the parties' submissions allowed the application. The trial magistrate held as follows:

“There is no doubt the Petitioner’s affidavit in support of the petition herein was commissioned by Lazaro David Were who had not taken out a Practicing Certificate at the time....The main issue herein is what effect does the action by Lazaro David Were have on the petition herein.....

The decision in *National Bank of Kenya Limited and Anaj Warehousing Limited* [2015] eKLR cited by the Petitioner is clearly distinguishable with the current scenario. The Supreme Court was dealing with a situation where document that is instrument or document of conveyance had been prepared by an advocate who at the time was not holding a current practicing certificate and not commissioning of an affidavit.

In the end I find and hold that the anomaly noted has a fatal effect to the Petition herein. It is true that leave was granted to amend his petition. This was done with the understanding that all procedural aspects as regards the validity of the petition had been complied with.”

5. The appellant now challenges the decision of the subordinate court on the following grounds enumerated in his memorandum of appeal dated 1<sup>st</sup> December 2022:

1. That the Learned Trial Magistrate erred in law and in fact in allowing the 1<sup>st</sup> Respondent’s Notice of Motion dated 19<sup>th</sup> October 2022 when the same was contrary to the express provisions of the [Advocates Act](#).
2. That the Learned Trial Magistrate erred in law and in fact in striking out the Appellants Petition and amended petitions without considering the provisions of Article 159 of the [Constitution](#) and other relevant provisions of the Law and more specifically the [Advocates Act](#).
3. That the Learned Trial Magistrate erred in law and in fact in holding that the petition before the court was incurably defective when the evidence on record showed otherwise.
4. That the Learned Trial Magistrate erred in law and in fact in failing to consider the pleadings and, evidence on record leading to miscarriage of justice.
5. That the Learned Trial Magistrate erred in law in failing to follow judicial decisions leading to miscarriage of justice.

6. The appeal was dispensed by way of written submissions and all parties have filed their respective submissions. The appellant in his submissions identified the following issues for this courts determination:

- a) Whether the commissioner for oaths had been struck out of the roll of advocates at the time of commissioning the affidavits.
- b) Whether the defective affidavit can be cured
- c) The legality of the amended petition.
- d) Whether the Court has jurisdiction to hear the appeal.

7. The appellant submits that the affidavit in support of the petition sworn by Richard Jesome was commissioned by Lazaro David Were while witness affidavits sworn on 7<sup>th</sup> September 2022 were before Simiyu N. Wattangah Advocate. There was no evidence that the advocates had been struck off the roll



of advocates. They cited the case of *National Bank of Kenya Limited and Anaf Warehousing Limited* (supra) where the court held 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 was at the time not holding a current practicing certificate. In any event the defect is curable under Article 159 of the *Constitution* and Order 19 Rule 7 of the *Civil Procedure Rules*. He submitted that there was no prejudice whatsoever to be suffered by the respondents. They also relied on the decision in *Microsoft Corporation v Mitsumi Computer Garage Ltd* (2001) 2 E.A. 460.

8. In addition, the appellant submits that the petition was amended pursuant to section 76 (4) of the *Elections Act* and it was therefore wrong for the trial magistrate to grant leave to amend the petition only to turn around and take that right away with its other hand. It contends that this court has jurisdiction to hear the appeal and submits that the 1<sup>st</sup> respondent has misunderstood the provisions of the election laws that an appeal must be filed and heard within 6 months of filing the petition.
9. The 1<sup>st</sup> respondent in his submissions challenges the jurisdiction of the court to entertain the appeal the petition having been filed on 7<sup>th</sup> September 2022. It argues that a petition must be heard and determined within 6 months from the date of filing, after which proceedings in an election petition become a nullity. The 6 months lapsed on 7<sup>th</sup> March 2023. The appeal process ought to have been concluded earlier that 7<sup>th</sup> March 2023 as the ruling of 15<sup>th</sup> November 2022 struck out the petition without consideration of the substantive issues raised therein. He cited the case of *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 Others* [2019] eKLR where the Supreme Court held that courts have no jurisdiction to extend timelines for hearing an election petition and a substantive hearing of an election petition cannot continue where the timelines for hearing a petition has lapsed. It was submitted that the question as to the timelines within which the substantive hearing of an election petition goes to the root of this case and divests this court of its jurisdiction to proceed and hear other issues for determination as it will amount to an academic exercise since the court lacks jurisdiction to open the proceedings in the lower court.
10. On the legality of the amended petition, the 1<sup>st</sup> respondent submitted that the appellant having filed the petition on 7<sup>th</sup> September 2022, the *Constitution* and Statute limited the time within which to introduce such amendments to 28 days from the date of the declaration of the results as provided for under section 76(1) of the *Elections Act* and Article 87(2) of the *Constitution*. The results were declared on 11<sup>th</sup> August 2022 and the said amendments ought to have been made by 8<sup>th</sup> September 2022. The appellant however filed the amended petition and affidavits in support thereof on 7<sup>th</sup> October 2022 outside the statutory timelines. They also claimed that the amended petition introduced new matters and the trial magistrate was correct to strike it out.
11. On whether the affidavits in support of the petition were duly commissioned in accordance with the law, it was submitted that the advocate that commissioned the documents did not have a practicing certificate at the time of commissioning which rendered the affidavits incurably defective. They cited the case of *Pius Njogu Kathuri v Joseph Muthura & 3 Others* [2018] eKLR where the court stated:

“ 19. The Supreme Court in Petition No. 36 2014 *National Bank of Kenya v Anaf Warehouse Limited*.....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.”
12. The 1<sup>st</sup> respondent submitted that an affidavit commissioned by unqualified advocate is as good as an affidavit not commissioned at all (see [Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 Others](#) [2013] eKLR). They also relied on 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.”

13. According to the 2<sup>nd</sup> respondent, the only issue before the court was whether the appeal should be allowed. The 2<sup>nd</sup> respondent submits that affidavits must be commissioned by a qualified advocate and the court cannot depart this from the law.

### **Analysis and Determination**

14. The main issue for consideration before the court is the fate of a petition where the affidavit in support of a petition was commissioned by an advocate without a practicing certificate.
15. The appellant filed his petition on 6<sup>th</sup> September 2022 together with an affidavit of Richard Jesome Wasike commissioned by David Were Advocate. He also filed witness affidavits of Eluid Wanjala Mulama and Ellon Sifuna sworn on 7<sup>th</sup> September 2022 were commissioned by Simiyu Wattang’ah advocate.
16. Although the petition was amended and the amended petition filed on 7<sup>th</sup> October 2022, I have perused the record and note that at no time did the trial magistrate grant the appellant leave to amend the petition. Section 76 (4) of the *Elections Act* provide:

“A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.”
17. The appellant amended his petition and filed his amended petition and an affidavit in support of the amended petition contrary to section 76 (4) of the *Elections Act*. The appellant was required to make an application for leave to amend pleadings within 28 days of the declaration of the results of the election. The results having been declared on 11<sup>th</sup> August 2022, then the petition ought to have been amended within 28 days, to mean the amended petition ought to have been filed by 8<sup>th</sup> September 2022. The amended petition and the affidavits in support thereof were therefore filed irregularly and in contravention of the strict timelines under section 76 (4) of the *Elections Act*. The amended petition was therefore unprocedurally filed as the same was not filed within 28 days and without the leave of court and the trial magistrate was correct to strike it out.
18. Therefore, the petition that was properly before the court is the appellant’s petition filed on 6<sup>th</sup> September 2022. Rule 8(4) (b) of the *Elections (Parliamentary and County Elections) Petitions Rules* 2017 requires that the petition be supported by an affidavit sworn by the petitioner. The same was supported by an affidavit sworn by the petitioner and commissioned by David Were Advocate. The 1<sup>st</sup>



respondent relied on the letter from the Law Society of Kenya, the custodian of the records of Lazaro David Were Advocate. In the letter the Law Society of Kenya stated:

“Lazaro David Were Advocate (P.105/4608/01) has paid for his certificate for the year 2022 and was issued with a receipt dated 23<sup>rd</sup> September, 2022. He is therefore only certified to practice law as from the said date.”

19. It is not in dispute that the appellant’s affidavit in support of the petition was commissioned by an advocate without a practicing certificate at the time the document was commissioned. The main issue for the court’s consideration is how to handle an affidavit that has been commissioned by an advocate who does not hold a valid practicing certificate; and the effect of such an affidavit to the petitioner’s case.
20. The appellant submitted that the Supreme Court validated a document executed by an advocate who did not have a practicing certificate (see *National Bank of Kenya v Anaj Warehousing Ltd supra*). It further submitted that the defect was curable under Article 159 of the *Constitution* and Order 19 Rule 7 of the *Civil Procedure Rules*. The 1<sup>st</sup> respondent on the other hand submits that the *National Bank of Kenya case supra* cited by the appellant deals with documents that are drawn by advocates without a practicing certificate but not commissioning of documents. The 1<sup>st</sup> respondent relied on the decision in *Pius Njogu Kathuri v Joseph Muthura & 3 Others* [2018] eKLR to buttress his argument.
21. In *National Bank of Kenya v Anaj Warehousing Ltd supra* the issue before the court was whether a document or instrument of conveyance is null and void for all purposes, on ground that it was prepared, attested and executed by an advocate who did not have a current practising certificate, within the meaning of section 34 (1) (a) of the *Advocates Act*. The Supreme Court proceeded to look at section 34 (1) of the *Advocates Act* which prohibits unqualified persons to directly or indirectly take instructions or draw or prepare any document or instrument relating to:
  - a) relating to the conveyancing of property; or
  - b) for, or in relation to, the formation of any limited liability company, whether private or public; or
  - c) for, or in relation to, an agreement of partnership or the dissolution thereof; or
  - d) for the purpose of filing or opposing a grant of probate or letters of administration; or
  - e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or
  - f) relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument

22. The court in *Pius Njogu Kathuri (supra)* was of the view that:

“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.”
23. Section 4 of the *Oaths and Statutory Declaration Act* stipulates the role of a commissioner for oaths. It provides that:
- “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.”
24. Commissioners for oaths are appointed by the Chief Justice and must be practicing advocates (see section 2 of the *Oaths and Statutory Declaration Act*). Under section 9 of the *Advocate’s Act*, an advocate is any person who is admitted as an advocate, whose name is listed on the roll, and holds a valid practicing certificate. Lazaro David Were, the person who commissioned the affidavit to support the petition was not qualified to act as a commissioner of oaths since he did not possess a valid practicing certificate at that time. In practice, affidavits are considered as the evidence in support of the petition. The court in *Muktar Bisbar Sheikh v Independent Electoral & Boundaries Commission & 2 others* [2017] eKLR stated:
- “Blacks’ Law Dictionary defines an affidavit as a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths such as a Notary Public. An affidavit therefore must be voluntary, written and commissioned. If any of these three ingredients is missing, then that document is not an affidavit. In this case the purported supporting affidavit is not commissioned. That document cannot be called an affidavit as known in law.”
25. If the affidavit is not duly declared before a qualified commissioner of oaths, it may diminish the evidentiary value of such document. The document filed by the appellant in support of his petition was therefore not an affidavit in its strict sense. The trial magistrate cannot be faulted for expunging the same from the record. The petition was therefore filed without a supporting affidavit contrary to Rule 8 (4) (b) of the *Elections (Parliamentary and County Elections) Petitions Rules* 2017. The effect of an election petition filed without a supporting affidavit was discussed in *Stephen M Mogaka v Independent Electoral & Boundaries Commission (IEBC) & 2 others* [2017] eKLR where the court stated:
- “From the above Rules a Petition is required to be filed with Petitioner’s supportive affidavit accompanied by affidavits of witnesses the petitioner intends to call as his or her witnesses. It is mandatory that the affidavits mentioned under the above Rules, be filed together with the Petition. In view of the aforesaid requirements, it is my view that the Petitioner’s witnesses affidavits are part and parcel of the petition. They must accompany the petition at the time of filing and cannot be filed after the timelines set under the *Constitution* and the *Elections Act* for filing a petition of 28 days has lapsed.



58. The Petitioner’s supportive affidavit and those of his witnesses having been struck out and expunged from the record, the petition is not supported by any affidavit, and cannot proceed to hearing without affidavits being on record. The Petitioner’s Counsel urged, incase the Court finds the affidavits defective, it can exercise its discretion to admit them or allow the petitioner to file fresh affidavits in support of the petition.”
26. The appellant has urged the court to consider that non compliance with provisions of Rule 8 (4) (b) of the *Elections (Parliamentary and County Elections) Petitions Rules* 2017 is curable by Article 159 of the *Constitution*. The provisions of Rule 8 are not mere technical requirements but are substantive and go to the root and substance of issues. In *Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others*, Nairobi Election Petition No. 4 of 2013, the Court held as follows:
- “...the provisions of Rule 10 and others aforesated [now Rule 8] are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon... in the circumstances and for the reasons discussed above, the Petitioner’s application seeking amendment...is hereby refused and dismissed...The end result is that the said petition must be and is hereby struck out, with costs to the Respondents.”
27. In the conclusion I find that the trial court cannot be faulted for striking out the petition as the appellant failed to comply with Rule 8 (4) (b) of the *Elections (Parliamentary and County Elections) Petitions Rules* 2017. It is not curable by Article 159 of the *Constitution*. I find that the appeal is without merit and is hereby dismissed. The respondents shall have the costs of the appeal.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 25<sup>ST</sup> DAY OF APRIL 2023**

**R.E. OUGO**

**JUDGE**

In the presence of:\*\*

Mr Maloba For the Appellant.

Mr. Wanjala h/b for Mr. Makokha for the Appellant

Mr. Okaka h/b for Mr. Wasilwa & Miss Ashioya for the 1<sup>st</sup> Respondent.

Mr. Okaka h/b for Mr. Kassim for the 2<sup>nd</sup> Respondent.

Wilkister C/A

