



REPUBLIC OF KENYA



**Walubengo v Independent Electoral and Boundaries Commission & 2 others (Election
Petition 2 of 2022) [2022] KEHC 16090 (KLR) (30 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
ELECTION PETITION 2 OF 2022
WM MUSYOKA, J
NOVEMBER 30, 2022**

BETWEEN

KELLY BARASA WALUBENGO PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**WEBUYE WEST CONSTITUENCY INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION RETURNING OFFICER 2ND RESPONDENT**

SITATI DANIEL WANYAMA 3RD RESPONDENT

RULING

1. When the 2nd respondent took to the witness stand on 24th November 2022, questions were posed to her by Mr. Omeri, one of the Advocates for the petitioner, during cross-examination, as to whether she knew a Grace Adhiambo Odongo, and she responded that she did not know her, and had never met anyone by that name. She stated that she signed her affidavit, in support of her response to the petition, before her Advocate, Mr. Vincent Oloo, and that a Grace Adhiambo Odongo commissioned it, but she never met the person.
2. As a follow-up to the cross-examination of 24th November 2022, on 25th November 2022, Mr. Nyaribo, the lead Advocate for the petitioner, raised an issue on the propriety of the affidavit sworn by the 2nd respondent in view of her admission that she did not appear before the Commissioner for Oaths, when the said affidavit was sworn. He went on to submit that there was no evidence that an Advocate by the name Grace Adhiambo Odongo existed, as the number indicated against her name, in the rubberstamp of the Commissioner for Oaths, embossed on the affidavit of the 2nd respondent, purported to be hers, was in fact that of Oribo Sheilla Salome, and that the number assigned to Grace Adhiambo Odongo was instead P105/18506/2020. He stated that what was before the court was a potential forgery, and



the court was invited to strike out the affidavit sworn by the 2nd respondent, and any other affidavit commissioned by the said Grace Adhiambo Odongo. He cited *Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 others* [2018] eKLR (Gitari, J), to make the point that affidavits must comply with the *Oaths and Statutory Declarations Act*, Cap 15, Laws of Kenya, Order 19 of the Civil Procedure Rules and Rule 13 of the Elections (Parliamentary and County Elections) Petition Rules, 2017. He submitted that Article 159 of *the Constitution* would not apply to the situation, as what he was raising was a matter of law and not a technicality of procedure. He asserted that there could be elements of criminality as there were possibilities of forgery and impersonation. He stated that the affected affidavits were of Allan Okombo Kombo, the 2nd respondent, Victor Wanyonyi Mirundu, Stephen Mandila Wanyonyi, Alex Wafula Nyongesa and Mukenda Fred, all sworn on 27th September 2022. He urged that the entire bundle of exhibits and any reference made to them in the proceedings so far conducted be expunged from the record.

3. In response, Mr. Oloo, the Advocate appearing for the 1st and 2nd respondents, stated that Grace Adhiambo Odongo was not known to the 2nd respondent, and that he knew her personally. He submitted that the said Grace Adhiambo Odongo did commission the impugned affidavit of the 2nd respondent. He explained that there was an issue about her admission number. She had been admitted in 2017, and the number indicated in her Commissioner of Oaths stamp, as embossed on the impugned affidavit, was hers. He offered that she could appear virtually and explain herself. He asserted that she was a Commissioner for Oaths.
4. Mr. Masinde, one of the Advocates for the 3rd respondent, submitted that the issue ought to have been raised personally with Mr Oloo. He noted that the same could have far-reaching consequences on the entire process. He urged that the petitioner files a formal application. He observed that the Law Society of Kenya had been having issues due to the large numbers of Advocates admitted recent times.
5. In rejoinder, Mr. Nyaribo asserted that the matter was fairly straightforward, and that it did not require availing documents to explain the anomaly. He asserted that as officers of the court Advocates could raise any issue before the court at any time. He further submitted that the challenges the Law Society of Kenya might have with large numbers ought not be addressed by the court, as the court cannot take judicial notice of such challenges. He asserted that the petitioner was ready to take the witnesses of the 3rd respondent if the court so directed.
6. After hearing all the sides, I directed the petitioner to file a formal application within 24 hours, to be argued on 28th November 2022, and to serve the same on the respondents, who were to file and serve their responses within set timelines. The 2nd respondent was then stood down from the witness box.
7. The petitioner filed the formal application as directed, being a Motion, dated 25th November 2022. It seeks that the court finds that the affidavits sworn on 27th September 2022, before Grace Adhiambo Odongo, by Peris Saina Cheruto, Mukenda Fred, Alex Wafula Nyongesa, Stephen Mandila Wanyonyi, Victor Wanyonyi Mirundu and Allan Okomba Kombo, were fatally defective; the striking out of the said affidavits; the striking out or expunging from the record of the annexures or documents exhibited in the said affidavits, and expunging of any references in the proceedings to any of the said annexures or exhibits; the striking out or expunging of any of those annexures or exhibits; and an order barring the deponents of the said affidavits from testifying on behalf of the 1st and 2nd respondents.
8. The grounds on which the Motion is premised are on the face of it, and the said grounds are regurgitated in the affidavit sworn in support of the application, by the petitioner, on 25th November 2022. In summary the grounds and facts are that the 2nd respondents had on 24th November 2022 adopted her affidavit, sworn on 27th September 2022, which had been commissioned by Grace



Adhiambo Odongo, as Commissioner for Oaths. The 2nd respondents also referred to several annexures to her affidavit, all of which had been certified as true copies of the originals by the said Grace Adhiambo Odongo. The said Grace Adhiambo Odongo had also purported to have commissioned affidavits sworn by five other individuals, in support of the response by the 1st and 2nd respondents. It is averred that when the 2nd respondent testified, she stated that she had never met anyone by the name Grace Adhiambo Odongo, and that that name was alien to her. She had further stated that she executed the affidavit before Mr. Vincent Oloo, Advocate. It is averred that that testimony undermined the authenticity and veracity of her affidavit, and the others alleged to have been executed before the alleged Commissioner for Oaths. It is stated that, according to the stamp affixed to that affidavit, her admission number is identified as P105/14070/17. The petitioner avers to have had searched the Law Society of Kenya website for the details of the said Grace Adhiambo Odongo, as against the number P105/14070/17, and established that that number was assigned to another Advocate, and that, according to that website the number for Grace Adhiambo Odongo was P105/18506/20. He avers that going by that it would appear that the said Grace Adhiambo Odongo was admitted in 2020, and had not qualified yet for the commission to administer oaths and statutory declarations. He avers that he had established that the number P105/14070/17 belonged to an Oriwo Sheilla Salome. It is asserted that the 2nd respondent never appeared before any Commissioner for Oaths. It is further averred that the variance and incongruence between the information on the stamp of the Commissioner for Oaths and the Law Society of Kenya search engine suggested forgery. It is also suggested that Grace Adhiambo Odongo was not a qualified Advocate and was masquerading as a Commissioner for Oaths, the combined effect of which should be to render the affidavits, purportedly sworn in support of the response by the 1st and 2nd respondents, incompetent. The petitioner avers that he wrote to the Chief Registrar of the Judiciary, who is the custodian of records relating to persons who have been admitted as Advocates of the High Court of Kenya and to whom the commission to administer oaths and statutory declarations has been given, and, by a letter dated 25th November 2022, there is information that the said Grace Adhiambo Odongo was not a Commissioner for Oaths.

9. Annexed to that affidavit are several attachments. The first is the jurat of the affidavit of the 2nd respondent of 27th September 2022, showing the purported Commissioner for Oaths stamp of Grace Adhiambo Odongo, which indicates her number as P105/14070/17. The second is a page from the Law Society of Kenya search engine, depicting Odongo Grace Adhiambo as an active Advocate, whose identifier is P105/18506/20. The third document is a page extracted from the Law Society of Kenya search engine, depicting Oriwo Sheilla Salome as P105/14070/17. The fourth is a letter from the Advocates for the petitioner, dated 25th November 2022, addressed to the Chief Registrar of the Judiciary, requesting information on the statuses of Odongo Grace Adhiambo and Oriwo Sheilla Salome as Advocates and Commissioners for Oaths. The fifth and last document is a letter, dated 25th November 2022, from the Chief Registrar of the Judiciary, confirming that Odongo Grace Adhiambo and Oriwo Sheilla Salome are Advocates of the High Court of Kenya, numbers P105/18506/20 and P105/14070/17, respectively, having been admitted on 26th November 2020 and 25th October 2017, respectively. It is further confirmed that Oriwo Sheilla Salome was appointed a Commissioner for Oaths on 28th May 2021, and that Odongo Grace Adhiambo is not a Commissioner for Oaths.
10. The respondents have reacted to the said application; the 1st and 2nd respondents, vide affidavits sworn by the 2nd respondent on 27th November 2022 and 29th November 2022; and the 3rd respondent vide grounds of opposition, dated 28th November 2022.
11. In her affidavit, the 2nd respondent avers that she and the 5 presiding officers signed their affidavits after a pre-trial briefing with her Advocates on 27th September 2022 at Nairobi. She avers that she signed hers before Mr. Oloo, and a woman who she was told would commission the affidavits, whose



name she later learnt was Grace Adhiambo Odongo. She then goes on to explain her testimony on 24th November 2022. She accuses the petitioner of jumping the gun, by not waiting to get an explanation, at the stage of re-examination, of the circumstances surrounding the commissioning of the affidavit, and similarly those of the other witnesses. She further avers that there was discrepancy between the admission number of the Commissioner for Oaths, as reflected in her affidavit and that in the online portal of the Law Society of Kenya. She further avers that the petitioner had issues with his own affidavits, which the court had excused. She contends that the striking out of the affidavits for the 1st and 2nd respondents would have a drastic effect on the petition. She then goes on to make legal arguments, complete with citation of statutory provisions and caselaw, which are things she should not do in an affidavit, since affidavits are conduits of facts and not the law.

12. Attached to the affidavit of the 2nd respondent are several annexures. There is a copy of the practising certificate issued to Grace Adhiambo Odongo, for 2022, dated 1st January 2022. Her admission number is indicated as P105/14070/17. There is email correspondence with the Law Society of Kenya, by mail dated 28th October of an unknown year, where she advises that her correct number is P105/14070/17. The third is a letter from the Law Society of Kenya, dated 29th November 2022, indicating that she was admitted on 17th October 2017, her admission number is P105/14070/17 and she is a member of good standing.
13. In the grounds of opposition, by the 3rd respondent, it is averred that an election petition is a public interest matter, and the documents sought to be expunged from the record are public documents necessary to enable the court make a just determination of the matter on merits.; the court should shun a decision that would result in absurdity; the material that the petitioner seeks to have expunged are the same material that he had asked the court to order the 1st and 2nd respondents to avail, and were necessary for the purpose of scrutiny; striking out evidential affidavits would be disproportionate to the mischief sought to be impugned; and there was residual jurisdiction for the court to order filing of additional or new evidential affidavits.
14. The application was argued orally on 28th November 2022.
15. Mr. Nyaribo submitted that an affidavit has its own architecture, which includes its commissioning, which is done by a Commissioner for Oaths. He stated that the issue was not whether Grace Adhiambo Odongo was an Advocate, but rather whether she was a Commissioner for Oaths. He submitted that the letter from the Chief Registrar of the Judiciary, dated 25th November 2022, confirmed that she was not a Commissioner for Oaths, and that only the Judiciary could confirm who was and was not a Commissioner for Oaths. He asserted that the affidavits filed by the 1st and 2nd respondents could not stand in view of that. He cited the decision in Pius Njogu Kathuri vs. Joseph Kiragu Muthura & 3 others [2018] eKLR (Gitari, J), where a petition was struck out on grounds that the affidavits relied on were non-complaint with the [Oaths and Statutory Declarations Act](#) and Order 19 of the Civil Procedure Rules. It was submitted that the affidavits should be struck out for lacking structural correctness.
16. Mr. Oloo submitted that Grace Adhiambo Odongo was an Advocate of the High Court of Kenya, with a current practicing certificate, and her admission number was captured in the said certificate. He stated that she had informed the Law Society of Kenya of a mistake with respect to her admission number. He submitted that there was no legal requirement that the deponent of an affidavit ought to know the name of the Advocate commissioning their affidavit, and he cited Apungu Arthur Kibira vs. Independent Electoral & Boundaries Commission & 2 others [2018] eKLR (Janet Mulwa, J). He submitted that the orders should not be granted, and cited several grounds. One, the petitioner and his Advocates had been given several indulgencies by the court. One of the Advocates for the petitioner has not taken out a practicing certificate since 2020. Two, the petitioner's own documents had technical



issues, and yet the respondents did not raise them, as they are keen on the matter being determined on its merits. All the affidavits filed in support of the petition were sworn by Mr. Nyaribo, who continued to lead the prosecution of the petition, that notwithstanding. There was also the issue of Mr. Odongo Nimrod Matunda not having a practicing certificate. He submitted that the affidavits sought to be struck out carried the material that the petitioner would utilize for the scrutiny that he seeks in his petition, asserting that the election court ought to audit the merits of the petition based on the public records held by the 1st and 2nd respondent, and if struck out there would be no basis for the court to determine whether the impugned election was conducted in accordance with the law. Finally, he submitted, should the court find that the affidavits were not properly before the court, then the 1st and 2nd respondents were giving an undertaking to regularize them by getting them commissioned properly.

17. Mr. Wasilwa submitted that Article 159(2)(d) of the Constitution had not been interpreted by the courts with regard to presuming validity of a document executed by an Advocate or Commissioner for Oaths who had no authority, except for the decision of the Supreme Court in *National Bank of Kenya Limited vs. Anaj Warehousing Limited* [2015] eKLR (Mutunga CJ&P, Tunoi, Ibrahim, Ojwang & Wanjala SCJJ). He cited sections 9 and 34(a)(b) of the Advocates Act, and Rule 4(1) of the Elections (Parliamentary and County Elections) Petition Rules, to submit that there was juridical wisdom in preserving documents or instruments where an Advocate lacks capacity to make them, there was need to separate the civil and criminal liability of the Advocate from the juridical purport of the document, and the statute that gives latitude to Advocates to commission affidavits is very old. He submitted that *Pius Njogu Kathuri vs. Joseph Kiragu Muthura & 3 others* [2018] eKLR (Gitari, J) was of persuasive authority only. He urged me to look at *National Bank of Kenya Limited vs. Anaj Warehousing Limited* [2015] eKLR (Mutunga CJ&P, Tunoi, Ibrahim, Ojwang & Wanjala SCJJ), although he conceded that the same was not in pari materia with the case before me. I was urged to ignore the persuasive authority of the High Court, and follow the decision of the Supreme Court. He submitted that the striking out the affidavits would result in an absurdity, and would be disproportionate to the mischief sought to be addressed. I was urged to refrain from exercising the equity of striking out. He further submitted that validity of evidence stems from sections 62 and 63 of the Evidence Act, Cap 80, Law of Kenya, and not the Oaths and Statutory Declarations Act. He also submitted that under Order 19 of the Civil Procedure Rules, on perception of evidence, saying that the same would be unaffected by the fact that the person who witnesses the affidavit lacks capacity. I was informed that the court looks at the functionality and practicability of the decision. I was told that if I strike out the said affidavits I would make it difficult for the court to establish who won the impugned election.
18. The rejoinder was by Mr. Wechabe, for the petitioner. He stated that the 1st and 2nd respondents produced a practising certificate, but not an extract of the Roll that the Grace Adhiambo Odongo signed. He further submitted that no proof was provided that Grace Adhiambo Odongo was a Commissioner for Oaths. It was further submitted that the court ought not rely on forged documents.
19. The only issue for me to consider is the propriety or regularity of the affidavit of the 2nd respondent and those of the other individuals who support the case for the 1st and 2nd respondents. The issue, as I understand it, is not whether Grace Adhiambo Odongo, the person who purported to commission those affidavits, was an Advocate or not, but rather whether she was a Commissioner for Oaths or not. The issue is not who drew the affidavits, but rather who commissioned them. The issues around when she was admitted to the Bar, her admission number and whether she has a practising certificate for 2022 are completely irrelevant.
20. An affidavit is a statement, essentially carrying evidential material, which makes it a witness statement. Witness statements are narratives of the facts of the case, to be presented by the maker of the statement or the person procuring its making. They are in two categories; they are either sworn or unsworn.



The sworn variety is what is called an affidavit. If it is not sworn or commissioned, then it is not an affidavit. The Concise Oxford English Dictionary, 12th edition, 2011, defines an affidavit as “a written statement confirmed by oath or affirmation, for use as evidence in court.” The Black’s Law Dictionary, 10th edition, 2014, defines an affidavit as “a voluntary declaration of facts written down and sworn to by a declarant, usu. before an officer authorised to administer oaths;” and a sworn statement as “a statement given under oath; an affidavit.” An affidavit, therefore, is a written statement made before an officer authorised by law to commission oaths. If not made under those circumstances, it would not be an affidavit. It becomes an affidavit upon being made or executed by the deponent or affiant before the officer authorised to commission affidavits. It is not the execution of the written statement by the deponent which makes it an affidavit, but its execution in the presence of the officer authorised in law to commission oaths, who confirms the making of the affidavit by appending his signature and affixing his stamp.

21. The Kenyan law on the commissioning of affidavits is the *Oaths and Statutory declarations Act*. I will deal with the provisions on appointment of Commissioners for Oaths first. The relevant provisions are in sections 2 and 3, and state that:



“2. Appointment of commissioners for oaths	
(1)	The Chief Justice may, by commission signed by him, appoint persons being practising advocates to be commissioners for oaths, and may revoke any such appointment.
(2)	Each commission by which any commissioner for oaths is appointed shall bear a stamp of the value of thirty shillings, to be paid for by the commissioner for oaths therein named; but no other charge or fee shall be made or be payable in respect of the appointment or in respect of anything required to be done to perfect it.
(3)	After the commission has been signed and stamped the appointment of the person therein named as a commissioner for oaths shall be forthwith published in the Gazette.
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(3)	After the commission has been signed and stamped the appointment of the person therein named as a commissioner for oaths shall be forthwith published in the Gazette.
3.	Commissioner for oaths to sign roll Every advocate appointed a commissioner for oaths shall, on appointment, sign a roll, which shall be kept by the Registrar of the High Court.”



22. Those who qualify for appointment are practising Advocates. Appointment is by the Chief Justice, by way of a commission signed by him, bearing a revenue stamp paid for by the person appointed. After the signing by the Chief Justice and the stamping, the appointment should be published in the Kenya Gazette, whereupon the appointee signs a roll of Commissioners for Oaths, kept by the Chief Registrar of the Judiciary.
23. For the purposes of this case, the question to ask should be whether the person who commissioned the impugned affidavits was a Commissioner for Oaths, in terms of section 2 of the oaths and Declarations Act. That would require that he was a practising Advocate, was appointed by the Chief Justice, the Chief Justice had signed a commission, which was then stamped upon payment of the requisite fee by the appointee, was gazetted and the appointee signed the relevant roll. That person is Grace Adhiambo Odongo. There is evidence that she is an Advocate of the High Court of Kenya, for her name is in the Roll of Advocates, and she holds a practising certificate. There is no dispute about that, and the petitioner concedes as much. What is clouded in mystery is whether she was a Commissioner for Oaths. Mr. Oloo asserted, on 25th November 2022, that he knew her personally, and that she was a Commissioner for Oaths. Curiously, after the Motion, the subject of this ruling was filed, he did not address the issue as to whether the said Grace Adhiambo Odongo was a Commissioner for Oaths or not. In the 2 affidavits in reply, the 2nd respondent did not make any averments on the appointment of the said Grace Adhiambo Odongo as Commissioner for Oaths. Mr. Oloo, in his address before me, on 28th November 2022, did not dwell on whether the said Grace Adhiambo Odongo had been appointed a Commissioner for Oaths by the Chief Justice, he majored on the irrelevancies around the admission number of the said Grace Adhiambo Odongo and the fact that she had a current practising certificate.
24. Much of what Mr. Oloo did was to make statements from the Bar, which had no evidential backing, by way of an affidavit. Grace Adhiambo Odongo did not swear and file any affidavit, to depose to the matters in controversy, as to whether she was a Commissioner for Oaths, and on whether she commissioned the impugned affidavits. It was only her who could authoritatively speak to those matters. Mr. Oloo, had sought to vouch for her from the Bar, on 25th November 2022, that he knew her, and to explain the challenge around her admission number, and what she was doing about. That was of little value, for Mr. Oloo did not have an affidavit sworn by himself deposing to those facts on information from her. The affidavit by the 2nd respondent does not make matters any better. She testified on oath on 24th November 2022, that she did not know Grace Adhiambo Odongo, so she cannot be heard later, in her 2 affidavits, to purport to depose on matters relating to her when she does not even know her, and when she does not even purport to make those averments based on information from her, or on documents sourced from or availed to her by the said Grace Adhiambo Odongo. Her averments in the said affidavits amount to nothing more than hearsay, and are of no value. What Mr. Oloo should have done should have been to get Grace Adhiambo Odongo to swear an affidavit, deposing to the fact that she had been appointed by the Chief Justice as a Commissioner for Oaths, and to attach a copy of the commission signed by the Chief Justice, duly stamped, and a copy of the Kenya Gazette notice which made public her appointment. That would be the only way of getting proof that indeed Grace Adhiambo Odongo was a Commissioner for Oaths, and that she acted properly in commissioning the impugned affidavits.
25. Under section 3 of the Oaths and Declarations Act, there is a Roll of Commissioners for Oaths, which is kept by the Chief Registrar of the Judiciary. The Chief Registrar is the custodian of public records on persons who have been admitted as Advocates of the High Court of Kenya and entered into the Roll of Advocates, as well as those appointed as Commissioners for Oaths and their names entered into the relevant Roll. The petitioner quite properly wrote to Chief Registrar, in her capacity as such, to source information on the status of Grace Adhiambo Odongo as an Advocate and as Commissioner for



Oaths. There is a letter on record from the Chief Registrar confirming that she is an Advocate, but not a Commissioner for Oaths. That is the word of the custodian of the Roll of Commissioners for Oaths on the matter. The Motion was served on the 1st and 2nd respondents, and with it a copy of that letter. The 1st and 2nd respondents have responded to that application, but they have not said a single word in response to the contents or substance of that letter. In the replying affidavit by the 2nd respondent, no attempt was made to controvert the contents of that letter. The statement by the Chief Registrar of the Judiciary that Grace Adhiambo Odongo was not a Commissioner of Oaths has not been controverted. There is nothing on the record to show that she was appointed Commissioner for Oaths by the Chief Justice, and that all those things envisaged by sections 2 and 3 of the Oaths and Statutory Declaration Act were done. There is, therefore, uncontroverted evidence that Grace Adhiambo Odongo was not a Commissioner for Oaths at the time she purported to commission the impugned affidavits on 27th September 2022.

26. I find it rather surprising that despite serious allegations being made that an Advocate of the High Court of Kenya purported to be a Commissioner for Oaths, or masqueraded as one, or passed herself as one, Grace Adhiambo Odongo did not come out to clarify the situation, or those using her name did not find it necessary to bring her forth to set the record straight. I say so because the [Oaths and Statutory Declarations Act](#) makes it an offence or criminalizes the conduct of masquerading as a Commissioner for Oaths, when the Chief Justice has not made the appointment. It has serious implications on the character and standing of a person holding the office and position of an Advocate of the High Court of Kenya, where image is everything. By masquerading as a Commissioner for Oaths, for there is no evidence that she was one, Grace Adhiambo Odongo exposed herself to criminal sanctions for holding herself out to be what she was not.
27. For avoidance of doubt, section 7 of the [Oaths and Statutory Declarations Act](#) states as follows:

“7.	<p>Penalty for unlawfully acting as commissioner for oaths</p> <p>Any person who holds himself out as a commissioner for oaths or receives any fee or reward as a commissioner for oaths shall, unless he has been appointed as such under this Act, be guilty of an offence and, in addition to any other penalty or punishment to which he may be liable by any law in force, be liable to a fine not exceeding six hundred shillings, and for a second offence, in addition to any other penalty or punishment, shall be liable to a fine of two thousand shillings or imprisonment for a term not exceeding six months or to both such fine and imprisonment.”</p>
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28. In view of what I have discussed above, what should be the fate of the 6 affidavits filed herein by the 1st and 2nd respondents? The answer to that question should lie with Rule 12(5)(6)(7)(12)(14) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, which state as follows:

“(5). A response to the petition under rule 11 shall be supported by an affidavit sworn by the respondent.



(6). Each person who the respondent intends to call as a witness at the hearing , shall swear an affidavit.

(7). A respondent shall, at the time of filing the response to a petition , file the affidavits sworn under sub-rule (6).

(8)...

(9)...

(10)...

(11) ...

(12). An affidavit shall form part of the record of the hearing ...

(13). The *Oaths and Statutory Declarations Act* (Cap. 15) and Order 19 of the Civil Procedure Rules, 2010 (L. N. No. 151/2010) shall apply to affidavits under these Rules.”

29. What emerges from Rule 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 is that a response to an election petition must be supported by an affidavit sworn by the respondent, under Rule 12(5). In this case, there is a purported affidavit in support of the response, sworn by the 2nd respondent, on behalf of herself and the 1st respondent. Secondly, any witnesses that a respondent plans on calling, to support his case, must also swear affidavits, under Rule 12(6). The effect of Rule 12(6) is that it is the filing of the affidavit that qualifies the intended witness to be a witness. It is a condition precedent to testifying, and without having filed that affidavit, the person cannot take to the witness stand as such. Thirdly, the affidavits filed in the matter, whether by the petitioner or the respondent or their witnesses form part of the record of the hearing. Fourthly, the *Oaths and Statutory Declarations Act* and Rule 19 of the Civil Procedure Rules are applied to the affidavits the subject of Rule 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, for the purpose of determining their validity and functionality.
30. I have already made a finding that there is no evidence that Grace Adhiambo Odongo had been appointed a Commissioner for Oaths, as at the date when she commissioned the impugned affidavits. She had no authority, therefore, to commission affidavits or administer oaths. Without such authority her purported acts did not constitute the documents that she signed as such affidavits, for such documents only become affidavits or sworn statements after they have been commissioned by a duly appointed Commissioner for Oaths. The effect of it is that the impugned affidavits are not in fact affidavits, for they are unsworn, as the person who purported to commission them had no authority to administer oaths or statutory declarations. The net effect is that the response by the 1st and 2nd respondents is not supported by an affidavit, contrary to Rule 12(5); and the said respondents do not have qualified witnesses, for the persons they intend to call as witnesses have not sworn affidavits, contrary to Rule 12(6).
31. So, what should I do with the purported affidavits? The petitioner has invited me to strike them out. The respondents plead that is should not. I understand the 1st and 2nd respondents to have only 2 grounds for that. One, the petitioner is equally guilty of certain indiscretions, but they have turned a blind eye to those anomalies, for the sake of getting the petition determined on merit. One of his Advocates is said not to have a current practising certificate. The lead Advocate has commissioned the affidavits of the petitioner and his witnesses. The affidavits in the application that I determined on 31st October 2022 had been sworn by an Advocate who had not taken out a practicing certificate. Two, the striking out would leave the cause without the key evidence upon which the petition should be determined, in terms of the statutory forms filed herein by the 1st respondent, being Forms 35As,



35B and the polling stations diaries. It is my view that these arguments do not carry much water. They cannot be a basis for not striking out the impugned affidavits. Regarding the first issue, of the Advocate without a practising certificate, Mr. Omeri, that is an allegation from the Bar. No proof has been provided, and Mr. Oloo had not raised the issue until now. If the issue had been raised at the appropriate time, and proof provided, the court would have cracked the whip. On the lead Advocate, prosecuting the petition despite having commissioned the affidavits of the petitioner and his witnesses, which is contrary to section 4 of the *Oaths and Statutory Declarations Act*, I had barred him from the matter, through my ruling of 31st October 2022, but Mr. Oloo and Mr. Wasilwa consented to have him back as lead Advocate for the petitioner on 15th November 2022. On the affidavits, in support of the application that I have since determined, that had been sworn by an Advocate who had no practicing certificate, I dealt with that issue in the ruling of 31st October 2022, and, in any event, the circumstances differ from what is now before me, where the person who purported to commission documents has not been appointed by the Chief Justice to act in that capacity. On the second issue of the striking out leading to expunging from the record crucial evidence, I will state that the law sets out how evidence is to be placed on record. In an election petition, it is initially by way of affidavit evidence, to be authenticated at the oral hearing by cross-examination of the deponents of the affidavits. It is up to the parties to ensure that they place the affidavit evidence properly on record, in terms of strictly adhering to the law on affidavits. If the law on affidavits is not followed to place the evidence on record, the parties would have no reason to argue that their evidence would be lost. They would only have themselves to blame for failing to follow the law.

32. For avoidance of doubt, section 4 of the *oaths and Statutory Declarations Act* states as follows:



<p>“4.</p>	<p>Powers of commissioner for oaths</p> <table border="1" data-bbox="858 271 1386 1839"> <tr> <td data-bbox="858 271 1123 1765">(1)</td> <td data-bbox="1123 271 1386 1765"> <p>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, including matters 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 subordinate court:</p> <p>Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.</p> </td> </tr> <tr> <td data-bbox="858 1765 1123 1839">(2)</td> <td data-bbox="1123 1765 1386 1839">...”</td> </tr> </table>	(1)	<p>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, including matters 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 subordinate court:</p> <p>Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.</p>	(2)	...”
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(2)	...”

33. On his part, Mr. Wasilwa, urged me to focus on what he called preservation of the juridical purport of the document or instrument, and less on the lack of qualification of the person who commissioned or made the document. I do not quite understand what he means by that. The law requires the filing of an affidavit. The impugned document is a purported affidavit, for it is not in fact an affidavit, for the person who commissioned it was not a Commissioner for Oaths. An affidavit is one only when commissioned by a Commissioner for Oaths. I cannot possibly presume a document is an affidavit when it is not one. There is nothing preserve there. I may, perhaps, presume or preserve a purported affidavit commissioned by an Advocate who is an appointed Commissioner for Oaths, but who does not hold a current practising certificate, not where no such appointment was ever made. A Commissioner for Oaths stamp belonging to an Advocate with a current practicing , but who is yet to be appointed as such, is a fake, and that position is not comparable to that of an Advocate who has been commissioned by the Chief Justice as such but does not hold a current practicing, for the Commissioner of Oaths stamp of such an Advocate would not be a fake, despite lack of a practicing certificate.
34. The other argument by Mr. Wasilwa was that striking out the affidavits would create an absurdity, for it would place the court in a situation where it would be left with no evidence to determine the petition. Mr. Oloo had also made this submission. My response is that any absurdity arising from such striking out would be a creation of the parties, not the court. The court would still be in a position to determine the matter, one way or the other, based on the material before it. The litigation belongs to the parties. If they draw, process and file pleadings and other filings or documents which are defective, and which are subsequently struck out, and thereby create an absurdity, then they just have to live with it. It would be a bed that they would have made for themselves.
35. I find the submission by Mr. Wasilwa interesting, given the absurdities that I have seen so far in these proceedings. If the striking out will lead to absurdity, it would not be out of place, for absurdity is a normality here. The lead Advocates appearing for the petitioner and the 3rd respondent, that is Mr. Nyaribo and Mr. Wasilwa, in a properly functioning system, should not be appearing in this matter. Their appearances are inconsistent with, nay, in contravention of, section 4(1) of the *Oaths and Statutory Declarations Act*. The proviso to that provision states that “a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter.” This says that do not,



as Commissioner for Oaths, commission affidavits for parties or witnesses in a matter where you are appearing as Advocate for either party. It would include situations where the Commissioner for Oaths is not involved in the matter initially, or at the time he commissions the affidavits, but is approached subsequently, to either come on record for either party in the matter or to lead the Advocates on record for whichever party. In such a situation, the Commissioner for Oaths should decline the instructions to get involved in the matter if the affidavits being used by whichever party to the litigation were commissioned by him. In this case, Mr. Nyaribo commissioned the affidavits signed by the petitioner in support of his petition, as well as the affidavits of his 2 witnesses. Despite the proviso to section 4(1) of the [Oaths and Statutory Declarations Act](#), he does not see anything wrong with continuing to act for the petitioner in the matter. It is an absurdity because he is acting contrary to the very clear provisions of section 4(1) of the [Oaths and Statutory Declarations Act](#).

36. Mr. Wasilwa commissioned the affidavit sworn by the 3rd respondent in support of his response to the petition, and the affidavits of the witnesses for the 3rd respondent. Despite that, he continues to act in these proceedings as if section 4(1) does not exist. It is an absurd situation, that a senior Advocate would ignore the very clear provisions of a statute that tells him, do not act in this matter if you have commissioned the affidavits being used in these proceedings. To make it even more absurd, he submits that the [Oaths and Statutory Declarations Act](#) should be ignored because it is an old statute. Am not privy to any law or legal principle which posits that old statutes should be disregarded. A statute remains in force and application, so long as it has not been repealed or disappplied. The mere fact that the [Oaths and Statutory Declarations Act](#) is nearly a century old, having come into force in 1926, does not make it impotent. For one, it has progressively been amended over the years, the latest amendments were in 2018. It is, therefore, updated and current. Two, it is the only statute in Kenya dealing with commissioning of affidavits, covering such matters as appointment of Commissioners for Oaths, their role, creating offences around misconduct relating to commissioning of affidavits, and related matters. What it covers is not dealt with by [the Constitution](#), the [Civil Procedure Act](#), Cap 21, Laws of Kenya, the [Evidence Act](#) or any other statute or law. It remains the law on the subject, and it cannot be wished away, in the manner that Mr. Wasilwa suggests.
37. Mr. Wechabe quite happily submitted that the fact that an Advocate has not taken out a practising certificate is a small matter, and gleefully pointed to a paragraph in my ruling of 31st October 2022. There is nothing to celebrate about Advocates not taking out practising certificates. Failure to take out certificate, when one is mandatorily required to, is indicative of a broken system. It is an absurdity. The law requires that Advocates take out practising certificates every year. It is a tool designed to enable the Law Society of Kenya regulate the profession. It is not meant to be an inconvenience to Advocates. It is an obligation on the part of Advocates, to raise revenue for the Law Society of Kenya, to enable it discharge its statutory obligations and execute its mandate under the [Law Society of Kenya Act](#). I did not, in that ruling, encourage Advocates not to take out practising certificates. Instead, I stated that I do not agree with the conventional judicial opinion, espoused in such decisions as National Bank of Kenya Limited vs. Anaj Warehousing Limited [2015] eKLR (Mutunga CJ&P, Tunoi, Ibrahim, Ojwang & Wanjala SCJJ), that Mr. Wasilwa cited, that documents drawn by Advocates without practising certificates should be unaffected by that fact. My view is that such an Advocate has no authority to practice, which includes the authority to draw or draft documents of legal consequence, and it should follow that where they do draw any documents, the same should be treated as invalid, and where filed at any registry the same ought to be struck out. I stated that to rule otherwise encourages Advocates not to take out practising certificates, and to continue to practise without them, as they would comfortable that their failure to take them out would be of no consequence, so long as their work is upheld by the courts. Indeed, it would appear that the only consequence would be denial of audience in court, otherwise they can continue to draw and file documents at whichever registry. This situation only



encourages disregard of the rules of practice, and breeds unprofessionalism, leading to a fall in standards in the legal profession. The current judicial trend, in this regard, in my humble view, is not assisting the Law Society of Kenya instil discipline in the profession. That position has been stated by courts superior to the High Court, and for that reason I accept it as binding on me, sitting as a Judge of the High Court, but, with respect, I do not agree with it, and I reject it. When Mr. Omeri addressed me, and even cross-examined a witness, it had not been drawn to my attention that he did not have a current practising certificate, if I had been notified of that fact, I would have stopped him, for he had no right of audience before me. If it is true that he did not have a practising certificate, then it was unprofessional, dishonourable and lacking in etiquette for Mr. Omeri to address the court and examine witnesses when he knew he was not entitled to.

38. For Mr. Oloo, I believe that he has done well, right from when the matter was mentioned for the first time on 7th October 2022, with regard to pointing out instances of conduct from his colleagues which did not bode well for a profession, where high standards of professionalism, probity and comportment is expected. He has been fairly consistent in doing so, including when the interlocutory application for scrutiny was lodged, by pointing out that Commissioner who had commissioned the supporting affidavit did not have a practising affidavit. Then when the petitioner sought to present witnesses who had not sworn affidavits. He suggested that the court had indulged the petitioner despite these shortcomings, which I not quite accurate, for the court only indulged the petitioner with respect to his scrutiny application. It ordered that Mr. Nyaribo excuse himself from the matter, and he only came back at the consent of Mr. Oloo and Mr. Wasilwa, to allow the hearings to commence. The court declined to hear the witnesses the petitioner sought to present, for non-compliance with the rule relating to filing of affidavits. I am disappointed that, despite the good record that Mr. Oloo had presented so far, he was defending an indefensible position, an affidavit or affidavits sworn by a “fake” Commissioner for Oaths. Asking or getting a person who has not been appointed a Commissioner for Oaths to commission an affidavit or affidavits that are intended to be used in legal proceedings of such weight as an election petition, and defending such a position in court, is an absurdity.
39. I could go on and on to demonstrate where absurdity lies. Let me leave it at that, but say that the integrity of the legal processes that are conducted daily in our courts is at stake, so long as the rules are not adhered to, on the basis that they are technicalities of procedure, and Article 159(2)(d) of [the Constitution](#) is cited to sanitise such non-observance or non-compliance with the rules. Anarchy and disorder are slowly creeping in, and will surely take over. These proceedings are about auditing the conduct of the last elections by the 1st respondent. The petitioner’s case is that the said elections were not conducted in accordance with [the Constitution](#) and the law. In other words, the rule of law was not observed. The proceedings where that audit should be conducted are, themselves, mired in a mess of non-compliances and non-observance of processes which ought to legitimise these proceedings. If those of us involved in these proceedings are not observing the rules that govern these proceedings, which we have brought complaining that the 1st respondent did not observe the rules that governed the elections that it conducted, what moral authority do we have to be involved in the conduct of that audit or to address that challenge.
40. I digressed. Let me get back to the question about what I should do with the impugned affidavits. They were commissioned by a person that the Chief Justice had not appointed as a Commissioner for Oaths. Consequently, they are not affidavits. They can only pass as unsworn written statements. Should I preserve them as suggested by Mr. Wasilwa, or should I strike them out as sought by Mr. Nyaribo? Rule 12(5) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, requires that a response to a petition be supported by an affidavit sworn by the respondent. It does not provide for an unsworn statement. Rule 12(6) provides that any person that the respondent intends to call as a witness should swear an affidavit. There is no provision for filing of unsworn statements by witnesses. Rule



12(12) states that such affidavits shall form part of the record of the hearing. That rule does not make unsworn written statements part of the record. In my ruling of 24th November 2022, when I declined to hear witnesses who had not filed affidavits, I did not strike out their unsworn written statements, because they did not form part of the record, by dint of Rule 12(12). There would have been no point of striking out what was not on record in the first place. The present situation is different. The impugned documents were filed as affidavits, as on the face of them, they had been commissioned by a Commissioner for Oaths. Being “affidavits,” they became part of the record. However, it has transpired that they are not affidavits, but fakes. Consequently, they ought not be part of the record as they are not affidavits. The way to remove them from the record is by way of striking them out and ordering that they be expunged. That is the fate that the said “affidavits” ought to face.

41. So, how have the courts dealt with this situation, if it has at all arisen in the past? In *Henry Okello Nadimo vs. Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR (Tuiyott, J), this is what the court said about the validity of an affidavit that is not properly sworn:

“ 13. There is no unequivocal rebuttal or denial that Mr. Kariuki Njuguna did not commission the affidavits. The Deponents of the said affidavits did not see the “Commissioner” append his signature on the affidavits or stamp them with his mark. To that extent, the 3rd Respondents assertion that the signatures and stamps on the 4 affidavits are forgeries have not been denied. Secondly, the 4 did not appear before the “Commissioner” and so no oath was administered to them. For these reasons the 4 affidavits are not valid and are therefore not affidavits as contemplated by the *Oaths and Statutory Declarations Act* (Chapter 15 Laws of Kenya).”

42. When the 2nd respondent was being cross-examined on 24th November 2022, I captured her as saying, with regard to the commissioning of her affidavit:

“I do not know Grace Adhiambo Odongo. I have never met anyone of that name. I signed my affidavit before Vincent Odhiambo Oloo. Grace Adhiambo Odongo commissioned my affidavit. I have never met the said person.”

43. My understanding of that testimony was that the 2nd respondent did not know the person who commissioned her affidavit, and never met her. All she could recall was that she executed her affidavit before her Advocate, Mr. Oloo, and she did not mention any other person as having been present. However, when the petitioner brought the instant application, challenging the validity of her affidavit, she shifted ground, in her replying affidavit of 27th November 2022, to now say that she in fact did meet the person who was to commission her affidavit, at the office of her Advocate, Mr. Oloo, on the date when she signed that affidavit. These two versions are not congruent, and the second version appears to be a revision of the first one, intended to fit into her latter narrative that she executed her affidavit in the presence of the Commissioner of Oaths, contrary to her earlier story that she had never met her. These two statements were made on oath. They do not, factually, stand together, and one of them must be false. I believe the first version, and I shall treat the second one as an attempt to revise the first one.

44. For avoidance of doubt, this is what she said:

“7. I confirm that I signed my Witness Affidavit in the presence of Vincent Odhiambo Oloo, the advocate on record for the 1st and 2nd Respondents, and a lady who I was informed was an advocate and would commission the Witness Affidavits and Exhibits filed in support of the 1st and 2nd Respondents case.



I have subsequently come to learn that the lady's name is Grace Adhiambo Odongo.”

45. Clearly, the version in the affidavit is meant to sanitise that given at cross-examination. In any case, and going by *Henry Okello Nadimo vs. Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR (Tuiyott, J), the 2nd respondent did not state whether or not the alleged Commissioner for Oaths signed and stamped her affidavit in her presence. The point is that the Commissioner administers the oath, and he should witness the deponent append her signature to the affidavit, and he should countersign her signature by appending his own, and to affix his stamp for authentication. All that ought to be done in the same transaction. The key point, in *Henry Okello Nadimo vs. Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR (Tuiyott, J), is that an affidavit, which is not properly witnessed, such as where the deponent and the Commissioner are not both present at the place where and when the signatures of the deponent and that of the Commissioner are appended, or where the purported Commissioner for Oaths is not qualified as such, would not be an affidavit, and would not be valid.
46. The 2nd respondent cited *Apungu Arthur Kibira vs. Independent Electoral & Boundaries Commission & 2 others* [2018] eKLR (Janet Mulwa, J) to argue that the deponent of the affidavit need not know the Commissioner of Oaths by name or personally. Indeed, that is the case. There is no legal requirement for that. However, the court, in that matter, emphasised the importance of the deponent being present before the Commissioner at the time the affidavit is commissioned, for the court said, at paragraph 20 “... but the party must appear before the said commissioner.”
47. In *David Wamatsi Omutsosi vs. Returning Officer Mumias – East Constituency & 2 others* [2017] eKLR (Njagi, J), the court faced a similar challenge, and ruled as follows, after citing sections 2(1) and 4(1) of the *Oaths and Statutory Declarations Act*:
- “26. It is clear from the provisions of the said Act that affidavits cannot be commissioned by a firm of advocates as happened in this case. An affidavit can only be commissioned by a Commissioner for Oaths and other officials of the court allowed to do so under the Act. In this petition the signatures of the person who was said to have commissioned the affidavits are forgeries. The stamp impressions on the affidavits are forgeries. The totality of all this is that the documents are not affidavits as known in law. They are mere forged documents.”
48. In *Pius Njogu Kathuri vs. Joseph Kiragu Muthura & 3 others* [2018] eKLR (Gitari, J), the court stated:
- “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*.”
49. In *Henry Okello Nadimo vs. Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR (Tuiyott, J) and *David Wamatsi Omutsosi vs. Returning Officer Mumias – East Constituency & 2 others* [2017] eKLR (Njagi, J) the courts struck out the affidavits. In *David Wamatsi Omutsosi vs. Returning Officer Mumias – East Constituency & 2 others* [2017] eKLR (Njagi, J) the issue was raised through an interlocutory application, and the striking out of the affidavits led to the striking out of the



petition, on the basis that a petition not supported by an affidavit could not stand. In *Henry Okello Nadimo vs. Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR (Tuiyott, J), the issue was raised after evidence had been taken from the witnesses, and was considered in the judgement, and the offending affidavits were struck out.

50. Mr. Wasilwa urged me to ignore these persuasive decisions from the High Court, and instead focus on the decision of the Supreme Court in *National Bank of Kenya Limited vs. Anaj Warehousing Limited* [2015] eKLR (Mutunga CJ&P, Tunoi, Ibrahim, Ojwang & Wanjala SCJJ). Mr. Wasilwa himself conceded that the said decision was not in *pari materia* with the situation before me. It turned on the drawing of a charge instrument by an Advocate who had not taken out a practising certificate, and it was held that that notwithstanding the charge instrument was valid. The matter before me is not about an Advocate practising without a licence drawing and executing documents, but about an individual masquerading as a Commissioner for Oaths executing documents in that respect. *National Bank of Kenya Limited vs. Anaj Warehousing Limited* [2015] eKLR (Mutunga CJ&P, Tunoi, Ibrahim, Ojwang & Wanjala SCJJ) is of no application at all to the present case, and the decisions that have dealt with the subject are the High Court decisions in *Henry Okello Nadimo vs. Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR (Tuiyott, J) and *David Wamatsi Omutosi vs. Returning Officer Mumias – East Constituency & 2 others* [2017] eKLR (Njagi, J), among others. In *Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 others* [2018] eKLR (Gitari, J), the court considered *National Bank of Kenya Limited vs. Anaj Warehousing Limited* [2015] eKLR (Mutunga CJ&P, Tunoi, Ibrahim, Ojwang & Wanjala SCJJ) and distinguished it from issues relating to administration of oaths, in the following terms:

“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.”

51. I was urged, as a matter of public interest, not to strike out the affidavits, but to allow the 1st and 2nd respondents to file further or additional affidavits. I was informed that it is the law which commands that the 1st respondent be made a party to the petition, so as to place on record material relating to how it conducted the election. On the matter of public interest, it was said as follows in *David Wamatsi Omutosi vs. Returning Officer Mumias – East Constituency & 2 others* [2017] eKLR (Njagi, J):

“

“43. I was further submitted that courts should take liberal views on matters concerning election petitions as petitions raise matters involving public interest. That Article 159(2)(d) of *the Constitution* require the courts to administer justice without undue regard to procedural technicalities.

The court does recognise that petitions are very important for the country’s democratic dispensation. Petitions are meant to enhance democracy and not to undermine it. However, public interest has to be considered within the realms of the law and not outside the law. In this regard I am guided by the Supreme Court of Kenya decision in *Zachariah Okoth Obado vs. Edward Okong’o Oyugi & 2 others* [2014] eKLR where the court stated that:-



“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 petitioner was under an obligation to follow the law despite the level of public interest that his petition raised. Courts of law cannot abrogate the law to assuage public interest, however important public interest is. ”

52. I could not agree more. There is public interest in election petitions, but the parties, when filing their papers must comply with the law. The mere fact of public interest is not sufficient ground for a court to overlook non-compliances. Public interest does not excuse full compliance with the law and procedure. The 1st and 2nd respondents are parties like any other party. They do not enjoy any privileges. The mere fact that Rule 9 of the Elections (Parliamentary and County Elections) Petition Rules, 2017, requires that the 1st respondent be made a party to all petitions filed under those Rules does not confer on it any special status. It has to comply with the relevant rules like any other party.
53. I was invited, should I be minded to strike out the affidavits, to give time to the 1st and 2nd respondents to lodge the same affidavits, but commissioned by an Advocate who is duly appointed as Commissioner for Oaths. I concede that the court does have wide discretion in these matters, but the time for filing pleadings closed. The window within which the 1st and 2nd respondents would have been given time to do the right thing is gone. Time is of the essence. The 1st and 2nd respondents should have exercised due diligence before getting their affidavits commissioned by a person who was not qualified.
54. The final orders are:
- a. That I do find merit in the application dated 25th November 2022, and I do hereby proceed to strike out the 6 affidavits sworn by Peris Saina Cheruto, Mukenda Fred, Alex Wafula Nyongesa, Stephen Mandila Wanyonyi, Victor Wanyonyi Mirundu and Allan Okomba Kombo, on 27th September 2022, in support of the response by the 1st and 2nd respondents, and order that the same be expunged from the record;
 - b. That the proceedings shall hereafter continue, with evidence being taken from the 3rd respondent and his witnesses, as from 2nd December 2022 at 9.30 AM; and
 - c. That costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS.....30TH
....DAY OFNOVEMBER.....2022**

W. MUSYOKA

JUDGE

Mr. Nyaribo, Mr. Omeri and Mr. Wechabe, instructed by Omondi Omeri & Mwasaru, Advocates for the petitioner.

Mr. Odhiambo Oloo, instructed by Muthaura Mugambi Ayugi & Njonjo, Advocates for the 1st and 2nd respondents.

Mr. Wasilwa and Mr. Masinde, instructed by Masinde & Company, Advocates for the 3rd respondent.

7

