



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

ELECTION PETITION NO. 2 OF 2017

(APPL. NO. 2 TO STRIKE OUT THE PETITION)

(CORAM: J.A. MAKAU - J.)

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE ELECTION ACT, NO. 24 OF 2011

IN THE MATTER OF: THE ELECTIONS OFFENCES ACT NO. 37 OF 2016

**IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES ACT NO. 9 OF
2011**

IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

**IN THE MATTER OF: ELECTIONS (PARLIAMENTARY AND
COUNTY) PETITION RULES 2017**

AND

**IN THE MATTER OF: THE ELECTION FOR
MEMBER OF NATIONAL ASSEMBLY, FOR
WEST MUGIRANGO CONSTITUENCY.**

BETWEEN

STEPHEN M. MOGAKA.....PETITIONER/APPLICANT

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

VINCENT KEMOSI MOGAKA.....2ND RESPONDENT

RETURNING OFFICER-WEST

MUGIRANGO CONSTITUENCY.....3RD RESPONDENT

RULING:

1. The Petitioner herein **STEPHEN M. MOGAKA** was one of the fourteen (14) aspiring candidates including the 2nd Respondent **VINCENT KEMOSI MOGAKA** for the Member of National Assembly, West Mugirango Constituency, in the election held on 8th August, 2017. That after the 1st Respondent, IEBC and the 3rd Respondent, Returning Officer, West Mugirango Constituency conducted the election, the 2nd Respondent garnered 12004 whereas the **Petitioner garnered 9906**; consequently the 3rd Respondent declared and certified that the 2nd Respondent duly elected Member of Parliament, West Mugirango Constituency and issued him with certificate of Election on 10th August, 2017. The 2nd Respondent was subsequently gazetted under special issue of Kenya Gazette Vol. CXIX – No. 121 Gazette Notice Number 8239 published on 22nd August, 2017 as the Member of Parliament for the West Mugirango Constituency, having garnered 12004 votes.

2. The Petitioner herein filed this petition dated 6th September 2017, on the same day, together with his supporting affidavit dated 6th September 2017 and annexures thereto. The Petitioner filed the Petition together with 6 affidavits dated 6th September, 2017, made by the Petitioner's intended following witnesses:-

1. Eric Mokuia

2. Peterson Nyaruri

3. Charles Obiero Mogwambo

4. Kennedy Mongare

5. Andrew Omoio

6. Justine Gekong'a Orina

All the six (6) affidavits as well as that of the Petitioner were sworn before one Mercy Moragwa Mogusu Advocate and Commissioner for Oaths, at Nairobi, for some of the witnesses and Nyamira for others as per the affidavits.

3. The Petition was duly served upon the Respondents, who filed their responses and the matter was subsequently set down for pre-trial conference on 3.10.2017 when the trial Court set down pre-trial directions. The Court set the applications already filed for hearing on 9.10.2017 and delivered ruling on the applications which had been filed on 30th October, 2017 and on which date the petition was set down for hearing on 20th – 22nd November, 2017 and 27th – 29th November 2017.

4. That before the Petition came up for hearing, the 2nd Respondent drew a Notice of Motion dated 8th November 2017 and filed the same on the same day. The application is brought pursuant to **Section 4 (1)** of the **Oaths and Statutory Declarations Act (Cap. 15) Laws of Kenya, Rule 7 (4) (b), 12 (1), (2), (3), (4) (ii) and 12** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017 and Order 19 of Civil procedure Rules** and seeks the following orders:

1. That this application be certified urgent and then heard exparte in the first instance.

2. That this Honourable Court be pleased to hear this application in priority to the hearing of the main election petition herein.

3. That this Honourable Court be pleased to strike out and expunge from the Court records Affidavits of:-

1) Stephen M. Mogaka Sworn on 6.9.2017.

2) Eric Mokuia sworn on 6.9.2017.

3) Peterson Nyaruri sworn on 6.9.2017.

4) Charles Obiero Mogwambo sworn on 6.9.2017.

5) Kennedy Mongare Mogaka Sworn on 6.9.2017.

6) Andrew Omwoyo sworn on 6.9.2017.

7) Justine Gekong'a Orina sworn on 6.9.2017.

4. That upon grant of prayers 3 herein above the Election Petition herein to stand dismissed for want of evidence in support.

5. That the costs of this application be provided for.

5. The Notice of Motion is premised on the grounds on the face of the Application and annexed affidavit of Hon. Vincent Kemosi Mogaka.

The grounds are as follows:

a) The main election petition is set down for hearing as from 20th November 2017.

b) That the Affidavits of Stephen M. Mogaka, Erick Mokuu, Peterson Nyaruri, Charles Obiero Mogwambo, Kennedy Mong'are, Andrew Omoyo and Justine Gekong'a Orina were commissioned by person who has an interest in the matter contrary to the clear provisions of the law.

c) That the said affidavits are therefore incurably defective.

6. The 2nd Respondent in his affidavit of support dated 8th November, 2017 has deponed interalia:- that on 7.11.2017 while with his Advocates perusing the pleadings, they went through all the seven (7) affidavits filed by the Petitioner in support of the petition and discovered the same were commissioned by an Advocate known as Mercy Moragwa Mogusu, (annexed and marked "VKMI"), that the last time the 2nd Respondent talked to Mercy Moragwa Mogusu, she informed him, which information he believes to be true, that she was practicing in the law firm of Musyoki Mogaka & Co. Advocates, which is the firm of Advocates, that had drawn and filed all the documents in this petition, that he was taken aback because as an Advocate practicing in that firm, she is definitely interested in the matter and cannot in law commission her law firm's documents, that the 2nd Respondent then checked with the Law Society of Kenya, Portal and the Law Society itself, to confirm whether M/s. Mercy Moragwa Mogusu, is still practicing from M/s. Musyoki Mogaka & Co. Advocates or not, that to his surprise as per official records of Law Society, it was confirmed M/s. Mercy Moragwa Mogusu, is still practicing in the law firm of Musyoki Mogaka & Co. Advocates (annexed and marked "V KM 2 (a) and 2 (b)" copies of M/s. Mercy Moragwa Mogusu's Advocates profile) obtained from the law society of Kenya Advocate search engine and Law Society of Kenya letter confirming the position, that M/s. Mercy Moragwa Mogusu being an Advocate in the law firm of Musyoki Mogaka & Co. Advocates by dint of **Section 4 of the Oaths and Statutory Declaration Act** is barred from commissioning documents drawn by her own firm of Advocates, that the affidavits commissioned by M/s. Mercy Moragwa Mogusu, being drawn by her own firm are fatally defective and that they should be expunged from the Court file.

7. The 1st and the 3rd Respondents filed a Replying affidavit to the 2nd Respondent's Notice of Motion dated 8th November, 2017, through Samson Mayo, the 3rd Respondent and the Returning Officer for West Mugirango Constituency during the election held on 8th August, 2017, stating interalia:- that all the affidavits sworn by Stephen M. Mogaka, the Petitioner, Eric Mokuu, Peterson Nyaruri, Charles Obiero Mogwambo, Kennedy Mong'are, Andrew Omoyo and Justine Gekong'a Orina on 6th September 2017 and filed by the Petitioner on the same day, were purportedly commissioned by M/s. Mercy Moragwa Mogusu, that the said commissioner for oaths, M/s. Mercy Moragwa Mogusu, is an Advocate Practicing in the firm of the Petitioner's Advocate, M/s. Musyoki Mogaka & Co. Advocates, that the Advocate has a direct interest in this matter, hence she has no capacity to commission the aforesaid affidavits by virtue of **Section 4 (1) of the Oaths and Statutory Declarations Act**, that the said affidavits having been drawn and filed by her firm, that the Commissioning of the aforesaid affidavits by the said Advocate renders them incurably defective, hence the same are null and void and that in the interest of justice the said affidavits ought to be struck out of the Court records for being fatally defective.

8. The Petitioner filed a Notice of Preliminary Objection dated 20th November 2017, raising the following preliminary point of objection:-

"This honourable court is divested of the jurisdiction to entertain the Notice of Motion Application dated 8th November, 2017 by dint of the provisions of Articles 162 (2) (a) and 162 (3) of the Constitution of Kenya 2010, Section 12 (1) (a) of the Employment and Labour Relations Act No. 20 of 2011 and Rules 15 (1) (c) and 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017"

9. The Petitioner further filed a Replying Affidavit dated 10th November 2017, stating interalia, that the Replying affidavit is filed without prejudice to Petitioner's right to raise and argue the Notice of Preliminary objection, that the Petitioner in filling the Petition he complied with all provisions of the **Constitution of Kenya 2010, the Elections Act, the Oaths and Statutory Declarations Act** and the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, that the 2nd Respondent's failure to disclose when he talked last to M/s. Mercy Moragwa Mogusu is intended to misled the Court into believing that Mercy Moragwa Mogusu is an employee of Musyoki Mogaka and Company Advocates, a position the Petitioner stated is not true at all, that the Petitioner stated that he is a founder of Musyoki Mogaka & Company Advocates, a sole proprietor and that he has not been in partnership since inception of the firm to date and that at the time of Commissioning the Affidavits M/s. Mercy Moragwa Mogusu was not an employee, Associate or partner of Musyoki Mogaka and Company Advocate or at all. That he is aware M/s. Mercy Moragwa Mogusu works with the firm of Momanyi and Associates, Windsor House 6th Floor and not with M/s. Musyoki Mogaka and Company Advocates that there is no interest whatsoever that M/s. Mercy Moragwa Mogusu has in the firm of M/s. Musyoki Mogaka and Company Advocates that drew and filed the pleadings to fetter her commissioning of the impugned affidavits, that on the LSK letter dated 8.11.2017, Ref. P.105/4591/03 addressed to the 2nd Respondent, he responded by stating that the 2nd Respondent's letter to LSK of 8.11.2017 was deliberately not filed in the Court, that it does not show when the said Advocate last furnished LSK with her address, leaving it to speculation, that he learned of the purported address of Mercy Moragwa Mogusu only through the 2nd Respondent's present application, that by a letter dated 14.11.2017 to LSK by M/s. Musyoki and Company Advocates, complained on the mistake in address for Mercy Moragwa Mogusu (attached and marked "SMM1"), that by a letter dated 15.11.2017 addressed to Momanyi & Associates by M/s. Musyoki Mogaka & Company Advocate and copied to LSK, they highlighted the mistake and asked for correction (annexed and marked "SMM2"), that the Petitioner visited LSK offices 16.11.2017 to correct the mistake and wrote a letter dated 16.11.2017 (annexed and marked "SMM3").

10. The Petitioner depones that the 2nd Respondent had been passing off as the Mogaka of Musyoki Mogaka and Company Advocates and he amended a Sale Agreement drawn by the 2nd Respondent marked "SMM4" prepared by the Petitioner's firm and urging the mistake of address of M/s. Mercy Moragwa Mogusu was caused by the 2nd Respondent's law firm yet Mercy Moragwa Mogusu was not an employee in his firm but that of M/s. Momanyi and Associates, that there were many other Advocates listed on the LSK website as currently working in Musyoki Mogaka and Company Advocate but in reality they are not working in Musyoki Mogaka and Company Advocates, such as:-

(a) *Agonda Jacqueline Adhiambo: who is currently a Magistrate at Mavoko Law Courts. See Gazette Notice No. 2114 dated 24th March, 2016. (Annexed hereto and marked "SMM5" is a copy of the said gazette notice.)*

(b) *Gisemba Paul Nyamweya: who is state Counsel working for Attorney General in Nyeri.*

(c) *Mwae Dorcas Wanjiru: who is a Partner at Hussein Mwae & Co. Advocates situate at 680 Hotel, 5th Floor, Room 605.*

That the negligent acts of the commission and/or omission by LSK, should not be visited on the Petitioner, that the Notice of Motion dated 8th November 2017, be dismissed with costs.

11. That before hearing of the Preliminary Objection upon hearing all the Advocates for the Petitioner and the respondents, the Court directed both the Preliminary Objection and the Notice of Motion be heard together, starting with Preliminary Objection then the Notice of Motion and ruling be delivered together.

NOTICE OF PRELIMINARY OBJECTION:

12. The Petitioner through a preliminary objection dated 20th November 2017 and filed on the same day, raised the following preliminary point of objection.

“This Honourable Court is divested of the jurisdiction to entertain the Notice of Motion Application dated 8th November, 2017 by dint of the provisions of Articles 162 (2) (a) and 162 (3) of the Constitution of Kenya 2010, Section 12 (1) (a) of the Employment and Labour Relations Act No. 20 of 2011 and Rules 15 (1) (c) and 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017”

13. At the hearing Mr. Mokua Ndubi, Learned Advocate, for the Petitioner appeared jointly with Mr. Omari, Learned Advocate, whereas Mr. Mogikoyo, Learned Advocate, appeared for the 2nd Respondent and Mr. Maloba, Learned Advocate, appeared for the 1st and the 3rd Respondents.

14. Mr. Mokua Ndubi, Advocate, urged the preliminary objection pointing out that this Court has no jurisdiction to entertain the 2nd Respondent's application by dint of **Article 162 (2) (a) and Article 162 (3) of the Constitution of Kenya 2010**. He submitted the 2nd Respondent's application is inviting the Court to make a determination of employment of Mercy Moragwa Mugusu, Advocate when the determination of that issue is exclusively restricted to the **Employment and Labour Relations Court (ELRC) pursuant to Section 12 (1) (a) of the Employment and Labour Relations Court Act No. 20 of 2011**. He urged the issue as he understands it, is where does that Advocate work?

15. Under **Rule 15(1) (c) of the Elections (Parliamentary and County Elections) Petitions Rules 2017**, he urged the Notice of Motion before this Court should have been determined at the pre-trial stage. That the time frame between pre-trial and the hearing he urged is to enable parties to prepare their witnesses. **Rule 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, he urged the Court should not allow the application save where application could not have been brought before the commencement of the hearing of the Petition. He therefore prayed for the Notice of Motion to be dismissed with costs.

16. Mr. Maloba, Learned Advocate, appearing for the 1st and the 3rd Respondents, submitted that he has very carefully looked at the preliminary objection, as well as the Notice of Motion dated 8.11.2017 and submitted to claim, that this is a dispute on employment is stretching the law to its elastic limits. He submitted that there is no dispute on employment of M/s. Mercy Moragwa Mugusu. He urged from the application and the responses by all parties in this matter, the Court is being asked to make a finding of fact on the current physical address of the concerned Advocate, thus M/s. Mercy Moragwa Mugusu, at the time she commissioned the Petitioner's affidavits and as such he urged that this is not a matter for ELRC but a matter for this Court. **On rule 15 (1) (c) and 15 (2) (c) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** he urged it is clear parties are at liberty to file any application as long as it is brought before commencement of the hearing of the Petition.

17. Mr. Mogikoyo, Learned Advocate, representing the 2nd Respondent associated himself fully with the submissions made by Mr. Maloba, learned Advocate, for the 1st and the 3rd Respondents, submitting the issue before the Court is not a labour and employment issue but one that revolves around an Advocate who commissioned affidavits before the Court and on compliance and Ethics under the **Oaths and Statutory Declarations Act** and further it is based on the communication from a professional body, the Law Society of Kenya, which regulates the professional conduct of the Advocates in Kenya. He urged further if there is an issue between Musyoki Mogaka and Company Advocates and Mercy Moragwa Mogusu, Advocate that is fully a private issue, under the contract of law which is not a preserve of on Election Court. He urged **Article 162 (2) and (3) of the Constitution of Kenya 2010**, is not applicable in this matter. On **Section 12 (1) (a) of the Employment and Labour Relations Court Act**, he urged the same is not applicable in this Petition. On **Rule 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** he urged the issue is, whether the application before Court is an interlocutory application, urging that he has filed supplementary authorities in support. Referring to authority No. 1 on the **Black Law Dictionary, 9th Edition on page 155**, pointing out the application seeks final orders and if prayers are granted the matter in issue shall finally be resolved. He referred to page 889 of the same authority on definition of interlocutory application urging if the matter on application is granted it will resolve the controversy completely. He therefore submitted that the matter is not an interlocutory application. He urged further the application is not barred by the virtue of **Rule 15 (2) of the Election (Parliamentary of and County Elections) Petitions Rules, 2017**, as the hearing of the main petition is yet to commence. He pointed out that the door to file any application at the time of pre-trial conferencing was not closed as the court stated any application could be brought by way of formal application before commencement of the hearing. He urged the preliminary objection be dismissed.

18. Mr. Mokuu Ndubi, Learned Advocate, in a rejoinder stated the Court in determining the application will make a determination of where the advocate works. He urged what is before the Court in the 2nd Respondent's application is an interlocutory application referring to page 115 of the Black's Law Dictionary. On **Rule 15 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, he urged it talks of interlocutory application and the Rule is couched in a mandatory terms and urged the Court to uphold the Petitioner's Preliminary objection.

19. Article 162 (2) (a) and (3) of the Constitution of Kenya 2010, as regards the jurisdiction of the ELRC provides as follows:-

162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause”

20. The jurisdiction of the High Court is provided under **Article 165 (3), (4), (6) and (7) of the Constitution of Kenya 2010**. The High Court however do not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the supreme Court under the constitution or falling within the jurisdiction of the Employment and Labour Relations Court or the Environment and Land Courts.

Article 165 (5) (a) and (b) of the Constitution of Kenya 2010 provides:-

“165 (5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

21. Section 12 (1) (a) of the Employment and Labour Relations Court Act No. 20 of 2011, on the jurisdiction of ELRC Court provides as follows:-

“12 (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:-

(a)Disputes relating to or arising out of employment between an employer and an employee;”.....

22. In view of the above an Election Court cannot deal with matters which fall within the jurisdiction of Courts contemplated under **Article 162 (2) of the Constitution. The employment and labour Relations Court Act No. 20 of 2011** clearly spells out the jurisdiction of the **ELRC under Section 12**. That include matters relating to dispute relating to or arising out of employer and an employee relationship. In the instant application, the issue is not an issue relating to an employer and employee as contended by the petitioner as it does not fall under any situation envisaged under **Section 12 of the Employment and Labour Relations, Court Act No. 20 of 2011**. This Court in the application before it, is being asked to make a finding of a fact whether the impugned affidavits were commissioned by an unauthorised person in view of the provisions of the provisions of the **Oaths and Statutory Declarations Act** or make a finding of the physical address of the Advocate who commissioned the Petitioner's and his witnesses affidavits. In the application before this court, there is no issue or prayer seeking a declaration that M/s. Mercy Moragwa Mogusu is an employee of the firm of Musyoki Mogaka and Company Advocates, nor has the application raised the issues as regards of employment and labour in the affidavits, rather than non-compliance with the ethics under the **Oaths and Statutory Declarations Act**. The Application is purely based on the communication received from the LSK, the professional body, which regulates the professional conduct of its members. This Court in dealing with this application, has not been invited in the 2nd Respondent's application to determine the issue of employer and employee in respect of the firm of Musyoki Mugoka & Company Advocates and one M/s. Mercy Moragwa Mogusu Advocate. This is an Election Court and is bound by **Rule 12 (14) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** to apply the provisions of the **Oaths and Statutory Declarations Act (Cap 15)** which provides:-

“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.”

In addition to the above all Courts whether its High Court or ELRC or ELC or Magistrates Courts including tribunals have jurisdiction to determine whether an affidavit intended to be used before it is lawfully commissioned or not. No Court can be said it has no jurisdiction when it comes to considering the legality of an affidavit intended to be used before it.

23. Rule 15 (1) (c) and 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides:-

“(15) (1) Within seven days after the receipt of the last response to a petition, an election court shall schedule a pre-trial

conference with the parties in which the election court shall:-

(c) *determine interlocutory applications*

and

15 (2) An election Court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference. If the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition.”

24. The issue raised by both the Petitioner’s Counsel and the Counsel for the 2nd Respondent is what is “interlocutory application” The **Blacks Law Dictionary, Ninth Edition on page 115** an interlocutory application is defined as follows:-

“Interlocutory application A motion for equitable or legal relief sought before final decision.”

Further on the same **Black’s Law Dictionary at page 889** ‘interlocutory’ is defined as:-

“an Order, judgment, appeal, etc, interim or temporary; not constituting of final resolution of the whole controversy - also termed medial, (Cases appeal and error – 66 – 84: Criminal law – 1023 (3) Federal courts – 572 – 583”

From above though “Interlocutory application” may result in final determination of a matter on a point of law by making of a final order or judgment, my view is that interlocutory application is the one which is filed and heard before final decision is made in a matter, thus all applications filed before determination of Election Petition are in my view interlocutory applications inspite of the eventual outcome, save where an application is on a point of law.

25. Rule 15 (1) (c) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 states that an election court shall schedule a pre-trial conference with the parties in which under election Court shall determine interlocutory applications and further under **Rule 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** states that an elections Court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before commencement of the hearing of the Petition.

26. The 2nd Respondent’s application was filed on 8th November 2017 after the conclusion of the pre-trial conference, after the 2nd Respondent and his Counsel, as they were preparing for the hearing of the case discovered all affidavits in support of the case were commissioned by one M/s. Mercy Moragwa Mogusu. On the conclusion of the pre-trial conference, the Court had directed that any further applications were to be brought forward by way of formal application. The Court had not closed the door for filing interlocutory applications before commencement of the hearing of the petition. I have perused the 2nd Respondent’s affidavit and reasons for bringing up the application after pre-trial conferencing and before commencement of the hearing and I am satisfied the interlocutory application could not have, by its nature been brought before pre-trial conferencing. The application was filed on 8.11.2017 and served on 10.11.2017 ten (10) days before the intended commencement date of the hearing of the petition. The petition has not been heard yet. I therefore do not find any breach of **Rule 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**. At any rate, my view is that any application, for striking out a petition which is purely based on a point of law can be filed at any time before conclusion of the hearing of the petition.

27. The upshot is that the preliminary objection is devoid of merits. I find and hold that this Court has jurisdiction to entertain the Notice of Motion dated 8th November 2017 by virtue of the reasons stated in this ruling. The preliminary objection is dismissed with costs to the 1st, the 2nd and the 3rd Respondents.

NOTICE OF MOTION DATED 8TH NOVEMBER, 2017.

28. The Notice of Motion by the 2nd Respondent dated 8th November 2017, is based on the provisions of the law on the top part of the Motion, and seeks prayers on the face of the application and is based on the grounds on the face of the application and an affidavit of the 2nd Respondent dated 8th November 2017, particulars whereof are well captured under paragraphs 4, 5, and 6 of this ruling which I need not reproduce. The 1st and the 3rd Respondents Response to the application is captured under paragraph 7 of this ruling and the petitioner’s Response to the Motion is captured under paragraph 8, 9 and 10 of this ruling.

29. Mr. Mogikoyo, Learned Advocate, representing the 2nd Respondent/Applicant relied on the grounds on the face of the Notice of Motion and the 2nd Respondent/Applicant’s Affidavit. He urged under **Rule 8 (4) (b) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** a petition shall be supported by an affidavit sworn personally by the petitioner as per **Rule 12 (1) (b) of the aforesaid Rules 2017. Under Rule 12 (2) (f) of the aforesaid Rules** the name and address of the advocate, if any acting for the petitioner, has to be provided, which shall be address of service. That the Petitioner’s affidavit of support on page 49 of the petition, gives the name of the firm of Advocates acting for the petitioner as Musyoki Mugaka and Company Advocates, that under **Rule 12 (3) of the aforesaid Rules 2017** it is provided that each person who the Petition intend to call as a witness at the hearing, shall swear an affidavit and **Rule 12 (4) of the aforesaid Rules**, requires the Petitioner to file the affidavits sworn under **12 (3) of the aforesaid Rules 2017**. Mr. Mogikoyo, learned Advocate, urged it is mandatory the aforesaid affidavits, be filed together with the petition. He urged the petitioner listed six (6) witnesses whose affidavits, he filed together with the petition referring to pages 3 – 19 of the Petitioner’s Petition filed on 6th September 2017. He urged all affidavits must be sworn before Commissioner for Oaths in accordance with the Rules and provisions set out under the **Oaths and Statutory Declarations Act** referring to **Section 4 (1) of the Oaths and Statutory Declarations Act** which he urged is relevant to this application, and submitted a commissioner cannot commission his or her own documents or documents prepared by firm of Advocates from where he/she works or where

he/she has an interest. He pointed out that all witnesses affidavits in support of the petition including the petitioner's affidavit in support of the Petition, were commissioned by M/s. Mercy Moragwa Mogusu, Advocate, which fact he urged the 2nd Respondent discovered on 7.11.2017 when preparing with his Advocates for the hearing of the Petition, and who the 2nd Respondent was aware was working in the firm of Musyoki Mogaka & Company Advocates. The 2nd Respondent took further action to confirm with the aforesaid Advocate whether she was still in the aforesaid firm of Advocates. That he went to LSK Portal and did a search from which he confirmed she had declared to LSK her work place was Musyoki Mogaka & Co. Advocates (Annexure "VKM 2 (a).") That the 2nd Respondent took further action to make an inquiry with LSK and got confirmation through (annexure "VKM 2 (b).") provoking the filling of the Notice of Motion. The Advocate for the 2nd Respondent/Applicant referred the Court to the following authorities in support of the application.

(i) Kenya Federation of Labour & Another V. Attorney General and 2 Others [2014] eKLR.

(ii) Caltex Oil (Kenya) Ltd V. New Stadium Station Ltd & Another [2002] eKLR.

30. Mr. Mogikoyo, submitted that the Replying affidavit by the Petitioner contravenes **Order 19 (2) (3) (a) of Civil Procedure Rules**, as it is argumentative and most of the paragraphs are based on hearsay and that M/s. Mercy Moragwa Mogusu did not file response denying that she does not work for Musyoki Mogaka and Company Advocates. That the allegation she works for Musyoki Mogaka and Company Advocates has not been controverted.

31. Mr. Maloba, Learned Advocate, appearing for the 1st and the 3rd Respondents, supports the Notice of Motion dated 8.11.2017 and relied on the 1st and the 3rd Respondents Replying affidavit dated 18th November 2017, contents whereof are found on paragraph 7 of this ruling. He urges the Petitioner denies M/s. Mercy Moragwa Mogusu works in the firm of M/s. Musyoki Mogaka and Advocates, yet no affidavit from her was filed denying the allegation, that she works in the said firm of Advocates. He pointed out the letter annexed by the 2nd Respondent/Applicant dated 8.11.2017 from LSK confirmed M/s. Mercy Moragwa Mogusu's current address is at Musyoki Mogaka & Co. Advocates, the same firm in which the Petitioner practices in and named after him. On the Petitioner's Replying affidavit he urged the same is evasive, diversionary and purely intended to mislead the Court. He pointed out the Petitioner has served the 3rd Respondent with Replying affidavits which are not commissioned and signed as required by Law, urging Court to strike the affidavits off. He urged that the law is clear as per **section 4 (1) of the Oaths and statutory Declarations Act** which he relied upon. He referred to the 1st and the 3rd Respondents list of authorities being as follows:

"1. Kenya Federation of Labour & Another V. Attorney General & 2 Others [2014] eKLR.

2. Caltex Oil (Kenya) Limited v. New Stadium Service Station Ltd & Another [2002] eKLR.

3. Dickson Mwenda Kithinji v. Gatirau Peter Munya & 2 Others [2014] eKLR.

On the effect of affidavit commissioned by the same firm:

32. On the authorities submitted by the Petitioner, to the effect that the Court can allow the Petitioner to file fresh affidavits in case his affidavits are struck out from record, Mr. Maloba, Advocates, in his response referred to **Rules of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, urging under **Rule 8 (4) (b) of the aforesaid Rules** which is couched in a mandatory terms, the Petition shall be supported by an affidavit and that under **Rule 19 (2) of the aforesaid Rules**, it is provided that Court cannot extend the time within which a Petition is supposed to be filed or determined. He urged that the Court has no jurisdiction to grant leave to the Petitioner to file fresh affidavits once it finds the affidavits on record are defective.

33. Mr. Omari, Learned Advocate, representing the Petitioner in response to the Respondent's Counsel Submissions, urged the Counsel urged two points on facts and law. That on the basis of facts he submitted are that one Mercy Moragwa Mogusu works for Musyoki Mogaka & Co. Advocates, is based on LSK Portal and attached documents over the said Counsel Adm. No. P.105/4951/03. He submitted that there is no dispute the Counsel is a Commissioner for oaths nor is it disputed the witnesses appeared before her and that she commissioned the affidavits. Urging the question is whether she works in the firm of Musyoki Mogaka and Co. Advocates.

34. Referring to the said Advocates, profile exhibit "VKM 2" which shows since 2009, Mercy Moragwa Mogusu Advocate was with Musyoki Mogaka & Company Advocate, he urged the Physical address is Uganda House, 4th Floor, Kenyatta Avenue, whereas in the pleadings it is clear where the law firm is situated, stating it is situated at the same place but suite 19 and not Door 19. He stated the Letter as regards the last known contact address as declared by Mercy Moragwa Mogusu, it is not provided when the address was declared, urging the same is ambiguous, as it is not clear when the commissioner declared her contact address. He urged contact address is not similar to work place, submitting contact means a place where one can be found and one can avail documents or information, may be, where letters from LSK can be sent to. He submitted contact has nothing to do with where one works.

35. On the Website he challenged the LSK Website, doubting whether the same is even updated and whether it is correct referring to contents of Replying Affidavit under **paragraph 22 (a)** in respect to **Agonda Jacqueline Advocates**, where it is indicated as working as employees of Musyoki Mogaka & Co. Advocates, notwithstanding, that she left the firm long time ago. The Petitioner referred to Kenya Gazette Notice ("SMM5") in respect of Agonda Jacqueline, now a Magistrate, who was once his employee and currently working at Mavoko Law Courts, and ("SMM6") a cause list for the said Agonda Jacqueline, urging that is one of the credibility question on the website. He urged another credibility question is raised on **paragraph 22 (b)** of the affidavit of the Petitioner, on the website where it is stated one **Gisemba Paul Nyamweya** is an Advocate in that firm, but that is not so as he is a State Counsel working for gain in the Attorney General's Office and urged he cannot as such be said to be working for Musyoki Mogaka & Co. Advocates, attaching his pay slip marked "SMM9" and allegedly based at Nyeri. He added an Advocate, in private law firm of Musyoki Mogaka & Co. Advocates, cannot and will never be a State Counsel in the Attorney General's Office. On **paragraph 22 (c) Mwae Dorcas Wanjiru** in the LSK website, he urged is shown as an Advocate, yet he urged she is a partner in the firm referred to as **Hussein Mwae & Co. Advocates** situated at six-eighty Hotel, 5th Floor Room 605, as per

annexture “SMM7.” He urged that the same LSK website depicts Mercy Moragwa Mogusu as an Advocate, in the firm of Musyoki Mogaka and Company Advocates, which the Petitioner denies. He asked whether the LSK website in view of the above can be relied. Submitting that whatever is in the LSK website cannot be truthful but is a misrepresentation of the true facts. He urged the Court to take Judicial Notice that, the LSK website is not updated and cannot be relied upon, referring to “VKM 2 (a) and “VKM 2 (b)” the 2nd Respondent’s annexures urging it is not certain when the last known contact address in respect of Mercy Moragwa Mogusu Advocate, were given to LSK and urged the address given is different as there is difference between the “door” and “suite” pointing the details are always given to LSK by the Advocates.

36. On the letter by Mary M. Kitonga, the Program Officer Compliance and Ethics, the Petitioner urged she should have made an affidavit. He urged under the **Law Society Act, 2014, No. 21 of 2014 under Section 26(3)**, the Secretary of LSK, who is C.E.O. of LSK is responsible to the council for the day to day administration and Management of the Secretariat and as such all compliance for the LSK, he urged are signed by the Secretary in respect to any communication and any communication by Mary M. Kitonga are not legitimate and has no full force of the Law. He urged the Court to interpret the Constitution guarded **by Schedule 6 (7) of the Constitution, Article 10 and 19 – 22 of the Constitution of Kenya 2010**, in regard to the matter before the Court, pointing out that the **Oaths and Statutory Declarations Act**, was enacted before the Constitution of Kenya 2010. He urged under **Article 259 of the Constitution** the interpretation must be purposeful and lead to the development of the law in strictly following the provisions of **Article 10 of the Constitution. On Section 4 (1) of the Oaths and Statutory Declarations Act**, Mr. Omari, Advocate submitted that it was made to bar Advocates from Commissioning documents for Commercial gain.

37. Mr. Mokuu Ndubi, learned Advocate, appearing jointly with Mr. Omari, learned Advocate, of the Petitioner in his response reiterated that the Petitioner in filing the Petition he complied with the provisions of the Constitution, Elections Act and all provisions of the elections Rules. He reiterated that at the time of swearing the impugned affidavits, the commissioner, who witnessed the affidavits was not an employee of the petitioner’s firm of Musyoki Mogaka & Co. Advocates. He urged the Court to place more weight on the affidavit of the Petitioner rather than the Letter by LSK. He further submitted the author of the letter can be examined. In support of the Petitioner’s case he relied on the case of **Henry Okello Nadimo V IEBC & 2 Others HCEP NO. 2 of 2013**. He submitted in case the Court finds the affidavits defective, it can exercise its discretion and admit them but submitted that the said affidavits are not defective. He further urged the Court to summon Mercy Moragwa Mogusu, Advocate, for cross-examination under **Section 80 of the Elections Act**.

38. In reply to the Petitioner’s Counsel submissions Mr. Mogikoyo, learned Advocate, for the 2nd Respondent/Applicant stated the Petitioner’s Counsel has gone ahead to discredit the LSK’s website submitting the Petitioner and his Counsel are professional lawyers and members of Law society of Kenya and they very well know the procedure for applying for practicing Certificate pointing out the application for practicing certificate for current practicing year is made between December the previous proceeding year and 28th February of the current year, with information declared by the Applicant in the application form for practicing certificate, which information LSK puts in its website. Amongst the information required from the advocate applying for practicing certificate to LSK, is to disclose where he or she either practices or work place or if is a sole legal practitioner, that must be disclosed including the name to his or her firm, give physical address of where he or she practices or of his firm. He pointed out that the information contained in annexture “VKM 2 (a) and 2 (b)” is the information that was given to LSK by Mercy Maragwa Mugusu, Advocate, when she was tasking out her practicing certificate for the year 2017, Pointing out there is no information of change of her current address. That the information as contained in “VKM 2 (a) and 2(b)” he urged is current and updated and a true reflection of where Mercy Moragwa Mogusu, Advocate, practices. On claim set out under paragraph 22 of the Petitioner’s affidavit, he stated the LSK website captured the correct and updated information as regards the individuals referred to by the Petitioner and that the LSK cannot be faulted. On the discrepancies of the address on Uganda House, Kenyatta Avenue, he urged there are no “suites” or “doors” labelling.

On allegation the Programs Officer of LSK cannot or is not an official person to write letters on issues touching on the advocate before Court, he urged the arguments is self-defeating referring to the Petitioner’s Replying affidavit. (Annexture “SMM1”) a letter dated 14.11.2017 from the office of Musyoki Mogaka and company Advocates signed by Mr. Dunston Omari, Advocate in this petition addressed to the Program Officer, compliance and Ethics and another letter copied to the same person by the same firm dated 15.11.2017 and even a third letter dated 16.11.2017 to the said Program Officer, compliance and Ethics, LSK signed by the petitioner. He submitted the Advocates in the firm of Musyoki Mogaka & Co. Advocates and the Petitioner have questioned the competence of the Program Officer, compliance and Ethics, LSK. He pointed that under **Section 28 (2) (b) of the Law Society of Kenya Act, 2014, No. 21 of 2014**, the structure of the Secretariat is structured in a manner that consist of various directorate and creating the compliance and ethics directorate.

39. On reference to the various **Articles of the Constitution and Schedule 6, Article 10, 19 – 22 and 159 (2) (d)**, he urged that this is not a Constitutional and Divisional Human rights of the High Court of Kenya, which deals with the infringement of rights provided for under Article 19 – 22 as read with Article 10 of the Constitution of Kenya 2010. He argued Articles referred to cannot be used by the Petitioner as a defence for non-compliance with the clear provisions of the law. He submitted on authority submitted by the Petitioner **Henry Okello Nadimo V. IEBC & 2 Others (supra)** at Busia, that the same is distinguishable.

40. Mr. Maloba, Learned Advocate, for the 1st and the 3rd Respondents on his part, responded by associating himself with submissions by Mr. Mogikoyo Advocate , urging much has been spent on discrediting the LSK portal but no time has been spent to inform the Court the firm under which Mercy Moragwa Mogusu Advocate practices. He urged no documentary evidence was produced by the Petitioner to show at what place she practices, notwithstanding the Petitioner’s side stated she was working at Petitioner’s brother’s-in-Law firm thus M/s. Momanyi & Co. Advocates. On the LSK website he submitted it was upon the Petitioner to demonstrate Mercy Moragwa Mogusu updated the LSK, with her current contact and it failed to update the same in their website and Database. On the issue of the physical address of Musyoki Mogaka & Co. Advocates as being “Door 19” to their preferred “Suite 19” he urged it was not shown that the two phrases “Door 19” refer to different physical locations. On the letter “VKM 2 (b)” and Petitioner’s submissions that the Petitioner’s affidavit should be given more weight than the LSK letter he pointed out that the letter “VKM 2 (b)” before Court is brought through an affidavit by the 2nd Respondent dated 8.11.2017 hence it is equally weighty. On allegation that the Petitioner is an innocent litigant he referred to paragraphs 1 and 42, of the Petitioners affidavit which confirms he is an Advocate of the High Court of Kenya practicing as a sole practitioner in the firm of Musyoki Mogaka & Co. Advocate. He is therefore a person who is well aware of the effects of swearing of an affidavit and the provisions of the Oaths and Statutory Declarations Act. He urged that there has been no dispute on legal position that an Advocate cannot commission an affidavit drawn by his or her own firm.

41. I have taken a lot of time to meticulously reproduce the rival submissions for and in opposition of the Notice of motion dated 8.11.2017 by the 2nd Respondent. I have equally captured the respective responses by the 1st and the 3rd Respondents and the Petitioner. I have also, have had time to go through the respective supportive authorities on the rival positions taken by both sides in the application. Having considered the pleadings and the submissions the issues arising for consideration in this application can be summed up as follows:

(i) Where was the commissioner of the Petitioner's supportive affidavit dated 6th September 2017 and the six affidavits of the Petitioner's six (6) witnesses all dated 6th September 2017 one Mercy Moragwa Mogusu, Practicing at the time of the commissioning of all the seven (7) affidavits?

(ii) Can a commissioner for Oaths exercise the powers given under the Oaths and Statutory Declarations Act in any proceedings or matter in which he or she is the Advocate for any of the parties to the proceedings or concerned in the matter or in which he or she is interested?

(iii) Can Court strike out and expunge the seven (7) affidavits referred in the 2nd Respondent's Notice of Motion dated 8.11.2017?

(iv) Can the Petition proceed to hearing if the seven (7) affidavits are struck out and expunged from the record?

(v) What order can the Court make on costs?

42. The first issue for consideration in this application is where was the commissioner of the Petitioner's supportive affidavit dated 6th September 2017? and the six (6) affidavits of the Petitioner's six (6) witnesses all dated 6th September 2017 one Mercy Moragwa Mogusu practicing at the time of the commissioning of all the seven (7) affidavits? In the submissions and affidavits filed in support and in opposition of the application there is no dispute that the affidavits were sworn by the parties mentioned in the respective affidavits and were commissioned by one Mercy Moragwa Mogusu either at Nairobi or Kisii as shown in the various affidavits. What is in dispute is where was the commissioner practicing law. The 2nd Respondent's position is that Mercy Moragwa Mogusu was at the time of commissioning the seven (7) affidavits practicing law with the firm of Musyoki Mogaka & Co. Advocates, whereas the Petitioner contests that position and states Mercy Moragwa Mogusu was not working in that firm but that of Momanyi and Associates Advocates. The Petitioner has not attached any documentary evidence to demonstrate indeed Mercy Moragwa Mogusu was not practicing law at the firm of Musyoki Mogaka & Co. Advocates but with the firm of Momanyi & Associates Advocates as submitted by the Petitioner. The 2nd Respondent on his part as per the contents of his affidavit attached documentary evidence showing where Mercy Moragwa Mogusu was at the time in question working or practicing.

43. The 2nd Respondent in his affidavit in support of the Notice of Motion dated 8th November, 2017 averred that he talked to Mercy Moragwa Mogusu, after perusing the seven (7) affidavits while he was preparing for hearing of the petition and after noticing all affidavits were commissioned by her. This was immediately after 7th November 2017 as per paragraph 4 of the 2nd Respondent's affidavit. She informed him, which, information he believed to be true, she was practicing in the law firm of Musyoki Mogaka & Co. Advocates, the firm which had drawn and filed all the documents in this petition. He then checked with the Law Society of Kenya portal and the Law Society itself, which confirmed indeed Mercy Moragwa Mogusu is still practicing from M/s. Musyoki Mogaka & Co. Advocates and was supplied with copies of M/s. Mercy Moragwa Mogusu's Advocate's profile "VKM 2 (a) and 2 (b)" LSK Advocate search Engine on Advocate profile Mogusu Mercy Moragwa P105 number P. 105/4951/03, practicing status:

Mogusu Mercy Moragwa

P105/ 105/4951/03

Practicing Status: Active (2017)

Practice Number: LSK/2017/739

ABA Status: Non Life

Work Place: MUSYOKI MOGAKA & CO. ADVOCATES

Physical Address: UGANDA HSE., 4TH FLR. DR. 19, KENYATTA AVENUE

TOWN: NAIROBI

TELEPHONE: -

The above contacts are the last known contacts as declared by Mogusu Mercy Moragwa

The document indicate further:

“The above contact are the last known contacts as declared by Mogusu Mercy Moragwa

Area of Practice

Year: 2017

The document further gives details of practicing status and CLE compliance form 2009 – 2017 showing under practicing status Active. On annexure VKM 2 (b) a letter from LSK by Mercy M. Kitonga, Program Officer, compliance and ethics, **Re: Mogusu Mercy Moragwa** it confirms according to the record, held by LSK, the current address for the advocate mentioned thereto is care Musyoki Mogaka & Co. Advocates Uganda House, 4th Floor Door 19, Kenyatta Avenue, P. O. Box 571800 – 00200, Nairobi.

44. The Petitioner in his affidavit aver that Mercy Moragwa Mogusu is not an employee of Musyoki Mogaka & Co. Advocate and under paragraph 13 of his affidavit averred that he is a sole proprietor registered under the Registration of Business Names Act and added at the time of commissioning the affidavits, Mercy Moragwa Mogusu, was not an employee, Associate or partner of Musyoki Mogaka & Co. Advocates, urging he is aware she works with and/or the firm of Momanyi & Associates, Windsor House, 6th Floor and adding she has no interest whatsoever in his firm, which had drawn and filed the pleadings to fetter her commissioning the impugned affidavits. He attached a letter addressed to Program Officer, compliance and Ethics dated 14.11.2017, (Annexure SMMI”) written by Mr. Danstun Omari Mogaka Advocate, in the same firm stating partly as follows:-

“We write to inform you that Mogusu Mercy Moragwa has never worked in our firm since the inception of this law firm. Kindly but urgently contact the said Advocate on 0727650027 with a purpose of establishing where she practices law. In the meantime, we will be most obliged if you would update your website to indicate that she does not work in our firm. Urgently issue the bearer of this letter with a letter indicating that Mogusu Mercy Moragwa has never worked in Musyoki Mogaka and Company Advocates. Also issue him with a copy of the letter dated 8/11/17 from Nyameta, Mogaka and Magiya Company Advocates to yourself, if any.”

The Petitioner by further letter dated 15.11.2017 to M/s. Momanyi & Associates written by D. Omari Mogaka, Advocate, over Mogusu Mercy Moragwa, Advocate, P.105/4951/03 stated Party as follows:-

“We note that the above advocate had previously taken out her practicing certificate from our firm but ended up joining your firm.

For purposes of ascertain her current address, kindly do confirm to us with a copy to the Law Society of Kenya that the said Advocate has been at your law firm more particularly from September 2017 to date.”

From the Petitioner’s annexures it is depicted that the Petitioner by his letter of 14.11.2017 did not know where Mercy Moragwa Mogusu was practicing law, yet the following day 15.11.2017 he wrote to Momanyi & Associate directing them to confirm to them with a copy to LSK the said Advocate has been at Momanyi & Associates and more particularly from September 2017 to date. That if Musyoki Mogaka & Co. Advocates were candid and/or honest that they did not know where Mercy Moragwa Mogusu was working, why ask Momanyi & Associates to do a letter stating she had been at their firm more particularly in September 2017?

45. In the instant case there is sufficient evidence from the 2nd Respondent’s affidavit and annexures from LSK that Mercy Moragwa Mogusu in seeking for current practicing certificate and in completing her application forms for current practicing certificate for the year 2017, in which the applicants are required to declare to the Law Society their work place, she declared her work place as M/s. Musyoki Mogaka & Co. Advocates, vide “VKM 2 (a)” she voluntarily and truthfully gave her particulars to the Law Society of Kenya. The LSK confirmed her particulars through annexure “VKM 2 (b).” I find the two documents weighty and clearly pointing to where Mercy Moragwa Mogusu practices laws as they were issued by Regulatory Professional body which deals with issues touching on practicing Advocates. I take Judicial Notice that an application for practicing certificate for the current practicing certificate for any practicing Advocate, is made between December of the previous preceeding year and 28th of February as of the current year and that the information declared in the form by the Applicant for practicing certificate is the same information the Law Society puts in its website. The LSK is not under any duty or obligation to investigate on the information given by the Applicant but takes it as the whole gospel truth as declared by the member who is applying for the certificate. The certificates are applied for individually, so it is the duty of the Applicant to give the correct information as to where he or she either practices or work place. I therefore find the information in “VKM 2 (a) and 2 (b)” to be correct and to have been given by no other person, other than Mercy Moragwa Mogusu and as truly reflecting her contact address and her place of practice or work place. That if there were changes say on the place of practice or work place it was upon her to have advised the LSK of the change. I find that no evidence inform of documentary evidence or otherwise has been adduced before this Court to decide otherwise. I find the information in the LSK’s website credible, correct and updated and as a true reflection of where Mercy Moragwa Mogusu works otherwise she would have sworn an affidavit contraverting the same. On issues raised under Petitioner’s **paragraph 22 (a) (b) and (c)** as regards the contact addresses of the three Advocates who once worked with M/s. Musyoki Mogaka & Company Advocates and failure to update the LSK website as regards the contact addresses of the said Advocates, I have perused annexures “SMM 5” “SMM 6” SMM7”, as regards Jacqueline Adhiambo Agonda, “SMM7” shows practicing status of **Agonda Jacqueline Adhiambo inactive (2017)** ABA status: unpaid, “SMM8” of **Gisemba Paul Nyamweya**, practicing status inactive (2017), ABA status: unpaid, “SMM9” is pay slip for **Gisemba Paul Nyamweya** for October 2016, November 2016, December 2016, Office of A.G. and Department of Justice “SMM10” **Mwea Dorcas Wanjiru** shows practicing status Active 2017. ABA status: non-life. All the annexures given by the Petitioner are clear, that the contact addresses thereto are the last known contacts as declared by the respective parties, that where the parties have not bothered to update or contact LSK to change their addresses, that does not mean as urged by the Petitioner, the website of LSK is incredible or unupdated. That apart, the issue mainly before this court is the contact address of Mercy Moragwa Mogusu and not that of the former employees of the Petitioner.

All the annexures relied upon by the Petitioner gave the physical address as Uganda House, 4th Floor, DR. 19, Kenyatta Avenue. There is no mention of “suite 19” as urged by the Petitioner, though the pleadings mention suite 19. The Petitioner has failed to demonstrate that there is

difference between the “Door 19” and “suite 19” and if it is there, it is of what? I find “door 19” and “Suite 19” are the same and one, whether one chooses to refer to the entrance as “door 19” or “suite 19” it is the same entrance to the Petitioner’s office.

46. On the Program Officer, compliance and ethics, **Section 26, 27 and 28 of the Law Society of Kenya Act, 2014, No. 26 of 2011 provides as follows:**

“26 (1) There shall be a secretary to the Council who shall be the chief executive of the Society and in charge of the secretariat of the Society.

27(1) The secretariat

(1) There shall be a secretariat of the Society to be headed by the secretary.

28(1) Structure of the secretariat

(1) The secretariat shall be structured in a manner that promotes the commitment to practice excellence and client care in the profession.”

(28) (2) (a) the practice standards directorate which shall be responsible for the promotion of excellence in practice, client care and the achievement of full compliance with the rules of good practice in the profession through advice, support and other forms of assistance to advocates and law firms;

(b) the compliance and ethics directorate which shall be responsible for the receipt and evaluation of complaints against advocates and the prosecution of matters before the Disciplinary Committee;

In view of the above I find and hold that the Program Officer, compliance and ethics, in the Law Society of Kenya is a statutory creature and M/s. Mary M. Kitonga is the current holder of that post with full mandate and responsibility for the receipt and evaluation of complaints against Advocates and the Prosecution of matters before Disciplinary Committee. I find she acted within her powers and authority in responding to the 2nd Respondent’s request and in issuing annexure “VKM 2 (b).” In fact the Petitioner recognises her position as he wrote more than one letter to her and even approached her in matters related to her duties. I find annexures “VKM 2 (a)” and “VKM 2 (b)” to have been issued by the right officer from the Law Society of Kenya.

47. The Petitioner’s Counsel referred to **Article 10, 12, 19 – 22, 159 (2) (d) of the Constitution of Kenya 2010 and Schedule 6 of the Constitution of Kenya 2010**, in urging the Court to be guided by the same in the interpretation of the Constitution, however, the Counsel was not specific on the issue that needed interpretation. I am in this Petition sitting as an Election Court and not as a Constitutional Court. This Court was not told what rights, if any rights, were being violated or infringed or threatened to be breached and by who and how. I am dealing with an Election Petition, which has to be determined within timelines set by the **Elections Act and the Constitution of Kenya 2010**. No single Article of the **“Constitution of Kenya 2010”** has been brought forward in this Petition for interpretation by this Court. In this Petition and more specifically what this Court is dealing with, is not an issue of technicalities but on issue of non-compliance of the law, regarding commissioning of the affidavits under **the Oaths and Statutory Declarations Act**. The Articles referred to by the Petitioner and which this Court was asked to interpret do not exempt any party from complying with the provisions of the Law. I find the Articles referred to, not relevant in the application before the Court and not forming any defence for non-compliance with statutes. This Court being a Court of Law is called upon and obligated to interpret the law and apply it as it is. The Court cannot close its eyes to non-compliance within the law nor can it forgive it. On **Section 4 (1) of the Oaths and Statutory Declarations Act**, the Petitioner urges that its purpose is to prevent commercialization of affidavits or documents by commissioners. I find that not supportable by any written law as **Section 4 (2) of the Oaths and Statutory Declarations Act** provides that the commissioner for Oaths is entitled to charge and be paid such fees as may be authorized by any rules of Court for time being.

48. Having said that much and having noted that Mercy Moragwa Mugusu never swore any affidavit to controvert the contents of the affidavit of the 2nd Respondent and challenge her contact address as given on the annexures “VKM 2 (a) and 2 (b),” and the petitioner having not demonstrated through documentary evidence that Mercy Moragwa Mogusu does not work in his firm but that of Momanyi and Associates, and having perused his affidavit which I have noted is not only evasive diversionary but is argumentative in nature, and considering all the submissions from both sides, I am satisfied that on balance of probabilities the 2nd Respondent has proved that Mercy Moragwa Mogusu, who commissioned the seven (7) impugned affidavits dated 6th September 2017 as of that time was practicing at the time of the commissioning of all seven (7) affidavits or her work place was at Musyoki Mogaka and company Advocates.

49. The next issue for consideration is whether a **commissioner for Oaths can exercise the powers given under Oaths and Statutory Declarations Act in any proceedings or matter in which he or she is the Advocate for any of the parties to the proceedings or concerned in the matter in which he or she is interested?** The relevant law on this point is found under **Section 4 (1) of the Oaths and Statutory Declarations Act**, which provides:-

“A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any Court or matter in Kenya, 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:

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.”

50. In **R.E BAGLEY (1911) 1 KBD 317** at the hearing the Court highlighted thus:

“Now one of those affidavits was sworn before Mr. Goddard, who was the solicitor for the trustee of the deed, and they also have been interested in it. It is sufficient to say that he was solicitor for the trustee of the deed, as appears from the endorsement of the deed itself. That is the really important point in this case. Is an affidavit, or what purport to be an affidavit, sworn before the solicitor of the trustee of the deed a nullity and is its effect to render the deed void?”
.....

It was held thus:-

“Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested.”

“That is to say, although under the first part of the section he is generally empowered to administer an oath whether the oath be in the form of an affidavit or of a statutory declaration, yet there is a proviso that this general power may not be exercised by any person who is solicitor to any of the parties in any proceeding.”

“If am right in the view that Goddard had no authority to administer this particular oath, it seems to me that there was no affidavit at all, and, that being so, the deed to the validity of which the filing of the debtor’s affidavit is essential is no deed at all and is gone.”.....

51. In the case of **James Francis Kariuki & Another V United Insurance Co. Ltd Civil Appeal No. 1450 of 2000**, Hon. Justice Onyango Otieno, as he then was; held as follows:

“That the verifying affidavit sworn by the plaintiffs is incurably defective as the Commissioner for Oaths while exercising the powers given, offended the mandatory proviso of Section 4(1) of the Oaths and Statutory Declarations Act.”

“The simple facts of this case are that the Plaintiffs are, according to the Plaint represented by Njenga Mwaura and Company, Advocates. Mr. Njenga Mwaura is a Partner in the firm of Njenga Mwaura and Company, Advocates, who are the Advocates representing the Plaintiffs. The Verifying affidavit has been sworn before Njenga Mwaura as Commissioner for Oaths.”.....

“It will be clear from the above that Mr. Njenga Mwaura, being an Advocate in the firm that is acting for the plaintiff should not have allowed the verifying affidavit to be sworn before him as in any event, is an interested party.”

52. In **Kenya Federation of Labour & Another V. Attorney General & 2 Others Industrial Court of Kenya at Nairobi, Case No. 735 of 2012**, Hon. Justice Nzioki wa Makau held:

“The short answer to that is that it would be against the provisions of the Oaths and Statutory Declarations Act. A Lawyer cannot commission a document drawn by his/her firm. Indeed the further affidavit by the claimants was defective in form as the jurat was not in conformity with the Oaths and Statutory Declaration Act.”

53. **Caltex Oil (Kenya) Limited Vs New Stadium Services Station Limited & Another [2002] eKLR** Hon Justice Onyango Otieno, as he then was, stated as follows:

“I do think that the courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the same laws under any pretenses whatsoever. I still stand by what I did say in the case of James Francis Kariuki & Another Vs. United Insurance Co. Ltd HCCC No. 1450 at 2000 that such an affidavit sworn in violation of section 4 (1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title.”

54. In view of the above authorities and the provision of **Section 4 (1) of the Oaths and Statutory Declarations Act**, it is clear from the facts of this petition, that the Petitioner in this petition is represented by the firm of M/s. Musyoki Mogaka & Co. Advocates, the firm which drew and filed this petition. The affidavits were sworn before Mercy Moragwa Mogusu, a Commissioner for Oaths who practices or works with the said firm, which is representing the Petitioner. It was clear at the time of commissioning of the affidavits that M/s. Mercy Moragwa Mogusu, being an Advocate practicing law in the firm, that is acting for the Petitioner should not have allowed the supportive affidavit of the Petitioner as well as the six witnesses affidavits to be sworn before her as in the event she is an interested party.

55. **The next issue is whether the Court can strike and expunge the seven (7) affidavits referred in the 2nd Respondent’s Notice of Motion dated 8.11.2017?** The Petitioner and his witnesses affidavits offends **Section 4 (1) of the Oaths and Statutory Declarations Act**. The seven affidavits have been sworn before an unauthorized commissioner by virtue of **Section 4 (1) of the Oaths and Declarations Act** as a Commissioner cannot commission his or her own documents or documents prepared by the firm where that Commissioner works or where he/she is interested. The said Section is couched in a mandatory form. The swearing of the aforesaid affidavits by the said commissioner offends an Act of Parliament and in my view that do not represent a mere irregularity either in a defect in form neither can it be said to be a technical irregularity as it goes to the root of the substantive issue before court. It is an irregularity that is incurably defective. All the affidavits in the Petition having been commissioned by an unauthorized person or contrary to the law are in my view defective. I accordingly

strike out and expunge from the Court records the affidavits by:-

1. *Stephen M. Mogaka*
2. *Eric Mokuu*
3. *Peterson Nyaruri*
4. *Charles Obiero Mogwambo*
5. *Kennedy Mongare Mogaka*
6. *Andrew Omoyo*
7. *Justine Gekong'a Orina*

56. Whether the Petition can proceed to hearing if the seven (7) affidavits are struck out and expunged from the record?

Rule 8 (1) (4) (b) of the Elections (Parliamentary and County Elections) petitions Rules, 2017, provides:

“8 (4) The petition shall:-

(b) be supported by an affidavit sworn by the petitioner containing the particulars set out under rule 12: and”
.....

Rule 12 (1) (b) of the Elections (Parliamentary & County Elections) Petitions Rules, 2017 provides:-

“12.(1) A petition shall be supported by an affidavit which shall:-

(b) be sworn personally by the Petitioner or by at least one of the Petitioners, if there is more than one Petitioner.”

From the above Rules the petition should be accompanied by an affidavit sworn personally by the petitioner

Rule 12 (2) (f) of Elections (Parliamentary & County Elections) Petitions Rules, 2017 provides:

“12. (2) An affidavit in support of a petition under sub-rule (1) shall state:-

(f) the name and address of the advocate, if any, acting for the Petitioner which shall be the address for service. ”
.....

57. Rule 12 (3) and (4) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, provides:

“12 (3) Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit.

12 (4) A petitioner shall, at the time of filing the Petition, file the affidavits sworn under sub-rule (3)”

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, in case 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. The petitioner relied on the case of **Henry Okello Nadimo V IEBC & 2 Others (supra)**. Under **Rule 12(1), (b), (3) and (4) of the Elections (Parliamentary & County Elections) Petitions Rules, 2017** which is couched in a mandatory form, it is provided that an affidavit by the Petitioner and those of the persons, who the petitioner intends to call as witness or witnesses at the hearing shall be filed at the time of filing the petition. There is no provision for filing affidavits after petition has been filed and after expiry of the time for filing a petition.

Section 76 (1) of the Elections Act provides:

“76(1) A Petition:-

”(a) to question the validity of an election shall be filed within twenty eight days after the date of declaration of the results of the election and served within fifteen days of presentation.”

Article 87 of the Constitution of Kenya 2010 provides:-

“87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

(3)”

59. From the above, it is clear the timelines within which a petition and all accompanying documents should be filed is 28 days from the time of the declaration of the results of the Elections. The High Court has no jurisdiction to extend the timelines within which to file further affidavits or fresh affidavits after the expiry of the constitutional timelines nor can Court exercise any discretion to re-admit the expunged or struck out affidavits. **Rule 19 (2) of the Elections (Parliamentary & County Elections) Petitions Rules, 2017** provides:

“19(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.”

60. In **Henry Okello Nadimo V IEBC & 2 Others (supra)**, Hon Justice F. Tuiyot, after striking out the affidavits in support of the Petition addressed himself thus:

“Paragraph (20) This Court savours the challenge because the unusual circumstances of this case calls for an unusual approach. I am persuaded that the affidavit is not an intergral part of the Petition and its absence cannot deal a fatal blow to these proceedings. Secondly the approach does not prejudice the Respondents. The Rules, it bears repetition, require that the Supporting Affidavit should contain the grounds on which the relief is sought and set out the facts to be relied on by the Petitioner. One reason for this requirement is that the Respondent should be aware, with reasonable specificity about the case which they are required to answer. Ambush and surprise are eliminated. In the instant case the affidavits which I have found to be invalid gave that information to the instant case the affidavits which I have found to be invalid gave that information to the Respondents. It is little wonder that they robustly answered to and participated in the Petition.”

61. The above case is distinguishable from the present case in that, that case was clearly decided on the basis of the **Elections (Parliamentary and County Elections) Petition Rules, 2013**, in which there were no features of the petition, as is the case now, under the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**. The features are clearly spelt out under **Rule 8** which sets out the contents and form of the petition contrary to **the Rules of 2013**. Secondly that case was very unique in its own way as 22 out of 27 witnesses had already testified on their affidavits when the issue of the defects of their affidavits arose. The Court was agonizing that 22 witnesses had given evidence on Oath and thoroughly cross-examined and was wondering what to make out of it even if the affidavits were struck out, the evidence was already on record and Court had to look for a balancing act and that is why the Court stated under paragraph 20 of its judgment that it had to apply unusual approach to save the situation as **Rule 10 of Elections (Parliamentary and County Elections) Petition Rules 2013** did not provide for features of the petition, unlike **Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules 2017**. The Court ruled the affidavits were not integral part of the Petition. I find the facts of that petition are not similar nor are they near similar to this case as the hearing in this petition has not started. The unique principle of that case cannot therefore apply nor is it applicable as **Rule 8 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, are couched in a mandatory manner and Court cannot extend timelines in view of the above. I find and hold that this Court cannot exercise its discretion to re-admit the affidavits struck out nor allow for filing fresh affidavits as it also lacks jurisdiction to do so, after the mandatory period of filing petitions together with all affidavits by the Petitioner has lapsed.

62. The Upshot is that the Petitioner’s Preliminary Objection is devoid of merits and the same is accordingly dismissed with costs to the 1st, the 2nd and the 3rd Respondents.

63. The 2nd Respondent’s Notice of Motion dated 8th November 2017 is meritorious and is accordingly allowed. I proceed to make the following orders: -

(a) The affidavits by (1) Stephen M. Mogaka, the Petitioner in support of the petition; the affidavit by Petitioner’s intended witnesses (2) Erick Mokuu; (3) Peterson Nyaruri; (4) Charles Obiero Mogwambo; (5) Kennedy Mongare Mogaka; (6) Andrew Omwoyo and (7) Justine Gekong’a Orina all sworn on 6th September 2017 before Mercy Moragwa Mogusu Advocate, are all struck out and expunged from the record for being incurably defective for being sworn before a person, unauthorised by law and having interest in the matter.

(b) The petition being unsupported by supportive affidavit and there being no witnesses affidavits after the same having been struck out and expunged from record, the petition is defective for non-compliance with mandatory Rules, being Rules 12(1) (2)(3)(4) and (14) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

(c) The Petitioner’s petition dated 6th September 2017 being not supported by supportive affidavits and witnesses’ affidavits after the same having been struck out and expunged from record, the Petition is defective, incompetent and is accordingly struck out with costs with interest to the Respondents against the Petitioner.

(d) Having heard the Counsel on the issue of costs and having considered the proceedings and considering the time taken in

preparing for the petition, the applications urged before Court and that the same did not go to full hearing, I award costs limited to Kshs. 1,200,000/=(one million and two hundred thousand shillings) to the 1st and the 3rd Respondents and Kshs. 1,500,000/=(one million and five hundred thousand shillings) to the 2nd Respondent being instruction fees, the rest of the fees due, be taxed by Deputy Registrar upon filing of the respective bill of costs.

DATED, AT NYAMIRA THIS 14TH DAY OF DECEMBER 2017.

HON. J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Court Assistants:

1. Karlbean K. Mobisa

2. Maurine Akinyi

Mr. Mokuia Ndubi for the Petitioner

Mr. Maloba: for the 1st and the 3rd Respondents

Mr. Mogikoyo: for the 2nd Respondent

HON. J.A. MAKAU

JUDGE