



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELECTION APPEAL NO. 3 OF 2013**  
**AND IN THE MATTER OF THE**  
**COUNTY ASSEMBLY WARD REPRESENTATIVE**  
**WOODLEY/KENYATTA/GOLF COURSE WARD IN**  
**KIBRA CONSTITUENCY, NAIROBI COUNTY**

BETWEEN

ABRAHAM MWANGI NJIHIA ..... APPELLANT

AND

THE INDEPENDENT ELECTORAL  
AND BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT

DAVID NJOROGE KAIRU .....2<sup>ND</sup> RESPONDENT

JANE WASILWA, RETURNING OFFICER ..... 3<sup>RD</sup> RESPONDENT

*(Being an appeal from the Judgment and Decree of the Chief Magistrates Court at Kibera Law Courts (Hon. J. Wanjala) delivered on the 13<sup>th</sup> June 2013 in Kibera Chief Magistrates Court Election Petition No. 3 of 2013)*

**JUDGMENT**

**Introduction**

1. This appeal is from the decision of the Chief Magistrate at Kibera Law Courts being **Election Petition No. 3 of 2013** challenging the election of the County Assembly Ward representative for Woodley/Kenyatta/Golf Course Ward in Kibra Constituency.
2. The appellant has moved the court by a Memorandum of Appeal dated 10<sup>th</sup> July 2013 seeking to set aside the decision of the subordinate court striking out the petition on the ground that it was drawn and filed by an unqualified person. The advocate acting for the petitioner had not taken out his practising certificate at the time of drawing and filing the petition on 15<sup>th</sup> March 2013.

3. The ruling, which is subject of this appeal, was made pursuant to a Notice of Motion dated 18<sup>th</sup> April 2013 filed by the 1<sup>st</sup> and 3<sup>rd</sup> respondent. In striking out the petition, the court held that; *“The petition having been filed by Njiru Boniface Advocate on 15/3/2013 when he did not hold a current practicing certificate is incompetent and it must be struck out. I proceed to allow the application to strike out this petition with costs.”*
4. It is not in dispute that Mr Boniface Njiru, the appellant’s counsel did not possess valid practicing certificate, for the year 2013 at the time of filing the petition. This fact was confirmed by the Deputy Secretary of the Law Society of Kenya in the letter dated 10<sup>th</sup> April 2013. Mr Njiru eventually took out his practising certificate on 2<sup>nd</sup> May 2013 after filing the petition.

### **Grounds of Appeal**

5. The appellant case was urged on the basis of the grounds of appeal set out in the Memorandum of Appeal as follows;
  1. *The decision of the Learned Magistrate Judith Wanjala to strike out the Election Petition only on the ground that the filing was done by an Advocate who is otherwise an Advocate of the High Court of Kenya of 33 years standing save that the Advocate had not paid revenue for the year 2013 practicing certificate is a grave miscarriage of justice as the decision is only based on a pure technicality of law as follows:*
    - a. *Rule 10(3) of the Election (Petition and County Elections) Petition Rules 2013 only requires the petition to be signed by the Petitioner himself or by a person authorised by him, and that the petition be supported by an affidavit by the petitioner containing the grounds on which relief is sought and setting out the facts relied by the petitioner. The appellant’s petition was signed by him and supported by an affidavit sworn by him.*
    - b. *Section 79 of the Elections Act provides that an Election Court shall peruse the petition and either dismiss it summarily or fix the date for the trial of the petition. There is no provision for striking out a petition under Section 79. The Learned Magistrate having perused the petition on 2<sup>nd</sup> May 2013 in presence of all Counsel, the same day she was appointed and gazetted in Gazette Notice No. 6117 and proceeded to fix the petition for pre-trial conference as required under Rule 17 of the Rules lacked power to reverse her decision. The Learned Magistrate could not proceed to strike out the petition after the date.*
    - c. *Section 80(1) of the Elections Act relating to the powers of the Election Court provides that the court should determine all matters that come before it without undue regard to technicalities. This statutory protection covering Election Petition was violated by the Learned Magistrate and occasioned a grave miscarriage.*
    - d. *The Magistrate did not fault the petition on any other ground especially those set out under Rule 17 save that the Advocate who filed it had not taken out a practicing certificate for the year 2013. The Learned Magistrate admitted that when the petition was filed on 2<sup>nd</sup> May 2013 when she assumed jurisdiction after her appointment by the Chief Justice as per Gazette Notice No. 6117 the same advocate had taken out a practicing certificate for the year.*
  2. *The Learned Magistrate erred in law in stating at paragraph 63 and 64 that a magistrate of a subordinate court has similar inherent powers as the High Court in an election petition to strike out an election petition. The Learned Magistrate failed to find that as a creature of the statute the subordinate court in an Election Petition could only exercise those powers that were conferred upon her by the Constitution, the Elections Act and the Election (Petition and County Elections) Petition Rules 2013.*
  3. *The Learned Magistrate infringed petitioners fundamental rights by contravening Article 159(2) of the Constitution which directs that justice should be administered without regard to procedural technicality and proceeded to strike out the appellant’s petition on ground that the petition was filed (not signed) by an advocate who had not taken a practicing certificate of the year 2013. In the same vein the Learned Magistrate misconstrued or misapplied the decision of Supreme Court*

in **Petition No. 5 of 2013 Raila Odinga vs IEBC & Others.**

4. *The Learned Magistrate was completely in error in paragraph 75 of the Ruling in failing to distinguish between an Advocate who is otherwise professionally qualified, has been admitted to the practice law, has not been struck off the Roll of Advocates or has not been suspended by the Law Society of Kenya Disciplinary Tribunal but has only delayed to take out the yearly practicing certificate and a person who is not qualified at all to practice law. The petitioner avers that the requirements to take out a practicing certificate yearly has no justice content in it at all save to collect revenue for the Government and the Law Society.*
5. *The Learned Magistrate erred in law in failing to distinguish the various decisions cited before her that established there was a confusion in law concerning striking out the pleadings filed by Advocates who had not taken practicing certificate as expressed by different judges who differed materially from each other. The Learned Magistrate did not state the criteria upon which she chose to follow some and not the others. The appellant should have been given the benefit of doubt this being an Election Petition affecting political rights under the Constitution.*
6. *The Learned Magistrate erred in law in being guided by decision emanating from the Civil Procedure Act while such provisions of the Civil Procedure Rules had not been adopted by the Elections Act and Rules made there under for determining election petitions.*
7. *The Learned Magistrate erred in law in allowing the application under Section 9 of the Act which was not an operative section of the Act but was only a defining section. No provision was ever cited before the Learned Magistrate that could operationalise her power to strike out the election petition of the petitioner.*

### **Respondent's Case**

6. The respondents have all opposed the appeal and support the Learned Magistrate's decision. They have filed written submissions and cited authorities which I shall refer to in the judgment. In a nutshell, their stance is that the petition was a nullity *ab initio* and that the court sitting as an Election Court had power to strike out the petition. The respondents, stated that the provisions of **the Advocates Act (Chapter 16 of the Laws of Kenya)** ("the Act") requiring that Advocates take out practising certificates are mandatory and that the Advocate was duty bound to inform his client of his impairment before filing suit.

### **Analysis and Determination**

7. The law does not allow an unqualified person to act as an Advocate. **Section 2** of the Act defines the term '*unqualified person*' as, "*a person not qualified under section 9 to act as an advocate.*" **Section 9** of the Act is clear on qualifications that one must possess in order to practice as advocate. The section reads thus;

**9. Subject to this Act, no person shall be qualified to act as an advocate unless;**

**(a) he has been admitted as an advocate; and**  
**(b) his name is for the time being on the Roll; and**

**(c) he has in force a practicing certificate and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4).**

It is therefore not in doubt that the law requires that for an advocate to qualify, he or she must have in force a practising certificate. **Section 31** of the Act creates an offence for unqualified persons acting as advocates while **section 34** makes it an offence for unqualified persons to draft certain documents.

8. The appellant, in the fourth ground of appeal argues that the Magistrates' court erred "*in failing to distinguish between an Advocate who is otherwise professionally qualified, has been admitted to the practice law, has not been struck off the Roll of Advocates or has not been suspended by the Law Society of Kenya Disciplinary Tribunal but has only delayed to take out the yearly practicing certificate and a person who is not qualified at all to practice law.*" This argument cannot stand in the face the clear word used in the statute. The use of the word '**and**' at the end of **section 9(a), (b) and (c)** of the Act requires a conjunctive reading of the requirements so that all the three requirements have to be met for an advocate to be regarded as being qualified under the Act. This was the finding in **Belgo Holdings Ltd v Esmail [2005] 2 EA 28** where the court said of **section 9** that; "*It is instructive that these four qualifications are not to be read to the exclusion of each other. The use of the word 'and' means that for one to be qualified to act as an advocate...one must have all of the four qualifications above. If one does not have one or all, he is thereby rendered an unqualified person and section 34 aforesaid operates to stop him from doing any of the things therein enumerated, including drawing documents in legal proceedings.*"
9. Under **section 24** of the Act, every practising certificate is to bear the date of the day on which it is issued and is to have effect from the beginning of that day save that a practising certificate issued during the first month of any practising year shall have effect from the beginning of that month. Therefore, the learned magistrate was right when she held that; "*Even the Elections Act does not state that Petitions can be allowed even if filed by advocates who do not hold practicing certificates. It is very clear that an advocate who did not have a practicing certificate as on 15/3/2013 filed this petition. The practicing certificate obtained on 2/5/2013 cannot be used to validate what was done on 15/3/2013.*"
10. In the case of **Kenya Power & Lighting Company v Chris Mahinda T/A Nyeri Trade Centre [2005] 1KLR 753**, the Court of Appeal addressed the effective date of a practicing certificate. The Court observed that, "*A practicing certificate is issued for a whole year and the certificate issued in this case was for the year 2004 and it was suggested that, although it was issued on 22<sup>nd</sup> September 2004, it had retrospective effect back to the beginning of 2004...We do not accept this submission. If no practicing certificate had been issued when the act was done, the advocate was not qualified to do that act, at the time he did it*". Flowing from this reasoning, the Court of Appeal further held, in **Standard Chartered Bank v Mechanical Engineering Plant Ltd & Others [2009] EA 404**, that a practicing certificate cannot have retrospective effect and therefore the memorandum of appeal filed by an advocate without a practicing certificate at the time of signing it was incompetent as the advocate was unqualified.
11. The appellant called in aid the provisions of **Article 159(2)(d)** of the Constitution which provides that, "*(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—(d) justice shall be administered without undue regard to procedural technicalities.*" Counsel cited the case of **Raila Odinga and Others v IEBC and Others SCK Petition No. 5 of 2013 [2013]eKLR** to support the argument that the Learned Magistrate, "*infringed petitioners fundamental rights by contravening Article 159(2) of the Constitution which directs that justice should be administered without regard to procedural technicality and proceeded to strike out the appellant's petition on ground that the petition was filed (not signed) by an advocate who had not taken a practicing certificate of the year 2013.*" The issue then that falls for consideration is whether the signing of a pleading is a 'procedural technicality.' The essence of signing a petition was articulated by Court of Appeal in **Jahazi v Cherogeny (1984) KLR 814** where it held, *inter alia*, that; "*The requirement that a petition be signed by a petitioner is not a formality. Equity demands that a petitioner assumes the responsibility for his petition by signing it. We are satisfied and find that the provisions contained in Rule 4(3) that a petition shall be signed by the petitioner is mandatory and that this petition not having been signed by the petitioners it is not properly before court. The petition is dismissed.*" [Emphasis mine]. The same position was taken by Musinga J., in the case of **Willis Evans Otieno v Law Society of Kenya & 2 others, Nairobi Petition No. 37 of 2011[2011] eKLR** stated as follows; "*Having come to that conclusion, what should the court do in light of the submissions made by the petitioner that the court is obliged to disregard procedural technicalities in dispensation of justice? I do not agree*

with the petitioner that the issue of competence of pleadings, and particularly where such incompetence arises from circumstances as in this case, can be termed as procedural technicality. This is a substantive question of law which goes to the root of the matter. The provisions of Article 159(2)(d) of the Constitution cannot be relied upon as a panacea for incompetent pleadings filed by an unqualified person. The Petition and Chamber Summons dated 8<sup>th</sup> March, 2011 must therefore be struck out with costs to the respondents, which I hereby do.” For these reasons, the third ground of appeal fails flat on its face.

12. Muchelule J., in the case of **John Langat v Kipkemoi Terer & 2 Others**, Kisumu HC. Civil Appeal No. 21 of 2013 (Unreported) considered the application Article 159(2)(d) of the Constitution in the context of an election petition. In that case, the advocate who had filed the appeal did not have a practicing certificate. The learned judge concluded as follows; “Mr Anyoka sought to persuade the court that his client was innocent. He further sought to rely on Article 159(2)(d) of the Constitution of Kenya 2010 to argue that now that the court was dealing with a petition, a serious matter, the acts that may be deemed illegal or unprocedural should be excused. The Article enjoins the court to do justice to all parties without undue regard to do justice to all parties without undue regard to procedural technicalities. There is a simple answer to Mr. Anyoka. It is criminal under section 34 of the Advocates Act for an Advocate to practice without a practicing certificate. The section is not a procedural technicality. It is a substantive statutory provision. The court is enjoined not only to protect the Constitution but all laws enacted by Parliament. It has the duty to protect the Advocates Act and its provisions. To ignore the clear provisions of section 34 of the Advocates Act is to perpetuate an illegality. Article 159(2) (d) does not condone such an act.” I agree with these sentiments and I find them consistent with the dicta expressed by the Supreme Court in **Raila Odinga and Others v IEBC and Others (Supra)** where it addressed the meaning of Article 159(2)(d) as follows; “The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.”
13. The other issue raised is that the Magistrates’ court lacked power to strike out the petition. This is subject of ground two of the memorandum in which the appellant argues that “The Learned Magistrate erred in law in stating at paragraph 63 and 64 that a magistrate of a subordinate court has similar inherent powers as the High Court in an election petition to strike out an election petition.”
14. Section 2 of the **Elections Act, 2011(No. 24 of 2011)** defines the term ‘election court’ to mean, “... the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution and the Resident Magistrate’s Court designated by the Chief Justice in accordance with section 75 of this Act.” Section 75(1A) of the same Act provides that, “(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.” There is no distinction in the Act and **Elections (Parliamentary and County Elections) Petition Rules, 2013 (“the Rules”)** regarding the powers of the court and the reliefs that may be issued by either the High Court or the Magistrates’ Court in their capacity as election courts. The power of the election court to strike out the petition is not in doubt and has been affirmed in several cases (See **Nyamweya v Oluoch and Others [1993 – 2009] 1 EAGR 377**, **Chelaite v Njuki & 2 Others [2008] 2KLR EP 209**, **Stephen Kimani Gakenia v Francis Mwangi Kimani Nairobi HC EP No. 1 of 1998 (Unreported)**, **Muiya v Nyagah and Others [2008] 2 KLR (EP) 493**).
15. I agree with the respondents that the power to strike out the petition may be exercised at any stage of the proceedings. The provisions of rule 17 of **the Rules**, which require that the election court deals with interlocutory applications during the pre-trial conference, are facilitative and are

- intended to achieve the overriding objective. The rule cannot be read in a manner that disempowers the court from exercising its power to strike out a pleading that is incompetent. In any case, there is no allegation that the appellant was prejudiced in the manner the application was dealt with by the learned magistrate.
16. I therefore find and hold that the Magistrates' Court acting as an election court has the same plenary powers as the High Court unless such power is specifically excluded by the Constitution or statute. This ground is therefore dismissed.
17. The issue that remains for consideration is whether in the circumstances of the present case, I ought to allow the appeal on the basis of ground number 1(a) of the memorandum, that the appellant's petition was signed by him and supported by an affidavit sworn by him. The question of signing of pleadings by unqualified advocates or otherwise advocates who lack practicing certificates has been subject of several decisions of the Court of Appeal which the respondents cited. In ***Obura v Koome* [2001] 1 EA 175**, the court considered whether to strike out an appeal stated that where an advocate lacked a practicing certificate at the time that a memorandum of appeal was filed. The Court held that the memorandum of appeal was "*In the circumstances, ... incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in this Court or in any other court.*" In ***National Bank of Kenya v Wilson Ndolo Ayah, Civil Appeal No. 119 of 2002 (Unreported)***, the Court of Appeal rendered itself thus: "*Section 9 makes provision for qualifications for practicing as an advocate, and the qualifications include having in force a current practicing certificate... It is public policy that courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such advocates we come to the conclusion that will discourage excuses being given for justifying the illegality. A failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal Act.*" (See also ***Delphis Bank Ltd v Behal & Others* [2003] 2 EA 412**)
18. The appellant argued that the petition was signed by the petitioner as required by ***the Rules***." At his ground no. 1 of his appeal, he states that, '*Rule 10(3) of the Election (Petition and County Elections) Petition Rules 2013 only requires the petition to be signed by the Petitioner himself or by a person authorised by him...*' This argument though very attractive is not dispositive in the circumstances of this case. The issue before the Magistrates' Court and indeed this Court is not whether the pleadings complied with **rule 10(3) of the Rules** but whether they were drawn and presented by an unqualified person. Therefore, the argument that **rule 10(3) of the Rules** requiring that a petition be signed by the petitioner or by a person duly authorized by the petitioner was complied with is irrelevant for purposes of disposing of the present issue as the provisions of the **Advocates Act** are mandatory as demonstrated by the cases I have cited above. To hold otherwise, would mean that the provisions of **the Rules** supercede those of the Act. In any case the signature of the petitioner cannot validate what is otherwise invalid.
19. In striking out the election petition in the case of ***Dobson Chiro Mwachunga v IEBC and Another, Malindi Election Petition No. 16 of 2013 (Unreported)***, Meoli J., observed at paragraphs 30, 31, "[30] *The election petition as filed is invalid, a nullity ab initio, incapable of being salvaged by any means, including the petitioner's belated notice to act in person. There is no competent pleading to proceed upon. I sympathize with his situation and those voters in Kilifi County who threw in their lot with him in instituting the petition, as was their right to do. Having put in time, effort and incurred expenses in pursuit of what the petitioner believed were proper legal proceedings, he is now faced with the painful spectre of the proceedings unraveling irredeemably before his very eyes...the proceedings have turned out to have been a "hoax". [31] As an individual the petitioner is not without remedy and he will no doubt take competent legal counsel regarding his next course of action. (See *Wilson Ndolo Ayah's Case*..."*
20. I will now turn to two cases that appear to be in the appellant's favour. In the case of ***Ntwiga v Musyoka & 3 others, (2008) 2KLR (EP)*** the court dealt with the validity of an election petition drawn and filed by an unqualified person. In declining to strike out the petition, the court noted that the petition had been signed by the petitioner himself and held as follows at page 163, "*The*

stress is on signing the pleading. A pleading signed by unqualified person leads to its being struck out in addition to contempt charges and criminal charged under section 31, 33, and 34 of the Advocates Act, while pleading or document drawn by unqualified person but not signed by him leads to criminal charges under the Advocates Act. The validity of the document or pleading is not affected. The intention of sections 31, 33 and 34 of the Advocates At is to deter those unqualified person (sic) from doing the Advocate's work." The Court went on to conclude that; "In the instant application the petition was singed (sic) by the petitioner. Mr. Okong'o did not sign the petition. The fact that Mr Okong'o drew the petition only exposes him to criminal charges under the Advocates Act. That fact does not affect the validity of the petition since it was singed (sic) by the petitioner himself. The provisions of Order VI Rule 14 were therefore complied with..... I am satisfied that the petition presented by the petitioner herein is competent and the same stands." Although I would have been inclined to adopt the reasoning in this case, the decision, being one of the High Court, is merely persuasive authority. Moreover, it is in direct conflict with the decisions of the Court of Appeal I have cited and which are clear and unequivocal on the issue and are binding on this court.

21. In ***Wilson Mbithi Munguti Kabuti & 5 Others v Patrick Makau King'ola & another, Machakos Petition No. 9 of 2013***, Mutende J., declined to strike out the petition and recommended disciplinary proceedings be taken against the advocate. At para. 38 of the judgment, the court stated; "Unlike issues determined in most of the cases cited; on the face of it the petition herein was drawn by Ombati Otieno & Opondo Advocates. It has been submitted by counsel for the 1<sup>st</sup> Respondent that during cross-examination the 1<sup>st</sup> Petitioner admitted that the documents were drawn by Mr. Ogwe. The Petition as drawn has a signature. The signatory signed on behalf of Ombati, Otieno Opondo & Company Advocates. There is absolutely nothing to indicate it was drawn by Raymond Janan Ogwe. Similarly there is no suggestion that the signature appended thereon is for Mr. Ogwe." In that case, the 1<sup>st</sup> Respondent had sought to have the petition, all proceedings and pleadings conducted and signed by one Raymond Ogwe Advocate dismissed by reason that the Mr Ogwe, one of the advocates who represented the petitioners did not have a practising certificate. It is evident from the facts that the court was in doubt as to who signed the pleadings.

22. The general principle resonating from the authorities both from this Court and the Court of Appeal is that pleadings drawn, signed and presented by unqualified persons cannot stand and ought to be struck out. I have no reason to divert from this principle.

23. I therefore find and hold that the court a quo was right in striking out the petition of 15<sup>th</sup> March 2013. While I empathize with the petitioner's cause, striking out is the option available intended to remedy non-compliance with the law and uphold its application. For the reasons stated above, I disallow the appeal. The advocate shall pay the costs of the appeal personally which are assessed at Kshs. 15,000 for the 1<sup>st</sup> and 3<sup>rd</sup> respondent and Kshs. 15,000.00 for the second respondent.

24. The final orders are as follows;

- a. **The appeal is filed herein be and is hereby dismissed.**
- b. **Mr Boniface Njiru, Advocate, shall pay the costs of the appeal personally which are assessed at Kshs. 15,000 for the 1<sup>st</sup> and 3<sup>rd</sup> respondent and Kshs. 15,000.00 for the second respondent.**

**DATED and DELIVERED at NAIROBI this 13<sup>th</sup> day of August, 2013.**

**D.S. MAJANJA**

**JUDGE**

Mr B. Njiru, instructed by Njiru Boniface & Co. Advocates for the appellant

Mr Kariuki instructed by J.K. Kibicho & Co. Advocates for the 1<sup>st</sup> and 3<sup>rd</sup> respondents

Mr Wanjohi instructed by J.W. Wanjohi & Co. Advocates for the 2<sup>nd</sup> respondent.