



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATES COURT AT NANYUKI**  
**ELECTION PETITION NO. 1 OF 2017**

**BETWEEN**

**GEOFFREY GITHINJI MWANGI.....1<sup>ST</sup> PETITIONER**  
**WINROSE NYAGUTHI MWANGI.....2<sup>ND</sup> PETITIONER**  
**THOMAS GICHARA KING'ORI .....3<sup>RD</sup> PETITIONER**

**VERSUS**

**JUBILEE PARTY.....1<sup>ST</sup> RESPONDENT**  
**INDEPENDENT ELECTORAL &**  
**BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**  
**THE CLERK-COUNTY**  
**ASSEMBLY OF LAIKIPIA.....3<sup>RD</sup> RESPONDENT**

**AND**

**CATHRYN NYAWERA MATHENGE.....1<sup>ST</sup> INTERESTED PARTY**  
**ZAMZAM SALMA HUSSEIN.....2<sup>ND</sup> INTERESTED PARTY**  
**CHRISTOPHER MARK SAID.....3<sup>RD</sup> INTERESTED PARTY**  
**PETER LEMERIAN MATUNGE.....4<sup>TH</sup> INTERESTED PARTY**  
**JUDY WANJIKU ISHUMAL LUKIO.....5<sup>TH</sup> INTERESTED PARTY**  
**IRENE WACHUKA JOHN.....6<sup>TH</sup> INTERESTED PARTY**  
**PATRICIA MUTHONI WAWERU.....7<sup>TH</sup> INTERESTED PARTY**  
**MARY SAMKEN KESHINE.....8<sup>TH</sup> INTERESTED PARTY**

CATHERINE NYOKABI KIBUI.....9<sup>TH</sup> INTERESTED PARTY

MOHAMED ABDIKADIR SALAH.....10<sup>TH</sup> INTERESTED PARTY

## RULING

This petition relates to the nomination of the members of the Laikipia County assembly. The members whose nomination is impugned were enjoined into the petition as the 1<sup>st</sup> – 9<sup>th</sup> interested parties. Their nomination is impugned on grounds that it breached the constitutional provisions on nominations, violated the orders issued on 1<sup>st</sup> and 4<sup>th</sup> August, 2017 respectively, that the nominations list was prepared without involving the petitioners among other grounds. This ruling relates to the 1<sup>st</sup>-4<sup>th</sup> interested parties, preliminary objection dated 7<sup>th</sup> December, 2017 and the 8<sup>th</sup> Interested Party's Notice of Motion dated 7<sup>th</sup> December, 2017.

The Preliminary objection together with the aforementioned Notice of Motion application were argued orally in court. For the sake of this ruling, I shall address the preliminary objection and the 8<sup>th</sup> interested party's Notice of motion dated 7<sup>th</sup> December, 2017 jointly as they were jointly argued and raise the same issues for determinations.

The grounds on the preliminary objection are that the affidavit dated 4<sup>th</sup> September, 2017 in support of the petition is fatally defective in that it's a joint affidavit and that if the affidavit is fatally and incurably defective in law cannot stand before court. These grounds are the same as the ones raised in the 8<sup>th</sup> Interested Party's Notice of Motion application dated 7<sup>th</sup> December, 2017.

Both the Preliminary Objection and Notice of Motion are opposed by the petitioners' replying affidavit dated 13<sup>th</sup> December, 2017. The petitioner's aver that the 8<sup>th</sup> interested party's notice of motion is incompetent, lacks merit and a nullity as it offends statutory provisions viz section 23(2A) of the LSK Act, and Section 34A and B(3) of the advocates Act. He stated that under the provisions of Order 19 rule 5 of the civil procedure rules, there is no prescribed form for affidavits and that there was no specific provision that bars or makes joint affidavits defective. The petitioner further averred that by dint of Order 19 rule 7 of the civil procedure rules, the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in any title or other irregularity in form thereof or any technicality and further that Section 100 of the Civil Procedure Rules gives the court inherent jurisdiction to allow procedural mistakes for the purpose of determining the 1<sup>st</sup>-4<sup>th</sup> interested issues. He stated that the issues raised by the applicants are excusable under the civil procedure rules as well as Article 159 of the Constitution of Kenya, 2010 and as thus, the joint affidavit is not defective and that the petition is competent and proper for hearing and determination on merit.

The parties filed written submissions which I have read and considered. The 1<sup>st</sup> – 4<sup>th</sup> interested parties filed their submissions on 11<sup>th</sup> December, 2017 while the petitioner's filed their submissions on 13<sup>th</sup> December, 2017. The gist of the 1<sup>st</sup>-4<sup>th</sup> interested parties' submissions is that the petitioner's affidavit is joint and sworn by 3 petitioners and that it is improperly commissioned. They submitted that an affidavit should be drawn in the first person as per the provision of Order 19 rule 5 thus a joint affidavit is fatally incurable and defective. On the issue parties' submitted that Section 4 (1) of the Oaths and Statutory Declarations Act, stated that commissioning of affidavits is personal and only a particular advocate who is a commissioner for oaths is authorised to commission and not a law firm. They relied on the case of **David Wamatsi Omusotsi v Returning Officer Mumias - East Constituency & 2 others** [2017] eKLR where the Hon. Justice Jesse Njagi held;

***“Section 4(1) states that:- “A Commissioner for Oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya .....” It is clear from the provisions of the said Act that affidavits cannot be commissioned by a firm of advocates as happened in this case. An affidavit can only be commissioned by a Commissioner for Oaths and other officials of the court allowed to do so***

*under the Act. .... The totality of all this is that the documents are not affidavits as known in law. ....”*

The interested parties’ further relied on the case of **Ismail Suleman & 9 Others V Returning Officer Isiolo County Independent Electoral and Boundaries Commission & 4 Others [2013] eKLR** where Makau J struck out a petition where the affidavits of witnesses were not commissioned as required under the oaths and statutory declarations act and stated that a similar situation prevails in this case and urged the court to allow the Preliminary objection and strike out the affidavit and entire petition with costs.

On their part, the petitioners relied on their replying affidavit dated 4<sup>th</sup> September, 2017 and the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** and stated that the preliminary objection together with the Notice of Motion do not meet the threshold set out in the Mukisa case (supra). They stated that the Preliminary objection consist of points of law unlike the PO and notice of motion herein. Regarding the issue of joint affidavit, the petitioners relied **In Re the Estate of Mwangi Nganga (Deceased) [2005] eKLR** where Dulu J. held that *“.....In my understanding first person refers to a situation where a person describes himself or herself as “I so and so”. In that event, if the persons are more than one person describing themselves as “we” does not change the first person. The difference is just that one is first person singular, the other one is first person plural. The supporting affidavit sworn jointly by John Nganga Mwangi and Joseph Njuguna Mwangi is not defective on that account. I dismiss this objection as it has no merits.* They also relied on the provisions of Order 19 of the Civil Procedure Rules, The Elections (Parliamentary and County Elections) petition Rules, 2017 and stated that the irregularities raised in the PO and notice of Motion are excusable and curable. They concluded that the PO and Notice of Motion lack merit and should be dismissed with costs.

In his Oral Submissions in support of the Preliminary Objection, Mr. Mbaabu submitted that the 1<sup>st</sup>-4<sup>th</sup> interested parties emphasized that the affidavit in support of the petition is defective in that it is jointly sworn thus offended the statutory provisions of the Civil Procedure rules as well as Rule 12 (1) of the elections (parliamentary and County Elections) Act and further stated that where there are more than one petitioners, then one of them should swear the affidavit of behalf of the others. The second reason was that the affidavit was commissioned using an office stamp and not a commissioner for oaths’ stamp. He stated that there are several people in a law firm including secretaries, clerks and drivers hence its hard clearly state whom among the staff commissioned the affidavit. He urged the court to strike out the affidavit.

Mr. Kariuki for the 8<sup>th</sup> interested party and in support of the Notice of motion submitted that the 8<sup>th</sup> Interested Party relied on the affidavit of Hiram Gachagwa Advocate and stated that according to the replying affidavit, only the 1<sup>st</sup> petitioner opposed the 8<sup>th</sup> Interested party’s notice of motion and that technically, the 2<sup>nd</sup> and 3<sup>rd</sup> petitioner’s supported the 8<sup>th</sup> interested party’s application. Counsel submitted that the joint affidavit offended the provisions of the oaths and Statutory Declarations Act, the Civil Procedure Rules as well as Rule 8 of the Civil Procedure Rules. He stated that rule 12(1) of the Elections (Parliamentary and County Elections) Act provides that a petition shall be supported by an affidavit sworn personally by the petitioner or at least by one of the petitioners. Counsel stated that the same rule provides that the provisions of the Oaths and statutory declarations act and order 19 of the Civil Procedure Rules shall apply to election petitions.

On commissioning, counsel submitted that the affidavit in support of the petition and the one opposing the 8<sup>th</sup> interested Party’s Notice of motion are commissioned by Bw’onwong’a & CO Advocates. He stated that in the **David Wamatsi Omusotsi** case (supra) the court held that the affidavit in support of the petition were not properly commissioned and allowing such improperly commissioned affidavit to remain as court records would amount to abuse of court process. Counsel further submitted that a petition supported by a defective affidavit must be dismissed. Relying on the case of **John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 others [2008] eKLR** counsel submitted that election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. He impugned the petitioners’ reliance on the case of **In Re the Estate of Mwangi Nganga (Deceased) [2005] eKLR** and stated that election petitions were of a different nature from the

succession causes hence the authority is not applicable herein and urged the court to strike out the petition.

In reply to the PO and the 8<sup>th</sup> interested party's Notice of Motion, Mr Abwour submitted that he was relying on the written submissions dated 13<sup>th</sup> December, 2013 as well as the replying affidavit sworn on 13<sup>th</sup> December, 2017. He relied on the case of **Mukisa Biscuits (supra)** and stated that a PO should only address points of law. He stated that Mr. Mbaabu had raised issues of joint affidavit and commissioning which are issues of facts that can only be proved by evidence. He stated that the **David Wamatsi Omusotsi case (supra)** was not applicable in the instant case, as in the Omutsatsi case, forgery was admitted and that the stamp of Kigen & Co advocates did not include "Commissioner for oaths". He said that the petitioners admitted that the affidavit was defective. He contrasted it with the petitioners' affidavit and stated that it met the threshold of rule 12 of the Elections (Parliamentary and County Elections Rules) 2017. He stated that the affidavit was commissioned as required by law. Counsel further submitted that there is no law which bars joint affidavits and reiterated the petitioner's reliance on **In Re the Estate of Mwangi Nganga (Deceased) [2005] eKLR** and said that joint evidence is not defective. He said that both the supporting affidavit and the replying affidavit were properly commissioned and met the threshold in the Elections (Parliamentary and County Elections) rules and stated that Order 19 rule 7 was discretionary. He urged the court to dismiss both the PO and the 8<sup>th</sup> interested party's notice of motion.

I have read and considered the 1<sup>st</sup>-4<sup>th</sup> interested parties' preliminary objection dated 7<sup>th</sup> December, 2017 and the 8<sup>th</sup> Interested Party's Notice of Motion dated 7<sup>th</sup> December, 2017. I find that the Preliminary Objection and the 8<sup>th</sup> interested party's notice of motion raise the following issue for determination;

- i. Whether to strike out the petitioner's affidavit for being defective on ground that it is improperly commissioned and that it is jointly sworn.

Order **19 Rule 5**, of the civil procedure rules provides that :-

*"Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject."*  
**(Emphasis provided)**

Rule 12(1) of Elections (Parliamentary and County Elections) Petitions rules, 2017 states that,

*"A petition shall be supported by an affidavit which Affidavits shall-*

*(a) ..... and*

*(b) be **sworn personally by the petitioner or by at least one of the petitioners**, if there is more than one petitioner. (Emphasis provided)*

The above provision of the law clearly indicates that joint swearing of affidavits should be sworn in the first person and that they should be sworn personally or at least by one petitioner in cases of more than one petitioner. The wording of the rules uses the word "at least" implying not less than or a minimum. This wording therefore to me, does not mean that two or more petitioners cannot swear a joint affidavit. Faced with a similar situation in **Shafina Magre & another v Aga Khan Health Services (K) Limited T/A Aga Khan University Hospital & another [2015] eKLR**,

*"As to the second point of joint swearing of the verifying affidavit, the Plaintiffs would have been tidier and less clumsy if each would have sworn a separate affidavit which this court would encourage in the future. However, the joint verifying affidavit is brief and to the point and raised no confusion to the Defendant. If it is imperfect, it would only be so in form. In the circumstances of this case accordingly I would have no valid reason to rule it invalid or defective; I would not even seek an amendment to it."*

Guided by the above authority and in line with the provisions of the Order 19 rule 5 as read with Rule 12(1) of the Elections (Parliamentary and County Rules Elections) Petitions Rules, 2017, the mere fact that a petition is jointly sworn does not invalidate it.

On the 2<sup>nd</sup> limb of striking out the affidavit on grounds that it was commissioned by a firm of advocates and not a particular commissioner for oaths, Section 2 of the oaths and statutory Declaration Act defines a commissioner for oaths is. It reads;

*(1) The Chief Justice may, by commission signed by him, appoint persons being practising advocates to be commissioners for oaths, and may revoke any such appointment. (Emphasis provided)*

Section (4) further provides that;

*“(1) 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”*

Finally, Section 8 of the act (Supra) reads,

*“A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.”*

Faced with a similar issue in the case of **David Wamatsi Omusotsi v Returning Officer Mumias - East Constituency & 2 others** [2017] eKLR the court had this to say;

*“Under section 2(1) of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya, only persons practicing as advocates can be appointed as Commissioners for Oaths. The section states that:-*

*“The Chief Justice may, by Commission signed by him, appoint persons being practicing advocates to be Commissioners for Oaths, and may revoke such appointment.”*

*Section 4(1) states that:- “A Commissioner for Oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya .....” It is clear from the provisions of the said Act that affidavits cannot be commissioned by a firm of advocates as happened in this case. An affidavit can only be commissioned by a Commissioner for Oaths and other officials of the court allowed to do so under the Act*

The petitioner had relied on rule 1A, 3A of the Civil Procedure Act as well as Article 159 2(a), (d) and (e) of the constitution and stated that the commissioning of the affidavit by a firm of advocates instead of a particular advocate was a procedural technicality which was excusable as they do not go to the root of the petition or pleadings, will not cause any prejudice or miscarriage of justice to any of the parties. Kiage, J.A in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others** [2013] eKLR states:

*“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.*

***I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...***

The petitioner's arguments therefore that the errors on the affidavit are curable and reliance on Sections 1A, 3A and Section 159 of the constitution (supra) does not in any way justify the technical errors on their affidavits. I therefore find that the petitioner's affidavits are not being commissioned as statutorily required, they are thus mere documents and not affidavits as known in law. As was held in the **David Wamatsi Omusotsi (supra)**;

*'It is the commissioning of an affidavit that distinguishes it from other documents. It would be an abuse of the process of the court to allow these kind of documents to remain in record to form the basis of the case for the petitioner. The documents are thereby struck out and expunged from the record.'*

I therefore hereby strike out the affidavit in support of the petitioners' petition sworn on 4<sup>th</sup> September, 2017. The next issue is the fate of the petition herein given that its supporting affidavit has been struck out.

The 1st-4<sup>th</sup> interested party's counsel as well as that of the 8<sup>th</sup> interested party submitted that should the court grant the orders sought in the Preliminary objection as well as those sought in the 8<sup>th</sup> petitioner's notice of motion, the petition will be incompetent and inconsistent with the provision of Rule 12(1) of the Elections (County and Parliamentary Elections) Rules, 2017. The other auxiliary question is whether a petition filed without the supporting affidavit of the petitioner and the affidavits of his intended witnesses is a competent one.

Rule 8(4) states that the petition shall:-

(a) .....

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

In **Dickson Mwenda Githinji vs Gatirau Peter Munya & 2 others** (2014) eKLR the Court of Appeal held that a supporting affidavit in support of a petition is a mandatory requirement. The court stated that:-

*"Rule 9(3) (b) (now 8(4)(b)) of the Election Petition Rules provides that an election petition shall be supported by an affidavit of the petitioner containing the grounds on which relief is sought. The plain reading of this rule is that an affidavit in support of the petition is a mandatory requirement..."*

This court is bound by the above decisions of superior courts. Having found that the affidavits sworn on 4<sup>th</sup> September, 2017 are defective and having struck them out, it is my considered view that this petition as filed is not supported by an affidavit as required by rule 12(1)(b) of the Elections (Parliamentary and County Rules Elections) Petitions Rules, 2017. A petition filed without a supporting affidavit is not competent. The petition is accordingly struck out with costs.

The Petitioners shall bear the costs of this petition.

Orders accordingly.

**Date and delivered** this 3<sup>rd</sup> day of **January**...2018 in open court at Nanyuki.

**L.K.Mutai**

**Chief Magistrate**