



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KIBERA

ELECTION PETITION NO. 3 OF 2013

IN THE MATTER OF THE ELECTIONS ACT No. 24 OF 2011 AND

ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

**IN THE MATTER OF THE COUNTY ELECTIONS FOR COUNTY REPRESENTATIVE FOR
WOODLEY/KENYATTA/GOLF COURSE WARD IN KIBRA CONSTITUTUENCY NAIROBI
COUNTY**

BETWEEN

ABRAHAM MWANGI NJIHIA..... PETITIONER

-VERSUS -

THE INDEPENDENT ELECTORAL & BOUNDARIES

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

DAVID NJOROGE KAIRU.....2ND RESPONDENT

JANE WASILWA (*Returning Officer Kibra Constituency*).....3RD RESPONDENT

RULING

INTRODUCTION

(1) Following the General Election held on 4th March 2013, the 2nd Respondent was returned as the duly elected County Representative for Woodley/Kenyatta Golf Course Ward of Kibra Constituency in the Nairobi County.

(2) The Petitioner who has filed this petition was also a contestant for the same seat. The petitioner filed this petition challenging the validity of the election of the said Respondent as the County Representative of the said Woodley/Kenyatta Golf Course Ward. He filed this petition against the IEBC as first Respondent, David Njoroge Kairu as the 2nd respondent and Jane Wasilwa the Returning Officer of the Kibra Constituency as the 3rd Respondent.

(3) The Petitioner filed this petition through Njiru Boniface Advocate. The Petition read on page 2 that it was drawn and filed by Njiru Boniface and Co. Advocates.

(4) On 18/4/2013, Counsel for the 1st and 3rd Respondent filed a joint answer to the petition and denied specifically and generally all the allegations in the petition pleadings. Similarly, the 2nd

Respondent through his advocates J. N. Wanjohi & Co. Advocates filed his answer to the petition denying each and every allegation in the petition.

(5) The 1st and 3rd Respondents filed an application seeking to have this petition struck out on the grounds that the provisions of Section 9 of the Advocates Act were violated. The application is by way of Notice of Motion dated 18/4/2013 titled NOTICE OF MOTION filed under section 9 of the Advocates Act Cap 16 of the Laws of Kenya. This ruling is about this Notice of Motion. In the application, the following orders were sought: -

1. ***That the petition herein be struck out as it is incompetently filed.***
2. ***That the costs of this petition be provided for.***

(6) The application is grounded on the affidavit of Christopher Mwangi Kariuki Advocate for the 1st and 3rd Respondents. In the affidavit he avers that the petition was filed by unqualified person in breach of Section 9 of the Advocates Act Cap 16 of the Laws of Kenya. He avers that Boniface Njiru Advocate who filed this petition on 15/3/2013 did not have a practicing certificate when he filed this petition. That he conducted search on the status of the said Boniface Njiru Advocate as at 5/4/2013 and it was indicated that he was inactive meaning that he had not obtained a practicing certificate.

(7) He also conducted a search on the status of Henry Omwega Advocate who is a partner in the firm of Njiru Boniface & Co. Advocates and the status was inactive. He also wrote to the Law Society of Kenya on 5/4/2013 seeking to confirm the status of the practicing certificate for BONIFACE NJIRU and HENRY OMWEGA if they had practicing certificates for the year 2013. That the LSK in a letter dated 10/4/2013 indicated they had not taken their practicing certificates for the year 2013.

(8) He then filed this application on 18/4/2013 seeking to have the petition struck out as having been filed by a person who was incompetent to file the same. Counsel for the petitioner opposed the application through his grounds of objection and an affidavit.

(9) All Counsels appearing for the parties herein filed written submissions and also made oral submissions. The counsel for the 2nd Respondent was basically supporting the application seeking to have the petition struck out as incompetently filed.

(10) In the submissions by Counsel for the 1st and 3rd Respondents, he states as follows:

- a. The petition was drawn and filed by the firm of Njiru Boniface & Co. Advocates on 15/3/2013
- b. The applicants are seeking an order that the petition filed herein be truck out as it was incompetently filed. That Njiru Boniface Advocates who filed this petition did not have a valid practicing certificate for the year 2013 at the time he filed this petition.
- c. That the advocate NJIRU BONIFACE produced a copy of his practicing certificate for the year 2013, which is, dated on 2/5/2013, which confirms that by the time he filed the petition on 15/3/2013, he did not have a valid practicing certificate. That the practicing certificate dated on 2/5/2013 cannot be backdated to cover 15/3/2013, which is the date the petition, was filed. That the act of Njiru Boniface appearing in court for the petitioner prior to 2/5/2013 was also unlawful as he was not competent to appear before court when he did not have a practicing certificate.
- d. That the **Advocates Act Cap 16 of the Laws of Kenya**, provides in **Section 9** that no person shall be qualified to act as an advocate unless he has been:

- (a) **admitted as an advocate, and**
- (b) **he is for the time being on the roll, and**
- (c) **he has in force a practicing certificate, and**
- (d) **he has paid for the annual license.**

That under Section 9 of the Act it means that an advocate can only practice when he meets all 4 conditions or qualifications set out in **Section 9**.

(11) That **Section 31 of the Advocates Act** prohibits unqualified persons from practicing as advocates. The section reads as follows:

(a) **Subject to Section 83 no unqualified person shall act as an advocate or as such cause any submission or other process to issue or institute or carry on or defend any suit or other proceedings.**

(b) **Any person who contravenes sub-section (1) shall: -**

- a. **Be declared to be in contempt of the court in which he so acts... and may be punished accordingly.**
- b. **Be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting, and**
- c. **In addition, be guilty of an offence.**

The counsel also argued that Section 34 of the Advocates Act provides that no: -

“Unqualified person may draw and file or take instructions or prepare any documents and any person who does so in contravention of this section shall be guilty of an offence.”

(12) Therefore Mr. Njiru Boniface was prevented by the provision of **Section 9, 31 and 34** from taking instructions and filing this petition when he did not hold a current practicing certificate before 2/5/2013. That the act of appearing before this court was in contempt of court and it is an offence according to Section 31 and 34 of the Advocates Act.

(13) The counsel also cited several authorities in support of the application and in answer to issues raised by the advocate for the petitioner in his written submissions.

(14) On the issue raised by the petitioner's counsel that this court has no jurisdiction to strike out an election petition, he cited the case of **CHELAITE VS NJUKI & 2 OTHERS (2008) 2 KLR EP 2009-230** where the Court of Appeal held that an election court has power to invoke its inherent jurisdiction to strike out an election petition even if it has not been summarily rejected.

(15) That in the **Election Petition No.4/2013** in the High Court at Garissa – **AMINA HASSAN AHMED VS RETURNING OFFICER, MANDERA COUNTY, IEBC AND FATHIA MAHBUB** Hon. Justice D. Onyancha struck out the petition and he stated that the court (an election court) can strike out a petition where it is proper to do so. He further submitted that there was no distinction between a Resident Magistrate Court and High Court when both are acting in their capacity as Election Courts.

(16) On the issue that the petitioner himself signed the petition, so that it cannot be struck out, he submitted that this petition was drawn and filed by Njiru Boniface & Co. Advocates and Njiru Boniface has admitted that he obtained his practicing certificate only on 2/5/2013. That the **HIGH COURT IN PETITION NO. 37/2011 WILLIS EVANS OTIENO VS LAW SOCIETY OF KENYA, APOLLO MBOYA** and the **ATTORNEY GENERAL**, where the petition had been filed by RUBY AKINYI OKOTH ADVCOATE when she did not have a valid practicing certificate, the petition was struck out on that ground. That petition had been drawn and filed by Ruby Akinyi Okoth & Co. Advocates on 9/3/2011. The court stated: -

“When the advocate did not have in force at that time a practicing certificate for the year 2011 and she was therefore not competent to draw and file the petition...”

The court struck out the petition.

(17) On the submission by the petitioner's counsel that this application is borne out of a technicality of procedure and that **Article 159(2) (d)** requires the courts not to pay undue regard to procedural technicalities. He stated that the application is not based on a technicality of procedure but it is based on a substantive requirement of law that advocates must have valid practicing certificates as required under **Section 9 of the Advocates Act**. That the court of Appeal in the case of **OBURA VS KOOME (2001) 1 EA P. 175-177** ruled that a memorandum of Appeal was incompetent having been signed by an advocate who was not entitled to appear and conduct any matter in the court. The court struck out the appeal.

(18) He submitted that the petitioner cannot hide under **Article 159(2)(d) of the Constitution** and rely on its provisions as a panacea to file incompetent pleadings. He stated that anything done by Njiru Boniface Advocate before he obtained his practicing certificate was in breach of the provisions of the Advocates Act and it is not a mere technicality of procedure. The provision of **Section 9, 31 and 34** were not complied with.

(19) That under **Section 24 of the Advocates Act** every practicing certificate shall bear the date when it was issued and shall be valid from that date. This means that the practicing certificate for Njiru Boniface is valid from 2/5/2013. That under **Section 34(2)** any money paid to unqualified person in contravention of the Section may be recovered by the person who paid it as any debt recoverable summarily. He stated that the decisions of the Court of Appeal and High Court are binding on this court. Hence this court should strike out this petition.

(20) He also submitted that the issue raised by counsel for the petitioner that the Civil Procedure Rules do not apply in an election court, he stated that no Civil Procedure Rules had been cited in the application, hence that submission is irrelevant. He submitted that **Section 79 of the Elections Act** gives power to the Court to reject petitions. That the **Supreme Court in petition No. 5/2013** remarked that **Article 159 (2) (d)** was not meant to oust obligation of litigants to comply with procedural requirements as they seek justice from the courts. That as stated in election petition No. 4/2013 in the High court at Garissa, the court ruled and dismissed an election petition.

(21) That the decision in **NJAGI VS KIHARA**, which the petitioner was relying upon, was a bad decision and latter decisions have not followed it. That **Section 80(a) of the Elections Act** gives Election Courts powers of civil nature. That the rights of the petitioner are not being denied through this application.

(22) Mr. Wanjohi Advocate for the 2nd respondent supported the application to strike out the petition on the ground that a person who did not have a valid practicing certificate as an advocate, namely NJIRU Boniface Advocate, incompetently filed it. That this court is bound by the decision in **OBURA VS KOOME (2001) 1EA 175** where it was held that an advocate who had no practicing certificate at the time of filing a Memorandum of Appeal was incompetent to appear and conduct any matter in court. That the petitioner's advocate does not deny that he did not have a current practicing certificate when he filed the petition.

(23) That his long practice of 33 years as an Advocate would not mean that he does not comply with the requirements under the Advocates Act. That a practicing certificate is meant to authorize an advocate mentioned therein to practice. That failure to comply with the requirements of a practicing certificate is a serious breach of the statute and the petition can be struck out.

(24) That in the **Election Petition number 1 of 2013**, Hon. Mr. Timothy Okello sitting at Makadara as an Election Court struck out an incompetent petition. He submitted further that in the case of **BELGO HOLDINGS VS ESMAIL (2005) 2 EA 28 (HCK)** Hon. Mr. Justice Lenaola struck out pleadings drawn by an advocate who did not have a valid practicing certificate. He submitted that this petition is incurably defective and it cannot stand.

(25) The petitioner's counsel Boniface Njiru submitted that he was opposing the application on the following grounds:

That this court is a creature of statute under **Section 75(1) of the Elections Act No. 24 of 2011**, which provides that:

“Where there are questions of the validity of an election of a member of the County Assembly, it shall be determined by a Resident Magistrate, who is appointed by the Chief Justice.”

(26) He submitted that he specifically appeared before this court on 2/5/2013 and he had a practicing certificate (dated 2/5/2013). He submitted that this court does not have capacity under the **Elections Act and the Elections (Parliamentary and County Elections) Petition Rules** to strike out a petition. That what this court is being asked to do cannot therefore be done by this court. He submitted that there is no power denoted by the Elections Act and the Election Petition Rules authorizing a Resident Magistrate to strike out a petition.

(27) He submitted that what the applicant's counsel has cited in the petition is **Section 9 of the Advocate Act**. He has not cited the Election Act or the Rules. That even the authorities cited in support of the application that the respective parties in those cases were citing specific rules under the Civil Procedure Rules which authorized striking out of pleadings. That there is no provision in the Elections Act and the Election Petition Rules, which authorize a Resident Magistrate to strike out a petition. He submitted that this Court (election Court) has no jurisdiction to strike out an election petition.

(28) That **Section 79 of the Election Act** authorizes how a court should proceed. That the court is required to peruse the petition (on receipt) and if there are no sufficient grounds cited it may reject the petition summarily or fix the petition for hearing. That there is nothing else this court is supposed to do. He submitted that this court does not enjoy inherent jurisdiction like the High Court, which has inherent jurisdiction. That the court cannot invoke any inherent power. That the court does not have powers to strike out a petition because it does not have jurisdiction to do that.

(29) He cited the case of **DANIEL T. MOI VS JOHN HARUN MWAU** where the Court of Appeal pointed out that the court (Election Court) was a creature of statute and has powers and jurisdiction only conferred by the Law.

(30) He further submitted that the petition herein was signed by the petitioner himself as provided for under **Rule 10 of the Election (Parliamentary and County Elections) Petition Rules 2013**. That this petition cannot be struck out on the ground that it was drawn and filed by an advocate who had no current practicing certificate, since it had been signed by the petitioner himself and supported by an affidavit signed by the petitioner. That the various authorities which have been cited by the applicants are irrelevant. For example, the case of **OBURA VS KOOME (2001) 1EA 177**, was an appeal which was signed by an incompetent Advocate. The court struck out the appeal because the memorandum of appeal had been **signed** by an advocate who was not entitled to appear and conduct any matter in the Court of Appeal by reason of lack of a practicing certificate

(31) That in the case of **DELPHIS BANK VS BEHAL & OTHERS** the plaint was struck out because an advocate who did not have a practicing certificate had signed it. That the question was on the signature and not drawing and filing. That in this case, the petitioner signed the petition. That under **Rule 10 of the Election Petition Rules**, it provides that a petition can be signed by the petitioner himself or somebody authorized by the petitioner and that person can be an advocate or not.

(32) That in the case of **MOI V MATIBA (2008) KLR EP 622**, the Court of Appeal rejected an election petition because it had been signed by the wife of the petitioner but that has changed now. That the Elections Act 2011 and the Elections Petition Rules allow somebody else to sign on behalf of the petitioner.

(33) He submitted that the petition is properly before this court. That in **KIBAKI VS MOI (2001) 1 EA 115** the petition was rejected because the petitioner did not serve the respondent in person, but such a situation has now changed through the new election rules.

(34) That in the cases of **OBURA VS KOOME (2001) 1EA, DELPHIS BANK VS BEHAL AND OTHERS (2003) EA 412 - 414** and in **KENYA POWER AND LIGHTING VS MAHINDA t/a NYERI TRADE CENTRE (2005) 1KLR 753** and **LUCAS NJUGUNA KAROBIA VS CONSOLIDATED BANK (K) LTD.**, which the applicants have used to challenge this petition, the pleadings in these cases were struck out for being signed by an advocate/advocates who did not have or who had not renewed their practicing certificates. But in the case of **KAJWANG VS LAW SOCIETY OF KENYA (2002) 1 KLR 846** and in **NJAGI VS KIHARA (2001) EA 158** and also in **KHANJI VS KANJI (1992) LLR 597** the High Court declined to strike out pleadings signed and filed by advocates who had no practicing certificates.

(35) He submitted further that the Civil Procedure Act and Rules do not apply in an election petition. That this is a special Election Court established under ***Section 75 of the Elections Act No. 24/2011*** and the Magistrate has been specifically gazetted to handle this election petition. As such, the court has jurisdiction specifically conferred by the statute alone. That the Elections Act and the Rules are self contained and govern proceedings.

(36) It means that in election petitions, the court should not look at the Advocates Act provisions. He submitted that in the election petition of **KIBAKI VS MOI** the court ruled that the Presidential Elections Act and Rules made there under formed a complete regime with regard to election petitions and no other legislation should apply. That in the case of **MOI Vs MWAU Civil Application No. 131/1994**, the Court of Appeal stated that the court being a creature of statute did not possess inherent jurisdiction which can be applicable in an Election Court.

(37) In **Succession Cause No. 2226 of 2008, Lucy Wanjiru Kibaba & another vs Lucy Wanjiru Muchene** the High Court declined to apply Civil Procedure Rules in a succession cause. He submitted that procedural technicalities are excluded from election petitions. That the Notice of Motion herein is based on a mere technicality, which violates the principle that courts, should administer substantive justice. That election petitions should be determined without undue technicalities.

(38) That ***Section 80(1) of the Elections Act No. 24/2011*** provides that an Elections Court in Exercise of its jurisdiction may decide all matters that come before it without undue technicalities. That ***Article 159(2)(d) of the Constitution*** provides that Justice shall be administered without undue regard to procedural technicalities.

(39) That Justice Mr. Mabeya in the case of **MUCOKANIRIA (HCC No. 170/2012)** applied ***Article 159(2)(d) of the Constitution*** by connecting it to the overriding objective of dispensing justice.

(40) That ***Article 159(2)(d)*** requires the court to interrogate a legal provision whether it is amenable to ***Article 159(2)(d)***. That in the **Election Petition No. 4/2013** in the high Court at Garissa, the Judge observed that the Elections Act and the Election (Parliamentary and County Elections) Petition Rules must be followed and not the Civil Procedure Rules. That this Petition being a creature of the Elections Act it cannot be treated like an ordinary civil suit.

(41) He submitted that this Court should not allow the prescriptions of Procedure and form to trump upon the primary objective of dispensing substantive justice to the parties. That this court as an agency of the process of justice is called upon to appreciate all relevant circumstances and the requirements of a particular case and consciously dispense justice to the parties. That for the sake of the requirements of justice, this court should not allow the application to strike out the petition. That the petition should be left to be heard on merit. That the petitioner should not be driven away from the seat of justice.

(42) The petitioner's counsel submitted further that this application is meant to violate the constitutional rights of the petitioner to come to court and have his rights adjudicated upon. That the application is meant to block the rights of the petitioner to enjoy his political rights including filing a petition. That the court should listen to both sides on the merits of the petition and determine which side is correct rather than strike out the petition without hearing the petitioner's plea.

(43) He submitted that the overriding objection nullifies all objections in a petition. Hence, this court is called upon to reject the application and allow the petition to proceed and determine it using a just, proportionate and affordable measure.

(44) He submitted that there is no overwhelming support in law and the decided cases to strike out documents filed by advocates who did not have practicing certificates. That two Judges in the case of **KAJWANG VS LAW SOCIETY OF KENYA** refused to strike out the documents of an advocate who was termed unqualified. And in **BELGO HOLDINGS case**, Justice Lenaola refused to strike out pleadings. Also in **NJAGI VS KIHARA** the judge refused to strike out the suit.

45. As such, there is no overwhelming support that pleadings especially election petitions filed by advocates who have not paid their fees for a practicing certificate should be struck out. That the Advocates Act does not talk of striking out pleadings but the Act leaves it open. That the only way justice can be done by the court is to set a date for hearing of the petition.

DETERMINATION

(46) The application was filed under **Section 9** of the Advocates Act. The applicants submitted that the petition as drawn and filed by Njiru Boniface Advocate is incompetent and should be struck out because he did not have a current practicing certificate when he filed the petition on 15/3/2013.

(47) The Advocate Mr. Njiru Boniface has submitted that there is nothing to justify or to support striking out of the petition. Instead justice dictates that the petition

(48) Various authorities were submitted in support of the application and in the objection to the application. The question is, should this petition be struck out or not be struck out? Counsel for the applicants relied on the following authorities in support of the application:-

- a. **The Advocate Act Section 9, 31 and Section 34**
- b. **Chelaite vs Njuki & two others - Civil Appeal No. 150/1998**
- c. **Election Petition No. 4/2013 in the High Court of Kenya at Garissa**
- d. **Court of Appeal Civil Appeal No. 148/2004 – Kenya Power & Lighting Co. Ltd vs Chris Mahinda T/A Nyeri Trade Centre**
- e. **Willis Evans Otieno vs Law Society of Kenya and two others**
- f. **Lucas Njuguna Karobia vs Consolidated Bank (K) Ltd**
- g. **and other authorities**

(49) In all these cases, the court was informed that pleadings were struck out because the advocates who filed them or who signed them had not taken out practicing certificates. That meant that they had not complied with the requirements of the Advocates Act.

(50) Counsel for the 2nd Respondent in support of the application to strike out the petition relied on the following authorities:-

- a. **Election Petition No. 4/14**
- b. **Milimani Commercial Courts at Nairobi Election Petition No. 1/2013 which was handled by Hon. Timothy Okelo at Makadara Courts.**
- c. **Belgo Holdings Ltd vs Ismail (2005) 2 EA 28 (HCK).**

These were among the authorities he cited.

(51) Counsel for the petitioner in support of his objection to the application relied on the following authorities:

- a. **The Constitution of Kenya, 2010**
- b. **The supreme Court Petition No. 5/2013 – Raila Odinga vs IEBC and Another**

- c. **Moi vs Matiba (2008) KLR 622**
- d. **Kibaki vs Moi 92001) 1EA 115**
- e. **Lucy Wanjiru Kibaba vs Lucy Wanjiru Muchene Hct Succession Cause No. 226 of 2008**
- f. **P. Waweru vs Thuku Mugira C.A Civil No. 27/1982**
- g. **Kajwang vs Law Society of Kenya**
- h. **Moi vs Harun Mwau, Civil Appeal No. 131/1994**

(52) I have considered the submissions made before me and the authorities cited by all the parties. From the submissions by the Petitioner's Advocate, he has submitted a copy of his practicing certificate for 2013, which is dated 2/5/2013. He has not denied the submission that as at 15/3/2013 when he filed this petition, he did not have a practicing certificate for the year 2013.

(53) The issue now is whether this petition should be struck out as being incompetent since it was filed in violation of the Advocates Act Section 9(c). Is the petition incompetent? Clearly from the authorities that were cited by counsel for the 1st and 3rd Respondents as well as Counsel for the 2nd Respondent, pleadings and or petitions were struck out which had been filed by advocates who did not have current practicing certificates when they were filed.

(54) In **Belgo Holdings case**, the orders which had been issued were struck out together with the pleadings when it was realized that Mr. Getanda who had filed the case had no practicing certificate. It was stated that: -

“If a person does not meet any of the conditions as set out in Section 9 of the Advocates Act, such a person is thereby rendered unqualified person to practice Law.”

It was further stated in the said case that:

“...it does not matter that a party may suffer the effect of striking out its pleadings because of the advocates actions. When an offence is committed, when a contempt of court is committed, when a statute is breached the Law must take its course and the injured party has a remedy against the Advocate whose actions caused the injury to it.”

(55) The counsel for the applicant also relied on the holding in **OBURA VS KOOME (2001) 1 EA 175**. The petitioner used the holding in **NJAGI VS KIHARA** and **KAJWANG VS LSK** to submit that the rulings in these cases should be followed because the judges refused to strike out the petitions or pleadings in cases which had been filed by advocates who did not hold practicing certificates when they were filed.

But counsel for the applicants (Mr. C. Kariuki) opposed this saying that those cases had not been followed in subsequent decisions. He cited the **Election Petition No. 4/2013** at Garissa High Court and others.

(56) It should, however, be noted that the **Election Petition No.4/2013** at Garissa was not struck out because of lack of practicing certificate. It was struck out because of other factors. The applicant cited this petition to show that an election court has jurisdiction to strike out an election petition where it is correct to do so. This petition was used to counter the contention by the Petitioner that this court does not have jurisdiction to strike out an election petition.

(57) It was submitted that this court as an election court has jurisdiction just like Judges who were gazetted together with this court to hear election petitions. That both courts have powers in accordance with the **Elections Act No. 24/2011** and the **Elections (Parliamentary and County Elections) Petition Rules, 2013**. I am also of the view that I have jurisdiction to decide an election petition and it includes striking out petitions. This court being a subordinate court is also bound by the decisions made by Superior Courts based on the doctrine of *stare decisis*, which is recognized by the Constitution in Article 163(7).

(58) In the **Election Petition No. 16/2013 in Malindi High Court**, the petition was struck out mainly

because an advocate who did not have a valid practicing certificate had filed it. The advocate purported to have filed the petition through another firm of advocates to which he did not belong but the firm denied knowledge of that. The advocate himself did not have a practicing certificate when he filed the petition. The petition was struck out.

(59) In this petition, the Judge cited the case of **NATIONAL BANK OF KENYA LTD VS WILSON NDOLO AYAH** where the Court of Appeal had stated as follows:

“ Section 9 of the Advocates makes provision for qualification for practicing as an advocate and the qualifications include having in force a current practicing certificate..”

A section 34 concern with offering legal services at a fee when one is not qualified as an advocate. It is public policy that citizens obey the Law of the land. Likewise, it is good policy that Courts enforce the Law of the land and avoid perpetuating acts of illegality. It can only do so if acts done in pursuance of an illegality are deemed as being invalid. However, a statute prohibiting certain facts is meant to protect public interest.

There is need to discourage the commission of such acts. Allowing such acts to stand is in effect a perpetuation of an illegality. Invalidating documents drawn by such unqualified advocates is public policy that courts should not aid in the perpetuation of illegalities. Failure to invalidate the act by unqualified advocate is likely to provide the incentive to repeat the illegal act”

(60) Hence to appear in court and represent a party or file documents when you have no current practicing certificate is termed as an illegality. It is an offence and an illegality under ***Section 31 of the Advocates Act***.

(61) The Petitioner’s Advocate submitted that the petition was signed by the petitioner himself, which is permitted under the ***Elections Act No.24/2011*** and ***Elections Rules, 2013***. That the petitioner signed the petition and the supporting affidavit. It is not denied that it is the firm of Njiru Boniface & Co. Advocates who drew and filed the petition. This is evidently clear on the face of the petition. It is also not denied that as at 15/3/2013 when the Advocate filed this petition at Milimani Commercial Courts, he was not having a practicing certificate for the year 2013.

(62) It was submitted that this court lacks jurisdiction to strike out the petition and that it only has powers provided under the Constitution 2010, the Elections Act, 2011 and the Elections Rules, 2013. I agree that I only have power or jurisdiction that is clearly given under the Constitution, the Elections Act and the Election Petition Rules. As an Election Court, I also have to follow what other Election Courts have decided. I am guided by what the Superior Courts have decided in similar matters in accordance with the elections laws. The ***Election Petition No. 4/2013*** in ***Garissa High Court*** and ***16/2013 in Malindi High Court*** have shown that election petitions can be truck out on such grounds.

Section 79 of the Elections Act provides that: -

“Upon receipt of a petition an Election Court shall peruse the petition and if it considers that no sufficient grounds for granting relief sought is disclosed therein, may reject the petition summarily or fix a date for trial of the petition.”

(63) It was argued that this being a Resident Magistrates Court it does not have inherent jurisdiction the way a High Court Judge has to strike out petitions. The Constitution is clear on the powers Resident Magistrates Court can exercise. That is why this Resident Magistrate Court can only handle petitions concerning County Representatives and not others such as members of Parliament or Governors. The Constitution and Elections Act are clear on which petitions this court can handle as an Election Court.

(64) The court is empowered to make decisions in this petition as an election court. The Elections Act does not grant different powers to the High Court and Resident Magistrate designated as election courts.

(65) I was cited a decision by my brother Timothy Okello in **Election Petition No. 1/2013** Milimani Commercial Courts Nairobi. He truck out a petition. This court as an Election Court has been granted special powers to handle an Election Petition when the Chief Justice gazetted it and I am empowered to make orders in accordance with the prayers contained in this **Election Petition No 3/2013** filed at Milimani Commercial Courts on 15/3/2013. This court was gazetted to handle this petition.

(66) It was submitted that the Civil Procedure Rules do not apply to this petition. That the cases which were cited in support of the application were filed based on Civil Procedure Rules which had not been followed. That this petition is controlled by the **Constitution 2010**, the **Elections Act 2011** and the **Election Rules 2013**. But the applicant replied that they did not even cite the Civil Procedure Rules in their application to have this petition struck out. It was submitted that the fact that the petition is governed by the Constitution, the Elections Act and the Elections Rule does not mean that the Court should not consider what the Advocates Act provides, yet it is the Act that controls the actions of advocates.

(67) In **Election Petition No. 16/2013** which was decided recently, the court cited the provisions of Section 9 of the Advocates Act in conjunction with the Elections Act and the Elections Rules and struck out the petition.

(68) It was submitted that the court should not rely on procedural technicalities to strike out the petition. That, the court should administer substantive justice in deciding this Election Petition. That, the court should be guided by **Article 159 (2)(d) of the Constitution 2010** and disallow the application, which is meant to trump upon the primary objective of dispensing justice. That the overriding objective in the Election Petition Rules nullifies all objections to the petition.

(69) I have considered **Article 159 (2) (d)**. It provides that procedural technicalities should be avoided. It provides that justice shall be administered without undue regard to technicalities. **Article 159 (2)(a)** also provides that justice shall be done to all irrespective of status.

(70) **Rule 4 of the Election Petition Rules 2013** provides that the overriding objective of the rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions, in accordance with the Constitution and the Elections Act. **Article 10 of the Constitution** requires any person or institution when making decisions to be guided by values and principles conferred in **Article 10 of the Constitution**.

(71) That is why the Judge in **Election Petition No. 2/13** at Bungoma stated:

“...The Constitution of Kenya lays a foundation for values and principles that must be followed in public decision making and especially when adjudicating disputes by the Judiciary. Election petitions are public disputes... and of substantive interest to the public at large...”

(72) Therefore, the court must take into consideration the values and principles of the Constitution when making a decision and the overriding objectives which is to administer substantive justice to the people. The interests presented in this petition are not just interests of the petitioner. They are also interests of the public, especially the voters of Woodley/Kenyatta Golf Course Ward.

73.However, this does not mean that **Section 9** of the Advocates Act must not be followed because it is an election Petition. Can this court overlook the provisions of Section 9 of the Advocates Act? It is very clear that Njiru Advocate filed the petition when he was not holding a current practicing certificate for the year 2013. The practicing certificate he obtained on 2/5/2013 cannot be backdated to cover 15/3/2013. It was held in **WILLIS EVANS OTIENO VS LSK & 2 OTHERS** that the practicing certificate would not be backdated to cover the period when the petition was filed. In that petition, the lawyer Ruby Akinyi Otieno had not obtained her practicing certificate by the time she filed the petition, but she had applied for it. The court rejected the petition on the grounds that she was unqualified to file the petition before she obtained her

practicing certificate.

(74) The Supreme Court in **Petition No. 5/2013** while commenting on **Article 159(2)(d)** stated that a petitioner cannot hide under **Article 159(2)(d) of the Constitution** as a panacea to file incompetent proceedings.

(75) The requirement for advocates to hold practicing certificate is not a mere procedural technicality that can be avoided under **Article 159(2)(d) of the Constitution**. It is a substantive requirement of Law that all advocates who want to practice in Courts must have practicing certificates. Every year the courts are given lists of advocates with valid practicing certificates so that courts would not allow those without certificates to appear in courts to represent parties. This requirement is good because it is meant to protect the public. The requirement is necessary in order to authorize advocates to appear before courts of law to represent their clients and to keep unqualified persons from representing people. This is meant to avoid illegalities being perpetuated in courts of law, which are meant to uphold Law and Order.

(76) The objects, values and principles of the constitution do not authorize illegalities to be protected by the Courts.

(77) I believe that the petitioner is entitled to justice. He is entitled to exercise his political rights just like any other Kenyan. He has a right to be heard in his petition. But his counsel was aware that he did not hold a current practicing certificate when he filed the petition. 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.

(78) The authorities cited in this petition including the Petition No. 16/2013 at Malindi guide this court to the effect that petitions filed incompetently can be struck out. Section 9 of the Constitution does not violate the provisions of the Constitution. It must be read in tandem with the Constitution, the Elections Act 2011 and the Elections Rules. The Constitution does not state that courts can shut their eyes on clear provisions of the law in order to do justice.

(79) This 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.

Orders accordingly.

HON. JUDITH WANJALA

CHIEF MAGISTRATE

13/06/2013

Delivered and signed at Kibera on this 13th day of June 2013

In the presence of:

C. M.Kariuki for 1st and 3rd Respondents/Applicants

J. Wanjohi for 2nd Respondent

Chesina Advocate holding brief for Njiru Boniface Advocate for petitioner

Delivered in open court.

HON. JUDITH WANJALA

CHIEF MAGISTRATE

13/06/2013

Stay of 30 days.

HON. JUDITH WANJALA

CHIEF MAGISTRATE

13/06/2013

Ms Chesina: We would like to seek leave to file an appeal. In order to do so, we seek an order to seek for typed proceedings.

HON. JUDITH WANJALA

CHIEF MAGISTRATE

13/06/2013

COURT: The application for typed proceedings is granted to allow for filing an appeal.

HON. JUDITH WANJALA

CHIEF MAGISTRATE

13/06/2013