



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

ELECTION PETITION NO.1 OF 2013

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE NAIROBI COUNTY
GOVERNOR ELECTIONS, 2013**

AND

**IN THE MATTER OF ARTICLE 1 (1), (2); 2(2);3(1); 4(2); 10; 21(1); 22(1); 23; 38;(3)(C); 47 92);
48; 81 (a); & 82 (2) (b); 84;86;87 (2); & (3); 88(5); 165 (3) (a) and (e); & 180 (1)**

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 75 & 80 OF THE ELECTIONS ACT, 2011

AND

IN THE ELECTIONS ACT, 2011 (ACT NO.24 OF 2011) AS AMENDED

AND

**IN THE MATTER OF LEGAL NOTICE NO.128 OF 2012, THE ELECTIONS (GENERAL)
REGULATIONS, 2012**

AND

**IN THE MATTER OF LEGAL NOTICE NO.126 OF 2012(THE ELECTIONS (REGISTARTION
OF VOTERS) REGULATIONS, 2012**

AND

IN THHE MATTER OF LEGAL NOTICE NO.44 OF 2013

AND IN THE PETITION BY

FERDINARD NDUNG’U WAITITU.....PETITIONER

V

THE INDEPENDENT ELECTORAL &

BOUNDARIES

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

ISAAC HASSAN (RETURNING OFFICER OF

THE NATIONAL TALLYING CENTRE).....2ND RESPONDENT

THE NAIROBI COUNTY RETURNING

OFFICER.....3RD RESPONDENT

EVANS ODHIAMBO KIDERO.....4TH RESPONDENT

JONATHAN MWEKE.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

THE DIVISIONAL COMMANDING

OFFICER

(DCIO) GIGIRI POLICE STATION NAIROBI.....7TH RESPONDENT

THE DIVISIONAL COMMANDING OFFICER

**(DCIO) KAYOLE POLICE DIVISION NAIROBI.....8TH RESPONDENT THE INSPECTOR
GENERAL OF THE NATIONAL POLICE SERVICE.....9TH RESPONDENT**

RULING

1. The Petitioner has applied to exercise his right of cross-examination of three witnesses of the 1st Respondent. All the Respondents object to the exercise of that right by the Petitioner. The issue for determination is whether the court should allow the Petitioner the right to cross-examine.
2. The circumstances giving rise to the application are as follows:

On the first day of the hearing the Petitioner, having at pre-trial indicated he would be calling four witnesses, abruptly closed his case on the first day after he and one other witness had testified. The 4th and 5th Respondents then applied to strike out the depositions of the witnesses that had not been called. In its Ruling, the court declined to strike out noting that under the Election Petition Rules, depositions and pleadings constitute part of the trial record.
3. The trial proceeded with the 1st Respondent offering its evidence through its witness RW1 who was cross-examined and re-examined. After re-examination, the 1st – 3rd Respondents then closed their case. They indicated that since the evidence of their other witnesses was part of the trial record, it should be treated in the same fashion as the evidence of the Petitioner’s witnesses who had not been called.
4. The Petitioner does not agree and seeks to cross-examine the following 2nd Respondent’s witnesses: Teresia Wanjiru Mwai, the Langata Constituency Election Co-ordinator; Joseph Leboo Masindet, the Constituency Election Co-ordinator for Kamukunji Constituency; and Pamela Wandeo, the Constituency Election Co-ordinator for Westlands Constituency.
5. The Petitioner asserts that he cannot be denied the right to cross-examine having made such request. In the case of his witnesses who were not called, he argues that none of the Respondents applied to cross-examine those witnesses. The Respondents, on their part, assert that they consider their case as having fully responded to the Petitioner’s case, and it is not for the Petitioner to seek to make out his case through the Respondent’s witnesses, he having closed his own case.

6. I have carefully considered the parties submissions. This court has already pronounced itself in rulings on the nature of witnesses' depositions. Under **Rules 12** and **15** of the Election Petitions Rules, affidavits contain the substance of the evidence and form part of the record of the trial. They are the bedrock upon which a party's evidence founded. I had stated that depositions, together with the pleadings, constitute the case of each party under the Rules.
7. **Rule 15 (3)** grants a Petitioner the option to cross-examine. Under **Rules 15 (4)** and **(5)**, no person is entitled to give evidence for a Respondent unless he has filed an affidavit, or has obtained the leave of the court. In other words, unless a person's evidence is part of an election court's trial record, such person cannot give evidence. Conversely only a person whose evidence is part of the trial record can be called.
8. In this case, the Petitioner provided depositions which became part of the trial record. In respect of the two witnesses not called, their evidence remains part of the trial record. The Respondents who, under **Rule 12 (2)** had the right or option to cross-examine the Petitioner's witnesses, opted not to apply for such cross-examination. Here, the Petitioner has opted to exercise his Rule 15 (3) discretion to cross examine the 1st Respondents' witnesses who have not been called. The object of cross-examination being to test and interrogate the evidence disputed, and such evidence being part of the trial record, it appears to me trite that the Petitioner must be allowed to so cross-examine.
9. Irrespective of whether the party whose witness it is that has filed a deposition for the trial record, such witness may be called for interrogation of his evidence. Indeed, the court, in the exercise of its general jurisdiction, may compel the attendance of a person who has filed a deposition, or any other person, to testify (section 80 Elections Act.)
10. In this case, it is regrettable that the parties, by curtailing the calling of witnesses, have conducted their cases in such a manner, as to make the testing of evidence difficult. Yet clarity of the court as to all matters that transpired is critical. The object of the Elections Petitions Rules is not to create a field for the display and testing of strategy and tactic games by parties. The overriding objective of the Rules are stated in Rules 4 as being to facilitate the just, expeditious, proportionate and affordable resolution of election petitions. Likewise, the duty of the court is to further the overriding objectives by conducting the proceedings with the aims of just determination of a petition in an efficient and expeditious manner – (**Rule 5**).
11. In light of the foregoing, the court has taken into account the timeframe for disposal of this petition, the time allocations already agreed by the parties, and the fact that numerous applications and objections have been raised by the respective parties requiring rulings. The result is that a fair amount of the allotted time for parties' cases has been consumed, and there remains only a few hours before the close of hearing of these proceedings as earlier scheduled with consensus of the parties.
12. The court has further taken into account the evidence already adduced, and identified the most contentious issues. The court has also perused the pleadings of the parties and the witness depositions of the various witnesses. In particular, the Petitioner: at paragraph 6 & 20 impugns County form 36 as invalid for failure to specify Embakasi South or Embakasi North Constituencies; at paragraph 27 Petitioner sought announcement of the election results for Embakasi South and Embakasi North in a valid form 36; at paragraph 37 he identifies discrepancies in votes cast an error admitted by the IEBC.
13. A careful balancing of the time left and the need to ensure just, albeit expeditious, determination of the petition in an efficient manner is also necessary. This calls for creativity, whilst balancing party rights in the directions to be issued by this court. It is as much in the interest of the court as it is in the parties' interest that the real substance of the disputes be resolved by drawing out kernel aspects of the parties' cases and their evidence.

14. To this end, the court is obliged to give directions that enable it to get to the root of the matter. The court is also conscious that the 4th and 5th Respondent's case is yet to commence and they have a number of witnesses. All these considerations now call for astute and innovative management of the case, in particular the remaining time so as to get to the core substance of the issues for determination.
15. There is no doubt in my mind that an election is determined by numbers, and that in an election dispute the real contest is to determine whether the will of the voting public prevailed. So there is a strong public law element in such disputes, because the voting public also desire to know whether their will prevailed.
16. This court has therefore come to the following conclusions and determinations. There shall be cross-examination of Joseph Leboo Masindet be limited to their affidavits and areas in dispute therein. No fishing expedition shall be allowed. Directions follow below.
- (b) There shall be a re-count of the ballots for St. Mary's Primary School Polling Station in Langata, and verification of Constituency Form 36 and against county Form 36. This will obviate the cross-examination of Teresia Wanjiru Mwai, Constituency Election Co-ordinator, to enable the court get to the root of the complaint concerning that polling station. Directions follow below.
- (c) The forms 36 for all seventeen Constituencies in Nairobi County shall be availed for re-tallying for verification of the County Form 36. Directions shall be as below.

Directions and Procedures flowing from court's Orders:

- A. **THAT** cross-Examination of Joseph Leboo Masindet shall be on the affidavit of the above witness and shall be directed to the scope of the disputed issue identified in the petition and Petitioner's evidence on the illegality of the appointment of IEBC officials.
- B. **THAT** cross-examination of Pamela Wandeo shall be on the affidavit of the above witness and shall be directed to the scope of the disputed issue identified in the petition and Petitioner's evidence on breach of security of ballot papers in Westlands Constituency.
- C. **THAT** there shall be a partial scrutiny of votes limited to a recount and ascertainment of the number of votes each candidate obtained in the following polling station and streams only:
- Polling Station; St. Mary's Primary School code: 001
- Stream 1, Stream 2, Stream 3, Stream 4, Stream 5 and Stream 6.
- D. **THAT** there shall be a scrutiny of all the Form 36 from the 17 Constituencies of the Nairobi County vis a vis the Form 36 of the Nairobi County to verify the entries of the Constituency Form 36 to the County Form 36.
- E. **THAT** the partial scrutiny of votes shall be undertaken under the direct supervision of the Deputy Registrar of this Court.
- F. **THAT** the scrutiny shall commence on the 1st July 2013 at 9.00 a.m. and proceed for 7 days on a day to day basis until the conclusion of the exercise.
- G. **THAT** the Petitioner, 1st – 3rd Respondents, 4th and 5th Respondents shall be allowed to present two agents each during the exercise. No counsel or parties shall be allowed. Parties shall not be allowed to change their agents. The agents shall be under the direction of the Deputy Registrar who shall have power to eject any agent for disruption.

H. **THAT** on conclusion of the of the scrutiny and recount, the Deputy Registrar shall record his/ her findings to the court in a Report on the Scrutiny and Recount, copies of which shall be supplied to the Parties who may make observations to be included in their final submissions and highlights therein before the court.

I. **THAT** the matter shall be mentioned on the 11th July 2013. As a result of these changes, parties shall now file their final submissions as hereunder;

i. The Petitioner shall file and serve his submissions on the **17th July 2013**.

ii. The Respondents shall file and serve their submissions on the **23rd July 2013**.

iii. Parties shall highlight their submissions on the **25th July 2013**.

The cross examination of Joseph Leboo Masindet and Pamela Wandeo shall now proceed.

Orders accordingly.

Dated at Nairobi this 28th Day of June, 2013

R. MWONGO

JUDG