



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
ELECTION PETITION NO. 1 OF 2013
BETWEEN
FERDINARD NDUNG’U WAITITU..... PETITIONER
AND
THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION (IEBC)..... 1ST RESPONDENT
ISAAC HASSAN (RETURNING OFFICER
OF THE NATIONAL TALLYING CENTER).....2ND RESPONDENT
THE NAIROBI COUNTY RETURNING OFFICER..... 3RD RESPONDENT
EVANS ODHIAMBO KIDERO 4TH RESPONDENT
JONATHAN MWEKE..... 5TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL..... 6TH RESPONDENT
THE DIVISIONAL COMMANDING OFFICER
(D.C.I.O.) GIGIRI POLICE DIVISION, NAIROBI 7TH RESPONDENT

RULING

During cross examination of Fiona Nduku Waithaka RW1, by Mr. Kinyanjui for the Petitioner, she was shown Form 36 for Embakasi Constituency. She had given evidence that she had looked at all forms 36 for all 17 Nairobi Constituencies before she compiled the Form 36 for Nairobi County. Mr. Ojienda for the 4th and 5th Respondent and Mr. Okonjo for the 1st, 2nd & 3rd Respondents objected to the line of questioning of counsel for the Petitioner on several grounds.

On the part of Mr. Okonjo, he was concerned that by relying on Forms 36 that were not filed as part of pleadings or as an affidavit of the witness, the counsel would be going beyond the permitted scope of cross-examination. He indicated that the IEBC had filed the Forms 35 and 36 for all Constituencies in Nairobi pursuant to **Rule 21 (a)** and specifically **(b)** of the Election Petition Rules. Those documents constitute thousands of pages and it would be unfair for the Petitioner to have blanket reliance on them, as

the scope of his cross-examination could extend beyond what is contained within the four corners of the witnesses affidavits, or beyond what is in the Petitioner's pleadings; that it would lead to the Petitioner introducing new matters; and generally using the documents to fish for material to incorporate into his petition.

Prof. Ojienda for the 4th & 5th Respondents objected to the cross-examination on the grounds that; first they had not been served with the documents supplied by the IEBC to the court under **Rule 21**, so this would prejudice the 4th and 5th Respondents. Secondly, he argued that under **Rule 12 (2) (c)** of the Election Petitions Rules, cross-examination is only permitted on contested issues and documents or affidavits properly filed and served. He said that **Rule 12 (2)** read with **Rule 14 (3)** provided the grounding of his argument.

Further Prof. Ojienda argued that a deponent may only be cross-examined on matters in an affidavit that form part of the record. Accordingly, should the court deviate and allow general cross examination on documents filed under **Rule 21 (a)** or **(b)**, it would be improper as those are only intended to facilitate scrutiny.

He was fearful that counsel would be cross-examining the witness on Forms 36 in respect of which the makers were not present for cross-examination, and she should therefore only be cross-examined on her own acts.

Counsel also argued that there would be prejudice on the 4th & 5th Respondents as the goalposts would be moved by the Petitioner thereby extending the scope of the petition. Finally, Prof. Ojienda argued that the Supreme Court in the **Raila vs. IEBC & Others** had ruled that such evidence cannot be used in the petition.

Mr. Kinyanjui, in response, pointed out that the witness, RW1, had given evidence in her affidavit at para 14 to the effect that the results from Forms 34 and 35 were transported to the Constituency Tallying Centre for tallying then to the County Tallying Centre. She had given evidence that she was the maker of Form 36 and therefore the cross-examination had not gone outside the scope of the witness's evidence. Further, counsel argued that on **26th April, 2013** the IEBC filed the documents in question in court; they were stamped and the court cannot be asked to close its eyes on them because the 4th and 5th Respondents had not been served with them.

Counsel also indicated that he had requested the documents i.e. Forms 35 & 36 from the Deputy Registrar on **24th June, 2013** at his own expense and that is how they came into his custody. As such, counsel argued, every party in court is entitled to refer to them. In this case, since the witness had admitted having looked at the Form 36 he had no choice but to take her through it. In her paragraph 14 of her affidavit she had also referred to Form 35.

I have carefully considered the parties submissions on this issue.

The first point which I must discuss is the scope of cross-examination in an election petition. Under **Section 146 (2)** of the Evidence Act, the general scope of cross-examination is broad. That provision states as follows:

“Subject to the following provisions of this Act the examination in chief and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination in Chief.”

Under **Article 87 (1)** of the Constitution, Parliament is mandated to **“enact legislation to establish mechanisms for timely settling of electoral disputes”**. In exercise of that constitutional mandate, Parliament enacted the **Election Act No. 24 of 2011**. Under **Section 96** of that Act Parliament provided for the making of rules by the Rules Committee:

“Generally to regulate the practice and procedure of the High Court with respect to the filing and trial of election and referendum petitions.”

It is not disputed that the **Election (Parliamentary and County Elections) Petition Rules 2013, LN 54** are the applicable Rules in respect of the practice and procedure of the court at trial of an election petition.

Under **Rule 12**, the Petitioner must file with his petition an affidavit sworn by each witness whom the Petitioner intends to call at the trial. The affidavit is required to contain the substance of the evidence and be served on all parties. It also forms part of the record of the trial and a deponent may be cross-examined thereon. With regard to a Respondent’s case, which is what is under consideration in this objection, the Rules provide as follows: Under **Rule 14**, a Respondent must file and serve a Response to a petition, and cannot appear or act as a party unless he does so (**Rule 14 (i) & (3)**).

Rule 15 then provides further as follows:

“(1) A Respondent shall at the time of filing a response to the petition, file an affidavit sworn by a witness whom the Respondent intends to call at the trial, which affidavit shall set out the substance of the evidence.

(2) Each affidavit shall be served on all parties to the petition including all Petitioners in the same petition and the Respondents.

(3) The affidavit shall form part of the record of the trial and a deponent may be cross-examined by the Petitioners and re-examined by the Respondents.”..... (underlining mine)

I pause here to draw out some principles. First, the Rules treat both parties (Petitioner and Respondent) equally, and the obligations on both are the same as regards the filing and service of witness affidavits as part of either the petition or the response, respectively.

Secondly, a witness affidavit contains the substance of the evidence and stands as the basis upon which evidence is adduced by parties.

Thirdly, the affidavits filed form part of the record of the trial in each case. Thus, subject to cross-examination, evidence is crystallized in an election petition automatically as part of the trial record by virtue of the affidavit. This includes all annexures or exhibits to such affidavit. As such, examination-in-chief is not an essential requirement. The affidavit evidence is treated as if it were adduced in chief, as the evidence of the deposing witness. This position differs markedly with the practice required under the Evidence Act which presupposes examination in chief.

Fourthly, and this is another distinction of election procedure and practice as against that under the Evidence Act in **Section 146 (2)**, a deponent of an affidavit may be cross-examined and may be re-examined, under **Rule 15 (3)**. The implication here is that the cross-examination relates to and concerns matters deposed to in the affidavit which mandatorily and automatically became part of the trial record.

To my mind, therefore, cross-examination of a deponent in respect of an election petition must relate to the substance of the evidence of that witness. But it must also be relevant and material to the scope of that witness’s deposed role, actions and involvement in the subject matter as circumscribed by the issues in contention and the party’s pleadings.

Under **Rule 15 (4)** a respondent’s witness cannot give evidence unless he or she has previously filed a sworn affidavit setting out the substance of the evidence and which has been filed and availed to the parties. Given the aforesaid parameters, it is clear to me that documents or items filed or delivered to the court pursuant to **Rule 21** of the Rules are not, and do not become part of the trial record unless and until the court grants leave for their use and inclusion in the trial. In such case they may then assume a place on the trial record. In my view, **Rule 21** is intended to ensure that the court has ready access to ballot

boxes and the results of an election in the event that the court is minded, either *suo moto* or upon an appropriate application, to engage the provisions of Part VI of the Rules in relation to scrutiny, tallying or recounting of votes.

Accordingly, and for the above reason, I am not inclined to allow the documents filed by the IEBC to be used in wide and general manner for cross-examination which may amount to mere fishing for information.

I have carefully perused the Petitioner's pleadings. As a party, he is bound by them. A party is also bound by the depositions of his or her witnesses. Thus, where the Petitioner or his witnesses have deposed to a specific Form 35 or 36 of IEBC in respect of or alleging an irregularity, malpractice or otherwise this court shall grant leave to the Petitioner to cross-examine a witness using the specified form contained in the Forms 35 & 36 filed under **Rule 21**. The court shall grant leave on a case by case basis to ensure that the rights of all parties are duly protected, to guard against the enlargement or stifling of a party's case, and so as to bring onto the trial record only such matters in respect of which the pleadings specifically relate.

I am confident that these limitations will achieve the aims of substantive justice intended in the exercise of the court's judicial authority pursuant to **Article 159 (2) (d) and (e)**, and the overriding objectives of the Rules pursuant to, and in terms of, **Rules 4 (1) (2) & (3) and Rule 5 (1)** of the Elections Petition Rules.

In taking this decision, the court is also cognisant of the various provisions under the Elections General Regulations made by the IEBC under the Elections Act. In **Regulation 79 (2) (a)** the elections results under Form 35 would have been announced publicly; under **Regulation 79 (2) (c)**, a copy of such results may be given to a candidate or his agent present at the declaration; and finally another copy would be affixed to the public entrance of a polling station (**Reg. 79 (2) (d)**).

In light of the foregoing, the court hereby determines and directs as follows:

1. Cross-examination based on the original documents filed under Rule 21 shall be allowed in respect of the following categories:

Category A: In respect of forms identified in the Petition document at pages

129 – 146 of the Petitioner's bundle as follows:

1. Identified at para (c) page 130 Form 36
2. Identified at para 9 (d) (ii) page 130 Form 36
3. Identified at para (d) (iii) page 131 Form 36
4. Identified at para 5 page 132 Form 36
5. Identified at para 6 page 133 Form 36
6. Identified at para 20 page 135 Form 36
7. Identified at para 27 page 138 Form 36

Category B: In respect of voter stations identified in paras 37 page 140

namely, Langata Constituency Karen Assembly Ward. St. Mary's Primary School

Category C: In respect of any witness statements Forms 35 and 36 referred to in the witness deposition or annexed to that witnesses deposition.

2. The court, if it is satisfied that a question put to a witness in cross-examination on the basis of the bundle filed under **Rule 21** is creeping or extending beyond the pleaded issues or the substance of the matters deposed by the witness, may curtail or prohibit such question.
3. (a) Copies of the Forms 35 and 36 in the bundle filed under **Rule 21** which shall be identified by

the parties for use under categories A, B or C shall be photocopied and availed to the Respondents.

(b) The above exercise of identification and photocopying of Forms 35 and 36 for cross-examination shall be completed within one (1) hour of the reading of this Ruling, and the hearing shall thereafter proceed.

Orders Accordingly.

Dated at Nairobi this 26th day of June, 2013.

R. MWONGO

JUDGE