



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**ELECTION PETITION NO. 5 OF 2013**

**MABLE MURULI ..... PETITIONER**

**VERSUS**

**1. HON. WYCLIFFE AMBETSA OPARANYA.....1<sup>ST</sup> RESPONDENT**

**2. PHILIP MUSEVE KUTIMA.....2<sup>ND</sup> RESPONDENT**

**3. NICHOLAS SUMBA.....3<sup>RD</sup> RESPONDENT**

**4. INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION (I.E.B.C).....4<sup>TH</sup> RESPONDENT**

**R U L I N G**

By a notice of motion dated 21.6.2013 the 1<sup>st</sup> and 2<sup>nd</sup> respondent seeks to have expunged several paragraphs contained in the petitioner's affidavit in support to the petition, paragraphs 17 and 18 of the petition, paragraphs 10, 11 and 12 of the affidavit of **Stanlus Anami** and several paragraphs contained in the affidavit of **Victor Shivega**. The application is made under Order 51 of the Civil Procedure Rules, the Elections Act 2011 and its rules as well as **sections 106A** and **B** of the Evidence Act. Contemporaneous to the application the two respondents filed a notice of preliminary objection to the testimony of the petitioner and the two named witnesses in respect of the paragraphs contained in their respective affidavits as hereinabove stated. The application is supported by the affidavit of the 1<sup>st</sup> respondent sworn on the 21.6.2013.

Mr. Nyaundi, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent submitted that the purported CDs do not meet the requirements for production of evidence contained in electronic records. Production of the CDs will prejudice the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Counsel further submitted that the CDs do not meet the requirements imposed by section 106B of the Evidence Act. The witnesses do not state the device or gadget used in recording the evidence. Stanlus states that he recorded the events using his gadget but the same is not described. Under section 106 B the particulars of the gadget must be provided. As of now it is not known who produced the CD and the one who produced the CD by the name Befrey Amawa does not indicate what instrument he used to produce the CDs. Counsel contends that electronic evidence is subject to manipulation and that is why the Evidence Act established the standards for its production.

Mr. Ogeto, counsel for the petitioner opposed the preliminary objection and the notice of motion on two grounds. Counsel submitted that the application was filed after parties had gone through the pre-trial process. Rule 17 of the Election Petition Rules is couched in mandatory terms and all interlocutory

applications have to be dealt with at the pre-trial stage. The applicant has not shown the court why the application was not filed before the pre-trial. Secondly counsel submitted that under **section 106A** the operative word is “**May**” and what is important is the probative value of the evidence itself as opposed to its admissibility. The issues being raised by the two respondents do not relate to the admissibility of the evidence but relate to its value. The applicant is in essence telling the court not to attach much weight to the evidence. Counsel relied on four authorities namely – **Election Petition No. 3 of 2013 Nairobi – Joseph Tiampati Ole Musuni & Others V Samuel Kuntai Tunai & Others, Election Petition No. 4 of 2013 – Garisa High Court – Amin Hassan Ahmed V IEBC & Others, Jyoti Basu & Others V Debi Ghosal & Others [1982] All India Report 983 and Election Petition No.5 of 2013 – Raila Odinga & Others V IEBC & Others.**

Paragraphs 17 and 18 of the petition relate to allegations that the 1<sup>st</sup> respondent gave out bribes in form of money to the electorate at Murhanda market as well as at a church service. Paragraphs 8, 9, 17, 19 and 69 of the petitioner’s further affidavit sworn on the 10.5.2013 relate to the same issue of bribery of voters. The petitioner in paragraphs 17 and 19 gives the source of her information as her two witnesses namely **Victor Shivega** and **Stanlaus Anami**. Paragraphs 8 and 9 of the petitioner’s further affidavit are a response to paragraphs 10 and 12 of the affidavit of the 1<sup>st</sup> respondent sworn on the 22.4.2013. Paragraph 69 of the further affidavit of the petitioner is in response to paragraph 8 of James Atsenga Ashiundu’s affidavit sworn on the 23.4.2013 in relation to the bribery allegations.

With regard to paragraphs 10, 11 and 12 of the affidavit of Stanlaus Anami sworn on the 8.4.2013 the allegations contained therein is to the effect that the 1<sup>st</sup> respondent gave a white envelope containing money to one Mr. Mutovelo at a church congregation. The witness alleges that he did a recording of the events and has processed a CD. The 1<sup>st</sup> and 2<sup>nd</sup> respondent would also like to have paragraphs 39 to 47 of the affidavit of Victor Shivega expunged. I have looked at the said paragraphs and the allegations are that the 1<sup>st</sup> respondent while addressing a gathering at Murhanda area informed the crowd that he was going to leave “**some milk**” for them. The alleged peoples’ milk was given to an aspirant for the Murhanda ward by the name Mr. Bonface. Bonface later confirmed that it was KShs.20,000/= and since people had become un-rowdy Bonface gave out the money to a boda boda operator who distributed it to the gathering. Paragraphs 56 to 59 of the same affidavit is further allegations as to what transpired at Murhanda when the 1<sup>st</sup> respondent addressed the gathering.

The 1<sup>st</sup> respondent in his affidavit sworn on the 22.4.2013 in paragraphs 10 and 12 denied the allegations that he bribed the voters. Similarly paragraphs 27, 28, 29, 30 and 31 of the same affidavit are to the effect that the bribery allegations are just but insinuations without any facts. Further paragraphs 37, 38 and 42 of the 1<sup>st</sup> respondent’s affidavit dwell on the same issue of bribery and in paragraph 42 the 1<sup>st</sup> respondent indicates that in some situations during the campaigns money might be given out to the organizers of public meetings to take care of logistics, transport and the hiring of the venue.

**Section 106A** of the Evidence Act provides for proving the contents of an electronic record. **Section 106B** provides for the procedure through which electronic records can become admissible in evidence. Section 106B (1) states as follows:-

***106B. (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electronic-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original, or of any fact stated therein where direct evidence would be admissible.***

Although the entire **section 106B** concentrates on information stored in a computer my view would be that even a CD is part and parcel of an electronic record. The applicant contends that the paragraphs of the petitioner and her witnesses do not meet the criteria set down in **section 106A** and **B** of the Evidence Act. It is further alleged that the paragraphs complained of do not meet the standards of proof in relation

to electronic records and it will be a waste of court's time if the witnesses were to be allowed to determine the truthfulness of the averments contained in those paragraphs. Paragraph 5 of the affidavit in support to the application indicates that the certificate sought to be produced in support of the electronic evidence does not identify the equipment used in producing the alleged video recording from which the CD was produced. The witnesses also do not give the particulars of any of the devices involved in the production of the electronic evidence. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondent the evidence to be produced does not meet the criteria established under the law.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents have denied all the allegations of bribery specifically in the affidavit of the 1<sup>st</sup> respondent as stated herein above. There is also the affidavit of **Kelly Keli Ndikuid** sworn on the 16.5.2013. The witness (Kelly) avers that the CDs may not be authentic or they could have been manipulated. According to Kelly some of the CDs show the governor with his entourage and could have been a real picture of the governor but in some situations manipulation could have occurred especially sound editing.

The essence of justice is to be fair to both parties. The petition herein is two pronged. The first limb is that the petitioner was unlawfully barred from participating in the elections while the second limb is that the elections were not free and fair as the 1<sup>st</sup> respondent bribed voters during the campaigns. It is clear that the petitioner was not present when the alleged bribery was done and it is only her other two witnesses namely Victor Shivega and Stanlus Anami who can testify as to the authenticity of the CDs. Section 106B of the Evidence Act gives conditions relating to the admissibility of electronic records. Such conditions include the following:-

1. The computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer.
2. During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities.
3. Throughout the material part of the said period the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
4. The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

From the pleadings herein I do note that the applicant was aware of the production of the CDs. The 1<sup>st</sup> respondent did respond to those allegations extensively. His witness also attacked the authenticity of the CDs. During the pre-trial the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not raise any issues relating to the CDs and by then they had already filed their responses and respective affidavits. I do agree with counsel for the applicant that the mere fact that parties have gone through a pre-trial bars parties from filing further application. Parties are at liberty to file any form of application before the pre-trial, after the pre-trial and even during the hearing of the petition. I therefore find that the application was properly filed.

With regard to the request by the applicants to expunge the paragraphs relating to the production of the CDs, I do find that the reasoning is grounded on technicalities. Even if the CDs are produced and watched by the court that does not mean that the court will automatically be convinced with what it will see. Article 159 of the Constitution requires courts to dispense justice without undue regard to technicalities. Shutting out the CDs on the basis that they were not authentic or the gadgets used have not been described will be tantamount to obstructing substantive justice. The court will look at the evidence in totality and will also evaluate the CDs. I have personally watched the seven (7) CDs and do find that there is no need to block them from being produced. Five (5) of the CDs simply show the petitioner talking to her supporters in her mother tongue which the court does not understand. Maybe the idea is to show that she had a huge following. Other CDs simply show the supporters matching to the offices of the Independent Electoral and Boundaries Commission.

The contentious CDs are two. One was taken while the 1<sup>st</sup> respondent was in a church function and he addressed the gathering. I have watched that CD up-to the end. There is another CD purportedly taken at Murhanda and this is in line with the evidence of Victor Shivega who alleges that the 1<sup>st</sup> respondent left money during the campaigns and it was distributed to the people. The court will hear the witness and further evaluate the CD and make its own conclusion. The two respondents will be able to respond to those allegations.

From the submissions by the applicants' counsel the main reason for striking out the contentious paragraphs is that the CDs were not produced in accordance with the law. I have seen the certificate by one Befrey Amahwa indicating that he processed the CDs. The said Befrey Amahwa seems not to have filed any affidavit. **Section 80(1)(b)** empowers the court to summon a witness who appears to the court to have been concerned in the election or in the circumstances of alleged vacancy and I do find that if need be the court will be able to summon that person to explain how he processed the CDs. Counsel for the applicants submitted that **Articles 47, 50 and 105** of the Constitution requires the court to administer justice fairly and there should be a balance between the parties. Those in my view such balance will only be attained if each party shall be allowed to tell his or her story supported by their respective witnesses. Under **Article 159 2(a)** it is stated that justice shall be done to all irrespective of status. Further justice shall be administered without undue regard to procedural technicalities. I do find that the CDs can be produced as evidence. The court will evaluate the probative value of that evidence or even the authenticity of the CDs.

The essence of justice is that a party should be able to approach the court and present his or her case. Such presentation should be supported by his or her oral evidence, electronic and documentary evidence. On the other side the defendants or respondents should also be accorded an opportunity to produce their evidence. By the end of the of the day each party should be able to go back home satisfied that they have presented their case to the court and the court was able to take their evidence. This is in line with the provisions of Article 50 which gives the right to every person to have any dispute resolved by the application of the law in a fair and public hearing before a court. Shutting out the electronic evidence will make the petitioner go back home while nursing the notion that the court did not take her evidence. In Presidential Election Petition No. 5 of 2013 Nairobi the court was able to view electronic evidence and such issues as the authenticity of the evidence did not arise.

In election petition number 2 of 2013, Kisumu, Justice Muchelule disallowed the production of a CD whose source was a notice form. The court was of the view that there was no evidence to show that the computers used in the production of the CD were operating properly. The court made the decision after hearing the witness who intended to produce the CD. Each case has to be determined on its own circumstances. I have not heard the witnesses who purportedly recorded and produced the CDs. Once the court takes the evidence of those witnesses it will be able to determine the truthfulness of both their oral evidence as well as the electronic evidence.

In the case of **OBANDA V REPUBLIC [1983] KLR 507** while dealing with evidence contained in a tape recorder the court held that the tape recorder, the cassette and the transcript of the cassette were all admissible as evidence produced. They were produced by the complainant and investigating officer and subject to confirmation that the recorder worked properly. There will be need for the witnesses to testify as to whether the instruments used to record and produce the CDs were working. Counsel for the respondents will be able to cross-examine the witnesses.

In the end, the application dated 21.6.2013 and the notice of preliminary objection is hereby dismissed. For the purposes of proper case management the court will not view all the CDs as most of them only show the petitioner and her supporters. The court will only view the CDs taken at Murhanda and at the church function.

**DATED AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF JUNE 2013**

**SAID J. CHITEMBWE**

# **JUDGE**