



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

ELECTION PETITION NO 1 OF 2013

MOHAMED ALI MURSAL.....PETITIONER

VERSUS

SAADIA MOHAMED.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...2ND RESPONDENT

AHMED ABDULLAHI MOHAMAD.....3RD RESPONDENT

RULING

[1] Mr. Oriaro, Counsel for the 1st and 2nd Respondent has objected to the production of the report by Mr. Antipas Nyanjwa. The latter is a handwriting expert and has been called by the Petitioner. The gist of that objection is that the report is a total variation of the Petition because it raises the issue that the Presiding Officers in the named Polling Stations forged the signatures of the candidates or their agents; that since the allegations of forgery are not contained in the Petition, this report is prejudicial to the 1st and 2nd Respondent. He also submitted the agents ought to have given evidence on the issue of forgery to form a basis for this report. He termed the expert opinion as “secondary evidence” and asked the court not to allow the production of the same.

[2] Mr. Issa for the 3rd Respondent is in support of the objection. According to him the report ought to have been filed contemporaneously with the Petition as part of the Petition. He submitted that the report introduces new grounds to the Petition and cannot be allowed after 28 days. Mr. Issa submitted that for the opinion of the expert to be called for, there must be an issue that requires such an opinion. He stated that the Petition does not contain an issue on allegations of forgery of the forms or an issue questioning the genuineness of the signatures, to necessitate the calling of an expert opinion. He further submitted that an expert witness cannot be partisan. He asked the court not to admit the evidence.

[3] In reply Mr. Thiga for the Petitioner termed the application res judicata since the same issues have been handled and determined by the court upon application by 1st and 2nd Respondent seeking review, setting aside or variation of its orders dated 3rd June 2013. Mr. Thiga further submitted that Rule 17 (2) does not allow an interlocutory application to be brought after the proceedings have commenced. He stated that the Petitioner has laid the basis for calling expert evidence in Paragraph 3 (8) (a) of his Petition and that it was not possible to seek this expert opinion before filing the Petition since the Petitioner did not have all the forms; that immediately the forms were availed to the Petitioner, he informed the court in his Check List that he would be calling an expert. He further submitted that the witness has filed an

affidavit together with this report and these documents have become part of this courts record.

[4] I wish to address the following questions:

- i. Has the Petitioner laid the basis for calling for expert evidence?
- ii. Is the witness (expert) partisan?
- iii. Has the Petition metamorphosed?
- iv. Is the expert's evidence secondary evidence?
- v. Is this evidence properly in court?
- vi. Is the application res judicata?

[5] Starting with the last question, res judicata in simple terms refers to a matter that has already been determined by a court. The 1st and 2nd Respondents came before this court and were heard on 17th June 2013 on their application dated 10th June 2013. In that application they were asking the court to review its orders of 3rd June 2013, among others, allowing the Petitioner to call a document examiner. The Court made its decision on that application and declined to grant that prayer. In asking the court not to admit the report of the expert to my mind is another way of revisiting the issue already determined. This court went further than what the two Respondents were asking and expunged from the report, paragraphs which this court felt were prejudicial to the Respondents. My view is that this matter is res judicata.

[6] On whether the Petitioner has laid the basis for calling for expert evidence and whether the Petition has metamorphosed as well as whether the witness is partisan, I have carefully read paragraph 3 (8) (a). The Petitioner has alleged that in some cases the forms were not signed by all the agents. I have read the report of the expert, specifically the paragraphs both Counsels for the Respondents are seeking to have expunged. I have not found any evidence stating the names of the person who may have forged the forms. All the witness told the court was that the handwritten entries and signatures were made by the same hand. I also fail to see the basis for the claim that the witness is partisan. In any proceedings before the court, one or the other party or even the court may call for expert evidence. This does not make that witness partisan to the party that called him to testify unless such witness does something that clearly points to his leaning on the side of the party that called him to testify.

[7] Secondary evidence is defined by the Black's Law Dictionary (8th Edition) as **“evidence that is inferior to the primary or best evidence and that becomes admissible when the primary evidence is lost or inaccessible.”** The examples given include a copy of a lost instrument etc. In our Evidence Act secondary evidence is defined under Section 66 as including certified copies; copies made from the original by mechanical processes and copies compared with the original; counterparts of documents or oral accounts of the contents of documents among others. In my considered view, the evidence in question does not fall under any of those definitions.

[8] This court has taken into account the objection and oral submissions of all the counsels. I wish to remind all of us that this is not the first application, as I have stated, challenging the calling of this witness. The documents he has examined have been in the custody of the 2nd Respondent and its officials. These are the documents that have been examined. The Petitioner filed a Check List in which he indicated that he would be calling an expert in handwriting and the report has been served on all the parties. It is not in furtherance of the Overriding Objective, in my view, for counsels to wait until the last minute to raise an objection especially when this report has been in their possession at least from the time they were served.

[9] I will invoke the inherent jurisdiction of this court and, which I hereby do, and reject the objection. The evidence is properly before the court and the Petitioner has laid the basis for it in Paragraph 3 (8) (a) of the Petition. In my view the Petition has not metamorphosed. The parties are at liberty to cross examine the witness. There is also a chance to rebut his evidence. In view of this order, the witness will proceed to testify to conclusion to pave way for cross examination. I make orders accordingly.

S.N MUTUKU

JUDGE

Dated, signed and delivered this 19th June 2013.