



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELECTION PETITION NUMBER 6 OF 2013**

**NUH NASSIR ABDI.....PETITIONER**

**VERSUS**

**1. ALI WARIO.....1<sup>ST</sup> RESPONDENT**

**2. FRANCIS RUNYA(RETURNING  
OFFICER, BURA CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**3. THE INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. On 26<sup>th</sup> July 2013, **Mr. Nyamodi** learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents took an objection to the cross examination by **Ms. Kethi Kilonzo**, learned counsel for the petitioner in respect of the Polling Day Diaries on the ground that the same had not been supplied to counsel for the parties in this petition. The court in all fairness to the parties directed **Ms. Kilonzo** to make copies of the said documents and supply the same to all the counsel for the parties so as to enable the parties properly address the court on the said document. When the hearing resumed 2.05 pm **Ms. Kilonzo** confirmed to the Court, which confirmation was not disputed that she had complied with the Court order. Thereafter the court heard the objection raised by counsel for the Respondents and in a reserved ruling delivered on 29<sup>th</sup> July 2013, disallowed the said objection and the cross examination continued without any party raising any issue.
2. **Mr. Nyamodi** has now applies that the evidence elicited from the 2<sup>nd</sup> respondent in cross-examination by counsel for the petitioner be expunged from the record. In the alternative he has urged the Court to direct the petitioner to supply complete Polling Day Diaries. His objection is based on cross-examination of the said witness by **Mr. Balala** in which it was stated by the witness that the documents relied on in cross-examination are incomplete. According to him parties before court ought to proceed based on the evidence before court in their entirety and not just extracts. According to counsel since the documents have been produced by the petitioner, it is the petitioner's duty to ensure that the whole document is placed before the Court. According to

him the Diaries remain in the custody of the Deputy Registrar of this Court and if they are produced the Court would be adducing evidence in an election petition an action which would force the Court to step down from its hallowed position and descend into the arena of evidence and proof which is the preserve of the parties. In his view, he is unable to discharge his duties as counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the absence of a complete Polling Day Diary which preferably ought to be in its original form in default of which the cross-examination thereon ought to be expunged from the record.

3. **Mr. Nyamodi's** submissions were supported by **Mr. Balala** who submitted that his client is handicapped since he has had to cross-examine the said witness based on piecemeal evidence. According to learned counsel since the evidence is incomplete an adverse inference ought to be drawn hence the cross-examination thereon ought to be expunged. According to him Polling Day Diary is a strange document since what he is aware of is a Polling Station Day Diary hence the cross-examination is based on an unknown document. In any case Polling Day Station Diary is an administrative document and to be thrown a document which is incomplete is unfair and in the spirit of fairness his client ought not to be ambushed with photocopies of documents.
4. On her part **Ms. Kethi Kilonzo** for the petitioner in opposing the application submitted that this being yet another challenge to the Polling Day Diary. To her litigation must come to an end hence the present application is res judicata taking into account the ruling delivered by the Court the same afternoon. In her view if the respondents are dissatisfied with the ruling they ought to appeal instead of reopening the issue. Counsel submitted that since the authors and custodians of the Polling Day Diary are the 2<sup>nd</sup> and 3<sup>rd</sup> respondent and the order for their production was made by the Court, they had the obligation to produce the same. Since the extract is from the Court it was submitted that it would be unfair and prejudicial to ask her clients to make copies thereof.
5. In his rejoinder, **Mr. Nyamodi** submitted what the Court allowed the petitioner to do was to cross-examine on the Diary and not extracts therefrom. According to him whereas there are obligations owed to the Court by his client those obligations are not necessarily owed to the parties. He urged the Court to guard against allowing these proceedings to be informal but ought to be based on the Constitution and the law which envisages that justice be pursued formally.
6. I have considered the foregoing. The main grounds for objecting to the said cross examination earlier on was that the said cross examination went beyond the scope of the petition; that by allowing the same the court would be allowing the petitioner to introduce new evidence; and that the petition would be expanding the scope of the petition. At that point in time no issue was raised with respect to the completeness or otherwise of the said records despite the fact that the respondents had in their possession copies of the said extracts.
7. As already indicated above when the hearing resumed after the ruling none of the parties raised any objection along the said lines during the cross examination by **Ms. Kilonzo** and **Mr. Balala** and it was only at the conclusion of the cross examination by **Mr. Balala**, learned counsel for the 1<sup>st</sup> respondent, that **Mr. Nyamodi** applied that either the petitioner supplies complete records of the said diaries or the cross-examination emanating from the said Diaries be expunged from the record.
8. I have considered the submissions made by counsel herein. It is clear that the objection was based on the view that the Court had admitted in evidence the documents supplied by **Ms. Kilonzo**. Nothing can be further from the truth. There was no application by **Ms. Kilonzo** for admission of the said documents as exhibits and no such order was made. The Election Petition Rules are clear as to what forms evidence in an election petition. These are the affidavits and the annexures and documents which come into possession of the Court as a result of the orders made by the Court such as in the course of the scrutiny. The mere fact, however, that a document is used in cross-examination does not make it an exhibit in the case and as was warned by **Bosire, J** (as he then was) in **Grace Wanjiku Mureithi vs. Benjamin Njui Nairobi HCCC No. 2936 of 1984**, a litigant ought not and must not put suggestions to a witness of the opposite party if he does not desire to call evidence with regard to such suggestions. Parties ought to know that cases are never conducted on the basis of cross examination alone but are conducted on the pleadings and the evidence. Cross-examination is a tool for building upon one's case hence where there is no case in the first place cross-examination however thorough cannot make out a case as the purpose of cross-examination is to test the veracity of the witness on his evidence-in-chief. See **Joachim Ndaire Macharia vs. Mary Wangare Ndaire & Another Nyeri HCCA No. 63 of 2006**.

9. The value of the material elicited in cross-examination, if any, can only be considered by the Court in deciding the case at which point the Court may well disregard the same. I do not know and I was not addressed on the provision under which the Court in the course of a trial can expunge the evidence from the record. See **Edward Manya vs. Nathaniel David Schulter & Another Civil Appeal No. 23 of 1997.**
10. I associate myself with the decision of the then East African Court of Appeal in **The Oriental Fire and General Assurance Ltd vs. Govinder and Others Civil Appeal No. 39 of 1968 [1969] EA 116,** in which it expressed itself as follows:

**“Cross-examination may sometimes let in evidence which could not be admissible in examination in chief, but here the cross-examination took place after objection had been taken to the admission of the evidence and, moreover, was only directed to the right of the witness to refresh his memory from a written record, not to the substance of the evidence. In any case, the evidence was clearly inadmissible against the third respondent. There is no authority for saying that the opportunity, not exercised, to cross-examine can make admissible evidence that is otherwise inadmissible and the court has no hesitation in rejecting that proposition.”**

11. The reason why the Court permitted **Ms. Kilonzo** to cross-examine the 2<sup>nd</sup> respondent on the said Diaries was to place all the parties before the Court on equal footing taking into account the fact that the petitioner had been cross-examined by counsel for the 1<sup>st</sup> respondent on the said documents. To bar the petitioner’s advocate from cross-examining the 2<sup>nd</sup> respondent on the said documents when the petitioner himself had been examined thereon would obviously amount to a clear manifestation of injustice. One cannot open up a legal battlefront and close it at will. Once you open up a legal battle front you must be prepared to fight on that front. The respondents having opened a legal battle front on the said documents could not in all fairness be permitted to bar the petitioner from engaging in legal combat on the said fronts as that would clearly have amounted to affording one party an unfair advantage over the others. As was held by **Musinga, J** (as he then was) held in **Simon Nyaundi Ogari & Another vs. Hon. Joel Omagwa Onyancha & 2 Others Kisii Election Petition No. 2 of 2008** while every effort must be made to follow rules of procedure as stipulated under the Act and the Election Petition Rules, the same should not be interpreted in a narrow and restrictive manner that may give undue advantage to some of the parties in an election petition.
12. As to whether the said documents are complete or not, it is not for this Court to direct the parties on how to conduct their cases. As rightly submitted by **Mr. Balala** a party who decides to adduce only part of the documents runs the risk of the Court drawing adverse inference thereon if it turns out that the same were deliberately omitted with a view to gain an unfair advantage over the other parties. To expect the court to direct the parties to adduce complete documents would be to invite the Court to do exactly what **Mr. Nyamodi** is complaining about that is turning the Court into an investigative forum rather than an independent arbiter. To invite the Court to order a party to produce the entire documents relied on in cross-examination when the Court is not even aware of how extensive that document is would in my view amount to inviting the court to take a sail in unchartered waters, a voyage which is bound to be as dangerous as it is illusive.
13. However it must be noted that even in ordinary civil litigation the serious inroads have been made in the adversarial system of litigation. The introduction of sections 1A and 1B of the **Civil Procedure Act** as well as Order 11 of the **Civil Procedure Rules** have had the effect removing the conduct of civil litigation from the parties and placing the court at the centre of civil litigation in order to drive the process of litigation with a view to reducing backlogs and ensuring that the Constitutional principle in Article 159(2)(b) that justice shall not be delayed is attained. The role of the Court especially in public law sphere as opposed to purely private law litigation cannot be underrated. In Election petitions, for example, the withdrawal of a petition is, under rule 23(1) of the **Election Petitions Rules**, subject to the leave of the Court a clear indication that election petitions are not merely a preserve of the parties to the petition to decide what they wish to do with them but a matter which affects the voters in a particular constituency who have a stake in the outcome of the petition since the said outcome may determined how and by who they are represented in Parliament or County Assembly.

14. With respect to the need to comply with formalities, parties must be reminded that the terrain in dispute resolution has shifted from strict adherence to rituals of procedure at the expense of substantive law. It must always be remembered that Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its calling to do justice by saving the proceedings in issue. Whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice. Though the rules of procedure constitute the handmaiden of the Court they must not be indulged in so as to convert them into a relentless mistress.
15. The above principles existed even before the advent of the current Constitution. Under the current Constitutional dispensation Article 159(2)(d) enjoins the Courts and the Tribunals to be guided by the principle that justice shall be administered without undue regard to procedural technicalities. The Courts are therefore no longer expected to concentrate their attention on checking whether the all the i's are dotted and the t's crossed but ought to rise to the higher calling of investigating the truth. Therefore where no prejudice is caused to the parties to the proceedings the Courts will no longer be enthusiastic in terminating proceedings in issue or locking out the parties from presenting their whole case to the Court. In doing so the Court will have to take into account the interests of the other parties to the proceedings to ensure that the party in default is not afforded an undue advantage in the proceedings.
16. In this case it is contended that the respondents have been ambushed by the manner in which the cross-examination has been conducted by the petitioner. It is not in dispute that the contested Polling Day Diaries were ordered to be availed by the 3<sup>rd</sup> respondent to the Court during the process of the recount. I did not hear any of the parties contend that the Court is not permitted to resort to the documents availed during the scrutiny in reaching a fair determination in this petition. Such contention would not in any event be upheld by the Court. For example there are issues which may arise during the said process of scrutiny which issues this Court cannot possibly be expected to determine without perusing the disputed documents. Similarly, it is my view that this Court is entitled as was held by **Musinga, J** (as he then was) held in **Simon Nyaundi Ogari & Another vs. Hon. Joel Omagwa Onyancha & 2 Others** (supra) to endeavour to do substantial justice without allowing unnecessary clogs and fetters to be placed along the path of justice and in its quest for truth and just determination of an election dispute, an election court can examine any public document that is shown to be relevant.
17. In this case the respondents had an opportunity of raising the issue herein while the cross-examination was being conducted. They did so and a decision was made and the hearing continued. To raise the same issue after the end of the cross-examination was in my view meant to derail or delay the expeditious disposal of this petition. Parties and their counsel are reminded that under Rule 4(3) of the ***Election Petition Rules*** they are under obligation to assist the court to further the overriding objective which objective is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court. Further Rule 5(2) of the aforesaid Rules empowers the Court where a party has breached any requirement of the Rules, to issue orders, and impose penalties, as the court may consider just and fit including an order for payment of costs.
18. In conclusion, it is my view that whereas the Court is properly entitled to rely on the documents supplied to the Deputy Registrar during the scrutiny ordered herein, the extracts relied upon in cross-examination are not necessarily exhibits in this case hence the objection taken herein was unnecessary. However, the documents availed during the said process of scrutiny are proper documents for cross-examination and as long as the extent of reliance thereon does not lend itself to an alteration of the petitioner's case, I do not see the reason why the same ought to be expunged. As to whether they are an attempt to alter the case pleaded is a matter which the Court

can only deal with at a later stage when considering the evidence and the pleadings.  
19. In the premises the application is disallowed and the hearing of the petition directed to proceed.

**Dated at Mombasa this 30<sup>th</sup> Day of July 2013**

**G.V. ODUNGA**

**JUDGE**

**Delivered in the presence of**

Ms Kethi Kilonzo.....for Petitioner

Mr Mohamed for Mr Balala.....for the 1<sup>st</sup> Respondent

Mr Mohamed for Mr Nyamodi.....for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents