



**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. The subject of this ruling is an objection raised by **Mr. Nyamodi**, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and **Mr Balala** learned counsel for the 1<sup>st</sup> respondent. In his submissions **Mr. Balala** contended that cross examination ought not to be carried out on the Polling Day Diaries since the same are not properly before the court. On behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, **Mr. Nyamodi** similarly opposed the cross examination based on the same documents. According to **Mr. Nyamodi** the said material is beyond the scope of the strict provisions governing the manner in which the Petitioner should adduce the evidence in an election petition and in particular rule 12(2) of the Election Petitions Rules. According to **Mr. Nyamodi**, what the Petitioner seeks to do is to adduce evidence yet the document counsel for the petitioner wishes to rely on is not a document before this Court as any of the parties' evidence and hence not available for cross examination or for any other purpose. Secondly, **Mr Nyamodi** submitted that the scrutiny and recount which was ordered by this Court was ordered *suo moto* despite the pendency of an application seeking orders for the same. To learned counsel the said order was made pursuant to section 83 of the **Evidence Act** and if the Petitioner were to be allowed to question the witness based on the said documents, it would amount to introduction by the court of evidence in this petition contrary to the procedure and practice in adversarial system such as ours. Citing the decision of the Supreme Court of Kenya in Petition Nos. 3, 4 and 5 of 2013 between **Raila Odinga & Others vs. the IEBC & Others**, it was submitted the report emanating from the said court order ought to be put to the parties for submissions but ought not to be a basis for cross-examination. Lastly, it was submitted that by putting questions to the 2<sup>nd</sup> Respondent in cross

- examination, the Petitioner is seeking to expand or amend his petition in a manner contrary to Article 87(2) of the Constitution. While the Polling Day Diaries and their contents are available to the petitioner as evidence, learned counsel submitted that they must be brought before the Court as provided under the Constitution, the Act and the Rules by the Petitioner. In learned counsel's view the petitioner is on a fishing expedition an expedition which this court ought not to be an accessory to. Relying on the decision of **Hon. Mr. Justice Mwangi** in Petition No. 1 of 2013 dated 26<sup>th</sup> June 2013 between **Ferdinand Ndung'u Waititu vs. IEBC & Others**, learned counsel submitted that faced with a similar situation the Court found that the documents which were supplied under Rule 21 of the aforesaid Rules were not available to any of the parties to refer to in examination. Learned counsel therefore urged the Court to find that the evidence arising from the scrutiny not formally being evidence ought to be treated in the manner submitted by counsel.
2. On her part **Ms. Kethi Kilonzo** learned counsel for the petitioner, while opposing the objection submitted that Article 81 of the Constitution requires that the 3<sup>rd</sup> respondent be an independent body hence it cannot take sides in an election dispute. In that position it was submitted that the 3<sup>rd</sup> respondent cannot be the petitioner's adversary hence the adversarial system does not apply to it as it ought to be independent and accountable. According to counsel the Polling Day Diary is an accounting document required by the law. With respect to the decision of the Supreme Court, learned counsel submitted that the said Court was acting under the **Supreme Court Rules** and the scrutiny therein was not ordered under section 82 of the **Elections Act** which section allows the Court to order for scrutiny in such manner as the Court may determine. Relying on Rule 32(4) of the Rules, counsel submitted that the court can examine written statements which include Polling Day Diaries since the same is not a secret Diary and in examining the same the Returning Officer can be asked what the Statement means. When giving directions for the scrutiny, it was submitted, the court ordered that the Registers and Polling Diaries be availed and there was no objection. Similarly no objection was raised when the same diaries were examined by the Deputy Registrar. To learned counsel, it would be wrong to disallow questions to be put to the Returning Officer who was in charge of the electoral process which process the petitioner is dissatisfied with. If it is true that the election was free and fair, there would be nothing to fear in being examined on a document generated by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents since it is the court that ought to be the final arbiter on the questions put to the witness. While denying that the petitioner is on a fishing expedition **Ms. Kilonzo** contended that their aim is to prove whether the Electronic Voter Identification Devices (EVID) and the manual register worked as they had raised the issue of the application of the ballot boxes, papers and diaries as well as the delivery of the forms and whether the law was complied with. To counsel, rule 21 is different from rule 32 since the former deals with delivery of ballot boxes while the latter deals with scrutiny for which the written statements were supplied and examined by the Deputy Registrar hence it would be extremely prejudicial not to allow the petitioner to cross-examine the Returning Officer thereon.
  3. I have considered the submissions made by counsel and this is the view I form of the matter.
  4. On 24<sup>th</sup> June 2013, I made directions in this matter one of which was that **"the 3<sup>rd</sup> Respondent shall ensure that all the registers which are in its possession and which have not been deposited in the Presidential Ballot Boxes are availed at the time of the said recount and scrutiny including the Polling Day Diary. With respect to the Biometric Register the same shall be availed electronically save for the photographs of the votes which the 3<sup>rd</sup> Respondent is at liberty to redact."** This direction was made pursuant to the confirmation by **Mr. Nyamodi**, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that **"It may be possible to produce the Polling Day Diary which is the day today activity of the Polling day."** It is these alleged polling diaries that **Ms. Kilonzo** is directing her cross-examination to.
  5. It must always be remembered that the ultimate purpose of the election petitions and the role of the Court thereunder is provided in section 83 of the Elections Act which provides:

***No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the noncompliance did not affect the result of the election.***

6. The aforesaid Constitutional principles are to be found in Article 81 of the Constitution which provides as follows:

*The electoral system shall comply with the following principles—*

- (a) freedom of citizens to exercise their political rights under Article 38;*
  - (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;*
  - (c) fair representation of persons with disabilities;*
  - (d) universal suffrage based on the aspiration for fair representation and equality of vote; and*
  - (e) free and fair elections, which are—*
    - (i) by secret ballot;*
    - (ii) free from violence, intimidation, improper influence or corruption;*
    - (iii) conducted by an independent body;*
  - (iv) transparent; and*
  - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.*
7. These in my view and the Legislative and Constitutional underpinnings which guide the Election Court in the conduct and determination of an election petition. With respect to procedural issues Rules 4 and 5 of the *Election (Parliamentary and County Assembly Elections) Petitions Rules* provide:

*4. (1) The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.*

*(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective specified in sub-rule (1).*

*(3) A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.*

*5. (1) For the purpose of furthering the overriding objective specified in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims—*

- a. the just determination of the proceedings; and*
- b. the efficient and expeditious disposal of the petition and in any case not beyond the timelines provided in the Constitution and the Act with respect to election petitions.*

*(2) The court may, where a party has breached any requirement of these Rules, issue orders, and impose penalties, as the court may consider just and fit including an order for payment of costs.*

8. A similar provision to this was the subject of interpretation by the Court of Appeal in **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009** where the single Judge of the Court (Nyamu, JA) eloquently expressed himself as follows:

**“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.”**

9. It is contended by the respondents that cross-examination on the Polling Day Diaries ought not to be allowed because the said diaries are not properly before this court. Taking queue from the Supreme Court decision aforesaid it is submitted that the report from the scrutiny ought to be dealt with at the time of submissions and not be subject of cross examination. In the course of cross-examination of the petitioner, the result of the said scrutiny as well as the Polling Day Diary in particular that of Bilbil Primary School were clearly dwelt on by the respondents. To now submit that the same cannot be subject of any examination is in my respectful view an attempt to lock the stable door after the horse has bolted.
10. In **Ferdinand Ndung’u Waititu vs. IEBC & Others** (supra) my learned brother **Hon. Justice Mwangi** expressed himself as follows:

**“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.”**

11. In the instant case, a scrutiny has been ordered albeit on the Court’s own motion and the report therefrom has been the subject of cross examination in this case. During the scrutiny the subject Polling Day Diaries were some of the materials which were directed by the Court to be availed. When this Court directed that the Polling Day Diaries be availed, the parties were put on notice that issues arising therefrom might possibly arise in the course of the hearing and determination of this petition. This Court ordered that copies of the said Diaries be made and served on all the parties and this was done. Therefore it is my view that mere reference to the said Polling Day Diaries in cross examining a witness with a view to confirming what actually took place on the polling day would not necessarily be prejudicial to a party. To the contrary it may assist the Court in determining the question whether or not the principles under Article 81 of the Constitution were adhered to. However, the petitioner is put on notice that he should avoid the temptation to enlarge his case outside the scope of his pleadings since it is trite that a party is bound by his pleadings despite the evidence.

12. Section 80(1) of the ***Elections Act*** provides:

*(1) An election court may, in the exercise of its jurisdiction—*

*(a) summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence;*

*(b) compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy;*

*(c) examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them; and*

*(d) decide all matters that come before it without undue regard to technicalities.*

13. Dealing with a similar provision under repealed *Elections Act*, Musinga, J (as he then was) held in **Simon Nyaundi Ogari & Another vs. Hon. Joel Omagwa Onyanha & 2 Others Kisii Election Petition No. 2 of 2008:**

“Section 23(1)(d) of the National Assembly and Presidential Elections Act stipulates that in the exercise of its jurisdiction, an election court shall decide all matters that come before it without undue regard to technicalities. Section 23(1) also empowers the court to compel the attendance of any person or witness who appears to it to have been concerned in the election...It is regrettable that many election courts have, in deciding several applications and petitions disregarded the spirit and tenor of section 23(1)(d) by allowing parties to resort to undue technicalities. 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. An election court should endeavour to do substantial justice without allowing unnecessary clogs and fetters to be placed along the path of justice...Section 34 of the Act gives the Electoral Commission power to make regulations for the better carrying out of its mandate. Some of those regulations provide for the manner in which the ballot boxes are handled before and after conduct of the elections and that includes sealing of the ballot boxes...In its quest for truth and just determination of an election dispute, an election court is not limited to examining only the documents referred to in Rule 19 of the Election Petition Rules but can examine any public document that is shown to be relevant...Section 23(b) of the Act also empowers the Election Court to summon the District Elections Co-ordinator and once summoned the witness has to swear an affidavit and deliver to court sufficient copies thereof as provided for under rule 18(4) of the Election Petition Rules.”

14. In the present petition as opposed to the afore cited decision of the Supreme Court deponents of the affidavits filed have been cross-examined on amongst others the report of the scrutiny and the recount. In **Wildlife Lodges Ltd. vs. Jacaranda Hotel Ltd. Civil Appeal No. 249 of 1999**, the Court of Appeal held that nothing is immaterial that helps justice to be done; nothing is extraneous which helps prevent injustice being done. Article 159(2)(d) of the Constitution enjoins the Courts and the Tribunals to be guided by the principle that justice shall be administered without undue regard to procedural technicalities. If I understood the respondents’ objection correctly, the direction taken in cross-examination is not objected to on the ground that the said documents can never be the subject of the cross examination rather that the same are not properly before this Court. In other words the procedural rules relating to election petitions have not been complied with in order for the same to properly form part of the record of this court. No prejudice has been alluded to at all.

15. In the result subject to the rules relating to pleadings, I will allow cross-examination on the said Polling Day Diaries.

**Dated at Mombasa this 29<sup>th</sup> Day of July 2013**

**G.V. ODUNGA**

**JUDGE**

**Delivered in the presence of**

Ms Kethi Kilonzo.....for Petitioner

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

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