



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

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

**VERSUS**

**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. In the course of the hearing of this petition **Mr Balala** learned Counsel for the 1<sup>st</sup> respondent applied that this petition be struck out. The application is based on the fact that the Petitioner having presented himself for the election as and having been elected the Speaker of the County Assembly for Tana River County is a State Officer hence is barred from taking part in a political process of which an election petition is. According to **Mr Balala**, the election petition is a continuation of the electoral process which took place on 4<sup>th</sup> of March 2013 whose outcome gave rise to these proceedings.
2. According to **Mr Balala**, the petitioner having taken up the said post of the Speaker in an election conducted by those who participated in the election process under challenge, is barred from challenging the said process. Further since the petitioner is earning a living arising from the said process it is immoral and unconscionable for him to challenge the same process hence this petition is an abuse of the process of the court.
3. On his part **Mr. Simiyu** learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents supported the application and associated himself with **Mr. Balala's** submissions.

4. On behalf of the petitioner **Ms Kethi Kilonzo** submitted that under Rule 17 of *Elections (Parliamentary and County Elections) Petitions Rules* the 1<sup>st</sup> respondent is barred from taking up an interlocutory application once the hearing of the petition commences if the objection could have been taken up earlier.
5. According to **Ms Kilonzo** the petitioner was not a state officer at the time of the elections under challenge and hence his right to institute these proceedings cannot be taken away even if he were a State Officer which he is not. The fact that the petitioner took up a job of the speaker after unsuccessfully vying for the Bura Parliamentary Constituency seat, it was submitted, does not bar him from exercising his Constitutional rights.
6. I have considered the submissions made by counsel. On the issue whether this application is properly before the Court Rule 17(2) of the Rules provides:

***The court shall not allow any interlocutory application made after the hearing of the petition has commenced if the interlocutory application is brought before the commencement of the hearing of the petition.***

7. Although that rule is couched in mandatory terms I do not read the word “shall” to bar the Court from entertaining such matters as are necessary for the ends of justice and ensuring that its process is not abused including entertainment of applications in the course of the hearing. However a party opting to take such course would be hard pressed to convince the Court why the step was not taken earlier on in the proceedings. However as the Court has already entertained the application that issue is no longer live.
8. That the petitioner was a candidate for the elections under consideration in this petition is not in dispute. That he was eligible to challenge the result of the said elections is similarly not in dispute. What is however alleged is that having become a state officer he is no longer eligible to challenge the same. I keenly listened to **Mr Balala** but I did not hear him cite any provision which expressly bars a state officer from challenging the results of an election petition. His application is however hinged on his interpretation that an election petition being a political process State Officers are barred from participating therein. First that argument if taken to its logical conclusion would in my view similarly bar a respondent from defending an election petition since to do so would amount to participating in a political process. That would clearly amount to a breach of the rules of natural justice. To treat one party differently from another however would amount to unjustifiable discrimination.
9. In my view election petitions though have a political flavour cannot be described as political process simpliciter. An election petition is a legal challenge to the process and the outcome of an election. It is a legal challenge to a political process. Such challenges do take many forms such as by way of judicial review and constitutional petitions. In my view it would not be correct to term a legal challenge to a political process as being a continuation of the political process under investigation by the Court. Courts make determinations in accordance with the law of the land and not through political expediency hence the court process is immuned and insulated from the political process that gives rise to the legal dispute.
10. To bar the petitioner from exercising the rights which accrued to him before he took up his position as state Officer would in my view amount to denial of his fundamental rights enshrined in the Constitution. Not only was he a candidate but he was a voter in the Constituency the subject of this matter and Article 38 of the Constitution enshrines his right to vote and present himself to an election which is free fair and regular. Where a voter feels that the elections were not conducted as per the Constitution I do not see why he should be barred from contesting the same, even if he is a State Officer. The mere fact that one is a State Officer does not in my respectful view take away fundamental rights and freedoms under the Bill of Rights unless such enjoyment is limited under the Constitution. I do not see any barrier to the right of a State Officer being represented by a person of his choice and that includes candidates in an election. Whereas it may be considered immoral by some people to challenge the results of an election whose benefit the petitioner does not stand to gain or whose results he derives a benefit from, we are not concerned with the morality of the petitioner or his intentions for challenging the elections since if the elections were not conducted in accordance with the law no person ought to gain from the flawed process. An electoral process is a public process and not merely a personal duel between the contestants.

- 11.As to whether the Court will grant the orders sought by the petitioner in the manner they are sought if he succeeds in the petition is a matter purely for the Court and must await the hearing of the evidence in the petition.
- 12.Accordingly I do not subscribe to the respondents' position that the petitioner has no *locus standi* to bring these proceedings. Consequently I disallow the application made by the first respondent seeking to strike out this petition on the aforesaid grounds and direct that the hearing of the petition proceeds. The costs of the oral application are awarded to the petitioner.

**Dated at Mombasa this 23<sup>rd</sup> Day of July 2013**

**G.V. ODUNGA**

**JUDGE**

**Delivered in the presence of**

Ms Kethi Kilonzo.....for Petitioner

Mr. Balala and Mr. Njiru.....1<sup>st</sup> Respondent

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