



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELECTION PETITION NO. 2 OF 2013**

**JACINTA WANJALA MWATELA.....PETITIONER**

**VERSUS**

- 1. I.E.B.C.**
- 2. THE COUNTY RETURNING OFFICER (TAITA/TAVETA)**
- 3. THE SECRETARY I.E.B.C.**
- 4. JOHNSON MTUTA MRUTTU.....RESPONDENTS**

**RULING**

This is a ruling in respect of an oral application made by **MR. KEMBOI** on behalf of the 4<sup>th</sup> respondent seeking to have the court strike out the affidavits of the following four witnesses who had sworn and filed affidavits in support of the petition.

1. Ahman Mose Msafiri
2. Benedict Wambua Kiema
3. Mathenge Ramadhan Kamosu
4. Stephen Mukeku Mwangi

Ms. Khannabhai for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents wholly supported the application to have the affidavits struck out. However, **MR. KITHI** for the petitioner opposed the application.

The genesis of the matter is that this is the petition brought by **JACINTA WANJALA MWATELA** (hereinafter referred to as ‘the Petitioner’) challenging the election of **JOHNSON MTUTA MRUTTU** (the 4<sup>th</sup> Respondent) as Governor of Taita/Taveta County. Several witnesses deponed and filed affidavits in support of the petition. By a notice dated 15<sup>th</sup> August, 2013 the respondents sought the presence of the 4 witnesses who had filed affidavits for purposes of cross-examination. Despite summons being issued by the court the witnesses failed and/or declined to present themselves before the court for purposes of cross-examination. The petitioner then opted to close her case. It is against this background that the 4<sup>th</sup> respondent now seeks to have the affidavits of these four witnesses expunged from the record. Mr. Kemboi for the 4<sup>th</sup> respondent submitted that the four affidavits contained material evidence which was prejudicial to the respondent. He further submitted that the right to cross-examine a witness

on their evidence in chief is a critical part of the doctrine of fair hearing. Since the deponents of these affidavits were not availed for cross-examination the respondents have not been able to test the veracity of the affidavits and as such they should be struck out.

In opposing the application to strike out Mr. Kithi for the petitioner submitted that there is no precedent in civil law for a witness who fails to appear in court to testify on the contents of their affidavit to have said affidavits struck out. He further argued that the remedy of striking out pertains to pleadings and not to evidence. An affidavit is evidence and not a pleading. He submitted that the affidavits ought to remain part of the record and the respondents could argue on the principle of adverse inference during their submissions.

In determining this issue I am guided by Rule 12 of the Elections (Parliamentary and County Elections) petitions Rules which provides:

**“12(1)A petitioner shall, at the time of filing the petition file an affidavit sworn by each witness whom the petitioner intends to call at the trial.**

**(2) The affidavit under sub-rule (1) shall**

**(a) state the substance of the evidence.**

**(b) be served on all parties to the election  
petition with sufficient copies filed in court**

**and**

**(c) form part of the record of the trial**

**and a deponent may be cross-examined by  
the respondent and re-examined by the  
petitioner on any contested issue.” [my own**

***emphasis]***

As such these rules provide that the affidavits filed constitute the evidence in chief of any particular witness. The use of the word ‘*may*’ in Rule 12(2)(c) implies a discretion as to whether or not a witness is to be called to appear before the court for cross-examination. Indeed this discretion was exercised by the decision of the parties to only call in certain witnesses for cross-examination. The Rules do not provide that an affidavit shall be expunged simply by virtue of the fact that its maker has not been cross-examined. All affidavits filed form part of the record of an election petition. The court will however caution itself when determining the value of the claims made in any affidavit and will take into account the question of whether or not such claims have been adequately tested by way of cross-examination. A distinction can be drawn between this case and the case of **PETER GICHUKI KINGARA VS. IEBC & 2 OTHERS Nyeri HC EP No. 3 of 2013**. In that case the learned Judge expunged the affidavit of one witness who was not called in for cross-examination on the basis that his evidence was repetitive and the purpose that affidavit intended to serve had already been served. No such argument has been made in the present case.

I do agree with counsel for the petitioner that the court will eventually be at liberty to draw an adverse inference from the failure of these witnesses to avail themselves for cross-examination. In the United Kingdom case of **WISNIEWSKI VS. CENTRAL MANCHESTER HEALTH AUTHORITY 1997 PIQR 324**, the Court of Appeal held as follows:

**“In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in any action.”**

This I believe would be the proper route to take. As such I hereby dismiss this application and rule that the four affidavits in question will remain part of the court record.

**Dated and delivered in Mombasa this 28<sup>th</sup> day of August, 2013.**

**M. ODERO**

**JUDGE**