



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.....1ST RESPONDENT

2. FRANCIS RUNYA(RETURNING

OFFICER, BURA CONSTITUENCY.....2ND RESPONDENT

3. THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

1. On 24th June 2013, I gave directions in this matter one of which was an order for recount and scrutiny of the votes cast in Bura Constituency.
2. On 1st July 2013, a week later when the matter was listed before me for mention, learned counsel for the 1st respondent **Mr Balala** orally applied for the stay of the proceedings on the ground that there was a pending application seeking to have the petition struck out which ought to be heard and determined first. After hearing counsel for the parties I disallowed the oral application for stay and directed the scrutiny to proceed.
3. Today the 1st respondent has filed another application seeking a review of the said orders for scrutiny on the ground that the said order was made before the application for scrutiny was heard and determined yet the said application was opposed. Further, it was submitted by **Mr Abed** learned counsel for the 1st respondent that the date for commencement of the said process is not convenient as the 1st respondent's agents have to travel from Bura and may only be available on 22nd July 2013.
4. On the part of the 2nd and 3rd respondents, **Mr Khagram** who held brief for **Mr Nyamodi** submitted that whether or not the application is certified urgent the hearing of the petition ought to proceed. Since the Court gave 30 days period for the process **Mr Khagram** was of the view that the process can be undertaken any time within the said 30 days. He however contended that there is a more serious issue being the *locus standi* of the petition to participate in the elections being a state officer.
5. I have considered the foregoing. The order for scrutiny was made pursuant to section 82 of the ***Elections Act*** which provides:

An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.

6. Apart from the foregoing section 80(1)(d) and (e) of the said Act empowers the Court to decide all matters that come before it without undue regard to technicalities. Rule 4 of the ***Elections (Parliamentary and County Elections) Petitions Rules*** provides:

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

7. These provisions derive their Constitutional underpinning on Article 159(2) of the Constitution which provides:

In exercising judicial authority, the courts and tribunals shall

be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

8. A Court ought only to interfere with its schedule and certify a matter urgent where it is shown by the applicant that the matter is so urgent that the scheduled matters ought to be placed aside to give way to the new matter. However even in cases where the matter is urgent but the applicant has not shown any diligence in coming to court the court would still not be inclined to certify the matter urgent.
9. I have looked at the record and there is no indication contrary to **Mr Abed's** submissions that any issue was taken before the Deputy Registrar with respect to the date of the commencement of the scrutiny and recount. When the date was fixed **Ms Kanabar** held brief for all the counsel for the respondents and the issue of the convenience of that date was never raised. The parties were each directed on 3rd July 2013 to avail three agents which they did. The issue of the 1st respondent not having an agent available is in my view of the 1st respondent's own making and the court and other parties cannot be held at ransom for the failure by the 1st respondent to ensure that he is represented at the recount taking into account the fact that the 1st respondent had a weekend to make travel arrangements for his agents. A party ought not to create a crisis for himself and rely on the same to derail the court process.
10. With respect to the application for review, it is my view that the applicant had sufficient time to instruct his advocates to make the application before the due date for the said scrutiny hence there is no justification for making the application at the 12th hour as it were in order to force the court into suspending the process of recount which is a sensitive process that ought not to be held in

abeyance for too long especially where the court is of the opinion that the same ought to be undertaken and the order was made by the Court on the Court's own motion. Election Petitions hearing have strict timelines and the parties ought to take seriously the Court of Appeal's sentiments with respect to the overriding objective in **Stephen Boro Gitihia vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009** where the Court expressed itself inter alia as follows:

“These provisions incorporate into the....process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective...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”.

11. These sentiments cannot be more appropriate than in Election petitions.

12. Accordingly I decline to certify the application dated 4th July 2013 and direct that the same be served for hearing and/or further orders on the 11th July 2013. For avoidance of doubt the Deputy Registrar's directions made on 3rd July 2013 to remain in force.

Dated at Mombasa this 8th Day of July 2013

G.V. ODUNGA

JUDGE

Delivered in the presence of

.....for Petitioner

.....for the 1st Respondent

.....for the 2nd and 3rd Respondents