



**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. This matter was listed before me for a mention by the Deputy Registrar in order to vary part of the direction made by this court on 24<sup>th</sup> June, 2013 and replace Hon. S.K. Gacheru with Hon. B. Ekhubi to preside over the recount and scrutiny of the votes. No issue has been raised with respect to that matter. Ordinarily, the court does not deal with issues not property before it and specifically substantive issues on a date fixed for mention.
2. However, Mr. Balala has orally applied that either the court stays these proceedings awaiting the outcome of the Appeal arising from Petition Number 8 of 2013, or certifies that the matter is a proper matter for reference to the Honourable Chief Justice to constitute a bench of 3 Judges to hear the application seeking to strike out the petition which application is still pending. Mr. Balala is alternatively of the view that the court ought to hear the same application first.
3. Mr. Khagram has on his part associated himself with Mr. Balala's submission. Suffice to say that Mr. Wafula has opposed the oral application. I have, due to respect for counsel, considered the said submissions despite the fact that the matter is coming up for mention. On 23<sup>rd</sup> May 2013, I directed that the ruling delivered in Petition Number 4 of 2013 relating to the striking out of that Petition to apply to this Petition subject to the outcome of the intended appeal to the Court of Appeal. In that ruling I declined to strike out the same Petition. Those directions have not been vacated or set aside. Subsequently on 30<sup>th</sup> May, 2013 I directed that this matter proceeds subject to the same appeal. Again that direction has not been set aside. The parties have since taken directions with a view to the conduct of the recount, scrutiny and hearing of this petition.
4. It is my view that, to grant the orders sought herein would amount to review of the said earlier

orders without an application to do so. It is argued that if this matter proceeds the Respondents will be prejudiced since they will be denied an opportunity to ventilate the issues in the pending application. With due respect I do not think so. The issue involved in the s said application is a jurisdictional issue and whereas the same ought to be raised at the earliest opportunity the law as I understand it is that the mere fact that the same is not determined at the outset does not bar a party from raising the same at any stage in the proceedings including at submissions stage.

- 5. On the issue of the declaration of Section 76 of the Elections Act, it is clear that by the time my learned brother Justice Ochieng made his decision, there were other decisions of the High Court which had declared the said section constitutional. To hold that Justice Ochieng's decision superseded the other decisions of the High Court would in my view go against the principle of concurrent jurisdictions. Apart from that Justice Ochieng declined to strike out the Petition and directed it to proceed. Although the proceedings in the said Petition have since been stayed there is no order staying proceedings in this Petition. This Court is only bound to lay down its tools once it finds that it has no jurisdiction which finding is yet to be made. This petition is fixed for hearing on 22<sup>nd</sup> July, 2013. I am informed that the Court of Appeal is due to deliver its decision on 25<sup>th</sup> July 2013. I do not see any serious prejudice that will be occasioned to the Respondents if the Petition proceeds. If on 25<sup>th</sup> July 2013 the Court of Appeal allows the appeal this court will be bound by that decision. If not, the hearing will proceed in the usual manner.
- 6. Accordingly, I direct that the process of scrutiny and recounts of votes for Bura Constituency shall proceed as earlier directed before Hon. B. Ekhubi. The matter will be mentioned on 2<sup>nd</sup> July, 2013 before the said Deputy Registrar at 9.00 a.m. The application for stay of proceedings is in effect disallowed.

**Dated at Mombasa this 1<sup>st</sup> Day of July 2013**

**G.V. ODUNGA**


**JUDGE**

**Delivered in the presence of**

Mr. Wafula for Kilonzo Jnr. ....for Petitioner

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

Mr. Khagram and Ms. Kanabar for Mr. Nyamodi.....2<sup>nd</sup> and 3<sup>rd</sup> Respondents

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