

REPUBLIC OF KENYA

High Court at Garissa

Election Petition 1 of 2013

MOHAMED ALI MURSAL.....1ST PETITIONER

VERSUS

SADIA MOHAMED.....1ST RESPOENDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....2ND RESPOENDENT

AHMED ABDULLAHI MOHAMAD.....3RD RESPONDENT

RULING

1. Following the ruling of the court in this matter to the effect that this court as currently constituted does not possess jurisdiction to hear election petition and the related application and that service by short text message (sms) was not an acceptable mode of service as per the Election Rules, Learned Counsel for the petitioner made an oral application asking the court to invoke its inherent jurisdiction and review its orders. Two reasons were advanced; that it was erroneous for the court to lump together service of the petition as contemplated under Article 87 of the Constitution and section 77 of the Elections Act; that it was not possible to serve process given the constraints of time.

2. Further, Learned Counsel submitted that the court was in error in its interpretation of an election court. Counsel referred this court to section 2 of the Elections Act and submitted that this definition does not tally with the definition contained in the court's interpretation of the same. Counsel asked the court to review the earlier orders because these are sufficient grounds to warrant the review.

3. The provisions of the law governing review are Order 45 (1) of the Civil Procedure Rules which allows any party who considers himself/herself aggrieved by orders/decree of the court to apply for review. Review of court orders is available to parties who establish discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made; some mistake or error apparent on the face of the record; or for any other sufficient reason. Such an application must be made without unreasonable delay.

4. The issue I have to determine is whether the applicant meets these criteria. The reasons given for seeking review are that this court made errors in its ruling by lumping together service of petitions and service of applications like the Notice of Motion. It is true that Article 87 (3) of the Constitution refers to service of a petition. The same case applies to section 77 (2) of the Elections Act and Rule 13 (2) of the Elections (Parliamentary and County Elections) Petition Rules 2013. I have scanned these rules and I found no other provision on service of petitions or applications. These are the only provisions we have on this issue and since no other legal provisions have been brought to my attention I want to hazard that these are the only available provisions to go by. To my mind, the Election Rules did not envisage a situation where applications of interlocutory nature would be handled outside the ambit of these rules. Rule 17 is specific on the mechanism to employ in handling petitions and all other related issues. Besides an interlocutory application in an election petition is part of that petition. To me, it is the high time legal practitioners involved in election petitions exercised a paradigm shift in order to appreciate the new way of doing business in regard to the new legal dispensation, more so in the manner election disputes are going to be handled.

5. Secondly, on jurisdiction, I wish to state that I have read section 2 of the Elections Act. It defines an election court thus: ***“election court” means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution and the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of this Act.*** If I take the part of that definition referring to the High Court, I come back to the same issues I have handled and made a ruling on about jurisdiction of this court. I do not wish to repeat myself especially on the issue of this court's jurisdiction to hear and determine election petitions. However I wish to state that I have carefully read section 2 of the Elections Act *vis a vis* my ruling. My understanding of this section is that it defines the status of the election courts by defining them as the Supreme Court, the High Court and the Resident Magistrate's Court as designated by the Chief Justice. The power and authority of the election court to hear and determine election petitions is donated to it by Rule 6 after a judge has been designated and gazetted. I also hold the view that a fact that one is a High Court Judge does not give one power to hear election petitions. One must be gazetted as per the wording of Rule 6 (3).

6. The upshot of this is therefore that the applicant has not satisfied the criteria set under Order 45 (1) of the Civil Procedure Rules. While I find that the application was canvassed immediately after the ruling was read and therefore there was no delay, it is my considered view that there is no discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time of hearing the matter yesterday (26th March 2013) when the ruling of this court was made. I also find the applicant did not identify some mistake or error apparent on the face of the record and there is no other sufficient reason advanced. This application must fail. The application is therefore dismissed and I so order.

S. N MUTUKU
JUDGE

Signed, dated and delivered in open court this 27th March 2013 in the presence of Mr. Thiga for the applicant.