



**REPUBLIC OF KENYA**

**High Court at Garissa**

**Election Petition 2 of 2013**

**ABDIKHAM OSMAN MOHAMED.....1<sup>ST</sup> PETITIONER**

**SAHAEL NUNO ABDI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER, GARISSA COUNTY.....2<sup>ND</sup> RESPONDENT**

**NATHIF JAMA ADAN.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Abdikham Osman Mohamed and Sahael Nuno Abdi (the petitioners) are challenging the validity of the elections and the results of the gubernatorial elections of the Garissa County held on 4<sup>th</sup> March 2013. In support of their petition they cite breach of constitutional provisions specifically breach of political rights guaranteed under Article 38 of the Constitution among other provisions as well as numerous electoral malpractices. The petition is dated 25<sup>th</sup> March 2013 and was filed on the same date. They are seeking a declaration that the gubernatorial elections in Garissa County were not in accordance with the Constitution and an order to nullify the entire process, among other orders.

2. Simultaneously with the petition, the petitioners filed a Notice of Motion under certificate of urgency which was presented to me on 25<sup>th</sup> March 2013. I directed Learned Counsels Mr. Mbugua and Ms Nduku to effect service on the respondents to pave way for the directions of this court. The matter was adjourned and today's date (26<sup>th</sup> March 2013) taken for further directions and orders of this court.

3. When Learned Counsels appeared before me this afternoon I asked them to address the court on two issues, namely service of the Notice of Motion on the respondents and the jurisdiction of this court. These two issues were crucial because this court must confirm whether it is seized of the jurisdiction to hear and determine this matter and secondly the court required all parties to the petition present in court in order to give its directions and orders in their presence due to the weighty issues raised in the petition.

4. When the Court Clerk called out the names of the respondents, there was no response from them signifying that there were absent. Mr. Mbugua addressed the court by submitting that service had been properly effected as directed by the court. He relied on an affidavit of service he swore today (26<sup>th</sup> March 2013). In his oral submissions he has illustrated the great length he and his process server went into to ensure that service was effected. I must commend him for such detailed efforts. He stated that the mode of service included short message text commonly known as sms through the telephone Number 0724 999

988 which he informed the court belongs to the 3<sup>rd</sup> respondent. In addition to sms, counsel also send an email address via [nadam@fcb.co.ke](mailto:nadam@fcb.co.ke) again said to belong to the 3<sup>rd</sup> respondent and further by affixing of the hearing notice at the gate of Forest Edge Villas where the 3<sup>rd</sup> respondent is said to reside. Further counsel informed the court that the 3<sup>rd</sup> respondent was also served at First Community Bank at Jamia Plaza Kigali Street (does not say which town/city) where he conducts business by leaving the documents with his secretary. In respect of the 1<sup>st</sup> and 2<sup>nd</sup> respondents counsel submitted that they were served and service acknowledged under protest. The court is being asked to accept this mode of service as proper and order that the respondents were duly served.

5. I want to dispose of this issue before that of the jurisdiction of this court. In support of the submissions, counsel relied on the Kisumu High Court Miscellaneous Application number 10 of 2013 in which Justice H. K Chemitei was of the view that the service by sms was sufficient due to time constraint. From the outset I want to distinguish that case with the present case. The case before Justice Chemitei related to judicial review orders while the matter before me relates to election petition. The mode of service provided for under the Constitution, the Elections Act and the Rules is specific as I will show in this ruling.

6. What then does the law say about service in respect to electoral petitions? Article 87 (3) of the Constitution is specific: **“Service of a petition may be by direct or by advertisement in a newspaper with national circulation”**. Similar provision is found in section 77 (2) of the Elections Act which states that **“A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation”**. Rule 13 of the Elections (Parliamentary and County Elections) Petition Rules 2013, (the Rules) also provide for direct service or by publication in a newspaper with national circulation while that to the Commission (IEBC) shall be by delivery at the head office of the Commission or other office notified by the Commission or by publication in a newspaper with national circulation. The words in respect to service in the Rules are couched in mandatory terms.

7. I appreciate that the words used by the constitutional provision and the Elections Act (the Act) under which the Election Rules are made are permissive not mandatory. I also appreciate the fact that the petitions being filed currently relate to the first elections after the promulgation of the current constitution and therefore the courts have not pronounced themselves on these provisions on service. I am sure that by the time we are through with the petitions we will have found firm ground on this issue. I wish to address this issue basing my arguments on the available provisions of the law.

8. What is personal or direct service? The Constitution refers to direct service; the Act refers to personal service while the Rules refer to direct service. The Black’s Law Dictionary (Eighth Edition) defines personal service as **“actual delivery of the notice or process to the person to whom it is directed”**. It also states that personal service is termed as actual service. I think I am not wrong to state that personal service and direct service refer to the same mode of service which connotes the physical presence of the person being served.

9. My considered view is that service by affixing the notice at the gate of the residence of a party; leaving it with the secretary at the place where a party conducts business; sending a sms to the party’s number or even sending an email to the party’s address is not direct or personal service envisaged under the provisions I have quoted above. The upshot of this is that service in this matter, by the modes of service articulated to the court, was not sufficient under the law relation to election petitions and specifically to electoral rules of procedure under the Rules. I however find 1<sup>st</sup> and 2<sup>nd</sup> respondents properly served.

10. That issue having been adequately addressed and settled leads me to the issue of jurisdiction of this court. Learned Counsel ably submitted on this issue. He quoted Article 165 (3) (a) of the Constitution which gives this court unlimited jurisdiction in criminal and civil matters; section 75 (1) of the Elections Act that **“A question as to validity of a county election shall be determined by High Court within the county or nearest to the county”**; and finally Rule 6 of the Election Rules. In brief Learned Counsel’s view is that this court is seized of the jurisdiction to hear this matter despite the requirement for gazettelement by the Chief Justice.

11. Let me begin by stating that I appreciate the submissions by Learned Counsel and indeed this court has unlimited jurisdiction in criminal and civil matters under Article 165 (3) (a). However, we cannot lose sight of the provisions of Article 87 (2) of the Constitution which in addition to the Elections Act and the Rules made there under constitute the legal mechanisms for dealing with election petitions. The provisions of the constitution must be read together and not in isolation. These together with the Elections Act and the Rules give courts special jurisdiction to hear and determine elections petitions. In **Ferdinand Ndung'u Waititu v. The Independent Electoral and Boundaries Commissions & 8 others Nairobi High Court Election Petition No 1 of 2013**, the judge observed the following in relation to the jurisdiction to hear election petitions:

**“Consequently the petitioner cannot disregard the electoral laws and cite provisions of Articles 159 and 165 (3) (a) of the Constitution as empowering him to do. Article 165 (3) (a), and indeed all other provisions of the Constitution, cannot be read in isolation but must be read and interpreted in the context of the Constitution. By bringing this election petition while relying on the jurisdiction of the High Court under Article 165 (3) (a), the petitioner is, in my view, attempting to circumvent the rigorous rules set out in the Elections Act and the Elections (Parliamentary and County) Petition Rules 2013. The Act and the Rules were enacted, in accordance with the dictates of the Constitution, to ensure efficient and expeditious disposition of election petitions, taking into account the great public interest in the efficient and expeditious disposition of such petitions....”**

12. I need not say more on the issue of jurisdiction of this court other than perhaps to add that Rule 6 (1) (2) and (3) must not be read in isolation. In my considered view, an election court is properly constituted to hear election petitions in respect to parliamentary elections or gubernatorial elections when it is composed of one judge duly designated by the Chief Justice. In my view such designation is not complete until such judge has been gazetted by name by the Chief Justice. This judge has not been so designated and gazetted.

13. Now that I have settled the issue of the jurisdiction of this court to hear this matter I wish to bring another matter to the attention of the parties in the name of transparency and accountability. Had this court been seized of the jurisdiction to determine this matter, I would not have proceeded with the hearing because this would have placed me in an awkward position. The rules of natural justice and fair place dictate that one should not handle a matter where there may arise some conflict of interest. I am one of the forty seven (47) Judges designated to swear the County Governors on 27<sup>th</sup> October 2013 and I would not have allowed myself to handle this matter. I was specifically designated to perform this function in Garissa County and my handling of this petition otherwise than I have already done would have placed both my judicial functions in conflict. The swearing in ceremony is a judicial function which has been assigned to me prior to the filing of this petition and like any other judicial function I am called upon to perform this one in accordance with the oath of office I took.

**S. N. MUTUKU**  
**JUDGE**

Signed, dated and delivered this 26<sup>th</sup> day of March 2013 in open court in the presence of Mr. Mbugua and Ms Nduku for the Petitioners.