



REPUBLIC OF KENYA

High Court at Garissa

Election Petition 1 of 2013

MOHAMED ALI MURSAL.....1ST PETITIONER

VERSUS

SADIA MOHAMED.....1ST RESPONDENT

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

AHMED ABDULLAHI MOHAMAD.....3RD RESPONDENT

RULING

1. Mohamed Ali Mursal (the petitioner) is challenging the validity of the elections and the results of the gubernatorial elections of the Wajir County held on 4th March 2013 that declared the 3rd respondent the winner. In support of his petition he cites breach of constitutional provisions well as numerous electoral malpractices. The petition is dated 25th March 2013 and was filed on the same date. The petitioner is seeking a nullification of the elections and an order for fresh elections among other orders.

2. Simultaneously with the petition, the petitioners filed a Notice of Motion under certificate of urgency and dated 23rd March 2013 which was presented to me on 25th March 2013. I directed Learned Counsel Mr. Thiga to effect service on the respondents to pave way for the directions of this court. The matter was adjourned and today's date (26th March 2013) taken for further directions and orders of this court.

3. When Learned Counsel appeared before me this afternoon I asked him 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 they were absent. Mr. Thiga 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 (26th March 2013). In his oral submissions he has illustrated the efforts he made to serve the respondents; that the 1st respondent was served by communicating through a mobile phone; that the whereabouts of the 3rd respondents were unknown and again counsel used mobile communication to serve the process by sending a sms through telephone number 0737500012 which he said belongs to the 3rd respondent. Counsel also submitted the efforts he put into practice to serve the 2nd respondent. 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 sending a sms to the party’s number as is the case here 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 1st and 2nd respondents properly served.

10. That issue having been adequately addressed and settled leads me to the issue of jurisdiction of this court. He submitted that the operative word under Rule 6 (2) is the word ‘may’ and therefore this court has jurisdiction to hear and determine this petition. He further submitted that his understanding is that Rule 6 (3) will only come into effect once the Chief Justice has designated a judge and that gazettelement will take effect once designation has been done. Further that if the intention was to require that petitions will only be heard after gazettelement the rules would have been specific on that requirement. He further submitted that the words of Rule 6 (3) are discretionary on the part of the Chief Justice. Learned Counsel also submitted that Article 165 (3) (a) of the Constitution which gives this court unlimited jurisdiction in criminal and civil matters.

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.

S. N. MUTUKU
JUDGE

Signed, dated and delivered this 26th day of March 2013 in open court in the presence of Mr. Thiga for the Petitioner.