



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**ELECTION PETITION NO 1 OF 2013**

**MOHAMED ALI MURSAL.....1<sup>ST</sup> PETITIONER**

**VERSUS**

**SADIA MOHAMED.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**AHMED ABDULLAHI MOHAMAD.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This Petition is scheduled to commence today, the 17<sup>th</sup> June 2013 following the directions of this court given on 3<sup>rd</sup> June 2013. However, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents moved this court by way of Notice of Motion dated 10<sup>th</sup> June 2013 seeking the hearing of the application on priority basis before hearing the Petition. The application seeks orders to review, vary or set aside the orders of this court allowing the Petitioner to call a document examiner as a witness; to review, vary or set aside the order of this court directing the respondent to pay Kshs 10,000 to the Petitioner and costs of the application. The application is brought under Article 159 of the Constitution and Rules 4, 5 and 15 (4) and (5) of the Elections (Parliamentary and County Elections) Petition Rules 2013.
2. The grounds in support of the application are found on the face of the application and in the supporting affidavit of Mr. Mwangi counsel on record for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. In addition to these grounds, Mr. Oriaro, Counsel currently on record for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents has made oral submissions. In summary, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions are that the Petitioner has not justified the calling as a witness of the document examiner and that there is no basis for calling this witness given that paragraphs 4, 5, 6, 7, 8 and 9 of the Petitioner's supplementary affidavit were expunged from the court record; that the affidavit of the document examiner has been filed without leave of this court; that the Respondents have been ambushed by the filing of this affidavit because they are not able to respond and cross examine on it without preparations; that payment of Kshs 10,000 to the Petitioner is understood by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as a form of punishment for failure to comply with courts order and ought to be paid to the court and not to the Petitioner who has not demonstrated any grievance; that Election Rules

do not provide for penalizing the parties.

3. Mr. Issa for the 3<sup>rd</sup> Respondent supported the application. In his submissions, he stated that the affidavit by the document examiner ought to be anchored on the grounds of the Petition since grounds No. 3 (a) and (b) of the Petition do not require evidence of a document examiner; that nowhere in the Petition has the Petitioner claimed that the signatures were varied to make the evidence of a document examiner necessary; that the affidavit of the document examiner is a variation of the Petition and it is not the kind of evidence that can be given by the document examiner; that the Petitioner is bringing in evidence that was rejected through the document examiner; that parties come to court to argue a case based on evidence they have had time to consider and that they have had no time to consider the affidavit by the document examiner; that the document examiner can examine the documents already filed.
4. The Petitioner has filed grounds of opposition raising the following issues: that there is inordinate delay in bringing this application given that the orders being challenged were granted on 3<sup>rd</sup> June 2013 and this application was filed on 12<sup>th</sup> June 2013; that the remedies being sought (if any) lie on appeal not review or variation of the orders given that the grounds relied on point to a claim that this court is wrong in making the orders; that this court is now functus officio in this matter; that the Petitioner will suffer prejudice in terms of time and extra legal costs if litigation in this matter does not come to an end and that the application is misconceived, vexatious and an abuse of this court's process. In addition to the grounds of opposition, counsel has made oral submissions that this court gave leave to call for the document examiner and this is confirmed by the court's orders as to the number of witnesses for the Petitioner which include the document examiner; that Elections Rules require the witnesses to file affidavits; that the court expunged from the record paragraphs of the Petitioner's Supplementary Affidavit because of introducing Forms 34 and that the allegations of the integrity of the elections results still remain a ground in the Petition.
5. I wish to point out that the order of addressing the court as exists in the Civil Practice was not followed in this case. The correct order ought to have been that counsel for the 3<sup>rd</sup> Respondents submits after the Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to enable counsel for the Petitioner to respond to all the issues canvassed by the Respondents. This court regrets this. However, it is my view that despite that slip up on procedure, no party has suffered prejudice. This court will and does hereby exercise its discretion and take into account the Overriding Objective under Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules 2013 as well as the provisions of Article 159 of the Constitution and Section 80 of the Elections Act and lay emphasis on substantive justice.
6. I have carefully given the application as well as the submissions by all the parties due consideration. I have taken into account that by now we are meant to have started hearing the main Petition since all the preliminary issues ought to have been dealt with on or before 3<sup>rd</sup> June 2013 when this court finalised the Pre-trial proceedings and set the case down for hearing. For this I agree with counsel for the Petitioner that further delay in commencing this hearing will prejudice the Petitioner. Not only will it do that, it will also cause inconvenience to the other parties and other court users who are queuing for justice before this court and who cannot be heard until this Petitioner is heard and finalized.
7. My understanding of one of the grounds relied on by the Petitioner in his Petition is the integrity of the election exercise in respect of the election of the Governor of Wajir County. Therefore any evidence that is relevant to demonstrating this fact ought to be placed before this court. I also agree with the Respondents that several paragraphs (4, 5, 6, 7, 8 and 9) of the Petitioner's Supplementary Affidavit dated 21<sup>st</sup> May 2013 were expunged from the court record and therefore any evidence brought by any witness for the Petitioner touching on the evidence contained in those paragraphs is inadmissible.

8. I have read the affidavit by Mr. Antipas Nyanjwa, the document examiner. A quick perusal of this document, which is being challenged by the Respondents, reveals that comparisons of signatures appearing on the Declaration of Governor Elections Results Forms and signatures on the Declaration of Election Results in respect of Member of National Assembly in various Constituencies in Wajir County. The evidence of these comparisons starts on page 2 last paragraph of the affidavit and go all through to page 9. In between pages 2 and 9, on page 4 last paragraph and page 7 on the first paragraph as well as on page 9 last three paragraphs, and page 10 first two paragraphs, the evidence is solely on the issue of the elections of the Governor. I have compared this with the instructions given to the document examiner contained in the letter from Counsel for the Petitioner and dated 10<sup>th</sup> June 2013. I find the letter specific that the examination was in regard to the election Forms 35 pertaining to the election of the Governor. The affidavit in question has several documents attached to it and the view of this court is that it is prejudicial to expect the Respondents to cross examine on it without prior preparations and instructions on the issues being raised.
9. This court wants to clarify that the introduction of the document examiner is done within the law as this court had pronounced itself on the issue. However, it would be unfair to the Respondents if this court were to, in granting leave to call the document examiner, allow the introduction of evidence that would prejudice the other parties.
10. On the issue of payment of Shs 10,000 to the Petitioner, I wish to point out that this court considered that application before granting the same. The payment is a form of recompense to the Petitioner for non compliance of this court's order. It is unfortunate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to view that order as favourable to the Petitioner given what this court has allowed them to get away with. I need not belabour the point as the record of this court is clear on the basis for that order. I need to point out that it is good practice in the current constitutional dispensation to supply to the other party all the information relevant to a case and required by that party to prepare his/her case in advance.
11. I have considered the application seeking review of this court's orders of 3<sup>rd</sup> June 2013 and submissions of all the parties through their counsel on both the issue of the affidavit of the document examiner and the payment of Kshs 10,000 to the Petitioner. I have also considered that Election Petitions are special cases that ought to be handled with a sober mind by all of us involved. I have also considered the provisions of Article 159 of the Constitution, Section 80 of the Elections Act and taken into account the Overriding Objection of the Elections Rules as well as the discretion of this court and I make the following orders in respect to the application dated 10<sup>th</sup> June 2013:
  - i. **Prayer number 1 of the application is granted.**
  - ii. **Prayer number 2 is denied.**
  - iii. **Further in respect of Prayer number 2, the affidavit by Mr. Antipas Nyanjwa, the document examiner, as far as it refers to the comparison of the Declaration of Election Results of the Governor with those of the Members of the National Assembly in Wajir County is expunged from the record.**
  - iv. **The Petitioner is at liberty to call the document examiner on issues relating to the documents already in the file touching on the integrity of the elections results of the Governor Wajir County.**
  - v. **Prayer number 3 of the application is denied.**
  - vi. **Costs will be in the cause.**

I make orders accordingly.

**S. N. MUTUKU**

**JUDGE**

**Dated, signed and delivered this 17<sup>th</sup> day of June 2013 in open court.**