



REPUBLIC OF KENYA

High Court at Garissa

Election Petition 1 of 2013

MOHAMED ALI MURSAL.....PETITIONER

VERSUS

SAADIA MOHAMED.....1ST RESPONDENT

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

AHMED ABDULLAHI MOHAMAD.....3RD RESPONDENT

RULING

Following the Ruling read earlier today, counsel for the Petitioner made an oral application for asking the court to review its orders contained in that ruling. Specifically, the Petitioner is asking the court to reconsider its decision to expunge from the court record paragraphs 5, 6, 7 and 8 of the Petitioner's Supplementary Affidavit filed on 22nd May 2013. Mr. Thiga has submitted that Forms 34 do not constitute evidence brought from external sources because it is material that is within the possession of the 2nd Respondent; that it is material that is essential for the determination of the matter before this court. He submitted further that one of the grounds the Petitioner is relying on is the mishandling of the elections on 4th March 2013 and for this court to determine this issue it is essential to look at these forms; that under Rule 21 the 2nd Respondent is obligated to present all election materials to the Registrar of this court; that the elections of all the six positions were conducted together and this being a special enquiry the court ought to look at all the evidence; that the paragraphs discloses discrepancies as far as the Petitioner's scrutiny revealed and this is what the Petitioner will be testifying to when he takes the stand as a witness.

Mr. Onono for Mr. Garane for the 1st and 2nd Respondents informed the court that his brief was limited to taking the ruling of the court and he was not able to respond to the submissions in respect of paragraphs 5, 6, 7 and 8. He asked the court to consider the matter and make a ruling as it deems appropriate.

Miss Njui for Mr. Issa for the 3rd Respondent associated herself with the submissions of Mr. Onono and left the matter to court to decide as it deems appropriate.

I have read the Elections Act 2011 and the Elections (Parliamentary and County Elections) Petition Rules 2013. To my understanding they do not provide for review of the court's orders. One has to resort to the Civil Procedure Rules, specifically Order 45 (1) which provides thus:

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the 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, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay (emphasis added).

The Petitioner is asking the court to reconsider its order expunging paragraphs 5, 6, 7 and 8 from his Supplementary Affidavit. Paragraphs 5, 6, and 8 refer to the discrepancies in Forms 34 and 35. Forms 35 in respect of Wajir County Governor's elections are part of the record of this court. Forms 34 are in respect of the Presidential elections and the Petitioner is saying that he downloaded these forms from the 2nd Respondent's Website. I have, in my earlier ruling explained the reasons behind my decision and I need not repeat myself.

i. Has the Petitioner discovered any 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 of hearing the application on 22nd May 2013?

ii. Is there some mistake or error apparent on the face of the record?

iii. Does the Petitioner have any other sufficient reason to warrant this court's review of its earlier orders?

The oral application for review and the submissions in support did not establish any of the first and second parameters for granting review. In regard to the third principal, the court has been told that the Petitioner scrutinized the Forms 34 and 35 and discovered the discrepancies and that he will testify to the same when he takes the stand at the witness box. Court has also been referred to Rule 21 of the Elections Rules in respect to the 2nd Respondent's obligation to deliver all election material to the Registrar. This Rules states thus;

The Commission shall deliver to the Registrar-

(a) the ballot boxes of that election not less that forty-eight hours before the date fixed by the court for the trial; and

(b) the results of the relevant election within fourteen days of being served with the Petition.

My understanding of the above provision is this; the relevant election as far as this Petition is concerned is the election for Governor, Wajir County. Form 34 is the Declaration of Presidential Election Results at the polling station while Form 35 is the Declaration of National Assembly, County Woman Representative/Senate/County Governor/County Assembly Election Results at the polling station. While I have considered the submissions of the counsel that the Petitioner will be referring to the Forms 34 in regard to the discrepancies his scrutiny of the same form revealed to him, it is my finding that Form 34 is not relevant to this Petition as it is concerned with results of elections that fall outside the jurisdiction of this court.

In view of this, it is my finding that the Petitioner has not met the criteria for review as stipulated under Order 45 Civil Procedure Rules. I have pronounced myself as length in respect to the reasoning behind Rules. The effect of this reasoning is that the oral application made before me this morning is hereby denied. The court will proceed with the Pre-trial conference as earlier scheduled. I make orders

accordingly.

S. N. MUTUKU
JUDGE

Dated and delivered this 3rd day of June 2013