



**Mokita & 4 others v Independent Electoral and Boundaries Commission & 2 others
(Election Petition E002 of 2022) [2023] KEHC 989 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
ELECTION PETITION E002 OF 2022
GL NZIOKA, J
FEBRUARY 17, 2023**

BETWEEN

**JULIUS OLE MOKITA 1ST PETITIONER
MARY CHELANGAT KIRUI 2ND PETITIONER
PAUL TAPUKAI OLE MEBARNE 3RD PETITIONER
TIAMPATI OLE KETUYIO LAMPESHUA 4TH PETITIONER
LETIYIA OLE MAINE 5TH PETITIONER**

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT
NAROK COUNTY RETURNING OFFICER 2ND RESPONDENT
OLEKINA LEDAMA 3RD RESPONDENT**

RULING

1. By a notice of motion application dated, 27th September 2022, filed by the 3rd Respondent (herein “the Applicant”), under the provisions of; Article 159 (2) (d) of *the Constitution* of Kenya, (herein “*the Constitution*”), section 96 (1) (b) of the *Elections Act*, and Rules 4, 5, and 16 of the Elections (Parliamentary and County Election) Petition Rules 2017, (herein “the 2017 Rules”), the Applicant is seeking for orders as here below reproduced: -
 - a. That, the time for filing a notice of address and a response to the petition by the 3rd Respondent be enlarged.
 - b. That, the time of service be deemed to start running upon the 3rd Respondent’s Advocates being served with the election petition.



- c. That, costs be in the cause.
2. The application is supported by the grounds on the face of it and the affidavit of the Applicant. He avers that, the election petition (herein “the Petition”), was filed on the 8th September, 2022 and that, he learnt of the filing thereof through the Gazette Notice of 6th September 2022, wherein the Hon. the Chief Justice, gazetted the Judges and Judicial officers to hear Election Petitions.
 3. That, he inquired from the High Court, at Narok and learnt that it was served by way of advertisement vide a weekend Standard Newspaper published on the 10th September, 2022. He avers that, Saturday not being a formal working day, the service was not proper. Further, since the advertisement was made on a weekend, he was not able to see it within time to file a response. That, he is a farmer, and attends to his farm on weekends and therefore it was impossible to access a newspaper.
 4. Furthermore, despite the Petitioners knowing his fixed abode, and/or whereabouts, and being a public figure, he was never personally served with the Petition. More so, despite the Petitioners having fourteen (14) days to serve him, they chose the most discreet mode at the onset by advertising the Petition on a weekend. Thus, the service was meant to ambush him.
 5. He argues that, physical personal service is the best mode of service as it guarantees service has been done and that, Rule 10 (1) (b) which deals with substituted service is not an opportunity to ambush but meant to allow service when a Respondent cannot be easily found.
 6. Further, the Petitioners did not make any efforts to effect physical service upon him as he would have no reason to refuse service, in that, it is a legal process in election matters. Furthermore, it will defeat a whole process of fair trial, if a party is allowed to serve a Petition over the weekend when the Respondent is unlikely to access a newspaper.
 7. He avers that, his Advocate has obtained a copy of the Petition and he is able to respond thereto. Further, he has a genuine and arguable response and it is in the interest of justice that, he be allowed time to respond to the Petition since the omission was by inadvertence. That, he has filed the application in good faith seeking to be allowed an opportunity to be heard and that, the Petitioners, will not suffer any prejudice as they can be compensated by an award of costs.
 8. However, application is opposed vide a replying affidavit sworn by the 1st Petitioner, dated 30th September, 2022. He avers that, under Article 87 (3) of *the Constitution* as read with section 77 of the Election Act and Rule 10(1) (b) of the 2017 Rules (herein “2017 Rules”), service of a Petition may be direct or through advertisement in a newspaper of nation-wide circulation
 9. That, Saturday is not an excluded day for purposes of service, therefore, the service upon the Applicant on Saturday, 10th September 2022, was proper and legal. He averred that, the argument by the Applicant that he was unable to access and read the newspaper is unfounded.
 10. That on the 8th September 2022, the Applicant posted on Facebook from his verified account that, he was aware of the Petition against him, which confirms that he knew about the Petition the day it was filed and not through the gazette notice by the Hon. the Chief Justice as alleged.
 11. Furthermore, even if the Applicant is to be believed that, he learnt of the Petition on the 16th September 2022, he indolently entered appearance on 26th September 2022, without the leave of court. That, the application is incompetent for failure to annex the intended response thereto. Finally, the Applicant has not advanced any plausible or satisfactory grounds for grant of the orders sought.
 12. The 1st and 2nd Respondents in the Petition did not oppose the application.



13. The application was canvassed orally, save for the authorities filed by the Applicant's learned counsel, Mr. Odhiambo. He submitted that, though the substituted service is legally compliant, it is not in accordance to the spirit of the law. That, Saturday not being a working day, the Rules of Practice do not allow service of documents on non-working days.
14. That, while the Election Rules, 2017 are silent on the issue of service on a Saturday, the Civil Procedure Rules are clear that service is to be effected on working days and during working hours. The Applicant relied on the case of; Christopher Odhiambo Karan v David Ouma Ochieng & 2 Others [2018] eKLR.
15. Further, there is no service by social media and therefore the Petitioners had a duty to serve the Applicant physically. Furthermore, substituted service was to deal with Respondents who evaded service and there is no evidence that, the Applicant evaded service, as he has always been available, his residence is known and is a notorious public figure. The cases of; Zebedo Jon Opopo v IEBC & 2 Others [2017] eKLR and Mwalimu Mwalimu Masudi v IEBC & 3 Others [2017] eKLR were cited.
16. Finally, it was submitted that, that the Petitioners will not suffer any prejudice if the application is allowed, but if not allowed, the Applicant will be denied an opportunity to defend himself.
17. However, the learned counsel Mr. Victor Obondi, for the Petitioners in response reiterated that, although the application is premised on alleged defective service, there is no law cited, which state that Saturday is not a convenient day for service, therefore, service is governed by special Rules and not the Civil Procedure Rules.
18. Further, there is no law which state that service should be personal. That, substituted service is not based on the failure to effect personal service as Article 87 (3) of *the Constitution* of Kenya, 2010, use the word "or". That, the Petitioners had a duty to effect service within a time frame and expeditiously which was done within two (2) days.
19. That, although the Applicant wants the court to exercise discretion which is equitable, he has not come to court with clean hands, as he was aware that, there was a Petition against him on 8th September 2022 as evidence by his Facebook post. Further, the application has no merit and should be dismissed with costs. However, should the court be inclined to grant application, then the Applicant should be condemned to pay costs before hearing of the Petition.
20. However, the learned counsel Mr. Odhiambo, for Applicant, in a brief rejoinder referred the court to the provisions of; Order 50 of the Civil Procedure Rules, and submitted that, it expressly outlaws Saturdays and excludes Weekends. Further, the *Interpretation and General Provisions Act* defines the time of doing things. Furthermore, Rule 11 of the Elections (Parliamentary and County Election) Petition Rules, stipulates that, a Respondent only opposes a Petition upon service.
21. I have considered the subject application in the light of the materials placed before the court, and I find that, the main issue to determine is whether the Applicant has met the threshold of grant of the orders sought.
22. However, before I delve into that issue, I note that, the issue of service of a Petition has been a subject of numerous court decisions, with the court holding that, service of a Petition is not a mere procedural requirement but a mandatory legal requirement and an integral part of a fair hearing. That, it accords with the rules of natural justice and if no service is effected then the pleadings filed and not served can be struck out on the application of the Respondent.



23. That time is of the utmost essence in election petitions, as stated by the Supreme Court of Kenya in the case of: Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR that: -
- “(69) We have to note that the electoral process, and the electoral dispute-resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by *the Constitution* and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court”.
24. Be that as it may, there is no dispute herein that service was effected. The issue is whether the mode of service employed was proper. The Petition was served through advertisement in the newspaper. In that regard, the law on service of a Petition is stipulated under Article 87(3) of *the Constitution* of Kenya, 2010 which states that service of a Petition may be direct or by advertisement in a newspaper with national circulation.
25. In the same vein, section 77 (2) of the Election Act provides that, a Petition may be served personally upon a Respondent or by advertisement in a newspaper with national circulation.
26. Similarly, Rule 10 (1) of the Elections (Parliamentary and County Election) Petition Rules, 2017 states that: -
- “(1) Within fifteen days after the filing of a petition, the petitioner shall serve the petition on the Respondent by-
- (a) direct service; or
- (b) an advertisement that is published in a newspaper of national circulation
27. The aforesaid provisions of the law use the term “or” between the words “direct” and “advertisement” which supports either direct service or indirect service by way of advertisement in a newspaper of national circulation. As such the argument that, the Petitioners should have attempted personal or physical service before using substituted service does not arise. Therefore, the mode of service used herein was valid and proper.
28. The key question that arises is whether the Applicant filed a response within the stipulated time. The 2017 Rules and in particular Rule 11 states that, upon being served with a Petition in accordance with Rule 10, a Respondent may oppose the Petition by filing a response to an election within seven (7) days. Obviously, by the application herein, the Applicant did not comply with that requirement.
29. The next question that arises is whether the court can extend the time for filing the response. Rule 19 of the Elections (Parliamentary and County Election) Petition Rules state as follows: -
- (1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.



(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined”.

30. Pursuant to the aforesaid, it is clear that, the court may extend time for any action prescribed in the Rules, or pursuant to a Court order. However, the timelines set under *the Constitution* of Kenya, 2010 and the Election Act are not extendable by the court. Having established that the Court has the discretion to extend time, the question before the court is whether the Applicant has satisfied the conditions to allow the court to exercise that discretion.

31. In the celebrated case of; Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others [2014] eKLR the Supreme Court of Kenya set out the principles to be considered in exercising the court’s discretion to extend time. The Court thus stated: -

“From the above case law, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

32. The issue to determine is whether the Applicant’s has offered sufficient and adequate reasons for the delay in filing his response to the Petition. At the expense of repeating what is already stated, the Applicant avers that service was effected on a Saturday which is not a working day and therefore it did not come to his attention. Further there was no attempt to effect physical service before advertising the Petition. Finally, service was done over the weekend which is exempted under Order 50 rule 9 of the Civil Procedure Rules.

33. The question that begs an answer is whether the applicant has offered a reasonable explanation for failure to respond to the Petition in time. It is a fact that the Applicant was aware of the Petition by 8th September, 2022, by virtue of the tweet wherein he is alleged to have indicated he was aware of it.



As such his explanation that he learnt of it when the Judges were gazette to hear the petitions is not sincere, honest or candid.

34. However, the service of the Petition on a weekend which is generally a non-working day tilts in favour of the Applicant. It's possible he did or did not see the newspaper where the advertisement was carried out. He therefore gets the benefit of doubt.
35. However, despite the aforesaid due to the public interest in election petition, exercise of discretion has tilted towards the courts being quite hesitant to deny a Respondent an opportunity to put in his/her response to the Petition after the lapse of the statutory period. In the case of; Stephen M. Mogaka v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2017] eKLR the court thus stated: -

“ 49. I have considered the Applicants’ applications and reasons for delay, which can be attributed to counsel not being aware of the timelines within which the response was to be filed following the amendment of the rules reducing the period from 14 days to 7 days. The delay was not deliberate, as it was made inadvertently. The blame is placed squarely on the Respondents Advocates and parties should not be made to suffer due to mistake of their counsel. The delay in my view is not unreasonable nor inordinate and the reasons given are in my view reasonable and if the application is rejected, the people of West Mugirango Constituency and the Respondents would suffer prejudice. Petitions are matters of public interest and in deciding to extend the time or not, public interest should be considered bearing in mind, Elections are conducted once every five (5) years and public should have the opportunity to have matters decided on merits and not purely on technicalities.

36. In addition, the Election courts have allowed the extension of time to avoid injustice that may be occasioned on the Respondent or electorates, especially in the light of the fact that the rules of natural justice demands that no person should be condemned unheard. However, there should be no inordinate delay, and if there is delay it should be adequately and sufficiently explained.
37. Thus the grant of an opportunity to the Respondent is to avoid miscarriage of justice that may be occasioned if part of the materials to be placed before the court are left out and the understanding that where the Respondent may be prejudiced by extension of time, they can be compensated with costs. To the contrary if the Respondent is not heard; the award of costs will not suffice.
38. In the instant matter the people of Narok County went to cast their votes to elect their Senator and they have a right to know who was validly elected. To deny the Respondent an opportunity to be heard will negate that right of the voters of Narok County.
39. Furthermore, it suffices to note that, Article 50 of *the Constitution* provides for the right to fair hearing, which can only be realized when all parties are heard. Finally, Article 48 allows each party access to justice.
40. In addition, although the 2017 Rules do not exclude weekends while computing time, by judicial notice and practice the service of pleadings or any other court processes over the weekends is not just. If the court upholds the Respondents arguments that service of a Petition can be done on all days as the subject Election Rules do not exempt weekends, that means service can be done on a Sunday, that will create anarchy, as it is generally understood that weekends are none working days and people are at their residences.



41. In my considered opinion where a provision of the law is silent on any issue then the court must apply purposive interpretation in the interest of justice.
42. To sum up this matter I find and hold that the interest of justice requires that, the application herein be allowed as prayed. I allow it accordingly and to compensate the Respondent for any prejudice that they may suffer, I award the Respondent costs.
43. It is so ordered

Dated, delivered and signed on this 17th day of October, 2022

GRACE L NZIOKA

JUDGE

In the presence of: -

Mr Odhiambo for the Applicant/3rd Respondent

Mr Obondi for the Respondent/Petitioners

Mr Abdikadir for the 1st & 2nd Respondent

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