



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**ELECTION PETITION NO. 14 OF 2017**

**SETH AMBUSINI PANYAKO.....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER,**

**KAKAMEGA COUNTY.....2<sup>ND</sup> RESPONDENT**

**CLEOPHAS WAKHUNGU MALALAH.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a party and party bill of costs on 4<sup>th</sup> December 2018 against the petitioner seeking Kshs. 4, 900, 765.00 as party and party costs. The matter was placed before the taxing mistress, Hon. JN Maragia, who taxed the bill at Kshs. 1, 095, 399.00, in a ruling dated 18<sup>th</sup> November 2018 and delivered on 21<sup>st</sup> November 2018.

2. The two respondents were dissatisfied with the outcome, and lodged herein a summons dated 30<sup>th</sup> November 2018. They sought the setting aside of the taxation ruling dated 18<sup>th</sup> November 2018, taxation of their bill of party and party costs dated 28<sup>th</sup> March 2018 on the disputed items, and costs of the application.

3. The matter came up for hearing before me on 8<sup>th</sup> May 2019. The advocate for the applicants stated that she had served the petitioner, and had filed written submissions upon which she relied on entirely with nothing more to add. She invited me to rule on the application.

4. Before I advert to the substance of the application, I need to first of all consider the preliminaries. The application about is costs that were assessed against the petitioner and in favour of the two applicants. That, no doubt, makes the petitioner a critical party to these proceedings. I should be satisfied, before I condemn him unheard, that he had been properly notified of the proceedings. The right to fair hearing is a critical component of any proceedings where a party is likely to be adversely affected. There can be no doubt that these proceedings would have a profound adverse effect upon the petitioner.

5. There is on record an affidavit of service sworn on 6<sup>th</sup> May 2019 by Daisy Nabalayo Wakoli. The deponent is an advocate of the High Court of Kenya. She avers that she was the one who effected service on the petitioner. On 25<sup>th</sup> March 2019, she says, she went to Kakamega town and at the homestead of the petitioner she served his wife with a copy of a hearing notice dated 21<sup>st</sup> March 2019 in respect of the hearing that was scheduled for 8<sup>th</sup> May 2019. She swore that she knew the wife of the petitioner for she had served her previously. After that she then journeyed to Syokimau, specifically to the Great Wall Phase II Beijing Road off Mombasa Road, another physical address of the petitioner, at the place where he allegedly worked. She did not find him and, therefore, she did not serve him personally with the notice.

6. From that affidavit of service, there can be no doubt that the petitioner was not served with notice of the hearing. There was no proper service on 25<sup>th</sup> March 2019 for the process server did not meet the petitioner in person. She allegedly met his wife, but curiously the name of the alleged wife is not given in the affidavit of service. It is not sufficient to describe a person merely as a wife without assigning any name to that person, and explaining how the process server got to know that that was the name of the person they were allegedly serving. Secondly, the exact location of the alleged homestead of the petitioner, within Kakamega town, where the service was allegedly effected, is not defined. It is simply said that it was at Kakamega town. The urban centre known as Kakamega occupies a huge expanse, sprawling over such places as Ikonyero, Rosterman, Joyland, Shirere, Amalemba, Milimani, Lurambi, among others. Service could have been at any of these places. The deponent of the affidavit, obviously, knew that she had not effected proper service hence her attempt, on 29<sup>th</sup> March 2019, to serve the petitioner, at Syokimau. For if she had been satisfied with the service of 25<sup>th</sup> March 2019 why would she have found it necessary to travel all the way to Nairobi/Machakos to effect service a second time.

7. The other thing is that the affidavit of service in question only talks of efforts to serve a notice for a hearing scheduled for 8<sup>th</sup> May 2019. The said affidavit of service does not indicate whether the summons itself, dated 30<sup>th</sup> November 2018, was served together with the hearing notice. I have closely perused through the record before me and I have not come across any other affidavit of service purporting that the application itself was ever served on the petitioner. That would mean that even if it were to be presumed that the hearing notice had been properly served, it would still not have been good enough if the summons itself had not been served, for the petitioner could not respond to the application at all unless the same had been served on him.

8. As there was no proper service, I find that it would be unjust to decide on the matter before the applicants have fully complied with the law with regard to properly notifying all the affected parties with the process. The law is very clear, where personal or direct service is rendered impossible, for whatever reason, the applicant has options. The law prescribes substituted service, either by registered post to the party's last known address or by advertisement in the daily press. The applicants herein are advised to consider those options. I decline to determine this matter in the circumstances where the petitioner was obviously not served.

9. Consequently, I shall direct that the petitioner herein be properly served with the summons. The applicants shall obtain fresh dates at the registry for the hearing of their summons. Should they encounter challenges in serving personally, then they should take advantage of the options that the law provides.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26<sup>th</sup> DAY OF July, 2019**

**W MUSYOKA**

**JUDGE**