



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 68 OF 2017

DAN OCHIENG WERE.....APPELLANT

VERSUS

EMILY ACHIENG OBILO OMONDI..... RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY.....INTERESTED PARTY

JUDGMENT

BACKGROUND

1. This is a consolidated appeal. The Appellant just filed a Memo of appeal dated 23rd May 2017 in which he challenged the judgment and decree of the PPDT dated 10th May 2017. The Appellant sought to have the judgment set aside on the following grounds. That the PPDT erred in law and fact in finding:

i) That the Appellant had been served by the Respondent

ii) By condemning the Appellant unheard.

iii) The judgment of the PPDT was in any event made in error as the Respondent's case had earlier been dismissed by IDRМ sitting in Homa Bay.

iv) Respondent's case was without merit.

2. After the PPDT rendered its judgment the Appellant approached the same Tribunal seeking a review of the Tribunal's judgment of 10th May, 2017. The PPDT dismissed the application in its ruling of 19th May 2017. The Appellant appeals against that ruling on the same grounds relied upon in the appeal against its judgment of 10th May 2017. I need not repeat it here.

3. The Appellant has crystalized four headings into which this appeal is to be considered.

a) Whether the Appellant was served with the Complaint before the IDRМ;

b) Whether the Appellant was condemned unheard;

c) Whether the PPDT misapprehended the effect of the proceedings of the Homa Bay IDRМ; and,

d) Whether what the Respondent presented to the Nairobi IDRМ which the PPDT upheld is

valid.

ISSUES FOR DETERMINATION

Whether the Appellant was served with the complaint before the IDRМ and whether the Appellant was condemned unheard.

4. It is the Appellant's contention that he was neither served nor notified of the Notice of the complaint before the IDRМ by the Respondent. The Appellant relies on the judgment of the IDRМ which on the face of it states **"The respondent was not present to answer to the allegations that had been filed."**

5. The Appellant contends that when he approached the PPDT with the application for review, the Respondent herein filed an affidavit dated 19th May 2017 in which she claims to have served the Applicant. I have seen the affidavit. The Respondent averred that she served the Appellant with a copy of complaint at Mash Park Hotel on 1st May 2017.

6. The Appellant urged the court to note that the affidavit by the Respondent was shown long after the judgment of the PPDT, and that it did not clearly state whether the service was before the IDRМ heard the complaint. Secondly, the Appellant urged the court to note that the IDRМ did not make any mention of service of the complaint upon the Appellant.

Further that PPDT contradicted IDRМ when it found that the Appellant had been served with the complaint before the IDRМ when the IDRМ found otherwise.

7. The Appellant contended that after all the PPDT finding that there was service upon both Appellant and Interested Party was based on the affidavit of service sworn by the Respondent filed on 10th May 2017. That affidavit is on record and I agree with the Appellant that that court does not make any mention of service upon the Appellant. In regard to the Interested Party the affidavit declares that service was declined and same returned unserved.

8. Mr. Kamau for the Respondent opposed this appeal on behalf of the Respondent. It was the Respondent's submission that the Appellant was first informed of the claim by the Interested Party upon which he called the Respondent and later met with her where he was served. The Respondent relies on the affidavit of service dated 10th May, 2017 as proof that proper service was effected upon the Appellant of the complaint before the IDRМ.

Law on service of court process

9. **Section 20 Civil Procedure Act** requires that upon the institution of a suit, the defendant should be served in the prescribed manner in order to enter appearance and answer the claim. **Order 5** provides the details regarding service. **Rule 1(1)** requires that **'When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.'** The mode of service, in line with **Rule 6** is by **delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints in this behalf, and sealed with the seal of the court.** **Rule 8** requires that service be made in person where it is practicable unless the defendant has empowered an agent to accept service on his behalf. Service upon an advocate with instructions to accept service and enter appearance would suffice.

10. Further, in line with **Rules 13 and 15**, a person who has been served is required to sign acknowledgment of service on the original summons, and an **Affidavit of Service** must be consequently filed as proof that service has been effected. The Affidavit of Service should indicate the time, when and the manner in which summons were served; and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.

11. Under **Rule 12**, where the defendant cannot be found, service may be effected through an agent or adult member of the family. Any other mode of service, by substituted means must be, as **Rule 17**

prescribes, with the leave of the Court. This is allowed where service cannot be effective through the ordinary means of service.

12. The above Rules which are applicable to the petition herein are clear as to what constitutes proper service. There was no attempt to serve the Appellant with the Claim before the IDRMM and also the PPDT. The affidavit of service sworn by the Respondent is suspect first of all for having come on record irregularly, having not been filed before the IDRMM and the PPDT at the time the matter first came before it. Furthermore, a party to a suit cannot serve process. The Respondent's counsel submitted a point of correction that the PPDT ordered the Respondent to serve the Interested Party and not the Appellant.

13. In the case of *Law Society of Kenya v Martin Day & 3 others* [2015] eKLR the court held:

‘33. The question is whether failure to adhere to such clear elaborate procedural requirements of the Civil Procedure rules on the validity of and service of summons outside the jurisdiction of this court are mere procedural technicalities that can be sacrificed at the altar of substantive justice.

34. In my humble view, those rules of engagement that prompt the hearing and disposal of a suit cannot be mere procedural technicalities contemplated by Article 159(2)(d) of the Constitution of Kenya, 2010 and or the overriding objectives espoused in sections 1A and 1B of the Civil Procedure Act.

35. As was held in the case of Nicholas Kiptoo Arap Korir Salat Vs IEBC & 6 Others [2013] eKLR by Kiage JA, Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines which make the process of judicial adjudication and determination fair, just, certain and even-handed....” The Supreme Court in the case of Raila Odinga & 5 Others Vs IEBC & 3 Others Petition 5/2013 SC [2013] eKLR, also held that Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls, ...it is plain to us that Article 159(2) (d) is applicable on a case to case basis.”

14. It is trite law that service upon the Appellant was mandatory as the orders sought before these bodies were adverse to him. The bottom line is that the Appellant was never served with the Claim herein, and therefore he was condemned unheard. The proceedings conducted in his absence were null and void for that reason. I am of the view that this matter turns on this point alone and there is no need to look into the other issues. Nevertheless I will make mention of them.

Whether the PPDT misapprehended the effect of the proceedings of the Homa Bay IDRMM; and, whether what the Respondent presented to the Nairobi IDRMM which the PPDT upheld

15. The other issue was whether the Respondent filed any complaint before Homa Bay IDRMM. The Respondent has denied the same and contends that the only claim she filed was in IDRMM Nairobi and that it was that body which sent her claim to Homa Bay Special County Appeals. The Respondent contends that the letter “**EAOO1**” made reference of two appeals only because the Respondent had been informed of the existence of the Homa Bay one by one Melab of the Interested Party's office.

16. The Appellant contends that the Respondent filed two claims, one in Nairobi and the other in Homa Bay. The Appellant relies on the Respondent's letter “**EAOO1**”.

17. The letter “**EAOO1**” is dated May, 1st 2017. It states as follows:

“May 1st 2017

To the National Election Board

ODM Party

Nairobi

Dear Sirs/Madam

I have enclosed here in my appeal as presented to the returning officer of Kabondo-Kasipul Constituency on April 24th 2017

I have also enclosed a further appeal to the ODM women's coordinating desk at Orange house (dated 27th April 2017) which was also presented to the tribunal at Homa bay County on April 28th 2017

Attached are also pictures giving evidence of violence that marred counting and tallying in my ward.

My appeal is that I be awarded the certificate to represent ODM and Kokwanyo Kakelo Ward in the Homa bay County Assembly.

Thank you.

Emily Achieng Obilo Omondi

Box 69

Oyugis

0723897272"

18. The letter "EAOO1" is clear that the Respondent is acknowledging two Claims. We also have two decisions from the Interested Party's IDRMs, one by Homa Bay County Tribunal titled Report, but at the bottom titled VERDICT dismissing the complaint in regard to Kakelo/Kokwanyo Ward dated 28th April, 2017. This is the Ward which is the subject matter of this appeal. It is clear from the document itself that the Members of this Tribunal heard several complaints arising from the nominations in that County and rendered the Verdicts in what they referred to as a Report. The Respondent has challenged the authenticity of the so called Verdict, and of an affidavit allegedly sworn by Mr. Apollo Mboya and another sworn by Mr. Anthony Moturi.

19. There is also the Judgment from the Nairobi which is not contested and which the PPDT upheld.

CONCLUSION AND ORDERS

20. I am satisfied that the Appellant was not served with the Claim before the Nairobi IDRMs and of the matter before the PPDT. Consequently the Appellant was condemned unheard, the proceedings, judgment and order arising therefrom were accordingly null and void and cannot stand. I order as follows:

- a. The judgment of the PPDT dated 10th May, 2017 and all the consequential orders be and are hereby set aside.**
- b. The order of the PPDT nullifying the nomination certificate issued to the Appellant herein be and is hereby set aside.**
- c. Each party to bear their own costs.**

DATED AT NAIROBI THIS 26TH DAY OF MAY, 2017.

LESIIT, J.

JUDGE