THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 18 OF 2017

OMAR SHALLO………..………..………….....................………APPELLANT

VERSUS

JUBILEE PARTY OF KENYA ....……….................................1ST RESPONDENT

MOHAMMED SALIM MOHAMMED…………………......2ND RESPONDENT

JUDGMENT

BACKGROUND

1. By a Memo of appeal dated 11th May 2017, the Appellant herein has approached this court seeking to have the judgement of the Tribunal No. 173 of 2017 set aside and that this court adopts the Appellant's prayers in his claim. The prayers sought in the claim are:

> **"That the Honourable court do compel the 1st Respondent to issue nomination certificate for the Mvita parliamentary seat to the claimant."**

2. Four grounds of appeal are cited in the memorandum of appeal. However, the appellant urged only the first ground in which he faults the PPDT for finding that proper service was effected upon the Appellant to attend the 1st Respondent's Appeal Tribunal leading to the proclamation that the 2nd Respondent was duly nominated as the candidate for MP seat Mvita Constituency on the 1st Respondent's ticket.

ISSUES FOR DETERMINATION

Whether the Tribunal erred in law and fact in finding that the Appellant was properly served.

3. Mr. Okonji for the Appellant urged the court to find that the Tribunal erred in finding that there was proper service. The Appellant contends that a whatsApp message was sent to him by the 2nd Respondent on the 5th May 2017. It is annexure 2 in the Appellant's supplementary affidavit showing the phone number through which the claim was sent, the date and time of sending. The Appellant drew the court's attention to the fact the whatsapp message did not give details of where, when or the time the complaint would be heard.

4. The Appellant contends that the Ruling of the 1st Respondent's Tribunal clearly indicates that the 2nd Respondent's complaint was heard on the 4th May 2017, one day before the Appellant was served with Notice of the complaint. The Appellant challenges the 2nd Respondent for "**effecting the service**" which as a complainant he could not have done.

5. The Appellant contends that he got 1500 votes against the 2nd Respondent's 1310, and that the 1st Respondent correctly declared him the winner.

6. Mr. Oloo for the 1st Respondent Political Party opposes the appeal on the grounds that even if the Appellant was served with the notice of the complaint on 5th May, one day after the complaint was heard, he should have taken steps to approach the Tribunal. That instead he sat on his rights despite having notice of the complaint.

7. Mrs. Koech for the 2nd Respondent also opposed the appeal. It was contended on behalf of the 2nd Respondent that at the 1st Respondent's Tribunal, the 2nd Respondent presented evidence which was the reason the 1st Respondent issued the nomination certificate to him. The 2nd Respondent contended that the Appellant had the opportunity of presenting evidence before the PPDT to show why the decision of the NAT should be upset, which he failed to do.

8. The 2nd Respondent filed nine (9) grounds of opposition in which the 2nd Respondent contended that the appeal is frivolous; that the PPDT applied the law and facts correctly and arrived at a sound judgement; that the Appellant had wrong belief that the mode of service was improper; that the Appellant should have based his appeal on the decision of the PPDT and that the grounds urged were malefide and the appeal should be dismissed.

FINDINGS

<u>Law on service of court process</u>

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***.

10. **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. 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 show the time when and the manner in which summons was 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 effected through the ordinary means of service.

12. Considering the above Rules which are applicable to the petitions herein, service by means of WhatsApp was outside the means recognised by the law, and would therefore, be bad service. WhatsApp is an instant messaging service, which uses the internet. Its use would therefore, raise questions of proof of delivery, acknowledgement of receipt of service, proof of identity of the intended recipient. Questions of authentication of such service would equally arise.

13. Procedure for service cannot be sacrificed as mere technicalities. That was what the court concluded in the case of ***Law Society of Kenya v Martin Day & 3 others*** **[2015] eKLR** thus:

> **'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.”**

38. A summons is a judicial document calling upon the defendant to submit to the jurisdiction of the court and if the party is not given that opportunity to so appear and either defend or admit the claim, how else would that party submit to the jurisdiction of the court particularly when that defendant is a foreigner residing outside the jurisdiction of the court.”

14. Furthermore, substituted service has not been defined to include electronic means. Essence of service is to notify a party of a case against him in order to respond appropriately and defend himself. It is premised on the right of every person to be heard. Personal service remains the best form of service. In ***Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others*** **[2005] eKLR**

“The decision clearly recognized that if personal service which is the best form of service in all areas of litigation, is not possible, other forms may be resorted to. Otherwise why would the Court have expected to be given reason or reasons why personal service was not effected? Why would the High Court and this Court have expected that some attempt at personal service be tried on the President and be shown to have been repelled? Lady Justice Khaminwa clearly recognized this aspect of the decision for she stated in her judgment at page 135 of the record of appeal:-

‘In the Kibaki – Moi case the Respondent stated on oath that he was not personally served with the Notice of Petition either within 28 days after the date of publication of the result of the petitions (sic) as required by section 20 (1) (a) of the Act at all. However it was shown that the petition was served through the Gazette Notice as provided under Rule 14 (2). The facts are different in that case (sic) made no effort to personally serve the Respondent. In this case alternative methods were made to bring the notice to (sic) of the petition (sic) of the respondent knowledge but personal service proved impossible.’”

15. The truth of the matter is that personal service remains the best form of service in all areas of litigation. Technology has evolved, as to provide expanded means of communication and courts have had to address some of the questions arising from use of technology in the justice process. There are few instances when the courts have allowed such service. In the ***High Court at Kisumu, Misc. Application No. 10 of 2013*** the court approved service of a hearing notice by text, stating:

One thing however that the court must address its mind to is that the Commission had a limited period of which it had to hear and decide all disputes before. It was stated by the interested party that the applicant was aware of the hearing having been informed by via a short message. This fact was not disputed. The court in the *Republic V Vice Chancellor Jomo Kenyatta University of Agriculture and Technology [2008] eKLR* **has stated*:-***

"A public body or a local authority while formulating a decision in circumstances to which the principles of natural justice apply need not observe the strict procedures of a court of law."

16. In England the court seems to allow other modes of service where there are time constraints. In the case of **The Board Of Education Vs Rice [1911] AC 179** at page 182 Lord Loreburn LC stated:

> **"In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those parties in the controversy for correcting or contradicting any relevant statement.**
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> **It is therefore my view that the information via short messages was enough considering the time restriction. The commission did not have to follow the strict court procedure and they could obtain information and proceed in any way they thought best. The applicant can therefore not argue that he was not allowed a chance to be heard.'**

17. In Kenya the law has not moved that far. It is clear that a party must make effort to serve any court process through personal service. Where personal service is not possible for some reason or other, the party must seek leave of the court to effect service through alternative mode. The court will then give leave and determine which mode of service will be allowed.

18. In the instant case, the Respondent did not effect personal service. He sought no leave to use alternative mode of service but elected privately to use a mode never heard of in law. Worse still he "effected" the service one day after his complaint was heard. Clearly the Appellant was not given notice of the complaint, neither was he served with the same in the manner provided in law. He was thus condemned unheard. The proceedings were thus null and void.

CONCLUSION

19. Having considered the evidence presented before this court, the Record of Appeal and affidavits, I find one fact is not in dispute. The 2nd Respondent has not disputed that he served the Appellant through whatsApp message one day after his complaint was heard by the 1st Respondent's NAT. The other fact not disputed is that the Appellant was the one who was declared the winner of the Mvita Constituency Member of Parliament candidate for the 1st Respondent.

<u>ORDERS</u>

1. The upshot of this appeal is as follows:

i. The judgment of the PPDT dated 11th May, 2017 be and is hereby set aside.

ii. The 1st Respondent be and is hereby ordered to issue the nomination certificate to the Appellant who was declared the 1st Respondent's representative for the Mvita Constituency Member of Parliament seat.

iii. The parties will bear their own costs.

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

LESIIT, J.

JUDGE