



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**SIAYA ELECTION PETITION NO. 4 OF 2017**  
**IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTION**  
**FOR WOMAN REPRESENTATIVE FOR SIAYA COUNTY**

**BETWEEN**

**ALUODO FLORENCE AKINYI.....PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND**

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

**RUTH KULUNDU.....2<sup>ND</sup> RESPONDENT**

**ODUOR OMBAKA CHRISTINE.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before the court are two applications filed by the respondents seeking to strike out the petition for want of service of the petition.

**1<sup>st</sup> and 2<sup>nd</sup> respondents' application**

2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' application is dated 22<sup>nd</sup> September 2017 and it is made under **Article 87(3)** of the Constitution, **section 77(2)** of the *Elections Act 2011* ("the *Act*") and **Rule 10(1)(a) and (b)** of the *Elections (Parliamentary and County Elections) Petition Rules, 2017* ("the *Rules*").

3. The grounds for the 1<sup>st</sup> and 2<sup>nd</sup> respondents' application are set out on the face of the application and they are that under the provisions of the Constitution, the *Act* and the *Rules*, the petitioner is under a mandatory obligation to serve the petition upon the 1<sup>st</sup> respondent by either direct service or by advertisement by publication in a newspaper of national circulation within 15 days of service. The 1<sup>st</sup> respondent adds that where direct service is not reasonably possible despite diligent efforts then the petitioner must serve the petition through advertisement within the 15 days permitted for service.

4. The factual basis of the application is set out the 2<sup>nd</sup> respondent's affidavit in support of the application

sworn on 9<sup>th</sup> October 2017. She depones that on 12<sup>th</sup> September 2017, she had travelled to Nairobi when she received a call from the said Eunice Auma Ochieng' ("Eunice") who informed her that a parcel that had been delivered for her at the office in Siaya. When she returned to Siaya on 19<sup>th</sup> September 2017, she found sealed brown envelopes lying on her desk and on opening them, she found that it was the petition and accompanying documents. She deponed that the person who left the documents at the Siaya office did not advise on the nature of the documents and their importance and that is why she instructed that the parcel be left with the assistant as she understood the parcel was for her.

5. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contended that Eunice was a clerk for Alego Usonga Constituency and she did not appreciate the importance of the documents and left them lying on the 2<sup>nd</sup> respondent's desk.

6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents argued that the 2<sup>nd</sup> respondent was neither served with the petition nor served in any manner at all. They were of the view that they filed their responses to the petition out of abundant caution but that this fact does not waive or otherwise negate the fact that the 2<sup>nd</sup> respondent was not served with the petition.

### **3<sup>rd</sup> respondent's application**

7. In her application, the 3<sup>rd</sup> respondent invoked **Article 87(3)** of the Constitution, **section 77(2)** of the **Act** and **Rule 10(1)(a) and (b)** of the **Rules** and contended that compliance with these provisions is mandatory.

8. The factual basis for the application is set out in two affidavits filed in support of the Notice of Motion dated 21<sup>st</sup> September 2017 seeking to extend time for filing the responses to the petition. The 3<sup>rd</sup> respondent in her affidavit deposed that on 18<sup>th</sup> September 2017 she went to her office in Siaya and found three large envelopes lying on her desk. She opened the envelopes and discovered that the contents were the petition and accompanying documents.

9. The 3<sup>rd</sup> respondent then inquired from the County Office Manager, Mr Aggrey Ondiege, who left the documents. He informed her that one of the former clerks, Bernard Otieno Ondiege ("Bernard") had called to inform him that he had come to the office on 12<sup>th</sup> September 2017, found it locked, took the office keys from the caretaker of the building, opened the office and left the documents from someone who had introduced himself to him as Edward, from Nairobi, who desperately needed help of someone to deliver the documents to her. The 2<sup>nd</sup> respondent deposed at the time of purported service, Bernard's services had been terminated as his contract had expired and as at 12<sup>th</sup> September 2017, he was no longer an employee of the County office.

10. Bernard deposed that he was working for the Office of the Siaya Woman County Representative Member of Parliament until his contract of service expired on 7<sup>th</sup> August 2017. On 12<sup>th</sup> September 2017, he was at the Social Service offices located at the Siaya County Commissioner's office when he received a call from his cell phone no. 0721\*\*\*684 from an unknown person who identified himself as Edward. The caller informed him that he was from Nairobi and wanted to deliver to the 3<sup>rd</sup> respondent a parcel but he found the office locked.

11. Bernard nevertheless went to the office and met the said Edward standing outside the door whereupon he was given three large documents in booklets and requested him to sign against his own set of three documents which were similar to the one he asked her to deliver to the 3<sup>rd</sup> respondent. Since he could not keep waiting for the County Office Manager, Aggrey Ondiege to come to the office, he decided to request for the office key from the building caretaker, one Julius, who had known him as an employee. He was given the key and when he went to the office, he found three large envelopes in which he inserted the booklets and left them on the 3<sup>rd</sup> respondent's desk. He then called Aggrey Ondiege and informed him what had happened. The 3<sup>rd</sup> respondent also called him on 18<sup>th</sup> September 2017 to inquire from him what happened and he told her how he received the documents.

12. The 3<sup>rd</sup> respondent contended that from the foregoing it was clear that the 3<sup>rd</sup> respondent was not served, either personally or in any other manner provided by the law and although she filed responses to the petition, the fact of service was neither negated nor waived as it is a mandatory requirement.

### **Petitioner's response**

13. The petitioner opposed both applications on the basis of two affidavits sworn by Edward Meshack Otieno ("Edward"). The first one is a replying to the 3<sup>rd</sup> respondent's application and the second one is an affidavit of service. During the hearing, counsel for the petitioner adopted both affidavits in response to both applications.

14. In both affidavits, Edward explained the factual basis on service. He deponed that on 12<sup>th</sup> September 2017, he personally went to the Office of the Siaya Woman Representative in Siaya where he found the door locked. He inquired whether any staff members were present to receive the petition and was informed that the person who was present had left for lunch and was yet to return. After waiting for a while, he requested for and was given the number of the person in charge of the office so that he could call him to receive the petition on behalf of the 3<sup>rd</sup> respondent. He was informed that the Benard was in-charge of the office and given his cell phone number. He called Benard and told him that he was at the office in order to drop certain papers. Edward deponed that, "*I did not disclose to him the nature of the documents I needed to drop for fear of him evading service.*"

15. Benard arrived in a short while and headed to the office which he personally unlocked and accessed. Edward then introduced himself and stated the purpose of his visit and the nature of the documents and thus Bernard acknowledged receipt of the documents.

### **The Submissions**

16. Both counsel for the respondents submitted that the provisions concerning service at **Article 87(3)** of the Constitution and **section 77(2)** of the **Act** were mandatory and that the service purported service effected on the 2<sup>nd</sup> and 3<sup>rd</sup> respondents was not service as contemplated and did not comply with the law relating to service of election petitions.

17. The counsels emphasized that lack of service or defective service could not be waived since service was a mandatory requirement. They cited and relied on the cases of ***Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission and 2 Others* KSM CA Civil Appeal No. 40 of 2013 [2014]eKLR** and ***Evans Nyambaso Zedekiah Nyakeriga and Another v Independent Electoral and Boundaries Commission and 2 Others* KISII EP No. 10 of 2013 [2013]eKLR** to support the proposition that service of the election petition is mandatory and failure to effect service is fatal to the petition.

18. In response, counsel for the petitioner, submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were served through their agents. As regards the 2<sup>nd</sup> respondent, he submitted that she was served through Eunice who was at her office and who was authorized to accept service on her behalf and did accept service. Likewise, for the 3<sup>rd</sup> respondent, the petition was accepted by the authorized agent. In both cases, counsel argued that if indeed service was defective, the defect was waived by the respondent filing their responses to the petition and also filing an application for extension of time for their responses to be deemed as duly filed.

19. Counsel for the petitioner accepted that the rules of service contained in the Article **87(3)** of Constitution and the **Act** and affirmed by the Court of Appeal in the ***Rozaah Buyu Case (Supra)*** were mandatory. He however explained that the nature of service was clearly set out in the **Rules**. Counsel submitted that under **Rule 2** of the **Rules** service was permitted on an agent appointed by the respondent and since Eunice and Benard were agents of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent respectively, then service was proper in the circumstances.

### **Issue for determination**

20. There are two main issues for determination. The first is whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents were served with the petition and if not, the consequences of failure to serve the petition. Before I deal with these issues, I will deal with the issue of service of election petitions generally.

### **Service of Election Petitions**

21. The issue of service of the petition is dealt with in **Article 87** of the Constitution which provides as follows;

*Electoral disputes.*

*87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.*

*(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.*

*(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.*

22. The provisions of **Article 87** are reiterated in **section 77** of the **Act** provides as follows;

*77. (1) A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission.*

*(2) A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.*

23. **Article 87** of the Constitution and **section 77** of the **Act** prescribe the time for filing and the mode of service of the petitioner. These provisions provide the petitioner with two options to effect service; direct or personal service or service through advertisement in a newspaper with national circulation.

24. The background leading to the enactment of these provisions is well known and documented. The provisions of the Constitution and the **Act** regarding the mode of service were intended to ameliorate the rigours imposed **section 20** of the repealed **National Assembly and Presidential Elections Act** and the interpretation given by the courts that personal service of the petition was the best form of service and the petitioner could only resort to other modes of service when he or she had exercised due diligence in effecting personal service on the respondent(s) (see generally **Kibaki v Moi** [2000] 1 E A 115, **Abu Chiaba Mohamed v Mohamed Bakari CA Civil Appeal No. 238 of 2003** [2005]eKLR, **M’Mithiaru v Maore and Others** (No. 2) [2008] 3 KLR (EP) 730).

25. The legal and constitutional landscape has now changed and the petitioner has the right to elect the mode of service. Contrary to the argument by counsel for the respondents, service by advertisement is an independent option and not a last resort when the petitioner has exercised due diligence in effecting personal service and has failed to do so. It is noteworthy that the **section 77** of **the Act** uses the term, “*personal service*” rather than “*direct service*” which is the term used at **Article 87(3)** of the Constitution but nothing turns on the different terms as it is now accepted that direct service and personal service refer to the same mode of service (see **Abdikham Osman Mohamed and Another v Independent Electoral and Boundaries Commission and Others** Garissa EP No. 2 of 2013 [2013]eKLR and **Steven Kariuki v George Mike Wanjohi and Others** Nairobi EP No. 2 of 2013 [2013]eKLR).

### **Whether 2<sup>nd</sup> and 3<sup>rd</sup> respondents were served**

26. In this case, the petitioner elected to effect personal or direct service. It is not disputed that the 2<sup>nd</sup> or

3<sup>rd</sup> respondents were not served personally. The petitioner contends that they were served through their respective agents.

27. Counsel for the petitioner relied on **Rule 2** of the **Rules** which states that, ““direct service” means personal service or service on a duly authorized agent.” He submitted that he served Eunice and Benard who were the authorized agents of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.

28. **Rule 2** is clear that the agent contemplated for direct service is an authorised agent. Service on an authorised agent is not inconsistent with direct or personal service contemplated by **Article 87(3)** of the Constitution and **section 77** of the **Act** as the acceptance of service is within the control and direction of the respondent who is to be served. The key to service on the agent is that the agent must be duly authorised by the respondent. In **Kimeu v Kasese [1990] KLR 32**, the court dealt with the requirement service of summons through an agent under the **Civil Procedure Rules**. Bosire J., held that:

*[W]henever it is practicable, service of summons and any other process shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent may be effected ..... [I]t is not the relationship of the person served to the defendant that counts but rather whether or not he is an authorised agent of the defendant.*

29. In this case, the capacity of both Eunice and Benard as agents let alone authorised agents was disputed and in order to determine whether the rule is satisfied I turn to consider whether service was effected through an agent duly authorised.

30. As regards the 2<sup>nd</sup> respondent, the evidence available from her deposition is that she was called from an unknown number and informed that there was a parcel for her at her office and she told the person to leave it there. This averment was not disputed or denied by the petitioner. The petitioner’s process server did not state whether he spoke to the petitioner and explained to her that he had the petition to serve and that the petitioner instructed him to serve Eunice or any other person who had authority to accept service on her behalf. It is clear that the petition was not served on the petitioner personally nor did the 2<sup>nd</sup> respondent authorise any person or indeed Eunice to accept service of court process. I find that Eunice was not an authorised agent for purposes of receiving service and was therefore defective and did not meet the requirement of the **rule 2** of the **Rules**. It did not matter that Eunice was a clerk or worked in the 2<sup>nd</sup> respondent’s office, what mattered was whether Eunice was authorised to receive service by the 2<sup>nd</sup> respondent. Evidently, she was not.

31. It was also accepted that the 3<sup>rd</sup> respondent, she was not served personally. The question is whether Benard, who accepted process, was the authorized agent of the petitioner. The evidence from both the petitioner and respondent is that Edward went to the 3<sup>rd</sup> respondent’s premises and found Benard there and served him. Edward did not disclose whether he called the 3<sup>rd</sup> respondent or talked to her and informed her that he wished to serve her with the petition and whether she informed him that Benard had authority to accept service on her behalf. In this case, there is clear and unchallenged evidence that Benard had left the 3<sup>rd</sup> respondent’s employment by the time he was served and could not possibly be her agent. I therefore find and hold that Benard was not an authorised agent for purposes of receiving service and could not accept service on her behalf.

32. The net result of my finding is that the persons who purported to accept service on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were not authorized agents as required by the **rule 2** of the **Rules**. As Tuiyott J., stated in **Paul Osore Ogutu v Michael Manyura Aringo & 2 Others Busia EP No. 1 of 2013 [2013]eKLR**

*[23] ... A party who chooses to serve Court process on an agent of an adversary carries the burden of proving that the person served is indeed an agent of the adversary and is authorized to receive Court process .....*

33. The petitioner did not discharge its burden of showing that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent had authorized Eunice and Benard respectively to accept service on their behalf. I now turn to the consequences of failure to effect direct or personal service on the 2<sup>nd</sup> and 3<sup>rd</sup> respondent.

### **Consequences of failure to serve the petition**

34. The Court of Appeal authoritatively stated the law as it concerns the consequences of failure to serve the petition in the ***Rozaah Buyu Case (Supra)***. The trial judge in that case had found that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the matter had not been served personally or by advertisement. The judge proceeded to examine process of service under the ***Civil Procedure Rules*** and held that although service was bad in law, it did not go to the root of the petition and could be waived as an irregularity, which could not nullify the petition.

35. The Court of Appeal reiterated the position that the trial judge could not have recourse to the ***Civil Procedure Rules*** as these were not applicable to election petitions as election petitioners were governed by a complete code of rules. These rules, the Court held, are to be construed strictly. After reviewing several decisions, the Court held as follows:

*As we have shown, service of the Petition upon the respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the respondents went into the root of the petition and the petition could not stand when there was failure to serve the same. The learned judge was clearly wrong in holding as he misdirected himself on the law applicable where he found as a fact that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were not served.*

36. In coming to this conclusion the Court dismissed the argument that **Article 159(2)(d)** of the Constitution, which obliges the court to administer justice without undue regard to technicalities, could cure the petitioner's situation as failure to effect service was fundamental to the process and a petition that was not served could only suffer the fate of being struck out.

37. As the petitioner did not serve the petition on the 2<sup>nd</sup> and 3<sup>rd</sup> respondents personally or directly, the petition is a nullity and must now be struck out.

### **Costs**

38. **Section 84** of the **Act** provides that, "*An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.*" Such costs are to follow the event and the Court has broad jurisdiction to determine costs **Rule 36 (1)** of the **Rules** provide as follows:

*36 (1) The Court shall, at the conclusion of an election petition, make an order specifying –*

*a) the total amount of costs payable; and*

*b) the person by and to whom the costs shall be paid.*

Under **rule 37** of the **Rules**, if the Court does not determine the costs, the Registrar of the Court is required to tax such costs.

39. As the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have succeeded in their application, they shall have the costs of the application and the petition.

40. As this case has been struck out at the preliminary stage before the pre-trial conference has been held. I award instruction fees for the petition and application to strike out for each party at **Kshs. 500,000/00**. The other incidental costs shall be taxed and the total costs certified by the Deputy Registrar and shall be paid out of the security deposit to the parties on a pro-rata basis.

## **Disposition**

41 . The final orders are therefore are follows;

- (a) The petition be and is hereby stuck out.
- (b) The respondents are awarded costs of the petition and the application assessed as follows:
  - (i) Kshs. 500,000/- as the total instruction fees for the petition and application for the 1<sup>st</sup> and 2<sup>nd</sup> respondent.
  - (ii) Kshs. 500,000/- as the total instruction fees for the petition and application for the 3<sup>rd</sup> respondent.
  - (iii) All other incidental costs shall be taxed and the total costs certified by the Deputy Registrar of this court.
  - (iv) The certified costs awarded shall be paid out of the security deposit on a pro-rata basis.
  - (v) A certificate of this determination in accordance with **section 86(1)** of the ***Elections Act, 2011*** shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the National Assembly.

**DATED and DELIVERED at KISUMU this 16<sup>th</sup> day of October 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Oboge instructed by Odinga Oboge & Company Advocates for the petitioner.

Ms Odek instructed by Ogejo, Olendo and Company Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

Mr Ragor instructed by Otieno Ragor & Company Advocates for the 3<sup>rd</sup> respondent.