



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

BUSIA ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTION FOR

TESO NORTH CONSTITUENCY

BETWEEN

HON. ODERA ARTHUR PAPA.....PETITIONER

AND

OKU EDWARD KAUNYA.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

JULIAN GOMITY, TESO NORTH

CONSTITUENCY RETURNING OFFICER.....3RD RESPONDENT

RULING

Introduction

1. This ruling is the 1st respondent's Notice of Motion dated 22nd September 2017 seeking an order to strike out the petition filed on 1st September 2017. It is made under **Article 87(3)** of the Constitution, **section 77(2)** of the *Elections Act 2011* ("the *Act*") and **Rule 4** and **10(1)** of the *Elections (Parliamentary and County Elections) Petition Rules 2017* ("the *Rules*").

The 1st respondent's application

2. The grounds upon which is filed are on the face of the application and are that the under the cited provisions of the Constitution, the *Act* and the *Rules*, the petitioner was under a mandatory obligation to serve the petition upon the 1st respondent by either direct service or by publication of an advertisement in a newspaper of national circulation. That contrary to these mandatory provisions, the petitioner did not serve the 1st respondent but purported to serve the 1st respondent through his advocate. The 1st respondent contended that in the circumstances, service of the petition was unprocedural, irregular and incompetent and it should be struck out.

Petitioner's Case

3. The petitioner opposed the application through the 1st respondent's replying affidavit sworn on 1st October 2017 and the affidavit of service of Frank Walukwe sworn on 13th September 2017. The affidavit of service by Frank Walukwe depones to the facts relating to service and for purposes of this application, I shall set out the relevant facts as follows:

*2. THAT on the same day [7th September, 2017], I attempted to call the 1st respondent herein through this telephone number in my possession specifically, Mobile Numbers 0718***841, 0703***830, 0792 ***933 which calls went unanswered. Consequent to the foregoing, I drafted a short message (SMS) in the following words, "Good evening mheshimiwa. My name is Walukwe from Okongo Omogeni & Co. Advocates and I have been instructed to serve you with an election Petition. Will you accept service" and sent it to all the aforementioned numbers.*

*3. THAT on the following day, the 8th of September, 2017 at about 8.30am, I made one final attempt to call the 1st respondent and was able to reach him vide his mobile Number 0718***841. I duly identified myself explaining the reason for contacting him and after explaining in details the contents of the petition dated 30th August 2017 and the fact that I had the option of effecting service through the papers, the 1st respondent here expressly instructed me to effect serve (sic) of the said petition on the firm of Odera Obar and Co. Advocates, located at Bruce House, 12th Floor, Nairobi, given that he was currently out of town on personal business. He further confirmed that he had agreed with one Odera Advocate that he would accept service on his behalf.*

4. THAT on the same day at around 1.30pm, I proceeded to the Firm of M/S Odera Obar & Co. Advocates, situate on the 12th Floor of Bruce House where upon arrival, I introduced myself to the receptionist therein stating my reason for being there consequent to which she averred that she had authority to receive the said petition on behalf of Hon. Oku Kaunya, the 1st respondent here corollary to which she accepted service of the bound petition dated 30th August 2017 by signing and stamping my copy which I return herewith as duly served.

The arguments

4. Counsel for the application re-iterated that ground set out on the face of the application and added that the replying affidavit was an unequivocal admission that the petition was not served in accordance with the mandatory constitutional and statutory requirements hence the only option for the court was to strike out the petition.

5. Counsel for the petitioner agreed with the statement of law that the petitioner was required to serve the petition personally or by advertisement. In this case though, he submitted that a party had the right to appoint an advocate of his choice to act on his behalf and to accept service of court process. Counsel for the petitioner further submitted the advocate was duly served and that he had demonstrated that the advocate had received instructions from the petitioner to accept service on his behalf. In his view, substantive service had been effected and as such the petition should not be struck out.

Issues for determination

6. The issue for determination in this case is whether the 1st respondent was served with the petition and if not, the consequences of want of service.

Whether the petition was served

7. The 1st respondent asserts that petition was not served on him personally. This petitioner's advocate who served the petition contends that he served process on the 1st respondent's duly authorized agent. Before I deal with the factual issue of whether the 1st respondent was served, I would be remiss if I did

not speak to the place of service in the electoral dispute resolution process.

8. Service of election petitions is dealt with at **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.

9. The provisions of **Article 87** of the Constitution are reiterated in **section 77** of the **Act** which provides;

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.

10. **Article 87** of the Constitution and **section 77** of the **Act** provide for the time of filing and mode of service of the petition. These provisions provide the petitioner with two options of effecting service of the petition; direct or personal service or service through advertisement in a newspaper with national circulation. Service by advertisement is an option and not a last resort when the petitioner has exercised due diligence in effecting personal service and had failed to effect personal. The term, “*personal service*” in **section 77** of the **Act** refers to “*direct service*” which is the term used at **Article 87(3)** of the Constitution (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]).

11. The consequences of failure to effect service of the petition were clearly stated by the Court of Appeal in **Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission and 2 Others** KSM CA Civil Appeal No. 40 of 2013 [2014]eKLR 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 were 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 2nd and 3rd respondents were not served.

12. The petitioner elected to serve the petition by direct service. **Rule 2** of the **Rules** states that “*direct service*” means *personal service or service on a duly authorized agent.*” This means that a respondent may authorize his or her agent to accept service of the petition on his or her behalf. Such authority is not inconsistent with direct or personal service under **Article 87(3)** of the Constitution or **section 77** of the **Act** as such agent received direct authority from the respondent to accept service of process. In such a case the petitioner must prove, on the balance of probabilities, that the agent had authority to accept service of the election petition on behalf of the respondent(s). Where authority to accept service is disputed, the burden of proving valid service is on the petitioner. In **Paul Osore Ogutu v Michael Manyura Aringo & 2 Others** Busia EP No. 1 of 2013 [2013]eKLR, Tuiyott J., observed that:

[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

13. In this case, the petitioner's process server deposed that he served the 1st respondent through his authorized agent. In the affidavit, whose contents I have set out above, the process server deposed that he called the 1st respondent who informed him to serve the petition on his advocates. He consequently served the advocates as directed and the documents were accepted. The 1st respondent did not file a replying affidavit to contest the process server's averments. Since the 1st respondent's factual averments were not contested they remained uncontroverted evidence before the court that the 1st respondent authorized his agents, the advocates, to accept service of the petition on his behalf.

14. I therefore find and hold that the 1st respondent was duly served through his authorized agent. This was effective service within the provisions of **Article 87(3)** of the Constitution and **section 77** of the **Act**.

15. The 1st respondent's Notice of Motion dated 22nd September 2017 is dismissed with costs to the petitioner.

DATED and DELIVERED at KISUMU this 16th day of October 2017.

D.S. MAJANJA

JUDGE

Mr Walukwe instructed by Okong'o Omogeni & Company Advocates for the petitioner.

Mr Odera instructed by Odera Obar & Company Advocates for the 1st respondent.

Mr Juma instructed by Mukele Moni & Company Advocates for the 2nd and 3rd respondents.