



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**ELECTION PETITION NO. 5 OF 2017**

**ROBERT WAMALWA RAMBORAH SIMIYU.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (I.E.B.C).....1<sup>ST</sup>RESPONDENT**

**THE RETURNING OFFICER ENDEBESS CONSTITUENCY....2<sup>ND</sup>RESPONDENT**

**DR. ROBERT PUKOSE.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 23<sup>rd</sup> October 2017, the 3<sup>rd</sup> Respondent *Dr. Robert Pukose* (the applicant) moved this court urging it to strike out the petition on two main grounds which are that the Petition was not served on him as required by the law and secondly, that the petitioner failed to comply with the mandatory provisions of *Rule 7 (1) (c)* of the *Elections (Parliamentary and County Elections) Petition Rules, 2017* (the Election Petition Rules) which regulates the form and content of election petitions.

2. In the grounds stated on the face of the application and in the affidavit sworn on 23<sup>rd</sup> October 2017 in support of the motion, the applicant contends that to date he has not been served with the Petition either personally or through an advertisement as required by the law; that he ought to have been served with the petition by 14<sup>th</sup> September 2017; that he learnt of the petition through the special issue of the Kenya Gazette published on 15<sup>th</sup> September 2017; that he filed a response out of abundance of caution but without prejudice to his right of applying to have the petition struck out for lack of service.

3. On the claim that the petition is defective for non-compliance with *Rule 7(1) (c)* of the Election Petition Rules, the applicant avers that the petitioner failed to include the date of declaration of the impugned results and the results of the election however declared.

4. It is the applicant's case that the omissions to comply with the Rule prescribing the form and content of election petitions as well as lack of service goes to the heart of the petition and renders the petition incompetent and incurably defective; that the petition therefore ought to be struck out as prayed.

5. It may be important to point out at this juncture that the applicant appears to have been mistaken or may have confused the rule on which the second limb of his application ought to have been anchored. He has consistently invoked *Rule 7(1) (c)* of the Election Petition Rules as the rule that governs the form and content of petitions. The correct position is the one taken by the 1<sup>st</sup> and 2<sup>nd</sup> respondents learned counsel

*Mr. Muriithi.* Rule 8 (1) of the Election Petition Rules is the rule that prescribes the form and content of election petitions not Rule 7(1) as stated by the applicant and the petitioner in the application and submissions respectively.

6. That said, I now turn to the responses made by the other parties to the application. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents (hereinafter the respondents) supported the application. Through the replying affidavit sworn on 7<sup>th</sup> November 2017 by the 2<sup>nd</sup> respondent *Ms Agnes Sarah Wanjala*, the returning officer for Endebes Constituency, the respondents asserted that the petition is incurably defective as it does not comply with Rule 8 (1) and 12(2) of the *Election Petition Rules* in that the petition and the supporting affidavit do not state how the election results were declared; the results of the election in dispute and the date of declaration of results of the election. The 2<sup>nd</sup> respondent further deposed that the period for amendment of petitions as prescribed under Section 76 (4) of the *Election Act* is 28 days which have already lapsed and that proceeding with the petition as drawn would be an abuse of the court process.

7. It is worth noting that the respondents in their response did not address the issue of lack of service raised by the applicant. They only joined issue with the applicant in his claim that the petition should be struck out for non-compliance with the dictates of Rule 8 (1) and 12 (2) of the *Election Petition Rules*.

8. The application is contested by the Petitioner *Mr. Robert Wamalwa Romborah Simiyu*. In his replying affidavit dated 13<sup>th</sup> November 2017, the Petitioner deposed that the application was an abuse of the court process; that though he had made numerous efforts to effect personal service on the applicant through a Process Server, the applicant entered appearance in the petition just as he was preparing to seek court's leave to serve him through an advertisement; that had he not entered appearance, he would have been served.

9. He further deposed that knowledge of the petition is sufficient and that courts are now more concerned with the substantive issues raised in petitions than with compliance with rules of procedure; that the applicant will not suffer any prejudice if the petition was heard on merit. He implored the court to decline to grant the orders sought.

10. Interestingly, in his brief response to the application, the petitioner did not bother to respond to the applicant's contention that besides the issue of lack of service, the petition was incurably defective for failure to disclose results of the election and the date they were declared. This was only done in the submissions made by his learned counsel.

11. The application was canvassed by way of both written and oral submissions. The applicant filed his written submissions together with the application while those of the respondents and the petitioner were filed on 13<sup>th</sup> November 2017. During the hearing, learned counsel for the parties highlighted their respective written submissions buttressing their clients' position in the matter.

12. In his oral submissions, learned counsel *Mr. Barongo* who held brief for counsel on record for the applicant relied on the written submissions and emphasized the grounds anchoring the motion. He contested the petitioner's proposition that knowledge of the petition was sufficient. He submitted that a respondent in a petition must be served either personally or through an advertisement in the newspapers as required by the law. He relied on the decision of the Court of Appeal in ***Rozaah Akinyi Buyu V Independent Electoral and Boundaries Commission & 2 others (2014) eKLR*** where the court held that failure to serve a petition upon the respondents went to the root of the petition and a petition could not stand in the absence of service even when the respondents had participated in the proceedings.

13. Regarding the content of the petition, *Mr. Barongo* relied on the authority of ***John Michael Njenga Mututho V Jayne Njeri Wanjiku Kihara & 2 others (2008) eKLR*** in which the Court of Appeal struck out a petition for failure to disclose results of the election in question. He submitted that election results are contained in Form 35B which in his view the petitioner should have attached to his supporting affidavit and disclosed the results tabulated therein in the petition.

14. On behalf of the respondents, learned counsel *Mr. Muriithi* adopted the respondents written submissions which were confined to the argument that the petition was incompetent for failure to comply with *Rule 8 (1) and 12 (2)* of the *Election Petition Rules* which are couched in mandatory terms. He urged the court to be persuaded by the decision of *Thande J* in ***Jimmy Mkala Kazungu V Independent Electoral and Boundaries Commission & 2 others Malindi Petition No. 9 of 2017*** where the court struck out a petition for failure to comply with the aforesaid provision.

15. Counsel also drew the court's attention to ***Samuel Kazungu Kambi & Another V Independent Electoral and Boundaries Commission & three others Malindi Petition No. 5 of 2017*** where *W. Korir J* when faced with a similar application declined to strike out a petition holding that if the petitioner had substantially complied with the Rule and the petition contained sufficient details to sustain a trial of the issues raised by the parties, substantive justice required that such a petition be salvaged.

16. On his part, learned counsel for the petitioner *Mr. Wafula* submitted that the petition raises substantive issues for determination by this court and the petitioner ought to be given an opportunity to ventilate his grievances. He denied the applicant's claim that the petition did not disclose the results arguing that although the results had not been stated in the body of the petition, they have been annexed to the further affidavit sworn by the petitioner on 24<sup>th</sup> October 2017; that consequently, the results have been availed to the court as they now form part of the court record.

17. It was further argued on behalf of the petitioner that the court under *Article 159 2(d)* of the *Constitution* has a mandate to administer substantive justice and should decline to allow prescriptions of procedure and form to supersede the constitutional objective of dispensing substantive justice to parties before it. For this proposition, counsel relied on the Supreme Court decision in ***Raila Amolo Odinga & another V Independent Electoral and Boundaries Commission (2017) eKLR*** and ***Sarah Mwanguzi Kai V Mustafa Idd Salim & 2 others Malindi Petition No. 8 of 2013***.

18. On service, *Mr. Wafula* reiterated the depositions in the petitioner's replying affidavit and added that since the applicant had filed his response, he was not likely to suffer any prejudice if the court declined to allow the application. He relied on several authorities namely, ***Philip Osore Ogotu V Michael Onyura Aringo & 2 others (2013) eKLR Busia Election Petition No. 1 of 2013***; ***Moses Ole Sakuda V George Saitoti & 2 others (2008) eKLR*** and ***John Koyi Waluke V Moses Masika Wetangula Bungoma Election Petition No. 1 of 2008*** which with respect to counsel are in my humble view irrelevant and inapplicable to the instant application for the reasons stated hereunder.

19. First, the facts and circumstances in those cases are completely different from the facts in the instant application. In all those cases, service had been effected on the respondent who had won the election through advertisements in the newspapers and it is the effectiveness or validity of that service that was the issue for determination before the court. In this case, it is not contested that the applicant was not served at all.

20. In addition, apart from the ***Philip Osore Ogotu*** case, all the other petitions were instituted and determined under the *National Assembly and Presidential Elections Act* (now repealed) which was the applicable law before the current *Constitution*, the *Elections Act 2011* and the *Rules* made thereunder came into force. *Section 20* of the *National Assembly and Presidential Elections Act* lay emphasis on personal service but if it was impossible to effect personal service, an alternative mode of service was provided for under *Section 20 (1) (iv)* which stated as follows;

***“where after due diligence it is not possible to effect service under paragraphs (a) and (b) (referring to personal service of election petitions), the presentation may be effected by its publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest national circulation in each case”.***

This is no longer the law governing the service of election petitions. Needless to say, the instant application can only be determined on the basis of the current electoral legal regime.

21. I have given due consideration to the application, the rival submissions by counsel on record for each party and all the authorities cited.

Having done so, I find that three key issues emerge for my determination.

These are;

- (i) Whether the petition should be struck out for want of service on the applicant.
- (ii) Whether the petition complied with *Rule 8(1)* and *12 (2)* of the Election Petition Rules and if not, whether the petition is incurably defective.
- (iii) what orders should be made on costs?

22. Starting with the first issue, the law relating to service of election petitions is found in both the constitution and the law.

Under *Article 87 (1)* of the *Constitution of Kenya 2010*, Parliament is mandated to enact legislation to establish mechanisms for timely settlement of election disputes. *Article 87 (2)* and *(3)* prescribes the time within which a petition concerning an election other than a presidential election should be filed and the mode of service of such petitions. The petitions should be filed within 28 days. They may be served directly or personally upon a respondent or by advertisement in a newspaper with national circulation.

23. In compliance with *Article 87 (1)* of the *Constitution*, Parliament enacted the *Elections Act 2011* (the Act). *Section 77* of the Act replicates *Article 87 (2)* and *(3)* of the *Constitution*. What is clear from *Article 87(3)* of the *Constitution* and *Section 77(2)* of the Act is that petitioners now have an option to serve a petition either personally or through an advertisement in a newspaper of national circulation. The days of demonstrating due diligence by showing efforts made to effect personal service before resorting to substituted service through advertisement in newspapers are long gone.

24. It is also clear from the above provisions that a petitioner does not need court's leave to serve a respondent by substituted service through advertisement in a newspaper since that mode of service is already provided for in the Constitution, the Act and the Election Petition Rules. The Petitioner's assertion that he was intending to seek court's leave to serve the applicant by advertisement when the applicant entered appearance is obviously misplaced.

25. *Article 87* of the *Constitution* and *Section 77* of the Act do not however limit the time within which service of petitions should be effected. The time is limited by *Section 76 (1)* of the Act and *Rule 10* of the Election Petition Rules. *Section 76 (1)* reads as follows;

***“A petition -***

***(a) to question the validity of an election shall be filed within twenty-eight days after the date of declaration of the results of the election and served within fifteen days of presentation.”***

26. On the other hand, *Rule 10 (1)* of the Election Petition Rules provides as follows;

***“within seven days after the filing of a petition, the Petitioner shall serve the petition on the respondent by -***

***(a) direct service; or***

***(b) an advertisement that is published in a newspaper of national circulation”.***

27. A reading of the above provisions of the law reveals a conflict between *Rule 10 (1)* of the Election

Petition Rules and *Section 76 (1)* of the Act regarding the time within which a petition should be served. *Rule 10 (1)* limits the time to seven days while *Section 76(1)* provides for fifteen days. As I held in **Sarah Mwangudza Kai V Mustafa Idd Salim & 2 others** (Supra), the Election Petition Rules are subsidiary legislation enacted under the *Elections Act* and are therefore subservient to the Act. They cannot override the provisions of the parent Act. I consequently find and hold that the time limited for service of election petitions other than those challenging the validity of a presidential election is fifteen days not seven days as prescribed in *Rule 10* of the Election Petition Rules.

28. As stated earlier, in this case, it is not disputed that though the 1<sup>st</sup> and 2<sup>nd</sup> respondents were served with the petition, the applicant was not served. The petitioner contends that had the applicant not entered appearance at the time that he did, he would have been served; that since he proceeded to file his response, lack of service did not occasion him any prejudice.

29. The court record reveals that the petition was filed on 7<sup>th</sup> September 2017. The applicant's advocates *Ms Gitonga Mureithi & Co. Advocates* filed a notice of appointment of advocates stating their address for service on 19<sup>th</sup> September 2017. Given my finding earlier that service of petitions should be effected within 15 days, the petitioner still had three days within which to effect service on the 3<sup>rd</sup> respondent using any of the modes of service prescribed by the law. He did not do so and no explanation has been advanced for this serious omission.

30. The petitioner had a constitutional and statutory duty to serve the petition on all the respondents in accordance with the law. The fact that the applicant filed a notice of appointment of advocates which the petitioner refers to as a memorandum of appearance did not exonerate him from the obligation of discharging that duty. In my opinion, service is not a procedural requirement that can be waived. It is a constitutional and legal requirement that must be complied with. It is the foundation of the right to a fair hearing for without service, it would be impossible for a respondent to know the case presented against him or her in order to prepare an appropriate defence. Respondents cannot be expected to go looking for petitions filed against them to enable them prepare a response. Indeed, the law does not impose on them such an obligation. I reiterate what I held in **Mohamed Odha Maro V The County Returning Officer, Tana River and Others, Malindi Petition No. 15 of 2013** that “*failure to serve a petition is a matter that goes to the very core of the proper and just determination of the petition and cannot be wished away.*”

31. The petitioner has argued that the applicant having filed a response is not likely to suffer any prejudice if the petition is heard. True, the applicant did file a response but he expressly reserved his right to seek striking out of the petition for lack of service. A perusal of the said response reveals that perhaps due to lack of service, the response was filed well beyond the time allowed by the law. It cannot thus be said to be properly on record.

32. But even when a respondent has filed a response within time and has actively participated in the proceedings, the Court of Appeal in the **Rozaah Buyu case** (Supra) held that lack of service invalidated the petition and such a petition ought to be struck out.

33. In that case, just like in the instant application, the respondents though not served had filed their respective responses. The petition was fully heard. The trial judge in his judgement found as a fact that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had not been served as required by the law. But after examining the process of service under the *Civil Procedure Rules*, the learned judge held that though service was not properly effected, it did not go to the root of the petition; that it could be waived as an irregularity and that though the respondents might have acquiesced the same, it could not be a ground to nullify the petition.

34. The petitioner filed an appeal against the dismissal of the Petition and the respondents filed cross-appeals challenging the trial judge's finding on service.

The Court of Appeal after considering the matter held that failure to serve was a fundamental omission which justified the striking out of a petition. The court expressed itself 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 his holding as he misdirected himself on the law applicable where he had found as fact that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were not served”.***

35. In making this decision, the Court of Appeal dismissed the argument that *Article 159 (2) (d)* of the *Constitution* which enjoins courts to administer justice without undue regard to technicalities could be invoked to cure lack of service.

36. *Majanja J* when confronted with a similar application in *Aluodo Florence Akinyi V Independent Electoral and Boundaries Commission & 2 others Siaya Election Petition No. 4 of 2017 (2017) eKLR* applied the Court of Appeal decision in the *RozaahBuyu* case and struck out the petition for want of service on the respondents.

37. In view of the foregoing, as lack of service on the applicant in this case is not contested, I find that the instant petition is incompetent and incurably defective for want of service on the applicant and must be struck out.

38. I make this finding fully aware that the petition was properly served on the 1<sup>st</sup> and 2<sup>nd</sup> respondents. These respondents were joined to the petition as necessary parties having been in charge of the conduct of the contested election and not because they had any stake in the outcome of the petition.

39. The principal respondent in the petition is the applicant whose declaration as the validly elected Member of the National Assembly for Endebess Constituency is contested. The petitioner seeks to have that declaration nullified and fresh elections ordered. In the circumstances, the striking out of the petition against the applicant will automatically lead to the collapse of the entire petition. I say so because if the petition proceeded against the other two respondents, no adverse orders can be made against the applicant when he had not participated in the hearing of the petition. It is therefore clear to me that sustaining the petition against the 1<sup>st</sup> and 2<sup>nd</sup> respondents will not serve any useful purpose. Consequently, the petition is hereby struck out in its entirety.

40. Having arrived at the above conclusion, I do not find it necessary to delve into a consideration of the other issues I had earlier identified for determination save for the issue of costs as the decision above conclusively determines the petition.

41. On costs, *Section 84* of the Act mandates this court to award costs of and incidental to a petition and such costs shall follow the cause which in effect means that costs shall follow the event. And under *Rule 30* of the Election Petition Rules, an election court has wide discretion to determine the total amount or maximum amount of costs payable, to whom they will be paid and by which party. *Rule 31* empowers the Registrar of the court to tax such costs if the court does not determine the same.

42. The applicant has been successful in his application. And as the 1<sup>st</sup> and 2<sup>nd</sup> respondents supported the motion, I award the applicant and the respondents costs of the application and the petition.

43. Taking into account the fact that the petition has been determined after conclusion of the pre-trial conference and before it was heard substantively, I cap the costs payable by the petitioner to all the respondents at Kshs. 2,500,000. Since the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a joint response to the petition and they were represented by one firm of advocates, for purposes of costs, they will not be treated as two independent respondents but as one party.

The costs shall be taxed and certified by the Deputy Registrar of this court.

44. In the end, the following are the final orders of this court.

(i) The petition be and is hereby struck out.

(ii) The respondents are awarded costs of the application and the petition.

(iii) The costs payable to all the respondents are capped at Kshs. 2,500,000. They shall be taxed and certified by the Deputy Registrar.

(iv) A certificate of this determination shall issue in accordance with *Section 86 (I)* of the *Elections Act* to the Independent Electoral and Boundaries Commission and to the Speaker of the National Assembly.

45. It is so ordered.

**C. W GITHUA**

**JUDGE**

**DATED** and **DELIVERED** at **KITALE** this 27<sup>th</sup> day of November, 2017.

In the presence of ;

Mr. Wafula for the Petitioner

Ms. Anyango for the 3<sup>rd</sup> Respondent and holding brief for Mr. Muriithi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Ms. Emily – Court Assistant