



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MURANG'A
ELECTION PETITION NO 1 OF 2017

JANE WAMBUI MWAURA.....PETITIONER

VERSUS

- 1. THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION**
- 2. KANDARA CONSTITUENCY RETURNING OFFICER**
- 3. ALICE MUTHONI WAHOME.....RESPONDENTS**

R U L I N G

1. The Petitioner in this petition is a registered voter in Kandara Constituency. She has challenged the validity of the election of the 3rd Respondent as the Member of Parliament for Kandara Constituency in the General Elections held on 08/08/2017. She has sought various orders and declarations, including a declaration that the 3rd Respondent was not validly elected on 08/08/2017 as the Kandara Member of Parliament, and that her said election be declared null and void. The Petitioner also seeks costs of the petition against all the Respondents.

2. All the Respondents filed their responses to the petition. An application by the 3rd Respondent by notice of motion dated 10/10/2017 against the Petitioner for the furnishing of further particulars was disposed of by consent. An application by one Philip Njuguna wa Ruth to be enjoined in the proceedings as an interested party is awaiting disposal.

3. This ruling concerns only the application by the 3rd Respondent by **notice of motion dated 17/10/2017** in which she seeks the order that the petition dated 05/09/2017 be struck out “for want of service” with costs. That ground is expanded as follows in the grounds for the application –

“1.....

2. That the petition ought to have been served on the Respondents by 20/09/2017 in compliance with the manner and time-frames provided for by the law. The Petitioner has never served the 3rd Respondent personally with the said petition. The Petitioner has also not advertised the same.

3. That the 3rd Respondent learnt of the petition from the Special Issue of the Kenya Gazette that published all election petitions that had been filed in the country. The Gazette Notice was published on 15/09/2017. The response was filed out of abundance of caution but without

prejudice to an intended application to apply to strike out the petition.

4. That to date the Petitioner has not served the petition, nor has the same been advertised as required by the law.

5.”

4. The application is stated to be brought under Rule 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. That rule provides generally for affidavits to be filed in support of petitions and responses thereto, witness affidavits, supplementary affidavits, etc. I cannot figure out why the rule was cited.

5. The 3rd Respondent swore an affidavit in support of the application in which she deponed that the rules on service of an election petition are strict and ought to be followed strictly “in view of the limited time that parties have to respond”. She further states that it is unfair for the Petitioner to file a petition that seeks to annul her election and then fail to serve her or advertise the petition as provided for by the Rules.

6. In response to the application the Petitioner filed a replying affidavit sworn by herself on 24/10/2017. The grounds of opposition emerging therefrom are –

(a) That the application seeks the draconian action of striking out her petition.

(b) That the petition has nothing to do with any personal right of the Petitioner, and that the same was “initiated in pursuit of protecting and safeguarding the election relating to Kandara Constituency.” The petition thus raises serious public-interest issues pertaining to the representation of the people of Kandara Constituency.

(c) That no personal service is required by either the Elections Act or Rules made thereunder.

(d) That the 3rd Respondent was duly served with the petition on time upon which service she duly filed a response.

(e) That the application is an afterthought which is based on procedural technicalities.

(f) That the 3rd Respondent has not demonstrated any prejudice occasioned to her by non-personal service.

(g) That service was effected at her legal practice at A. M. Wahome & Co., Advocates situated at Ambassador Court along Jakaya Kikwete Road.

(h) That as far as the Petitioner is concerned direct service means “service that can or will readily invite a response from the intended respondent”: and the 3rd Respondent indeed responded.

(i) That the 3rd Respondent is not candid as she has not disclosed where she got a copy of the petition to be able to prepare and file her substantive response

(j) That as the 1st and 2nd Respondents have not alleged non-service of the petition, the court should allow the petition to be heard as the same cannot be split between the 1st and 2nd Respondents on the one hand, and the 3rd Respondent.

(k) That the 3rd Respondent is a Member of Parliament whose permanent place of abode is unknown to the Petitioner.

(l) That the process server has deponed that he served the petition at the 3rd Respondent's last known address – her practice, an address that has not been denied by the 3rd Respondent.

(m) That the 3rd Respondent never raised the issue of service at the earliest opportunity, instead requesting for further particulars, demonstrating that she “had fully submitted to the contents of the petition” by the doctrine of acquiescence, and is thus estopped from disputing due service of the petition upon her.

(n) That it is in the best interest of justice that the petition be sustained for full hearing.

7. On 18/10/2017 the court gave directions as to hearing of the 3rd Respondent's application to strike out the petition. The directions included the filing and exchange of written submissions, and highlighting on 08/11/2017.

8. On 24/10/2017 the 1st and 2nd Respondents filed their own application (by notice of motion dated 23/10/2017) for an order to strike out the petition upon the same ground of want of service. On 08/11/2017 the same was ordered held in abeyance pending disposal of the 3rd Respondent's application.

9. The 3rd Respondent's submissions were filed on 30/10/2017; the Petitioner filed hers on 31/10/2017. The 1st and 2nd Respondents filed theirs on 01/11/2017. I have read and considered those submissions. The learned counsels appearing orally submitted on 08/11/2017. I have also considered those oral submissions.

10. The issues before the court in the present application are whether or not the petition was duly served upon the 3rd Respondent as prescribed by law, and if not what the consequences to the petition are.

11. The law pertaining to service of election petitions has grounding in **Article 87** of the *Constitution of Kenya, 2010* (the Constitution) and is to be found in **section 77** of the *Elections Act, Cap 7* (the Act) and in **Rule 10(1)** of the *Elections (Parliamentary and County Elections) Petitions Rules, 2017* (the Rules).

12. Article 87 aforesaid provides –

“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”.

Parliament subsequently enacted the Act whose section 77 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.”

13. And Rule 10(1) of the Rules provides –

“10. (1) Within fifteen days after the filing of a petition, the petitioner shall serve the petition on the respondent by –

(a) direct service; or

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

14. Direct service is defined in **Rule 2** of the Rules as follows –

“direct service means personal service or service on a duly authorized agent”.

15. On 10/10/2017 the court directed that each party shall file and serve within seven days an affidavit of service in respect to any service they were required to do within the time-lines set out in the Rules.

16. The Petitioner filed her affidavit of service on 18/10/2017 in respect to service of the petition and related documents. It is sworn by one Alex Mutinda. It states at paragraphs 4, 5 and 6 as follows (as read with paragraphs 2 and 3) –

“4. That I thereafter proceeded to Ambassador Court along Jakaya Kikwete Road in the office of A.M. Wahome & Co. Advocates to effect service upon the 3rd Respondent. (On) arrival I was received by a lady, the office receptionist, to whom I introduced myself and the purpose of my visit and sought to serve her with the aforementioned pleadings. She declined service and told me that the 3rd Respondent was no longer in that office and ordered me to leave the office.

5. That on 14th September 2017 I went back to the office and found the same lady and (I) informed her (that) I have instructions to leave a copy of the petition at that office since that was the 3rd Respondent’s last address I knew.

6. That she called a gentleman, a lawyer in the office, who told me I cannot leave a copy of the petition in that office as they will just throw it away and as well ordered me to leave. That being the last address I knew for the 3rd Respondent, I left the copy in the same office on my way out.”

17. Two indisputable facts emerge from the affidavit of service quoted above.

(a) There was no service of the petition upon the 3rd Respondent by advertisement published in a newspaper of national circulation.

(b) There was no personal service of the petition upon the 3rd Respondent as the same was never personally handed over or delivered to her.

18. That leaves only service on a duly authorised agent. Did the Petitioner serve the petition upon the 3rd Respondent by a duly authorized agent? There is no claim in the affidavit of service quoted above that any authorised agent of the 3rd Respondent was served. The affidavit of service stated at paragraph 4 thereof that an attempt to serve the receptionist found at the offices of A. M. Wahome & Co., Advocates was declined with the words that the 3rd Respondent was no longer in that office.

19. Another attempt at service was made the following day. The process server stated at paragraphs 5 and 6 of the affidavit of service –

“That on 14th September 2017 I went back to the office and found the same lady and (I) informed her (that) I had instructions to leave a copy of the petition at that officer since that was the 3rd Respondent’s last known address I knew.

6. That she called a gentleman, a lawyer in the office, who as told me I cannot leave a copy of the petition in that office as they will just throw it away and as well ordered me to leave. That

being the last address I knew for the 3rd Respondent, I left the copy in the same office on my way out.”

20. There is no claim in the affidavit of service that the 3rd Respondent had a duly authorized agent to be served on her behalf, and none is named. The affidavit of service does not disclose any such service. Leaving a copy of the petition in the office claimed to be the last known address of the 3rd Respondent did not amount to service upon a duly authorized agent. The process server was told that the 3rd Respondent was no longer in that office. She was a sitting Member of Parliament, and her current offices would probably have been found in **Parliament Building** in Nairobi or in her constituency. It is not unusual for a practising lawyer who has gone into politics or to some other profession or occupation to leave his or her former practice to others. There was thus no service of the petition upon a duly authorized agent of the 3rd Respondent.

21. I find as a matter of fact that there was no service at all of the petition upon the 3rd Respondent in any manner authorized by law. The methods of service prescribed by law are two – direct service or advertisement published in a newspaper with national circulation. Direct service itself could either be personal service (that is service upon the person herself or himself being served by tendering the document to him or her) or service upon a duly authorized agent.

22. The issue that I must now rule upon, having found as a matter of fact that there was no service of the petition upon the 3rd Respondent in any manner prescribed by law, is the effect of such lack of service upon the petition. It was argued for the Petitioner that notwithstanding lack of service, the petition should be allowed to proceed because the 3rd Respondent has acquiesced to jurisdiction by filing a response to the petition, and that in any event the 1st and 2nd Respondents have not challenged service of the petition upon themselves. This last submission is not factually correct; we have already seen that there is an application by the 1st and 2nd Respondents to strike out the petition upon the very same ground of lack of service pending in the court record.

23. It has also been submitted for the Petitioner that the petition is of such public importance to the people of Kandara Constituency because - it raises issues of their representation in the National Assembly; issues of national values and principles of governance under **Article 10** of the Constitution; issues of equality and freedom from discrimination under **Article 27** of the Constitution; issues of access to justice under **Article 48** of the Constitution; and issues of fair hearing under **Article 50** of the Constitution – that it ought therefore be allowed to proceed to hearing.

24. Finally it was argued for the Petitioner that allowing the petition to proceed to hearing will not prejudice the 3rd Respondent in any way as she is now before the court and has filed all her papers, and that in any event **Article 159(2) (d)** does not brook defeat of the petition upon the mere procedural technicality of want of service as prescribed by law.

25. The first thing to note, as already seen, is that the law relating to service of election petitions as by law prescribed is not a mere statutory or procedural technicality. It is a constitutional requirement.

26. Our superior courts have consistently held that the “Election Petition Rules” is a complete code for all matters election petition except where the rules are silent on any procedural matter, in which case resort could be had in other laws. However, where there is a specific rule in the “Election Petition Rules” on any matter, it alone must be applied to the exclusion of any other body of laws or rules because in election petitions the court is exercising a special jurisdiction. See for instance the case of **Chalaite –vs- Njehu & Others, Court of Appeal (Nakuru) Civil Appeal No 150 of 1998**.

27. What then is the effect of failure to serve an election petition upon a respondent as by law provided?

28. In the case of **Onalo –vs- Ludeki & others [2008] 2 KLR 508**, the court held that failure to serve as, and within the time, prescribed by law, rendered the petition incurably defective and it would be struck

out. The court further held that such failure washed away the whole substratum of the petition, and that the petition as against the other respondents would also be struck out.

29. In the case of *Ayub J. Mwakesi –vs- Mwakwere Chirau Ali & 2 Others (2008) eKLR* the *High Court* stated –

“...if the petition is not properly served upon all the respondents named, then the entire petition will be rendered incompetent....”

30. Other jurisdictions in the British Commonwealth have had a similar approach. In the British case of *Craig –vs- Kanssen [1943] 1 KB 256* for instance, it was held that -

“...failure to serve process where service of process is required renders null and void an order made against the party who should have been served. Failure to effect service was fatal. It could not even be cured by waiver because no waiver can give validity to a nullity.”

31. The *Supreme Court of India* has had occasion to deliberate on the same issue. In the case of *Tyota Basu & Others –vs- Debi Ghosal & Others* it held –

“...An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them or considerations of alleged policy because policy in such matters as those relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes the Court is put in a straight-jacket....”

32. In the case of *Rozaah Akinyi Buyu –vs- IEBC & Others, (Kisumu) Civil Appeal No 40 of 2013* the *Court of Appeal* stated after reviewing several decisions of the *High Court*, the *Court of Appeal* and of other jurisdictions –

“It therefore can be seen that the courts in Kenya and elsewhere have interpreted electoral laws strictly within the corners and confines of the same, as electoral law is a special jurisdiction created by the Constitution and statutes, and civil process is not applicable to the same...”

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 to the root of the petition, and the petition could not stand....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 2nd and 3rd respondents were not served...”

The learned Judge of the *High Court* had held –

“Consequently, though the service was bad in law it did not go to the fundamental root of the petition and it can be waived as an irregularity....(The) same cannot be a ground to nullify the petition herein...”

The *Court of Appeal* overturned this holding.

33. With regard to **Article 159(2) (d)** of the Constitution that demands that in exercising judicial authority the courts and tribunals shall be guided by the principle, *inter alia*, that justice shall be administered without undue regard to procedural technicalities, the *Supreme Court* stated in *Raila Odinga & 5 others –vs- IEBC & Others, Supreme Court Petition No 3 of 2013* –

“Our attention has repeatedly been drawn to the provisions of Article 159(2) (d) of the Constitution....The operative words are (without undue regard)....The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law....”

Article 159(2) (d) therefore does not afford a cure for the failure to duly serve an election petition, the law pertaining to such service being itself grounded on the very same *Constitution of Kenya, 2010* at Article 87(3).

34. I have said enough to show that the petition herein having not been duly served upon the 3rd Respondent, the same is a nullity and must be and is hereby struck out as against all the Respondents. It is so ordered. This determination shall be certified to the *Independent Electoral and Boundaries Commission* in terms of **section 86(1)** of the **Elections Act**.

35. That leaves only the issue of costs. **Section 84** of the Elections Act provides –

“84. An election court shall award the costs of and incidental to a petition, and such costs shall follow the cause.”

36. **Rule 30** of the Rules provides as follows –

“30. (1) The election court may, at the conclusion of a petition, make an order specifying –

(a) the total amount of costs payable;

(b) the maximum amount of costs payable;

(c) the person who shall pay the costs under paragraph (a) or (b); and

(d) the person to whom the costs payable under paragraph (a) and (b) shall be paid.

(2) When making an order under sub-rule (1), the election court may –

(a) disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and

(b) impose the burden of payment on the party who may have caused the unnecessary expense, whether that party is successful or not, in order to discourage any such expense.

(3) The abatement of a petition shall not affect the liability of the petitioner or of any other person to the payment of previously incurred costs.

37. The petition herein has been struck out at the application of the 3rd Respondent. The 3rd Respondent is therefore awarded her costs of these proceedings to be paid by the Petitioner. The same shall be taxed by the taxing officer of the court subject to an aggregate maximum of KShs 1,500,000/00. In imposing this ceiling I have considered that the petition has terminated without a full hearing; but at the same time I recognize the industry of the 3rd Respondent’s learned advocates in researching the relevant law pertaining to service of election petitions. I have also looked at the relevant schedule of the *Advocates (Remuneration) Order*.

38. The 1st and 2nd Respondents shall also have their costs of these proceedings, again to be paid by the Petitioner. The same shall be taxed by the taxing officer subject to an aggregate maximum of KShs

1,200,000/00. In arriving at this ceiling I have also taken into account all relevant factors.

37. Those will be the orders of the court.

DATED AND SIGNED AT MURANG'A THIS 23RD DAY OF NOVEMBER 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 24TH DAY OF NOVEMBER 2017