



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
ELECTION PETITION NO. 12 OF 2017
(CONSOLIDATED WITH ELECTION PETITION NO. 10 OF 2017)
IN THE MATTER OF ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTION)
PETITION RULES, 2017

AND

IN THE MATTER OF THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY FOR
NYARIBARI CHACHE CONSTITUENCY

BETWEEN

CHRIS MUNGA N. BICHAGE.....1ST PETITIONER
ZAHEER JHANDA.....2ND PETITIONER
JAMES F. O KENANI.....3RD PETITIONER

VERSUS

I.E.B.C.....1ST RESPONDENT
JULIUS MEJA OKEYO
(RETURNING OFFICER).....2ND RESPONDENT
RICHARD NYAGAKA TONGLI.....3RD RESPONDENT

RULING

At the point when the 1st and 2nd Respondents were to open their case this late afternoon, Counsel for the 1st Petitioner brought it to the attention of the Court that the 1st Petitioner had never been served with the response to petition and any replying affidavits.

Counsel for the 1st and 2nd Respondents indicated service was done and indeed passed over a document stamped as received by the firm of Ms Oguttu, Ochwangi, Ochwal and Co. Advocates.

The issue of service thus became a contested issue and the Court invited submissions on the same.

In his submissions, Counsel for 1st Petitioner cast doubt on authenticity of the stamp on the response said to be served. He asserts he is not aware of the signature thereon. He denied service of any affidavit.

Ms Makobu in her submissions indicated that the onus is on the person who served to prove service.

Mr. Terer relied on the stamp and signature to show the document was served. He avers that the issue has not been raised all through the pretrial upto the conclusion of the 1st Petitioner's case and the 2nd and 3rd Petitioner's case. Indeed he seeks that if the documents are not served then the 1st and 2nd Respondents be granted leave to serve.

Mr. Omogeni while taking a neutral stand since the battle was between the 1st Petitioner and the 1st and 2nd Respondent, terms the current application a preliminary objection which seeks to expunge affidavits filed by the 1st and 2nd Respondents. Before the Court makes a determination an inquiry needs to be made as the facts are not settled. There is an element of ambush and application is locked out by Rule 15(2) of the Elections (Parliamentary and County Elections) Petition Rules.

Strictly speaking, the issue before Court is one on service.

I have considered the circumstances of this case more so noting that there is a document stamped as received by the firm of Oguttu, Ochwangi and Ochwal Advocates which stamp is now disputed.

This in my considered view and given the nature of the matter before Court, is a proper case for an inquiry as to the issue of the service that is disputed.

It will serve the wider interests of justice to inquire as to the truth of service or lack of it if at all.

To that extent, I direct and order that the process server or advocate who effected service does file an affidavit of service and if found necessary be cross-examined on the same. This must be done as a matter of urgency and directions on this will be given at delivery of this ruling.

Dated, Signed and Delivered in Kisii this 18th day of December, 2017.

A. K. NDUNG'U

JUDGE