



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**TURIBU MOSES KINYUA.....APPELLANT**

**-VS-**

**ANDREW KOBIA M'ERINGO.....1ST RESPONDENT**

**ABDI SHEIKH MOHAMMED.....2ND RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...3RD RESPONDENT**

**(BEING AN APPEAL FROM THE RULING OF THE CHIEF MAGISTRATES' COURT AT MAUA)**

**JUDGEMENT.**

1. This appeal was brought by the Petitioner who was one of the candidates for the seat of County Assembly Representative for, Muthara Ward of Tigania East Constituency. After the elections the 2<sup>nd</sup> Respondent who was the Returning Officer of the elections declared the 1<sup>st</sup> Respondent the winner of the elections having garnered 2820 votes above the first runners up, the Petitioner's 2797 votes.
2. The Petitioner was aggrieved by the declaration and therefore filed an Election Petition before CM's Court at Maua. After serving the Petition, the Respondents filed their various responses. The 2<sup>nd</sup> Respondent in addition to his joint Response with the 3<sup>rd</sup> Respondent individually filed an application dated 25<sup>th</sup> April, 2013. In that application he sought to have the Petition struck out for want of service upon him.
3. After hearing the application inter parties, the learned trial magistrate struck out the Petition on grounds of want of service upon the 2<sup>nd</sup> Respondent hence this appeal. The Petitioner has set out 15 grounds of appeal in his filed Memorandum of Appeal as follows:
  - i. **The learned magistrate erred in law and fact in misconstruing the import of an affidavit of service and it's time for filling.**
  - ii. **The learned magistrate erred in law and fact in failing to address his mind as to the lack of prejudice occasioned to any of the Respondents.**
  - iii. **The learned magistrate erred in law and fact in his declaration that the standard of proof in an election petition is beyond a balance of probability.**
  - iv. **The learned magistrate erred in law and in fact in misconstruing the modalities of service of election petitions.**
  - v. **The learned magistrate erred in law and fact in taking issue with missing paragraphs of an affidavit while the same was not an issue at the filling or during the hearing of**

**the applications.**

- vi. **The learned magistrate erred in law and fact in holding that the court does not have jurisdiction to summon witnesses.**
  - vii. **The learned magistrate erred in law and fact in holding that a Petitioner cannot seek a recount if he relies on other grounds.**
  - viii. **The learned magistrate erred in law and fact in failing to hold that personal service is necessary to enable the Respondent to participate.**
  - ix. **The learned magistrate erred in law and fact in failing to appreciate the cogent, clear and direct viva voce and affidavit evidence of the Process Server.**
  - x. **The learned magistrate erred in law and fact in relying on extraneous and mundane matters to strike out the appellant's petition.**
  - xi. **The learned magistrate erred in law and fact in failing to appreciate that all the Respondents had filled their responses within time.**
  - xii. **The learned magistrate erred in law and fact in giving undue consideration to the affidavit evidence of minor and peripheral players.**
  - xiii. **The learned magistrate erred in law and fact determining serious constitutioned issues on mere technicalities.**
  - xiv. **The learned magistrate erred in law and fact in failing to hold that the affidavit evidence of 2<sup>nd</sup> Respondent was not sufficient to warrant the sticking out of the petition.**
  - xv. **The learned magistrate erred in law and fact in failing to appreciate the other merits in the petition.**
4. There are several affidavits which Petitioner filed. The Process Server filed an Affidavit of Service giving details of service of the Petition on the Respondents. He further deposes that on 11<sup>th</sup> April 2013, he visited the 1<sup>st</sup> Respondent at his home near Muthara market and served a copy of the stated documents on him. He further deposed that on 12<sup>th</sup> April 2014, he visited the offices of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents at Muriri to effect service upon the 2<sup>nd</sup> Respondent but found the offices closed whereupon he made enquires as to the whereabouts of the 2<sup>nd</sup> Respondent. He deposes that he was informed that the 2<sup>nd</sup> Respondent had been admitted at Karen hospital in Nairobi and that he proceeded to Nairobi and served him with the Petition documents.
  5. Eric Nthiga who is alleged to have been with the Process Server filed an affidavit in which he deposed that on 11<sup>th</sup> April 2013 he was instructed to drive the Process Server to places where he was to effect service of the Petition documents. He later drove the Process Server to Nairobi Karen hospital together with the Appellant and remained in the car only for the Process Server and the Petitioner to emerge an hour later.
  6. The 2<sup>nd</sup> Respondent in response to the said affidavits denied having been personally or otherwise served with the Petition. Similarly, the 2<sup>nd</sup> Respondent denied having ever met the Process Server or ever been told that he was looking for him. He further deposed that on the day it was alleged that he was served at Muthara he was at Nairobi and that he obtained a copy of this Petition from the Court Registry.
  7. Counsel for the Appellant submitted that the filed affidavits properly explained how the Process Server while in the company of the Appellant and their driver Eric Ndwiga Nthiga served the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He further submitted that the only hiccup to the evidence of service was confusion of dates as the Process Server served on 12<sup>th</sup> April 2013, but unfortunately there was a typographical error on the affidavits of service and 2013 was indicated as 2014. He further submitted that there was yet another typing error in that the driver Eric Nthiga and the Appellant herein in their replying affidavits described the events of 12<sup>th</sup> April 2013 as happening on 11<sup>th</sup> April 2013.
  8. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the affidavit of service was filed long after the 2<sup>nd</sup> Respondent had filed his application to have the Petition struck out for want of service or proper service. Counsel urged that the affidavit of service was more or less in similar words, content mistake and errors as the replying affidavit of the Process Server even though they had been dated differently. Counsel has further submitted that the documents were drawn on the

- same date and that both of them were a reaction to the 2<sup>nd</sup> Respondent's application to have the Petition struck out.
9. I have carefully considered this appeal, together with the response by the Respondents and submissions by all three counsels and authorities filed by them.
  10. The brief background of the case is that the appellant was one of the candidates for the seat of County Representative for Muthara Ward of Tigania East Constituency. After the elections, the 2<sup>nd</sup> Respondent declared 1<sup>st</sup> Respondent the duly elected County Representative for the said MUTHARA WARD having garnered 2820 votes against the Petitioners 2797 votes.
  11. The Petitioner was aggrieved by the declaration of the 1<sup>st</sup> Respondent as the winner of the said elections and therefore filed his petition on 10<sup>th</sup> April, 2013. Eventually the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their responses dated 25<sup>th</sup> April 2013. At the same time the 2<sup>nd</sup> Respondent filed an application seeking to strike out the Petition for want of personal service upon him. It is that application that led to the striking out of the petition and hence this appeal.
  12. The issues before this court is whether the learned trial magistrates conclusion that there was no proof of personal service of the petition by the Petitioners Process Server upon the 2<sup>nd</sup> Respondent was right. The issue for determination then is simply whether there was proper service upon the 2<sup>nd</sup> Respondent.
  13. The Petitioner relies on the affidavit of service filed by the Process Server and two affidavits, one by the Petitioner and another by one Eric Nthiga the driver. In his affidavit the Process Server deposed that he served the 1<sup>st</sup> Respondent on 11<sup>th</sup> April 2013. On cross examination he stated that he went there by motorbike with the Petitioner. The driver Eric Nthiga stated that he drove them to the home of the 1<sup>st</sup> Respondent. With regard to service of the 2<sup>nd</sup> Respondent, the Process Server deposed that he served him on 12<sup>th</sup> April 2014 at Karen hospital (though he stated that this was a typographical error and that and that it ought to read 12<sup>th</sup> April 2013). This is contradicted by the evidence of the Petitioner who stated that the 2<sup>nd</sup> Respondent was served on 11<sup>th</sup> April 2013. This is further contradicted by the evidence of the driver Eric Nthiga who stated that service on both Respondents was on 11<sup>th</sup> April 2013. Eric Nthiga further contradicts the evidence of the Process Server who stated that he went to serve on a motorbike whereas the driver stated that he drove him there in a motor vehicle.
  14. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents has submitted that service of an election petition is not a technical issue but is rather mandatory. Counsel for the Appellant has on the other hand submitted that the objective of the Constitution is to provide a forum where an aggrieved party can petition and that Article 159 protects such Petitioner's from falling prey to various legal technicalities.
  15. It is now well settled that service of an election Petition is a legal requirement. In the case of ***Kagunyi v Gathua & another Civil Appeal no.6 of 2004*** relied upon by the Respondents, the Court of Appeal rendered itself thus:

***“election petitions are of such importance to the parties concerned and to the general public that unless parliament has itself specifically dispensed with the need for personal service, then the courts must insist on such service. The other modes of service are only alternative to personal service.”***

16. Similarly in the case of ***Ayub Juma Mwakesi v Mwakwere Chirau Ali and 2 others (2008) KLR***, Justice Serگون (as he then was), stated as follows:

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

Article 87 (3) of the Constitution 2010 provides the mode of service of an election petition. The same provides as follows:

***“service of a petition may be direct or by advertisement in a newspaper with national circulation.....”***

17. From the above it is clear that service of an election petition is a mandatory legal requirement. Contrary to submission by the counsel for the Appellant that service of an election petition is a mere technicality.
18. I have also looked at the various authorities sought to be relied upon by counsel for the Appellant and find and hold that the same are irrelevant in the instant Petition since the same dealt with the issue of technicalities which is not the issue in the instant petition. For instance, in the case of **Peter Kimori Maranga & Another –vs- Joel Omagwa & 2 others Kisii High Court Election Petition No. 7 of 2013** the issue inter alia was whether “affidavits” not commissioned by a Commissioner for Oaths are valid affidavits which is not the case in the instant case.
19. Similarly the case of **Hosea Mundi Kiplagat –vs- Sammy Komen Mwaita & 2 Others Nairobi High Court Petition No.11 of 2013** the Respondent had sought to strike out the Petition on the grounds that the same was incompetent and fatally defective for not being filed under the Elections Act No.24 of 2011 and the Election (Parliamentary and County Election), Petition Rules,2013 and that the same was been in violation of the Rules, thus rendering it null and void abinitio. Again, this authority is not relevant to the instant petition since the issues raised in that authority and the instant petition are not the same.
20. With regard to the two other authorities sought to be relied upon by the Appellant namely **Patrick Ngeta Kimanzi –vs- Marcus Mutua Muvuli & 2 others Machakos High Court Election Petition No.8 of 2013** and **M’nkiria Petkay Shen Miriti-vs- Ragwa Samuel Mbae & 2 others Meru High Court Petition No.4 of 2013** the same are equally not applicable to the instant petition since they related to different issues which are not the ones in issue in this Petition. In the first case the 1<sup>st</sup> Respondent had sought to have the Petition struck out on the grounds inter alia that there was want of compliance with mandatory statutory requirements on time, service and deposit of security. As a matter of fact the Petition in that case was dismissed by the court. The second decision which was a decision from this court, the Respondents had sought to strike out the various affidavits filed together with the Petition for being bad in law, which similarly is not the issue in the instant Petition.
21. Counsel for the Appellant has submitted that the only “hiccup” to the evidence of service was a confusion of dates as the process served on 12<sup>th</sup> April 2013 but that unfortunately there was a typographical error on the affidavit of service and 2013 was indicated as 2014. He further submitted that there was another typing error and/or confusion in that the driver and the Appellant in their replying affidavits to the application to strike out described the events of 12<sup>th</sup> April 2013 as having happened on 11<sup>th</sup> April 2013.
22. Even if we were to assume that indeed those were typographical errors, the Appellant has not cured the inconsistencies and contradictions in the Process Server’s evidence and the driver as well. Whereas Process Server stated that he went to serve on a motorbike, the driver stated that he drove the Process Server to effect the alleged service by a vehicle. The Appellant has not addressed these glaring inconsistencies in his submissions.
23. It is also imperative to note that the affidavit of service was only filed after the Respondents filed an application to strike out the petition for want of service. This appears to have been clearly an afterthought. In the case of **JUSTUS M. OMITI V WALTER ENOCK OSEBE NYAMBATI KISII ELECTION PETITION NO.1 OF 2008**, Mohammed J as he then was when dealing with a similar situation stated as follows:

***“the so called affidavit of service was an afterthought and a reaction to the application to strike out.”***

24. In my view it cannot be said that errors in the affidavits were be inadvertent errors. The errors were too many to be a coincident. Errors of date of service and mode of travel to serve are many the Appellant and his counsel ought to have exercised due diligence and carefully checked their documents before filing in such a serious matter owing to the attendant consequences. The only logical inference that can be made is twofold. First the process server, Petitioner and Erick were lying and secondly the instant Petition was never served upon the Respondents as required by law. No wonder that the three deponents who alleged to be together during service could not agree on very mandane issues.
25. For the above reasons and having come to the above conclusion, I do find and hold that this

Petition was not served upon the Respondents as required by law Accordingly and I do not find any reason to interfere with the decision of the Learned Magistrate. This appeal is there fore dismissed with costs to the Respondents.

Dated signed and delivered this 18<sup>th</sup> day of October, 2013

**J. Lesiit**

**Judge.**