



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Election Petition 35 of 2008

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT CAP 7 PARLIAMENTARY
AND PRESIDENTIAL ELECTIONS REGULATIONS AND THE NATIONAL ASSEMBLY
ELECTIONS (ELECTION PETITION) RULES**

AND

IN THE MATTER OF: THE ELECTION PETITION FOR KAMUKUNJI CONSTITUENCY

BETWEEN

IBRAHIM AHMEDPETITIONER

AND

SIMON MBUGUA1ST RESPONDENT

PRISCYLLAR A. WAWIRU

(RETURNING OFFICER KAMUKUNJI CONSTITUENCY)2ND RESPONDENT

THE ELECTORAL COMMISSION OF KENYA3RD RESPONDENT

RULING

The 1st Respondent after his preliminary objection, as to the validity of substitution of Interim Independent Electoral Commission in the place of disbanded Election Commission of Kenya was dismissed, filed the request for particulars, which were supplied by the Petitioner. The dates for hearing were also fixed.

But by a Notice of Motion dated 12th February, 2010 he sought prayers to the effect that the Petition be struck out with costs. The application is based on the grounds that the 1st Respondent has not been served with the petition within 28 days after the publication of the result of the election in gazette and that the notice of presentation of the Petition has not been served in accordance with Sec. 20 (1) and Provisio (iv) thereof of the National Assembly and Presidential Election Act and Rule 14 of the National Assembly Electors Petition Rules (both respectively be referred hereinafter as 'the Act' and 'the Rules').

It is not in dispute that the Petition was not served personally to the 1st Respondent and that the service was affected through gazette Notice No. 8413 published in Kenya gazette of 5th September, 2008.

The said Notice of Motion was also supported by supporting affidavit of the 1st Respondent sworn on 12th February, 2010 and further affidavit sworn on 17th February, 2010. In the further affidavit, he did agree that his previous averments to the effect that he was in Nairobi between **11th August, 2009 (sic)** and **8th September 2009 (sic)** was not strictly true. I do note that the said dates are not accurate though averred in paragraph 8 of his affidavit.

The Petitioner filed his replying affidavit averring inter alia that he made due efforts to serve personally the 1st Respondent but was unsuccessful and to avoid being caught up with limitation period he adopted the alternative method of service as provided by the Act and the Rules. The petitioner also annexed the Affidavit of Service sworn by one Willis Agayi on 10th September, 2008 in which he describes his efforts to serve the 1st respondent as per the after receiving information received from several sources including the Petitioner.

On service of the replying affidavit, Mr. Kibe applied for leave to file further affidavit to respond to matters of facts sworn in the replying affidavit and expressed his intention to cross-examine the process server. In the elaborate further affidavit, 1st Respondent has controverted the averments made in the affidavit of the said process server.

Mr. Kibe also filed a Notice to cross-examine Mr. Willis Agayi and in default of which the 1st Respondent shall apply for the affidavit sworn by him be struck out.

He based his notice to cross-examine on the grounds of the contents of paragraphs 4, 5, 8, 29 and 31 of the further affidavit of the 1st Respondent vis a vis the affidavit of the process server and specifically paragraph 34 thereof.

In short, it was contended that the issue is whether due diligence to serve the 1st Respondent personally was undertaken and to establish the same, the cross examination of the process server is essential.

Mr. Owino in his response submitted that to determine the issue of due diligence, the efforts to serve were right or wrong is not relevant. The fact remains that the attempts were made to serve on receipts of informations as regards the whereabouts of the 1st Respondent.

Mr. Adere only responded that the 2nd and 3rd Respondents are the innocent party in this issue and in any event they be granted their costs.

The main application before the court is to strike out the petition for want of due diligence so far as the personal service is made.

The relevant provisions are Sec. 20 (1) (a), (b) and proviso IV thereof as well as order 18 (1) Rules 1 and 2:-

1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read as the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the production of a witness, for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2. (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the court otherwise directs.

I shall not presently dwell on the interpretation of Sec. 20 of the Act coupled with Rule 14 of the Rules, as the same shall have to be looked into at the time of making ruling on the main application.

At present, I do note from the affidavits filed that there are serious contradictions in the averments made by rival parties, and the court may benefit from further evidence to arrive at right decision.

As per order 18 Rules 1 and 2 of Civil Procedure Rules the court has discretion to order the personal appearance of a deponent to be cross-examined.

I thus direct that the 1st Respondent and Mr. Willis Agayi be present in the court for the purposes of cross-examination.

I shall make orders on costs on determination of the Notice of Motion dated 12th February, 2010.

Dated, Signed and delivered at Nairobi this **22th** day of **February, 2010**.

K. H. RAWAL

JUDGE

22.02.2010