REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Election Petition 3 of 2008

DICKSON DANIEL KARABA.....PETITIONER

VERSUS

JOHN NGATA KARIUKI .....1ST RESPONDENT

JAMES KARIUKI GITAHI .....2ND RESPONDENT

INTERIM INDEPENDENT ELECTORAL COMMISSION OF KENYA

(Successor to Electoral Commission of Kenya) .....3RD RESPONDENT

RULING

The application for my determination relates to the Parliamentary elections which took place in Kirinyaga Central on 27th December 2007. The application is dated 3rd March 2008 and was taken out by the 2nd Respondent who was the Returning Officer in Kirinyaga Central Constituency. He was made a party in this proceeding by virtue of his conduct and the acts and omissions of the officers who were conducting the election process for and on behalf of the defunct Electoral Commission of Kenya. That body was established under section 41 of the Constitution of Kenya and its role was to inter alia to carry out and supervise elections in a free, fair and transparent manner including but not limited to Kirinyaga Constituency. The petitioner is allegedly aggrieved by the conduct of the 2nd and 3rd Respondents in the way the elections were conducted and managed. As a result he has filed the present petition seeking this court to determine and answer the questions raised therein.

The application under seeks the following substantive order;

> "That the petition dated 10th January 2008 and filed on 11th January 2008 be struck out on the ground that the same was not served upon the 2nd Respondent within 21 days after the publication of the result of the parliamentary elections in Kenya Gazette on the 30th December 2007 or at all."

The application is supported by the affidavit of James Kariuki Gitahi sworn on 3rd March 2008. The applicant contends that on 4th of February 2008 he went visiting his mother at her rural home and found the petition herein as having been pinned and left at the window to his mother's house at Kihuyo village, Mukaro Location within Nyeri Municipality. The applicant contends that he does not reside at Kihuyo village but resides at King'ong'o estate at Nyeri town. He therefore says that he was not served with the petition either within the 21 days after the date of publication of the election results as required by section 20(1)(a) of the National Assembly and Presidential Elections Act Cap 7 Laws of Kenya or at all.

The applicant also contends that the affidavit of service sworn by one John Musyoka on 8th February 2008 is silent on the service of the petition on him. As a result he contends that under section 20(1) (a) of Cap 7 prescribes in no uncertain terms that a petition to question the validity of an election

shall be presented and served within 28 days after the date of publication of the results of the election in the Gazette. The applicant further contends that no notice of presentation accompanied by a copy of the petition has been served upon him within 10 days of the presentation of the petition or at all. The applicant states in paragraph 11 of his supporting affidavit why he filed the present application and expresses as follows;

> "That I am further advised by my counsel on record which advice I verily believe to be true and correct, that without service of a petition within the prescribed 28 days after the date of the publication of the results of the election in the Gazette, the petition is thus incompetent and must be struck out."

The application is also grounded on the following grounds;

(1) That the petition herein was not served upon the 2nd respondent within the 28 days after the publication of the election results as required by section 20(1)(a) of the national Assembly and Presidential Election Act Cap 7 Laws of Kenya or at all.

(2) That further no notice of presentation of a petition accompanied by a copy of the petition was served upon the 2nd respondent within the 10 days of the presentation of the petition or at all.

(3) That the affidavit of service of one John Musyoka sworn on 8th February 2008 on the service of the petition is silent on service upon the 2nd respondent.

(4) That since section 20(1) (a) of the National Assembly & Presidential Election Act Cap 7 Laws of Kenya prescribes the 21 days as the period within which a petition must be served, any petition which is served outside that period is incompetent and must be struck out.

It is also the case of applicant that the application is supported by the supplementary affidavits, one sworn by him on 9th April 2008 and filed in court on 24th April 2008 and one by John Kabia sworn on 9th April and filed in court on 24th April 2008. From the court record of 10th April 2008, the 2nd respondent was granted leave to file and serve further affidavit within 14 days. There is no indication that the applicant was granted leave to file and serve three supplementary affidavits as alleged by him.

The application is opposed by the petitioner who filed several affidavits alleging that the 2nd respondent was served after due diligence was exercised and after it was found, that it was impossible to serve him personally. The affidavit of service by Patrick Gichere Kabui stated as follows;

(3) On 21st January 2008, accompanied by the petitioner we went to the Nyeri Provincial ECK office to enquire the whereabouts of the said James Kariuki which we did. We were told he resides at Kihuyo village opposite Muhoya Academy within Nyeri District.

(4) We proceeded to Kihuyo village via Kamwenja Teachers College and met a local inhabitant who gave us the directions to the said defendant's home.

(5) On reaching the said home we met the 2nd respondent's mother and a house help who informed us that he had left a few minutes to the village market.

(6) We hurriedly proceeded to the said village market and after making many enquiries some villagers informed us that he was around but none of them agreed to show us the specific place where the 2nd respondent was at that time despite our persuasion that they show us. I and my companions searched for the 2nd respondent in the locality of his residence the whole day without success. We called off the search late in the evening.

(7) On 27th January 2008 the following day at around 8 a.m. I went by a taxi driven by a Mr. Macharia directly to the 2nd respondent's home and found the 2nd respondent's mother supervising construction work on her grandson's home and after informing her the purpose of our visit just as the previous day, she declined to tell us her son's whereabouts and became very hostile and told us to go and look him at Nairobi.

(8) On 24th January 2008 I and the petitioner returned to the 2nd respondent's home with the intention of effecting service of the petition but his mother became hostile again and shouted at us to leave the compound telling us it was out of bounds.

(9) (a) That On 25th January 2008 I went to the Administration Police Lines and sought protection to enable me return to the home of the 2nd respondent to effect service of the petition.

(b) That I was provided with one Administration Police officer Mr. Joseph Kariithi who together

with the sub-chief of the area Mr. Kabia and a photographer a Mr. Matu accompanied me on my 4th visit to the 2nd respondent's said home.

(c) That on arrival at the aforesaid 2nd respondent's home in the company of the said persons I found the respondent's mother who I asked where the 2nd respondent was but she replied she did not know.

(d) after all these fruitless effort to trace and serve the respondent, I had no choice but to affix the copy of the petition on the window pane of the frontal side of the house where he resides in the presence of my companions aforesaid and the 2nd respondent's mother who I told that the documents affixed on the window pane were for the 2nd respondent. This was the mode of service of the petition that I effected upon the 2nd petition in the light of the aforesaid circumstances.

The person who took the photographs at the time when the process server was affixing a copy of the petition filed an affidavit supporting the contention put forward by the process server. The petitioner also filed an affidavit stating that on instructions of his advocate, he accompanied the process server on the journeys he made to and from the house of the 2nd respondent. He confirmed that he was present when a copy of the petition was affixed on the house of the 2nd respondent's mother. He also confirmed that he was present and saw Mr. Matu a photographer take pictures of the petition after it was affixed as aforesaid. It is also averred by the petitioner that according to the information gathered, the applicant has a bungalow with a stone wall within the compound of where his mother resides and that it is not true that the 2nd respondent does not reside at the house that was identified as his residence at Kihuyo village.

The question that arises in this application is that the 2nd respondent was not duly served with the election petition in accordance with the law. Section 20(1) (a) (iv) of Cap 7 states;

"A petition

(a) To question a validity of an election shall be presented and served with 28 days after the date of the publication of the result of the election in the gazette.

(iv) Where after due diligence it is not possible to effect service under paragraph (a) and (b) the presentation may be effected by its publication in the Gazette and in one English and one Kiswahili local daily newspaper with highest national circulation in each case.

It was submitted by Mr. Arusei learned counsel for the 2nd respondent that the construction of section 20(1) (a) (iv) has had a chequered history both in parliament and court since the Act came into effect in 1969. He stated that the Act did not require service of the petition but only provided for the time limit for representation of the petition. By Act No.10 of 1997, commencing 7th November 1997 Parliament inserted the words *'and served'* after the phrase *'shall be presented'*. He contended that there was nothing about how such service was to be effected and duty fell on the court to construe what Parliament intended in its wisdom of inserting the said words. He relied on the famous case of KIBAKI V MOI [2000] 1EA 115 which was decided by a bench of 5 Court of Appeal Judges. The court held;

"What we are saying, however is that election petition 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. We cannot read from section (20(i) (a) that parliament intended to dispense with personal service. Even under rule 14(2) of the rules Personal Service was not dispensed with. The other modes of service were only alternative modes of service. That is why in the various other cases quoted to us personal service was always described as the best form of service. Section 20(i) (a) of the Act does not prescribe any mode of service and in those circumstances the court must go for the best form of service which is the personal service".

The above position was reiterated in the case of Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others Civil Appeal No. 238 of 2003(UR) where the Court of Appeal held;

"The truth of the matter is that personal service remains the best form of service in all areas of litigation and to say that members of parliament are a different breed of people and different rules must apply to them as opposed to those applicable to other Kenyans cannot support the principle of equality before the law."

The advocate also relied in the case of Ali Chirau Mwakwere v Ayub Juma Mwakesi & 2 others Civil Appeal No.80 of 2008 (UR) in which the majority applied the Court of Appeal decision in Ntoithia

M'Mithiaru vs Maore & 2 others (No.2 (2008) 3 KLR (EP). 730 stating;

> "2. Personal service remains the best form of service. However personal service need not be by actually handing over the papers to the respondent. It can be inferred if the petitioner makes all reasonable efforts to serve the respondent but fails to do so because the respondent evades service by hiding, refusing to acknowledge service, causing his agents or servants to restrain in any way the process server from reaching or by use of any other tactic to avoid service. ……It can be inferred if the petitioner makes all reasonable efforts to serve the respondent but fails to do so simply because the respondent evades service by hiding, refusing to acknowledge service, causing his agents or servants to restrain in any way from process server from reaching him or by use of any other tactics to avoid service."

It is the position of 2nd respondent that the petitioner has not demonstrated that he made every effort to effect personal service and that the same was thwarted by the actions of the 2nd respondent. In such circumstances the court will not infer personal service has been effected. Mr. Arusei learned counsel for the 2nd respondent submitted, that the law as regards service of election petition and notice of presentation is clear. He stated that the respondent should be served personally in as far as that is possible. i.e. personal service is the best service.

Secondly, he contended that where the respondent is clearly evading service either by refusing to acknowledge service or by hiding, or using tactics to avoid personal service, then personal service would be inferred. He alleged that the third mode of service is by substituted service in Kenya Gazette and in one English newspaper and one Swahili paper each with the highest national circulation in the country. This mode of service will be accepted only after the court is satisfied that it was resulted to after the due diligence had been made to serve the respondent but it became impossible. In short substituted service is a last resort which will be used as a mode of service after the petitioner and his process server have demonstrated that they made every effort to serve the respondent personally but it becomes impossible to do so.

On the other hand it is the position of the petitioner that section 20(1) of the National Assembly and Presidential elections Act Cap 7 does not provide for the mode of service of a petition. That the mode of service provided for, under rule 14(2) of the said Act is that service may be effected either by delivering the notice and copy to the advocate appointed by the respondent and if no advocate has been appointed and no such address has been given, by a notice published in gazette stating that petition has been presented and a copy may be obtained at the office of the Registrar. Mr. Wamae learned counsel for the petitioner submitted that in the KIBAKI & MOI case, the Court of Appeal held that personal service remains the best mode of service and that the mode of service spelt out in rule 14(2) is substituted service and not the main mode of service. He also contended that personal service can be inferred if the petitioner is faced with difficulties and relied in the case of Abu Chiaba Mohamed where the Court of Appeal held;

> "Did KIBAKI VS MOI establish any proposition that even where it be proved that a party was hiding with the sole purpose of avoiding personal service, yet such a party must still be personally served? The decision established nothing of the kind…..The decision clearly recognizes that personal service which is the best form of service in all areas of litigation, is not possible, other forms may be resorted to. Otherwise why would the Court have expected to be given reason or reasons why personal service was not effected?.....The effort made by the 1st Respondent to personally serve him amounted to personal service on him……" He made it impossible for the 1st Respondent and his agents to physically get hold of him and personally hand over the documents to him….."

He also relied in the case of M'Mithiaru vs Maore & 2 others (No.2) (2008) 3KLR where the Court of Appeal stated as follows;

> "……Personal service need not be by actually handing over the papers to the respondent. It can be inferred if the petitioner makes all reasonable efforts to serve the respondent but fails to do so simply because the respondent evades service by hiding, refusing to acknowledge service, causing his agents or servants to restrain in any way the process server from reaching him or by use of any other tactics to avoid service……If the petitioner demonstrates to the court's satisfaction that he made every effort to effect service but the same was thwarted by the actions of the respondent, then the court will infer that personal service has been effected upon the respondent."

It was the position of the petitioner that the Court of Appeal has been categorical that personal service cannot be the only mode of service especially where the petitioner is faced with hardships created by the

respondent to hide in order to evade service and that as a result it is valid to resort to various modes of services suggested and decreed under Cap 7 and rules made thereunder. It was contended by Mr. Wamae advocate that the petitioner made all reasonable efforts to serve the 2nd respondent with the petition but failed to do so simply because the 2nd respondent evaded service by going into hiding, causing his agents or servants to restrain in any way the process server from reaching him or by use of any other tactics to avoid service. Faced with no other option, and in accordance to the law, the petitioner through his process server chose to affix a copy of the petition on the window pane of the frontal side of the house where the 2nd respondent resides. To prove inferred personal service, the petitioner is relying in the affidavit of the process server sworn on 10th February 2008. In that affidavit the petitioner accompanied the process server to effect service and swore his own affidavit dated 29th March 2008, stating the chronology of the events which was corroborated the sworn evidence of the process server.

In short, it is, the case of the petitioner that he made several fruitless efforts to trace and serve the 2nd respondent personally but ultimately used other modes of service since he had no choice but to affix a copy of the petition on the window of the house where he resides.

I have considered the application and all the documents in support and in response to the said application. I have also taken into consideration the filed skeleton arguments by the 2nd respondent and the petitioner. The advocates also made oral submissions in support of their respective positions so that the case of their clients can succeed. I have also considered the cross examination that was undertaken against the process server, the petitioner and the 2nd respondent by the advocates appearing in this matter.

The first issue is on service and what are the consequences of personal service or non-service against the 2nd respondent by the petitioner. Black Law dictionary 6th Edition defines service as;

> "The exhibition or delivery of a writ, summons and complaint, criminal summons, notice, order etc. by an authorized person to a person who is thereby officially notified of some action or proceedings in which he is concerned and is thereby advised or warned of some action or step which he is commanded to take or to forbear."

In my understanding the purpose of service is to bring to the knowledge or attention of a litigant that there is a cause of action or proceedings in which he is concerned and in the same breadth he is warned of some step or action which may be taken in the event he does not appear before court to defend or inform court his side of the story. The fundamental issue is that there must be a cause of action in which some action or proceedings will be undertaken in the event the defendant or the respondent does not file appearance or notice of appointment and/or a defence. In essence it is meant;

(1) To put parties in equal footing.
(2) Saving expenses
(3) Dealing with the case in ways which are proportionate.
(4) Ensuring the case is dealt with expeditiously and fairly.

It therefore means service is the step required by the rules of the court to bring documents filed in court to an individual's attention. The meaning of service was considered by the Court of Appeal in KIBAKI VS MOI and the court rendered itself;

> "In ordinary language, to serve a person with a document is to deliver that document to that person. For example, Order 5 of the Civil Procedure Rules deal with service of summons in ordinary civil case. Rule 7 deals with mode of service to the effect that:
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> > "Service of the summons shall be made by delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints in this behalf, and sealed with the seal of the court. Rule 9 (1) and (2) Order of the Civil Procedure rules deal specifically with service on a party or his agent. The general tenor of service under this Order is that unless there is an appointed agent or unless a defendant cannot be found service is normally personal. Exceptions only come when personal service is not practical."

In Abu Chiaba case, the Court of Appeal was of the view that where personal service is not possible other means of service may be resorted to. The court of appeal also held in Abu Chiaba case that the KIBAKI VS MOI case did not establish any proposition that even that where it is proved that a party is hiding with a sole purpose of avoiding personal service, such a party may still be personally served. In my view the decision clearly recognized that if personal service which is the best form of service in all areas of litigation is not possible, other forms may be resorted to. The court also reiterated that personal service remains the best form of service in all areas of litigation and that members of Parliament are not different

breed of people and that different rules cannot apply to them for that would not support the principle of equality before the law.

I have put into perspective, the issue of service as a background, however, the point I want to address first is whether it is necessary or possible to serve the 2nd respondent and whether failure to serve him personally or otherwise can have a direct impact on the petition. The starting point is that the 2nd respondent is an agent of a disclosed principal. Under the repealed section 42(a) of the Constitution of Kenya, the function of the defunct Electoral Commission of Kenya was;

(1) Direct and supervise the Presidential, National Assembly and Local Government elections.

(2) Promoting free and fair elections.

Under section 41(2) of 29th December 2008 Amendment Act which repealed section 41 and abolished Electoral Commission of Kenya had replaced it with the Interim Independent Electoral Commission which became the successor to Electoral Commission of Kenya. Section 41(2) of the Constitution states;

> "The Interim Independent Electoral Commission shall be the successor to the Electoral Commission of Kenya established by section 41(now repealed) and subject to the Constitution, all rights, duties, obligations, assets and liabilities, of the Electoral Commission of Kenya existing immediately before the commencement of this Section shall be automatically and fully transferred to the interim Independent Electoral Commission and any reference to the Electoral Commission of Kenya shall, for all purposes be deemed to be a reference to the Interim Independent Electoral Commission established under this section."

The 2nd respondent as a returning Officer was mandated to carry out the election in Kirinyaga Central Constituency under the general direction and supervision of the defunct Electoral Commission of Kenya. It can be therefore be stated that the 2nd respondent discharged his duties in consultation, coordination and under the direction of the said body. This court is capable of looking at the allegations against the 2nd respondent not in respect of any willful misconduct that could attract personal liabilities or retribution but which could amount to possible impropriety into the way the election process took place in Kirinyaga Central constituency and whether the defunct ECK carried out its functions and duties competently, fairly and freely and on the same breadth determine the extent of any allegations and whether it is true or credible. In determining that task the court has to ensure the right parties are before court. In determining that issue the court has to ensure the parties are rightly served, therefore before court.

The primary duty of an agent is to carry out, the business he has undertaken and the rights of an agent flow from the principal as representative and acting on his behalf and is therefore entitled to be indemnified for such liabilities incurred and losses suffered as were in contemplation when the agency was undertaken. As a general rule, a principal is responsible for all the acts of his agents within the authority of the agent. It is also clear that an employer is vicariously liable or responsible for the negligence of his employee in the course of his employment. In certain circumstances, he may incur responsibilities by reason of their acts or omissions. The Returning officer in an election is given definite instructions as to the manner in which the election must be conducted. He must follow the instructions given clearly and strictly, provided they are lawful. He has no discretion to disregard the instructions given and in that regard he has to exercise care, skill and diligence. In essence he is not required to go beyond his reasonable and expected duty. However, he is expected to exercise remarkable skill and high standard of honesty and diligence.

In this case the cause of action and the proceedings is primarily against the 1st respondent and the 3rd respondent. Any action or step can only be undertaken against the 1st respondent and the 3rd respondent jointly or severally. That is why the prayers sought by the petitioner is primarily directed against the 1st and 3rd respondents. The issue that immediately comes to my mind is whether the 2nd respondent can be regarded as a party where some actions or proceedings can be undertaken in his absence. And whether his absence, some action or step which he is commanded to take or forbear, can happen if he decides not to participate in these proceedings, whether the 2nd respondent's presence or his failure to be served can invalidate the petition. The law is that there is no cause without a remedy and that a person cannot suffer an injury which will not result in compensation from a third party. Parties whose presence before court may be necessary in order to enable the court to effectually and completely

adjudicate upon and settle all questions in a case, should ordinarily be sued, made a party and served. The interest of the 2nd and 3rd respondents are not at variance but mutual.

The question is whether the absence of the 2nd respondent will greatly prejudice the petitioner and the 3rd respondent. A receiver is not normally a necessary party or a proper party as the agent of the company as his acts or omissions are regarded to be those of the company. In essence a receiver bears no personal responsibility to a party who may be injured as a result of his action. On the same principle an agent of a disclosed principal takes no responsibility in his capacity of performing the functions and the duties of his principal.

The court has to determine the issues or questions in dispute so far as they affect the rights and interests of a persons who are parties to the cause or matter. All necessary and proper parties should be before court to enable the effectual and complete determination of the questions or issues arising in the proceedings. A claimant claims a remedy and in this case the petitioner is claiming some relief or is alleging some liability against the 3rd respondent. In that regard the question is whether the presence or the absence of the 2nd respondent would have an effect, whether substantial or otherwise on the claim or the cause of action of the petitioner. And whether the petitioner has a claim which can be properly and reasonably given against the 2nd respondent for his failure to conduct free, fair and competent elections. In my mind applying the principles of vicarious liabilities and principal/agent, the 3rd respondent is likely to be responsible for the negligence, want of care and failure to conduct and conclude free and fair elections of the 2nd respondent unless there is evidence that the malpractices alleged by the petitioner was for the benefit of the returning officer.

There is a presumption in law that the statutory body (3rd respondent) appointed responsible, knowledgeable and honest officers in performance of its constitutional and equitable mandate. I do not think the 3rd respondent can be heard to say that some of the omissions or acts of its officers were not foreseeable, reasonable and expected in the environment of elections conducted in 2007. Whether the 3rd respondent is liable for the conduct and/or negligence of the 2nd respondent to conduct a fair and free election, can be equated to that of agent/principal relationship.

In my humble opinion the 2nd respondent was a driver of a motor vehicle, constitutionally and statutorily owned by the 3rd respondent. If the driver drove the vehicle negligently, recklessly or want of care, then the owner cannot escape liability by the presence or absence of its driver. In the case of Associated Motor Boat Company Limited [1968] EA 123 it was held;

> "where, however a person delegates a task or duty to another not a servant or employs another not a servant to do something for his benefit or the joint benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be."

As per Legal Notice No.14 of 1993 of the National Assembly Elections (Election Petition) Rules 1993 respondent is defined

> "In relation to an election petition, means the person whose election is complained of, or if the petition complains of the conduct of the returning officer or any person under him that officer and includes any other person whose conduct is complained of in relation to the election."

Ibrahim J in the case of Ali Chirau Mwakwere & 2 others Mombasa High Court Election Petition No.1 held;

> "My interpretation is that Parliament decided to widen or extend the persons who are respondents in an Election petition. This could be easily understood or make one to believe that it was as a result of the decision of Mudavadi vs Kibisu and was intended to remove any doubts as to who a respondent in an election petition could be without the need for judicial interpretation as has happened in the Mudavadi vs Kibisu election petition. It is my view that as a result that where there are specific allegations against or in relation to the conduct of any other person, then such a person where practically possible ought to be named, enjoin and served as a respondent. It is understandable that in view of the number of constituencies, number of officers under any returning officer including others like agents, police officers and even voters etc. it may still not be practicable to name or enjoin them thereby making the ratio decidi in the Mudavadi vs Kibisu case is still applicable in so far as officials answerable to the returning officers are concerned…….I would think that it is quite possible that even without a returning officer being a respondent and party in an election petition having been so removed the court can look at any evidence placed

before it to find out whether there could have been errors, irregularities, omissions etc. that could possibly have affected the result of the elections and to what extent. In such a case the court would not be hearing any case against the returning officer but strictly looking at the electoral process and whether there was compliance with the law and to what extent it affected the role of the 3rd respondent which is still a party."

Under section 41 of the Constitution of Kenya and Cap 7 Laws of Kenya, it is the 3rd respondent which has the constitutional and statutory function to conduct free and fair elections and in performance of its functions it has powers to employ agents and/or servants who fulfill the functions given under the Constitution and Cap 7 Laws of Kenya. In this case the 2nd respondent was the agent of the 3rd respondent and in my view the presence or the absence of the 2nd respondent does not change the outcome of this election petition. The character and the substance of the petition cannot change because the Returning Officer is an agent of a disclosed principal.

Let me say what is at stake in this matter, is whether the aspirations and the values of the people of Kirinyaga Central was respected and/or upheld by the 3rd respondent. I reckon that every person whose conduct is complained of, must be included in a suit for trial but the conduct of election process is vested in the 3rd respondent which has the ultimate control of its officers, therefore responsible for their acts and omissions. The 3rd respondent cannot escape liability for the conduct of the election officials, hence the absence or the inclusion of the 2nd respondent in this petition is immaterial. It is my determination that there exists a relationship of master and servant between the 2nd and the 3rd respondents and the absence of the returning officer as a party is not fatal to a petition filed by an aggrieved party. My position is that an election petition is not about the returning officer but the wholesome process of the electoral process conducted by the election authority. If the election body thinks that the presence or the omission of the returning officer is fundamental to its case, then it can make the relevant application before court for that party to be enjoined in the proceedings. I therefore think that a returning officer is not a party who is necessary in the effectual and complete determination of a petition filed by aggrieved party.

The second issue, I wish, to address is whether it is necessary, practicable, possible, reasonable and prudent to serve a returning officer. Having made a determination that the returning officer is not a necessary party, and if I am wrong in that proposition, I wish to address the issue of serving him with the petition. It is not in dispute that the returning officer was not personally served. It is the contention of the returning officer that he was not personally served. A quick glance at the affidavit of Patrick Gichere Kabui, the process server in this case shows the petition was not served personally upon the 2nd respondent. That the same was affixed at a house at Kihuyo village opposite Muhoya Academy which premises he describes in his affidavit as belonging to the 2nd respondent. That has been rebutted and it is the contention of the 2nd respondent that he resides in plot No. King'ong'o estate Room 8 in Nyeri town. In evidence the 2nd respondent exhibited a tenancy agreement. According to the 2nd respondent, that is a crucial and pertinent fact as to the 2nd respondent's residence which was never disputed by the petitioner or his process server. It is alleged that the process server purported to show fruitless efforts to trace the 2nd respondent.

Mr. Arusei learned counsel for the 2nd respondent submitted that no personal service was effected as prescribed by the law on the 2nd respondent. On the other hand it was contended by Mr. Wamae that although the petitioner did not serve the process server personally, nevertheless personal service can be inferred from the circumstances in this case. The question that arises is that the law requires the petitioner to demonstrate to the court's satisfaction that he made efforts to effect service but the effort did not bear fruits. The dispute here is whether the appellant was served personally or otherwise. The law is that the petition be served within 28 days as per section 20(1) (a) of Cap 7. Rule 14 provides that the petition should be served with 10 days of the presentation. It is clear in my mind that under section 20 (1) (a) and Rule 14(1), do not provide for a particular mode of service. As was rightly pointed out by the Court of Appeal, the best mode of service is personal service.

The Court of appeal in KIBAKI VS MOI clearly recognized that if personal service which is the best form of service in all areas of litigation is not possible, other forms may be resorted. The court also found that personal service remains the best form of service in all areas of litigation and that Members of Parliament cannot be treated differently from other people litigating before court.

The question is whether it is practicable to serve a person who has not given his address and who can only be termed as a local fisherman or peasant in the words of Bosire JA in the case of Ali Chirau

Mwakwere *(supra)*. The other issue which was not addressed is whether the court has jurisdiction to sustain an objection raised by a party who is before court and who is claiming that he was not served and is seeking to strike out the whole petition.

In this case, the petition was filed on 11th January 2008. The applicant filed the application seeking to strike out the petition on 3rd March 2008. The application is brought under section 20(1) (a) of Cap 7 and Rule 14(1) of the Election Petition Rules. The main prayer in the application is "that the petition dated 10th January 2008 and filed on 11th January 2008 be struck out on the ground that the same was not served upon the 2nd respondent within 28 days after the publication of the results of the Parliamentary elections in the Kenya Gazette on the 30th December 2007 or at all." The application is supported by the affidavit of the 2nd respondent who confirms that he conducted the Kirinyaga Central Constituency elections on 27th December 2007 and results announced which was gazetted in Kenya Gazette dated 30th December 23007. It is interesting for purposes of this determination to quote paragraph 3 and 6 of the supporting affidavit;

> (3) That on or about 4th February 2008 I went visiting my mother a Mrs. Martha Wacheke at her rural home and thereat I found the petition herein as having been pinned and left at the window to my mother's house at Kihuyo village Mukaro Location, Municipality Division in Nyeri District.
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> (6) That in any event the affidavit of service on this petition sworn by one John Musyoka on the 8th February 2008 is silent on the service of the petition on my person. (Annexed herewith marked JKG2 find a copy of the said affidavit.)

It is the case of the 2nd respondent that he does not reside at Kihuyo village, Mukaro Location but does reside at King'ong'o estate in Nyeri town. The question is how would the petitioner know that the returning officer of Kirinyaga Central Constituency resides in King'ong'o or Kihuyo village. The starting point is that Rule 10 of the Election Petition Rules, do not, compel a Returning Officer to give or supply address for service upon him in case of a petition. It is clear that the returning officer in this case did not leave or supply his personal or physical address to the ECK offices in Nyeri one may say that in such circumstances it would be practically impossible to trace his residence since he is not a man who can be said is a prominent individual within Kirinyaga or Nyeri Districts.

From my knowledge Kirinyaga is a different district from Nyeri and for the petitioner and the process server to travel all the way from Kirinyaga to Nyeri ECK offices they must have been informed that the returning officer resides within Nyeri district. The evidence by the process server and the petitioner is that on 21st January 2008 they went to Nyeri Provincial ECK office to enquire the whereabouts of the returning officer who conducted elections in Kirinyaga Central. According to them they were told he resides in Kihuyo village opposite Muhoya Academy within Nyeri District. It is after that information that they proceeded to Kihuyo village and met a local inhabitant who gave them the direction to the 2nd respondent's home. On reaching the said home, they met the 2nd respondent's mother and her house help who informed them that the 2nd respondent had left a few minutes to the village. They proceeded to the village market and they were informed that he was around but nobody volunteered to show them the specific place where the 2nd respondent was despite their persuasion. They went back on 22nd January 2008 at around 8.00 a.m. and found the 2nd respondent's mother but she declined to tell them the whereabouts of her son. It is also alleged she became hostile and told them to look for him at Nairobi.

Again they went back on 24th January 2008 but the mother became hostile telling them to leave her compound as it was out of bounds. On 25th January 2008, they went back to Kihuyo village with the intention of effecting service and in the company of Administration Police Officer provided at the local chief's office but they did not find the 2nd respondent. From the affidavit of service, it is clear that the process server made five attempts to locate and serve the 2nd respondent who had not given his physical address but who according to information received by the petitioner and the process server was residing at Kihuyo village opposite Muhoya Academy. The 2nd respondent contends that he does not reside at Kihuyo village but resides at King'ong'o village. That information was not supplied, the truth or otherwise by the 2nd respondent at his place of work. How would a person like the process server know whether he resides at Kihuyo village or King'ong'o in the absence of any information supplied by him or his employer.

According to the petitioner and the process server, they went to Nyeri Provincial ECK office to enquire the whereabouts of James Kariuki Gitahi the returning officer of Kirinyaga Central and they were informed that he resides at Kihuyo village opposite Muhoya Academy within Nyeri Municipality. As stated earlier the 2nd respondent did not supply his address and in all the affidavits sworn before this court, his post office box is shown as 45371, Nairobi in the Republic of Kenya. Nowhere in his affidavits does the 2nd respondent indicates that his address for purposes of service is King'ong'o estate House No.8. He alleges that he has no information or knowledge of having been traced in the towns of Karatina, Nyeri and Kerugoya and that the people who allegedly gave direction to his residence have not been named. It is interesting to note, that he confirms that the petitioner and the process server looked for him in Karatina, Nyeri and Kerugoya for purposes of effecting service. The question is whether it was necessary for the petitioner and the process server to make such efforts simply to serve the 2nd respondent whose role was to conduct elections in Kirinyaga Central Constituency for and on behalf of the 3rd respondent.

It is clear that the 2nd respondent could not be found so that personal service could be effected. To justify such service, it must be shown that proper efforts were made to find him, that the process server went to the place or places and at times where and when it was reasonable to find him. The law is that where there is no material on record to show that the returning officer refused to receive the petition or any effort to serve was made, then there is no justification to resort to substituted service. It is the contention of Mr. Arusei learned counsel for the 2nd respondent that mere findings that the 2nd respondent was not at his mother's residence, is not enough for the process server to resort to other modes of service.

The 2nd respondent alleges that the petition came to his knowledge after a copy was affixed at the home of his mother. An interesting point in this application is that the basis of the application is that the affidavit of service by John Musyoka sworn on 8th February 2008. It is alleged that it is silent on service upon the 2nd respondent. It is also important to note that the 2nd respondent alleges that he came to learn about the petition on 4th February 2008 after visiting his mother at Kihuyo village. Perhaps it is important to note, that the application is based on the affidavit by John Musyoka and not of Patrick Gichere Kibui.

In a notice of appointment dated 23rd January 2008, the former Chairman of the defunct Electoral Commission of Kenya appointed M/S Arusei & Co. Advocates to act in this election petition on behalf of the 2nd and 3rd respondents. In the said notice, the chairman required that all notices and communications pertaining to this election should be delivered or sent to M/S Arusei & Co. Advocates. In satisfaction or compliance with the said instructions, the firm of Arusei & Co. advocates in a Notice of appointment dated the same day 23rd January 2008, received and accepted instructions to act for the 2nd and 3rd respondents. Now, the same advocates filed the present application based on instructions given by the 2nd respondent alleging that he was not served within 28 days after the publication of the results of the Parliamentary elections which was gazette on 30th December 2007. It is also alleged that the said advocates advised the 2nd respondent that Cap 7 Laws of Kenya prescribes in no uncertain terms a petition to question the validity of an election shall be presented and served within 28days after the date of publication of the results of the election in Kenya gazette.

The 2nd respondent also contends that he had received advice from the said advocates which he believes to be true and correct that without service of the petition within the prescribed 28 days after the publication of results of the election in the Kenya gazette, the petition is thus incompetent and must be struck out. No doubt the petition was filed on 11th January 2008 and on 23rd January 2008, the 2nd and 3rd respondents filed a notice of appointment of advocates which was accepted on the same day on behalf of the said respondents. The said advocates advised the 2nd respondent to undertake an application to strike out the petition on the ground that the same was not served within 28 days after publication of election results as required under section 20(1) (a) of Cap 7. He also alleges that the affidavit of service by John Musyoka sworn on 8th February 2008 is silent on service upon the 2nd respondent. The question is why was the advocate accepting instructions on behalf of the 2nd respondent on 23rd January 2008, who now alleges that, the petition came to his knowledge on 4th February 2008. In my view that is an incorrect and dishonest instructions. Why was the advocate, in hurry to accept instructions on 23rd January 2008 for a party who now alleges that the petition came to his knowledge on 4th February 2008?

In my understanding the application by the 2nd respondent is incompetent and an abuse of the court process because the basis of the application is whether the petition was properly served or not. The only way to know whether a particular document was served personally or otherwise, is to be in possession of evidence or facts alleging that the said person was served. In this case the application is based on a different affidavit of service while the 2nd respondent is complaining that he was not personally or otherwise served.

I think, the issue of personal service is an afterthought on the part of the 2nd respondent who filed an incompetent application. I do not think it was right to cross examine the process server, since the application did not raise any complaints or issues against the service he effected upon the applicant. Similarly, the issue of the capacity of the process server is a non issue since the applicant did not invoke the jurisdiction of this court correctly for me to give a determination. The procedure followed by the applicant and his advocates clearly explains the unfaithfulness or lack of good faith employed by the 2nd respondent. In short, I am satisfied that the petition was served upon the 2nd respondent within 28 days after the publication of the results in the Kenya gazette and that the present application is nothing but an attempt to engage in a process unknown in law. I think it can be stated with some sense of reality that the 2nd respondent permanently or even for a protracted period stayed away from their home in a manner likely to obstruct or delay the cause of justice. It is also my humble view that a honest belief based upon a full conviction founded upon reasonable grounds of the existence of the circumstances in this case, would lead an ordinary prudent and cautious man placed in the position of the petitioner to the conclusion that the 2nd respondent resided at Kihuyo village.

What is the consequence or effect of non-service of court documents. As stated earlier, the 2nd respondent had not given his physical address and has filed notice of appointment on 23rd January 2008 but now alleges that he was not personally served. It has been agreed that the law does not provide for personal service but personal service is clearly and universally the best mode of service.

Admittedly, the 2nd respondent was not personally served but he filed notice of appointment on 23rd January 2008 and he has submitted himself before this court. Can, a party who has submitted himself before court and who has not filed, any documents under protest seek the striking out of a matter in which he submitted himself without any protestation. Another pertinent issue is whether the court has jurisdiction to sustain the plea of a party who is properly before court and who has not suffered any prejudice as a result of the alleged personal service or non service at all. A cause of action is a factual situation the existence of which entitles one person to obtain a remedy against another. A reasonable cause of action is one which has some chances of success. The petition forms the grievances founding the claim of the petitioner against the respondents herein. So the question that begs for answers is whether the petition can be defeated as a result of procedural lapses committed by the petitioner. And in particular where the said lapse or omission has not resulted in an injury or prejudice to the person who is seeking to strike out the petition.

The 2nd respondent filed a notice of appointment acknowledging service on 23rd January 2008. However, on the other hand he is alleging that he was not personally served within the mandatory 28 days after publication of the results. It is a general rule of law founded on public policy and recognized by parliament that litigation or matters filed before court must be determined on substantive merit without undue regard to technicalities or procedure. Section 23 (1) (d) of Cap 7 is a clear manifestation in that regard. It is the case of the petition, that he would suffer substantial loss or injury if his petition is not determined on substance or merit. It is also unduly oppressive and disproportionate to strike out a cause of action on allegation of personal service. In that regard, disposal of proceedings without trial must be meant to achieve the ends of justice.

Assuming, that the 2nd respondent is correct in his contention that the service was defective, the next question to consider is whether the defect has been waived by entering an appearance and by his conduct. Certainly nothing in section 20 or rule 14 is couched, in a manner to suggest that, if no personal service is effected, the whole petition would be struck out. Is there anything in the service effected by the petitioner, as could or should be regarded of so fundamental a nature as to result in striking out the whole petition.

In my opinion, where a party enters an unconditional appearance to an action, it has always been regarded as an act which waives any irregularities. It may be argued that Cap 7 and the Rules made thereunder have no provision for conditional appearance and also because that an unconditional appearance did not expressly waive an irregularity. It is true, that there is no specific provision in the Act

and the Rules for conditional appearance but to my knowledge it has been the practice where appropriate to enter a conditional appearance. In my view where a party chooses to enter an unconditional appearance in proceedings in court, he must be taken save in exceptional circumstances such as where he contemporaneously files a notice of motion to set aside the proceedings which he has entered an appearance to have waived any irregularities in the process to which he enters an appearance and thus accepts the jurisdiction of the court to determine the matter on merit. The 2nd respondent acknowledged service by instructing M/S Arusei & Co. Advocates to file notice of appointment on 23rd January 2008. An acknowledgement of service can only be amended or withdrawn with the leave and permission of the court. The 2nd respondent did not seek leave of the court to file the present application, after filing an unconditional appearance and participating in the proceedings before court.

A further aspect of the 2nd respondent's conduct as constituting evidence of waiver is the very great delay in bringing the present application. The application was brought 40 days after the filing of an unconditional notice of appointment on behalf of the 2nd and 3rd respondents. Although no time limit is prescribed for the bringing of such an application, it is inherent in the obligation attaching to a party seeking a relief of this nature to ensure that there is prompt and quick resolve in pursuing what he feels is a defence or a point of attack. There is no justification or explanation of any kind that has been suggested or offered by the 2nd respondent that made it, impossible to bring the application within reasonable time.

The statute and the rules governing the election petitions makes no provision or gives no step to be taken by the failure of the petitioner to serve personally or in cases where the respondent raises an issue of personal service or non service. In essence there is no step that can be taken against the respondent other than setting the petition for hearing. No judgment that can be obtained *exparte* against the respondents. In my view therefore, where a party files an unconditional notice of appointment and there being no evidence that he has suffered any prejudice, injury or damage, he cannot be heard to question the mode of service that was used by the petitioner in serving the petition.

In Civil No.183 of 2008 Justus Omiti vs Walter Nyambati & 2 others (unreported) the Court of Appeal held;

> "the nearest reference is in the Civil Procedure Rules Order V Rule 15 which relates to service of summons and directs that an affidavit of service be made and filed in a prescribed manner. It is for good reason that this should be so. The summons to enter appearance served under the Procedure Rules would result in a default judgment if no appearance was entered within a prescribed period the Deputy Registrar would rely upon the affidavit of service to enter final or interlocutory judgement as the case may be. Not so in an election petition. There is no requirement for appearance or threat of judgement in default. …..There is no reason in my view to anticipate that service e of the petition would be challenged and therefore file the affidavit of service before the Motion to strike out."

As was rightly pointed out by the Court of Appeal, the failure to serve the petition personally or otherwise, cannot entitle the petitioner to seek and obtain final or interlocutory judgement. In essence there is no requirement for appearance or threat of judgement in default of personal service or non-service at all. In my view therefore, the remedy of striking out a petition, when the same party has filed an unconditional notice of appointment and when there is no final or interlocutory judgement against him or her is utterly misconceived. In short, the entry of an unconditional appearance waived any irregularities in the service against the 2nd respondent.

The correct position was addressed by Githinji JA in Civil Appeal No.80 and 136 of 2008 in the matter of Ali Chirau Mwakwere where the judge expressed himself on the issue of whether to effect the service through any mode and failure to follow particular procedure amounted to an irregularity or a nullity;

> "There is another important matter raised by Mr. Abeid in respect of service of election petitions. He submitted, in effect, if I understood him correctly, that the purpose of the strict requirement that election petitions be personally serviced is to notify a party that a petition has been filed against him and to avoid an election petition proceeding without his knowledge. He contended that although in this case the appellants were not personally served they had adequate notice of the presentation of the petition and cannot complain that they have been prejudiced. He referred to section 23(1) (d) of the Act which enjoins the election court to decide all matters that come before it without undue regard to technicalities. This submission begs the question – does irregular service

e of an election petition necessarily render the petition liable to be struck out?

In this case, it has been submitted that service on Mr. Gikandi advocate with the copy of the petition after the publication of the notice of the presentation of the petition as irregular. Mr. Ngatia has specifically submitted that failure to serve the petition as prescribed renders the petition incompetent. That with respect, is not necessarily so, for, it depends on whether the service was a nullity or a mere irregularity, and, if it is an irregularity, whether the irregularity has been waived by subsequent conduct of the defendant.

In Prabhudas (N) & Co. vs Standard Bank [1968] EA 679 Sir Charles Newbold P. when dealing with service of summons under Order VI Rule 25 and 26 Civil Procedure Rules said at page 683 paragraph B.

> "The court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a fundamental nature. Matters of procedure are not normally of a fundamental nature……In my view where a defendant chooses to enter unconditional appearance in proceedings in court, he must be taken, save in exceptional circumstances such as where he contemporaneously files a notice of motion to set aside the proceedings to which he has entered appearance to have waive d any irregularity in the process to which he enters appearance and thus accepts the jurisdiction of the court".

In my view, since Rule 14 (2) prescribes alternative procedures for effecting service of an election petition it is permissible for the petitioner to effect service through any of the prescribed procedures so long as it is applicable. The fact that the petitioner uses the less preferred procedure does not necessarily render the ser vie, if in fact effected, a nullity. In each case the Court should link my view, make a juridical determination whether the use of one prescribed procedure rather than another prescribed procedure is a nullity or an irregularity, and, if it is an irregularity, make a finding whether the irregularity has been waived or has caused prejudice."

I consider that anything to the contrary is an incorrect statement of the law. The question is did the incorrect act result in the service being a nullity. The courts should not treat any incorrect act as a nullity with the consequence that anything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. In my view matters of procedures (service) are not normally of a fundamental nature to defeat the case of a party seeking justice for a disclosed grievances. To treat service of a petition so fundamental a nature that it results in the complete nullification and vitiation of everything following therefrom, would appear to me to be completely unreal. It would be strangely out of date to hold, as was agreed by Mr. Arusei Advocate that failure to serve the 2nd respondent personally would result in an automatic termination of the petition. I do not think any judicial rule making authority could have intended such an absurd situation to exist when it has always and still is the practice of the courts to look at substantive justice. In my view no rule making authority would wish to create such an unreasonable situation. The circumstances in this case, in any event show no ground for treating the irregularities which may have occurred as entitling the 2nd respondent to set aside the service and consequently struck out the whole petition.

The central issue in this matter is to establish the truth about service of the petition upon the 2nd respondent. I think the truth was established by the advocate for the 2nd respondent and the chairman of the defunct ECK when a notice of instruction and notice of appointment was filed on behalf of the 2nd and 3rd respondents. That conduct in my view creates unqualified presumption in favour of the petitioner that the petition was properly served by use of the correct means and mode. The 2nd respondent cannot contradict his principal and the advocate on record by stating that he was not personally served and that the petition came to his knowledge on 4th February 2008. It would normally be considered sufficient evidence because of the conduct of the 2nd and 3rd respondents that they were properly aware of the petition and the issue of personal service which is not provided under section 20(1) (a) and Rule 14(1) cannot be used to defeat the petition filed herein.

In the Abu Chiaba case Civil Appeal No.238 of 2003 Omollo JA captured the position that a party cannot be allowed to benefit from his own wrong or from his own contradiction. The learned Judge writing the lead judgement of the court rendered himself;

> "I know the law has often been said to be an ass. But I equally know that the law cannot be such an ass that it would even forget its other well known principles, namely does no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man……The law will not and cannot permit such a party to rely on his own wrong to defeat an otherwise valid petition."

Applying the above hypothesis, it appears to me in the first place the defect of which the 2nd respondent complains in regard to the service of the petition constitutes an irregularity capable of being waived and secondly that irregularity has been waived by the conduct of the 2nd respondent filing notice of appointment and filing the present application 40 days after he submitted himself to the jurisdiction of the court.

The contention by a party who is before court and who has filed documents in satisfaction of service of a petition that the petition was not served personally within 28 days, is nothing but an abuse of the court process. In my understanding the only time a respondent can challenge service is when it was served outside the mandatory 28 days. In essence it is open for the respondents in an election petition to question the time of service but they cannot be heard to question the mode of service as that is in violation of section 20(1) (a) and Rule 14(1). An individual is entitled to fundamental justice in the adjudication of his/her case on merit. That is a right not a privilege accorded by courts. In my view the striking of a petition on an irregularity amounts to a denial of a fundamental right of equality before the law. In any case there is no direct link or connection between personal service and striking out of a petition, when a party seeking the orders is before court having suffered no injury or is unlikely to suffer any damage. To allow an application for striking out a petition on personal service is reverse or narrow focus or reactionary and/or retrogressive jurisprudence developed by the courts. Its principles and underlying premises are not so firmly entrenched in our statute and is not so fundamentally sound to acquire precedence status.

On jurisdiction of the court in striking out a petition and whether the court has such powers to do so. The jurisdiction of the court in an election petition is derived from the Constitution and Cap 7 Laws of Kenya. A petition court does not enjoy unlimited jurisdiction but can only exercise powers conferred under the Constitution and Cap 7 Laws of Kenya. Cap 7 establishes a particular procedure for adjudication of a petition. It is a special machinery for the settlement of a petition filed by a party. I also reckon that the role of a Judge is to decide matters impartially on the basis of the facts and in accordance with the law without any restrictions. A judge in an election petition cannot exercise powers which are not donated by the Constitution and by Cap 7 Laws of Kenya. A judge also has no powers to whittle down an interpretation in order to result in an injustice. It is also clear that the rules are procedural and are to be construed subject to overriding consideration that the right provided by the Constitution and the statue survives.

On jurisdictional issue and striking out of the petition for personal service or non-service is a fundamental issue which must arise or be derived from the statutes or the rules under Cap 7 laws of Kenya. Jurisdiction is meant by the authority which a court has to decide matters that are litigated before it or to take cognizance. The limits are imposed by statutes or procedure or precedent and may be extended or restricted as to the kind a nature of the matter in question. Prima facie no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of the court unless it is expressly shown on the face that a particular matter or within the cognizance of the particular court hence the jurisdiction to decide a matter in a particular way arises. Statutory bodies, like courts have such rights and powers and can do such acts only as are authorized directly or indirectly by the statutes creating them or giving them power in a particular manner. In my view, an act done without authority express or implied may render, the whole determination as a nullity. Under section 22 of Cap 7 it states;

> "Upon receipt of a petition the election court shall peruse the petition and
>
> (a) If it considers that no sufficient grounds for granting the relief claimed is disclosed therein may reject the petition summarily.
>
> (b) Shall fix a date for the trial of the petition. "

According to section 22(a) a petition can only be rejected summarily if the court considers that no sufficient grounds for granting the relief claimed as disclosed in the petition. In my view "sufficient grounds" are not to be curtailed by placing a limited interpretation upon its meaning or by reading into it, the requirement of striking out the whole petition. I also think, no limitation should be prescribed to say what particular set of circumstances will constitute sufficient grounds. If the court is to give an intelligent

interpretation to the legislation, and not to construe it, in a manner which will imply to it, a meaning not expressly provided for, the words 'no sufficient ground' must be considered separately and independently from the issue of personal service or non-service at all. Under section 23(1) (d);

> "The election court shall decide all matters that come before it without undue regard to technicalities."

Admittedly section 20(1) (a) only provides for the time when the petition has to be effected. It does not provide for the mode of service. The point I am driving is that striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court. In my view section 22(a) of Cap 7 is equivalent to Order 6 Rule 13 which clearly spells out when a cause of action can be struck out. Where a statute confers a jurisdiction upon a court, unless the exercise of such jurisdiction is made conditional upon rules of the court first being made, the fact that no rules have been made regulating the procedure does not prevent the jurisdiction from being exercised. It is also clear in my mind that habitual, repetitive or continuous use of a particular procedure does not give the court authority to strike out a petition when the law does not provide for that procedure.

The function of practice and procedure (which has evolved in this country) is to provide the machinery or the manner in which the legal rights or status and legal duties may be enforced and recognized by a court of law. On my reading of Cap 7 and the rules made thereunder is that, no sanction is provided, in instances where the respondent is not personally or otherwise served. Where no sanction is imposed, failure to comply cannot result in the striking out of a case or a matter. In striking out, a case filed by a party, the court has to take into consideration the following;

(1) The interest of administration of justice.
(2) Whether the application has been promptly made
(3) Whether failure to comply was intentional.
(4) Whether there is good explanation for the failure.
(5) Extent of compliance.
(6) Whether failure to comply was caused by the party seeking intervention of the court.
(7) The effect which the failure to comply had on each party.
(8) The effect which the granting of the relief would have on each party.

(The list is not conclusive.)

In essence, a cause of action can be struck out, if it discloses no reasonable grounds for bringing it or it is an abuse of the court process or it is vexatious, frivolous or is inconsistent or is otherwise likely to obstruct the fast disposal of the suit or there has been failure to comply with a rule, practice, direction or court order or that it is scandalous, would embarrass or delay the trial. Lord Diplock in Mackman case [1983] 2AC 237 held;

> "the breakthrough that anisminic case made was the recognition by the majority of this house that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the applicable law to the facts as it had found them it must have asked itself the wrong question one into which it was not empowered to inquire and so had no jurisdiction to determination. Its purported determination not being a determination within the meaning of empowering legislation was accordingly a nullity."

It is the responsibility of the High Court to ensure strict compliance with the relevant provisions of the law. It can be easily demonstrated that the court exercise powers donated by a particular statute in addressing and answering a question put to it or placed before it for answers. In answering questions put before court, the court has to be clothed with proper jurisdiction. I also appreciate the High court enjoys unrestricted and unlimited powers in all matters of substantive law, concerning the general administration of justice in order to fulfill, properly and effectively its role as a court of law. However, the overriding features of justice is that it must not only be done but it must be seen to be done. I am saying so because in all the circumstances before the High court where the petitions were struck out, the parties seeking the intervention of High Court were before court but was alleging procedural issues of personal service or non-service at all. In my understanding where a statute confers a jurisdiction upon a court, then unless the exercise of such jurisdiction is made conditional upon the rules of the court first being met, the fact no rules have been made regulating the procedure does not prevent the court from addressing its mind to the

issue of substantive justice. In Remon vs City of London Property Co. Ltd. [1921] 1KBD 49 it was held;

> "there is a principle of law, however, that where a court has interpreted the law in a certain manner, particularly on interpretation which affects property rights and that interpretation has been acted upon for a considerable time, that interpretation should not be departed from unless it is clearly wrong or it gives rise to injustice."

The question is whether the interpretation or the procedure which has evolved which is to strike out the petition on the grounds of non-service should be departed from and whether the interpretation is clearly wrong or gives rise to injustice. The issue of whether the court has jurisdiction to strike out a petition was addressed by Khaminwa J in the case of Abu Chiaba wherein she found it was unconstitutional to strike out a petition on the grounds of personal or non-service. The Court of Appeal answered the question and in the lead judgement of Omollo JA, the learned Judge stated;

> "The only other issue I wish to touch on briefly is the learned Judge's holding that it would be unconstitutional to strike out an election petition without hearing it on merit. The provisions of section 44 of the Constitution provide for the court where elections petitions are to be lodged, i.e. the High Court, the person or persons, who may Judge a petition, and in section 44(4) it is specifically provided:-
>
> "Parliament may make provision with respect to:
> (a) The circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and
>
> (b) The power, practice and procedure of the High court in relation to the application."
>
> The Act, i.e. the National Assembly and Presidential Elections Act, is obviously made pursuant to section 44(4) of the Constitution. The Act provides that an election petition shall be filed and served within 28 days. Surely the learned Judge cannot be saying that the High Court would be acting unconstitutionally if it were to strike out a petition filed some three months from the date of publication of an election result in the Kenya Gazette. With respect to the learned Judge there is nothing unconstitutional in striking out an incompetent petition."

My position is that the court has no jurisdiction to strike out a petition because of personal service or non-service at all. I also sincerely think that the court has no jurisdiction to strike out a petition on the grounds that it was served outside the mandatory 28 provided there are sufficient reasons for doing so. In civil proceedings, the summons can be extended or enlarged even after 1 year and up to 2 years depending on the circumstances. I think the provision limiting the time of service to 28 days is discriminatory and does not support the principle of equality before the law. In Grace Graies on statute Law 6th Edition at page 66 the writer says;

> "The cardinal rules for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. The tribunal that has to construe an Act of legislature or indeed any other document has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view."

In Barnes vs Jarvis [1953] 1WLR 649 Lord Goddard CJ said;

> "A certain amount of commonsense must be applied in construed statutes. The objects of the Act has to be considered."

The proposition coming out is that if the words of the statute are themselves precise and unambiguous then no more can be necessary to expound those words in their ordinary and natural sense. The words themselves do in such a case best declare the intention of Parliament. In my view, what one may believe or think to be the spirit of the Act cannot prevail if the language of the Act does not support that view. It is not the role of the courts to usurp or put words into the mouth of Parliament when no such intention is expressed in the statute. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be placed upon the words. Our mandate is to determine what is the proper construction sections 20(1) (a), 22(a), 23(1) (d) of Cap 7 and it is no concern to us as judges whether a particular mode of service is the best or not. Legislative would have expanded the scope and application of section 20(1) (a), thereby enlarging the court's jurisdiction to grant the relief of striking out a petition for non service or personal service. Absence doe not in my view

necessarily connote impediment, disability, void or vacuum preventing a petition from proceeding to full hearing if no personal service exists. Any statement to the contrary is an incorrect statement of law and should not be followed.

As stated earlier striking out of pleadings is drastic and draconian which should only be resorted to when the jurisdiction of the court has been properly invoked. I agree that the High Court has jurisdiction or powers to strike out pleadings in an appropriate cases but where the statute and rules granting the court jurisdiction, do not permit such a route, absolutely the court has no powers to do so. Under section 82(1) of the Constitution, no law shall make any provision that is discriminatory either itself or in its effect. Section 82(2) provides that no person shall be treated in discriminatory manner by a person acting by virtue of any written law or in the performance of the function of a public office or public authority. In my view the law does not allow affording different treatment to different persons attributable wholly or mainly to their positions. I think the striking out of a petition mainly on issue of personal service or non-service when the party alleging such defect is before court, is tantamount to treating respondents in a petition cases with kid gloves which is in violation of the Constitution. Where the law does not impose a duty or an obligation upon a party it cannot be inferred or imported that it was intended. The law never implies and the court never presumes unless there is an absolute necessity to do so.

A cursory reading of section 20(1) (a) and rule 14 (1) and (2) together with Rule 10 will show that it does not impose a duty on the petitioner to personally serve the respondent. Of course, it had been held that personal service is the best and the most accepted mode of service. In my mind the failure by the petitioner to personally serve the 2nd respondent will not and cannot render the whole petition invalid so long as the respondent is made aware and is properly before court having suffered no prejudice.

The crux of the matter is that the 2nd respondent is before court. He has filed documents and no detrimental steps were taken against him. It is therefore, my decision, that any deficiency to personally serve a petition is immaterial, so long as there are no prejudices or injustices suffered. It is also my position that there is no presumption of importing a particular construction/interpretation into a statute which may partly or wholly displace, radically and substantially change the intent and purport of the statute or it may materially prejudice the rights and interest of a party or where it will create an impracticable situation or where it would give an opportunity for party to trespass or transgress upon the right of an individual. The National Assembly and Presidential Elections Act Cap 7 and the rules made thereunder, do not provide for striking out, an election petition, and in the absence of an express power to strike out a pleading, the court can only invoke its inherent power prescribed under section 60(1) of the Constitution.

The court cannot also exercise its inherent jurisdiction, when the exercise will lead to an injustice. In my view the inherent jurisdiction of the court enables it, to exercise control over process by regulating its proceedings by preventing the abuse of the process. Inherent power is a residual power which may be used upon unnecessary event and when it is just and equitable to do so in a particular case to ensure the observance of the due process of the law or to prevent vexation or oppression or to do justice between parties and to secure a fair trial between them. It is not intended to displace a party of his matured right which is likely to result in an injustice. I think, striking out of a petition is outside the inherent jurisdiction of the High Court and it cannot be exercised to aid a party who has not suffered any prejudice or injustice due to the acts or omission of another party.

Having given this matter my utmost and careful consideration, I think that personal service can be inferred from the circumstances employed by the petitioner and his process server. In any case the application did not lie, for the reasons which I have endeavoured to express. I hold that the 2nd respondent's application should be dismissed in its entirety and with costs to the petitioner and the 1st respondent. I direct the costs shall be borne by the 2nd respondent.

Dated, signed and delivered at Nairobi this 21st day of May 2010.

M. WARSAME
JUDGE