



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

**Election Petition 19 of 2008**

**ADAN MOHAMED AHMED.....PETITIONER**

**VERSUS**

**HUSSEIN MOHAMED ABDIKADIR..... 1<sup>ST</sup> RESPONDENT**

**ELECTORAL COMMISSION OF KENYA..... 2<sup>ND</sup> RESPONDENT**

**YUSUF MOHAMUD..... 3<sup>RD</sup> RESPONDENT**

**R U L I N G**

The Petitioner Adan Mohamed Ahmed filed the petition dated 22.1.2008 challenging the election of Hussein Mohamed Abdikadir as the Member of Parliament for Mandera Central Constituency at the Parliamentary Elections held on 27.12.2007 under the National Assembly and Presidential Elections Act, Cap 7 Laws of Kenya and the Regulations made thereunder. The petitioner brings this petition as a voter in the said elections. The petition is also filed against the Electoral Commission of Kenya, 2<sup>nd</sup> Respondent (herein referred to as ECK) and Yusuf Mohamed, 3<sup>rd</sup> Respondent who was the Returning Officer in the said Mandera Central Constituency. The petitioner wants the Parliamentary elections declared null and void.

Meanwhile, all the Respondents have filed applications seeking to strike out the petition for want of service on them as required by the law. On 16.05.2008 the 1<sup>st</sup> Respondent filed the Notice of Motion dated the same day seeking an order that the petition dated 22.1.2008 and filed in court on 23.1.2008 be struck out with costs. The grounds found on the face of the motion are that the petition is fatally incompetent because it was not served on the 1<sup>st</sup> Respondent personally or at all, within 28 days from the date of publication in the Kenya Gazette on 30.12.2007, of the results of the Parliamentary election; that the petitioner was never served with a notice of presentation of the subject petition as mandatorily required by Rule 14 of the National Assembly Elections (Election petitions) Rules hitherto invalidating the service and that the purported service of the petition vide the Kenya Gazette No. 460 published on 25.1.2008 is fundamentally flawed, irregular and ineffective. The motion is also supported by the affidavits of Hussein Mohamed Abdikadir, Ahmednasir M. Abdulahi both dated 16.05.2006 and further affidavit of the 1<sup>st</sup> Respondent/Applicant dated 23.07.2008 and skeleton arguments filed in court on 24.07.2008.

On 5.06.2008 the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also filed a Notice of Motion under Sections 20 (1) and 23 (2) of the National Assembly and Presidential Elections Act, Cap 7 Laws of Kenya and Rules 13 and 34 of

the National Assembly Elections (Election petitions) Rules seeking to strike out the petition dated 22.1.2008 and filed in court on 23.1.2008. The grounds are similar to those of the 1<sup>st</sup> Respondent which are the petition was never served in accordance with Section 20 (1) and the Proviso (iv) of Section 21 of the National Assembly and Presidential Elections Act. The application was supported by the affidavit of Yusuf Mohamed the 3<sup>rd</sup> Respondent and skeleton arguments filed in court on 1.07.2008.

The 1<sup>st</sup> Respondent requested to cross-examine both the petitioner and the process server on the service but the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not require to cross-examine them. Counsel only made submissions.

The applications were both opposed and a replying affidavit was sworn by the petitioner on 30.06.2008 and skeleton arguments were filed in court on 25.07.2008.

On cross-examination, the petitioner admitted that he was not with the process server at the time of service of the Petition documents but that he went to his advocates office, Mr. Orengo on 23.06.2008 and was shown the documents which bore a stamp showing 3.40 p.m. as time of service and that it bore a stamp for the firm of Advocates but not Abdulkadir in person, and that service in North Eastern was not possible because there were clashes at Rahmu.

Thomas W. O. Nduku, the process server was cross-examined on his affidavit dated 23.1.2008. He deponed that he is a licenced process server and has an investigations business known as Nduku Investigation Bureau. He deponed that he filed an affidavit of service in court on 26.05.2008 though it was sworn in January 2008. He recalled having received the petition from Messrs Orengo Advocates so that he could serve it on the 1<sup>st</sup> Respondent. He said that the petitioner was known to him as he was the practicing partner of Ahmed Nassir. The process server went to their offices at CBA Building which office he had visited there before. He found the receptionist called Wendy, enquired about the 1<sup>st</sup> Respondent. He was introduced to the 1<sup>st</sup> Respondent's Secretary known as Miriam who asked to take the papers to the 1<sup>st</sup> Respondent before he could go in to serve. He gave her a copy of the petition. He asked her to inform the 1<sup>st</sup> Respondent of his presence and that he had retained a copy of the petition. He then went into the office, briefed the 1<sup>st</sup> Respondent on the purpose of his visit and asked the 1<sup>st</sup> Respondent to sign his copy which he did sign and he returned it to Orengo Advocate. That the 1<sup>st</sup> Respondent appended both the signature and office stamp. He denied seeing Ahmed Nassir in that office as he knew him. Mr. Nduku denied that Ahmednassir took the documents from him. He said that he went to that office at 3.00 p.m. and left about 3.41 p.m. He said that Ahmednassir is lying when he alleges that he is the one who received and remained with the Petition documents. The Petitioner also denied forging the signature on the petition that was served.

Mr. Gatonye counsel for the 1<sup>st</sup> Respondent urged that the law requires personal service of election Petition documents on the Respondent and it is only after due diligence has been made that alternative service can be resorted to. That the 1<sup>st</sup> Respondent has denied having been served personally and that his partner Mr. Ahmednassir, a respected advocate of the High Court, deponed to the same fact. That having seen the process server under cross-examination, he is not believable because his demeanour is in question, he was evasive in answers, argumentative and that his affidavit is a hurriedly executed document intended to cure a fatal defect in prosecuting this petition because it does not indicate the physical address where service was effected, it does not indicate the time of service, and it is questionable why an affidavit prepared on 23.1.2008 was not returned to court till an application to strike out the petition was filed. That the process server was not qualified to serve process since he qualified in August 2008 yet he served process in 2008. That the court should not believe that the 1<sup>st</sup> Respondent did not have his personal stamps in the office as alleged by the process server and lastly that the process server never deponed to having had an argument with the 1<sup>st</sup> Respondent over the names affixed on the stamped documents. That the onus shifted on the petitioner to prove service which they he has failed to do.

Mr. Mulekyo, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents urged that no personal service was ever effected on the 3<sup>rd</sup> Respondent. That personal service is the best service mode of service unless the person serving

fails to serve but shows due diligence in attempting personal service. Reference was made **on EP 1/08 NAMBWA SAKAYA MUSAWANI - VS - SOITA SHITANDA AND ECK; MUIYA - VS - NYAGAH (2003) 2EA 616** in both cases, it was held that personal service is mandatory and the election petition procedure is unique. Counsel urged that there was no personal service effected on the 3<sup>rd</sup> Respondent and no due diligence was exercised by the process server. That the process server, Nduku claims to have served the 2<sup>nd</sup> Respondent and made enquiries on an officer of the 2<sup>nd</sup> Respondent, a Mr. Matolo whose duty was to receive process on behalf of the 2<sup>nd</sup> Respondent. That after enquiries, the process server never made any attempt to serve the 3<sup>rd</sup> Respondent and that attempting service between noon and end of day discloses no attempts made to serve. That the efforts made by the petitioner (at paragraph 14 - 16 of his affidavit) trying to explain why the 3<sup>rd</sup> Respondent could not be served are contrary to rules of service and are all hearsay. That the information on the Returning Officer could be found at ECK offices Mandera and Nairobi or any District Officer and what the appellant depones to is not correct.

In reply to the 1<sup>st</sup> Respondent's application, Mr. Masika submitted that the 1<sup>st</sup> Respondent and Mr. Ahmednassir have committed perjury to this court by falsely swearing that the 1<sup>st</sup> Respondent was not served and the affidavits should be struck off.

That the issue of service being a critical one, it should have been raised at the earliest time possible but in this case, it was an afterthought as the application under consideration was filed after supply of particulars and the Respondents must have noted their case to be weak and filed this application. That the affidavit of the 1<sup>st</sup> Respondent offends the Provisions of Order 18 as he should state his place of abode, physical and postal addresses and having failed to comply, it should be struck out.

As to the process server not being licenced, it was submitted that he had applied for the licence at the time and there is no requirement that he signs the certificate. As regards the filing of the affidavit of service in May 2008 instead of January 2008, counsel urged that there is no time limit on filing of affidavits of service. That what is important is the date the affidavit of service was sworn and that the petitioner was invited to see it.

As regards the application filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, Mr. Masika agreed that there was no personal service but due diligence has been shown by the process server. That efforts to serve were shown by both the process server and the petitioner. That the petitioner took all the necessary steps and having failed to do so, adopted the substituted method of service. That it is upto this court to decide what due diligence means and that the ECK having declined to give information on the whereabouts of the 3<sup>rd</sup> Respondent, the petitioner did all he could to serve the 3<sup>rd</sup> Respondent in the circumstances and it amounted to due diligence under Section 20 of Cap 7. Reference was made to **EP 14/08 MOSES SOMOINE OLE SAKUDA - VS - GEORGE SAITOTI** where Hon. Kihara Kariuki (J) considered what due diligence means. Counsel also submitted that the office of the Returning Officer is created by subsidiary legislation, that the Returning Officer remains an agent of ECK and service on ECK was proper. Reliance was also made **on EP 11/98 SAMUEL MACHARIA - VS - ECK** where Justice Mboghohi held that service on the ECK was effectively done on the Returning Officer and that it is still good law.

I have considered all the affidavits filed both in support and in opposition to the applications before me for determination, the annexures thereto, submissions by all counsel and authorities that were relied upon. The 1<sup>st</sup> issue I will address is whether the 1<sup>st</sup> Respondent was served in accordance with the law.

There is no dispute that the publication of the result of the election was on 30.12.2007 in a special issue of the Kenya Gazette Vol. CIX - No. 103 Gazette Notice No. 12615. Therefore the petition should have been filed within 28 days thereafter. This petition was filed on 23.1.2008 and the Respondents should have been served by 27.1.2008. Whereas the petitioner contends that the process server served the 1<sup>st</sup> Respondent on 25.1.2008, the 1<sup>st</sup> Respondent denies that fact. In fact his partner Mr. Ahmednassir has deponed at paragraph 3 of his affidavit that it is him who was in the office at the time the process server

visited their office and the process server left the documents meant for the 1<sup>st</sup> Respondent with him. To reach a finding on this issue, this court will have to consider the affidavit of service filed by the process server, Mr. Thomas Nduku, what he said during cross-examination in court, alongside the affidavits of the 1<sup>st</sup> Respondent and that of Ahmednassir.

The law that governs the issue of service is Section 20 of the National Assembly and Presidential Elections Act Cap 7 Laws of Kenya. It reads as follows:-

**"Section 20 (1) A petition**

- (a) To question the validity of an election shall be presented and served within twenty eight days after the date of publication of the result of the election in the Gazette.**
- (b) ...**
- (c) ...**
- (i) ...**
- (ii) ...**
- (iii) ...**
- (iv) Where after due diligence it is not possible to effect service under paragraphs (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 the highest national circulation in each case."**

In the instant case, what is in issue is whether what the process server purports to have done was proper service in accordance with Section 20 as read and rules of practice regarding service of process.

The court of Appeal has severally held that the best mode of service envisaged under Section 20 (a) of Cap 7 is personal service. In **KIBAKI - VS - MOI (CA 172 OF 1999)** the Court of Appeal stated:- **"What we are saying, however, is that 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. We can not read from Section 20 (1) (a) that Parliament intended to dispense with personal service. Even under 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 cases quoted to us, personal service was always described as the best form of service. Section 20 (1) (a) of the Act does not prescribe any other mode of service and in those circumstances, the courts must go for the best form of service which is personal service."**

I will first consider the attack on the affidavit of service filed by the process server Mr. Nduku. Order 18 of the Civil Procedure Rules which provides for the content and format of an affidavit has been specifically incorporated into the Election Petition Rules by virtue of Regulation 18 of those rules. The affidavit of service should include the time of service, the name and address of the person served if any, shall be certified or be witnessed upon delivery. It is the 1<sup>st</sup> Respondent's contention that the process server did not state the time when the service was effected. I have read the affidavit and it does not state the time of service. However, there is a stamp of Ahmednassir Advocates which was appended. It indicates that service was at 3.40 p.m. It has been admitted that the process server went to that office and left the documents there. Even if not indicated in the affidavit, I would take the time of service to be 3.40 p.m.

It is also contended that the process server did not state the address at which he served. He merely states that service was effected at the firm of Ahmednassir Abdikadir & Co. Advocates. That affidavit does

flout the requirement that the address of service be specifically stated. However, in this case, the address is not an issue since Ahmednassir has confirmed having received documents which were meant for the 1<sup>st</sup> Respondent while he was at their office.

The other issue that the 1<sup>st</sup> Respondent raises is why it took the process server from 23.1.2008 to 26.05.2008 to file the affidavit of service. Was it filed for purposes of this application? Although there is no specific limit on time as to when an affidavit of service should be filed but it would be presumed that once the service is done, the process server will prepare one and file it as part of the court records. The affidavit of service should not be filed just because an application challenging service has been filed. The Notice of Motion was filed on 16.05.2008 and it is not until 26.05.2008 that the process server filed his affidavit. I believe it is after the application had been served on the petitioner. It is expected that such an affidavit would be filed within reasonable time. Four months down the line is not reasonable time. The only conclusion I can draw is that it must have been filed because of this application. Failure to file the affidavit in January soon after service raises questions in ones mind whether there was one sworn after service or was it just sworn and filed to counter this application to strike out the petition. An affidavit is evidence and when one does not put the evidence on record soon after the event, the memory may fade and may result in the person misinforming the court as to the actual events that transpired.

Another question that has arisen is whether the said Thomas Nduku is a licenced process server. On cross-examination, he said that he was qualified and showed the court a licence issued in August 2008. He admitted having had no certificate before 2008 but had just paid for it. The service was effected in January 2008 and the affidavit allegedly sworn on 23.1.2008. Though he depones at his paragraph 1 that he was a registered, licenced process server that is not the case. He did not avail any evidence to the effect that he had paid for a licence as of 2008 and had been allowed to practice as a process server before the licence was issued. To make matters worse, he had not worked as a process server before 2008. I find that Thomas Nduku was not a licenced process server and hence not qualified to serve any process as he purported to do. I will agree with the 1<sup>st</sup> Respondent that service by an unqualified process server amounts to no service at all and is therefore null and void.

The stamp appended on the documents allegedly served on the 1<sup>st</sup> Respondent is that of the firm of Ahmednassir, Abdikadir & Co. Advocates. It is not the personal stamp of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent denies that the signature appended is his. The process server admitted that he knows that it was important that the 1<sup>st</sup> Respondent should append his own stamp and that there was even an argument between him and the 1<sup>st</sup> Respondent as to why his personal stamp could not be affixed. But yet the process server did not deem it necessary to depone to the alleged arguments over this very important issue in his affidavit. The only conclusion this court can reach is that no such argument ever took place between the process server and the 1<sup>st</sup> respondent and the appending of the firm's stamp on the documents goes to support the of Ahmednassir that the 1<sup>st</sup> Respondent was not present and instead, the documents were left with him. The evidence in cross-examination does therefore not support Nduku's averments in the affidavit and that further punctures the process server's evidence on alleged service of the petition documents on the 1<sup>st</sup> Respondent. I find that the service is in doubt and coupled with the fact that Mr. Nduku is not a qualified process server, I find that the 1<sup>st</sup> Respondent was not properly served or at all.

As regards the objection regarding the 1<sup>st</sup> Respondent's affidavit, that it is defective for not indicating his physical and postal address, I find that to be incorrect. In the supporting affidavit dated 16.05.2008, the 1<sup>st</sup> Respondent discloses his postal address and that he is a resident of Nairobi. Though the other details are not disclosed, I find that to be a minor discrepancy that would not go to invalidate the affidavit. Order 18 Rule 9 CPR allows the court to overlook any irregularity in the form of an affidavit by way of misdescription of the parties or the title or other irregularity as regards form. The irregularity referred to is minor and curable under the above provision.

It was the petitioners contention that Ahmednassir in his affidavit depones to having been served on 25.01.2008 which is contrary to the averments of the process server and even the stamp appended thereon

shows that service was on 23.01.2008 and that the affidavit is a falsehood. I have read the further affidavit of the 1<sup>st</sup> Respondent dated 28.07.2008 which clarifies that the service was on 23.01.2008 and he was not there - refer paragraph 7 and 10. I am persuaded that reference to 25.01.2008 must be a mistake because even the documents do confirm the alleged service to have been on 23.01.2008 not 25.01.2008. The issue of material non-disclosure does not therefore arise.

There is now a wealth of authorities that have held that personal service is the best mode of service. In this case Ahmednassir was not an agent of the 1<sup>st</sup> Respondent in order to receive process on his behalf. Besides no other attempts had been made to serve the 1<sup>st</sup> Respondent before 23.1.2008 or after 23/1/08. In addition to the **KIBAKI CASE (SUPRA)** the courts have maintained that personal service is the best mode. In **EP 74/1993 JAMES NYAMWEYA - VS - COSMOS OLUOCH** the Court of Appeal said, **"It is thus abundantly clear as our view that service on an agent is invalid service . . ."** The courts in **TITUS KIONDO MUYA - VS - PETER NJOROGI BAIYA EP 31/08; NTOITHIA M'MITHIARI - VS - RICHARD MAOKA MAORE (2007) KLR; MOSE NYAMBEGA - VS - WALTER ENOCH NYAMBATI OSEBE EP 4/08; MWITA W.P. MAROA -VS - GISOKA WILFRED MACHAGE, EP 5/08**, the courts have maintained that personal service is the best mode of service. In **ABU CHIABA MOHAMED - VS - HOMHAMED BWANA BAKARI CA 272/03**, the Court of Appeal said, **"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 above is the law in Kenya today. The law was amended in 2007 to include Section 20 (1) (iv) to take care of situations where it is impossible to effect personal service such as where one evades or hides from being served then one has to exercise due diligence. In the **CHABIA CASE** which was decided before the amendment to the law, the court observed that if personal service was not possible, other laws of service may be resorted to. In **EP 4/08 MOSE NYAMBEGA (SUPRA)**, Justice Ibrahim considered what due diligence is. He referred to J. Kihara Kariuki's decision in **EP 14/08 SAKUDA'S CASE** which quoted Black's Law Dictionary (6<sup>th</sup> Edition) that defines due diligence as:-

**"Such a measure of providence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by a reasonable and prudent man under the particular circumstances, not measured by any absolute standard, but depending on the relative facts of the special case"**.

In the 8<sup>th</sup> Edition, of Black's Law Dictionary, J. Ibrahim found the definition to be:-

**"The diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation."** And that diligence is defined as:-

**"1. A continual effort to accomplish something.**

**2. Care, caution, the attention and care required from a person in a given situation."**

In the instant case it seems the process server first met Ahmednassir and served him on the same day without making any or further effort to serve the 1<sup>st</sup> Respondent personally. The exercise of due diligence will of course depend on the special facts and circumstances of each individual case. In this case however, no due diligence was exercised by the process server or petitioner to serve the 1<sup>st</sup> Respondent and the petition must be struck out on that basis.

Was the 3<sup>rd</sup> Respondent served? The process server does admit that he did not personally serve the 3<sup>rd</sup> Respondent but that they opted for substituted service by Gazettement. In his affidavit dated 23.01.2008 and filed in court on 26.05.2008, the process server depones that he was given copies of the petition and other related documents to serve the ECK and the Returning Officer. He proceeded to ECK offices, Headquarters where he arrived at noon, and was directed to one Matolo's office, the person charged with receipt of process and who was known to him. At paragraph 4, he deponed:-

**"That neither the ECK nor the petitioner herein seemed to have the address for the 3<sup>rd</sup> Respondent the Returning Officer and his whereabouts wherefore it became difficult for me to trace the 3<sup>rd</sup> Respondent for purposes of effecting on him personal service."**

**(5) . . . that I am informed by the petitioner herein which information I verily believe to be true that he has continued to find the whereabouts of the 3<sup>rd</sup> Respondent in vain both in Mandera Central Constituency and elsewhere in the Republic of Kenya."**

From the above affidavit it is clear that the process server merely made suppositions that the Returning Officer could not be traced. It is also clear from his affidavit that the process server never made any attempts to trace the Returning Officer for personal service. To confirm that fact, the documents for service were given to him on 23.01.2008 and he had proceeded to ECK Headquarters by noon to serve. He did not even take a day to try and trace and serve the 3<sup>rd</sup> Respondent. There is no evidence that the process server ever attempted to serve the 3<sup>rd</sup> Respondent nor did he apply due diligence in trying to trace him.

The petitioner in his affidavit sworn on 30.06.2008 deposes that the ECK did not seem to have information on where the 3<sup>rd</sup> Respondent could be found. He has not told the court what efforts he made to try and trace the 3<sup>rd</sup> Respondent at ECK offices in Nairobi or Mandera. The petitioner is not sure whether or not the ECK had any information on the 3<sup>rd</sup> Respondent meaning he did not enquire. Besides, he does not disclose how he came to establish that the 3<sup>rd</sup> Respondent could not be traced. The petitioner then claims to have tried to use his brother Kullow Mohamed to trace the 3<sup>rd</sup> Respondent in Mandera ECK Offices on 23.1.2008. However, the said Kullow Mohamed has not sworn any affidavit to state what he did and that allegation remains hearsay. The efforts made by the said Kullow Mohamed to trace the 3<sup>rd</sup> Respondent are not disclosed. Coming to ECK offices once on 23.01.2008 is not sufficient attempt to trace the said 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent has deposed that the ECK website has details on how they could be traced and that he is also a prominent businessman in Mandera running a private school there. That is not disputed. Surely if the petitioner was a resident of that area, these facts must have been known to him or he must have found out from investigations for purposes of effecting service on the 3<sup>rd</sup> Respondent. I doubt that the ECK would withhold the whereabouts of the Returning Officers for purposes of service. As observed above, the best mode of service is personal service and it was the duty of the petitioner to make all efforts to serve the 3<sup>rd</sup> Respondent personally. The 2<sup>nd</sup> Respondent was not an appointed agent of the 3<sup>rd</sup> Respondent for the documents to be served on their representative. I do not agree with the case of **SAMUEL MACHARIA (SUPRA)** that service on the 2<sup>nd</sup> Respondent as an agent of the 3<sup>rd</sup> Respondent is good law especially in light of the amendment to the law (Section 20 (1) (c) iv) which requires the petitioner to exercise due diligence before attempting an alternative mode of service like publication in the Gazette and newspapers in accordance with Section 20 (1) (c) (iv). Each party to the petition has to be considered individually and served personally but not one to be treated as being subordinate to the other and therefore either to be served on their behalf without the petitioner making sufficient effort to personally serve that party. I find that the petitioner and the process server have not demonstrated any efforts made or exercise of due diligence and hence the 3<sup>rd</sup> Respondent was not served as required by law. Service by publication was resorted to before they exercised due diligence and the same was therefore incompetent.

It is the petitioner's case that these applications to strike out were an afterthought as the Respondents had filed applications for supply of particulars and the petitioner had obliged. That these applications were filed because the Respondents realized their cases were weak. It is true that the question of service is at the core of election petitions and it would be expected that such an issue would be taken up at the earliest possible time and be dispensed with as a preliminary issue so that if there is no proper service, there would be no need to go on to request for further particulars as the Respondents did. It would be presumed that service was proper and if particulars are not availed that is when the Respondent can then apply that the petition be struck out. I do agree with the petitioner that the Notice of Motion to strike out were filed late in the day, but that notwithstanding, the requirement of service of a petition is core to any petition just

as it would be in civil proceedings. It is expressly provided in the Act, Section 20 of Cap 7, and it can not be ignored. The fact that the application to strike out on the basis of non-service can not be overlooked just because it is filed late in the day. After all the hearing of the petition had not commenced and history can tell that election petitions do not take a short period to determine.

Before I conclude, I wish to note that the petition was filed on 23.01.2008 within the 28 days allowed under the Act. The Gazettment of the 1<sup>st</sup> Respondent as a Member of Parliament for Mandera Central Constituency was made on 30.12.2007 and the 28 days within which the petition was to be filed and served was by 27.1.2008. So the petitioner had only about 5 days within which to serve the petition. **In ALICEN CHELAITE - VS - DAVID MANYARA CA 150/1998** Kwach J. A observed as follows:- **"Election Petitions are governed by a special regime and they follow rigid time table under constant supervision of the court and while it is true that election petitions should be determined expeditiously because the next elections are in the next five years, it seems that the time within which the petition should be filed and served seems to be too short and tends to be punitive on the petitioners. Once the results are published it takes time for the looser to absorb the shock of losing, pull himself together, instruct an advocate, gather his facts before he can make a decision to file a petition. Then after filing of petition there is the challenge of service with some elected persons evading personal service. Parliament should relook at this provision and allow more time to those who wish to file petitions."**

Though the time to file and serve petitions is too short as expressed by J. A. Kwach in above case, the law remains unchanged and the petitioner has to comply with that strict regime. This is an area that the law makers need to look into as it tends to favour the Respondents.

In this case however, I find that there was no personal service effected on either the 1<sup>st</sup> or 3<sup>rd</sup> Respondents and no due diligence was exercised to personally serve them. This court has no option but strike out the petition for failure to comply with this mandatory provision of the law on service. The petitioner will bear costs of the petition save for costs that relate to the Notice of Motion dated 26.02.2008 by the 1<sup>st</sup> Respondent and 20.02.2008 by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent requesting for particulars which should be borne by each party. This is because had the Respondents filed the instant application timeously there would have been no need to file these applications.

Orders accordingly.

**Dated Read and Delivered at Nairobi this 18<sup>th</sup> day of September 2009.**

**R.P.V. WENDOH**

**JUDGE**

**Present**

Mr. Masika – Petitioner

Mr. Mulekyo – 2<sup>nd</sup> and 3<sup>rd</sup> Respondent and

holding brief for Mr. W. Gatonye – 1<sup>st</sup> Respondent

Muturi –court clerk