REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Election Petition 1 of 2008

IN THE MATTER OF NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT CHAPTER 7 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE PRESIDENTIAL AND PARLIAMENTARY ELECTIONS REGULATIONS AND THE NATIONAL ASSEMBLY (ELECTION PETITION) RULES

AND

IN THE MATTER OF THE ELECTION OFFENCES ACT, CHAPTER 66 OF THE LAWS OF KENYA AND IN THE MATTER OF THE ELECTION FOR THE SIRISIA CONSTITUENCY

JOHN KOYI WALUKE…….PETITIONER

~VRS~

MOSES MASIKA WETANGULA…….1ST RESPONDENT
ELECTORAL COMMISSION OF KENYA…….2ND RESPONDENT
JAMES KULUBI OMWANGWE…….3RD RESPONDENT

RULING

This is a ruling on the 1st Respondent's application dated 19th October, 2009 brought under sections 80, 3 and 3A of the Civil Procedure Act, Cap 21, Order XLIV Rules 1, 2, 3 and 4 of the Civil Procedure Rules and section 20 of the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya. The 1st Respondent's prayers in his notice of motion are as follows:

a) That the ruling and/ order this honourable court be reviewed and/or varied only to the extent that the petition herein be struck out for want of valid service.

b) That the costs of this application be provided for.

The application is grounded on the affidavit of the 1st Respondent Moses Masika Wetangula and some skeletal grounds on the face of the application.

Mr. A. B. Shah represented the Applicant/1st Respondent in this application. He was assisted by Mr. Michael Mubea and Mr. Wattangah. The 2nd and 3rd Respondent was represented by Ms Ateya while Mr. Masika and E. Wangila appeared for the Respondent/Petitioner.

Mr. Shah submitted that the Applicant seeks for review of the ruling delivered by Justice W. Karanja on the 27th May 2008 in which the honourable judge ruled that the 1st and 3rd Respondents had been properly served with the petition dated 31st March 2008 and dismissed an application to strike out the petition for non-service. The main ground supporting the prayer for review is that the Applicant has discovered new and important evidence which was not within his knowledge at the time that application was heard. The Applicant is convinced that if that evidence was available at the hearing, it would have changed the cause of the ruling. The Applicant has annexed correspondence addressed to the Chief Magistrate, Nairobi Law Courts by his advocates Wetangula, Adan and Makokha Advocates requesting for confirmation whether the process server one Thomas W. O. Nduku had a valid process serving license from 1st January 2008. The Applicant depones in his affidavit that, he did not receive that confirmation until 13th October 2009 after the information was received. The Applicant urges the court to consider that an unqualified process server could not establish that he exercised due diligence in his attempts to serve the petition which led to the justification of alternative service in the local dailies pursuant to section 20 (1) of the National Assembly and Presidential Elections Act.

The 2nd and 3rd Respondent supported the application through their counsel Ms Ateya who adopted the submissions of Mr. A. B. Shah. The counsel urged the court to allow the prayers sought.

The Respondent John Koyi Waluke opposed the application relying on his replying affidavit sworn on the 23rd October, 2009. He deponed that the application is incompetent and an abuse of the due process of the court. It is brought in bad faith and intended to prejudice the Petitioner. The court in its ruling found the substituted service by advertisement valid and this position should subsist. It was contended that the Applicant is guilty of larches for bringing this application late in the day with a view of delaying the cause of justice. Mr. Masika and E. Wangila argued that the service of the petition in this case was done through substituted service and not personal service. They asked the court to note that the law on service was amended in 2007 and that some of the authorities relied on by the Applicant were decided before the amendment.

The filing and serving of election petitions is contained in the National Assembly and Presidential Elections Act Cap 7, section 20 (1) provides:

> ***"A petition-***
>
> ***a) To the question of 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.***

In 2007 section 20 was amended by inserting a proviso:

iv) where after due diligence, it is not possible to effect service under paragraphs (a) and (b), the presentation may be affected by the publication in the Kenya Gazette and in one English and one Kiswahili and local daily newspaper with the highest national circulation in each case."

This application is for review of the ruling of my sister Lady Justice W. Karanja delivered on 27th May, 2008 in which she gave the following orders:

i) That the first Respondent was properly served by way of alternative service.

ii) That the application is dismissed with costs.

The orders followed an application by the 1st Respondent to strike out the petition for non-service. The Applicant invokes the provisions of Order XLIV rules 1 – 4 of the Civil Procedure Rules which provide for review. The provisions allow a party who is aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or by a decree or order from which no appeal is hereby allowed to apply for review. The Applicant must satisfy the court that he has:

" discovered new or important matter, or evidence, which after the exercise of due diligence was not within his knowledge, or could not be produced by him at the time when the decree or order was made ……"

The Applicant depones that at the time his application was heard by Justice Karanja, his advocates had written to the Chief Magistrate, Nairobi, was seeking a confirmation whether the process server Thomas Nduku was licensed. He annexes the letter dated

10th April 2008 which reads in part:

"Please confirm to us whether or not the above mentioned person had a valid license to serve court process from the period starting from January 2008 to 1st May 2008."

The letter is signed by Ahmed Adan for Wetang'ula, Adan and Makokha & Co. Advocates. The Applicant has also annexed a reminder letter to the same addressee sent by the same firm of advocates dated 14th September 2009 which states in part:

"As requested in our letter under reference (meaning the one dated 10th April 2008) please confirm to us in writing whether or not the above person was licensed as court process server the period between 1st January 2008 and 1st May 2009."

The Applicant avers that his advocate did not receive a reply to his letter until on 13th October, 2009. Annexed is a letter by the Secretary to the Process Servers Committee, High Court of Kenya, Nairobi, dated 13th October 2009 which reads in part:

"In this case of Thomas W. O. Nduku, renewed his license for 2008 on 25th July 2008. He was therefore only authorized to effect service from the date of renewal until the end of the year. Any service effected by the process server prior to the renewal of the license was unauthorized and therefore unlicensed."

The contents of this last letter is what the Applicant refers to as discovery of new and important matters or

evidence. Mr. A. B. Shah argued that if this piece of evidence was available at the time that the 1st Respondent's application was being heard, it would have influenced the ruling of the court to a different dimension. He referred this court to the ruling of Lady Justice Wendo where the same process server Thomas W. Nduku was declared as not authorized to serve process in respect of the same period of time, specifically in January 2008. The process server was cross-examined on oath in that case and he said that he was a licensed process server but admitted that he had no certificate for the year 2008. The process server also admitted that prior to the year 2008, he had not worked as a process server. The court ruled:

> ***In this case, I find that there was no personal service effected on either the 1st or the 3rd Respondents and no due diligence was exercised to personally serve them. The court has no option but to strike out the petition for failure to comply with this mandatory provision of the law on service.***

Mr. Shah referred this court to the Election Petition of ***ALICEN CHELAITE -VRS- DAVID MANAYARA*** where the importance of personal service was emphasized by Justices R. Kwach, P. K. Tunoi and E. Owour. The court said that the issue of service in election petitions is governed by section 20 (1) of the Act being a statutory provision and not by the rules. The fact that service on election petitions is a preserve of parliament underscores the importance of the subject. I am properly guided by the relevant legal provisions and the Court of Appeal decision.

In the case before me, the process server did not manage to personally serve the 1st Respondent. The court was satisfied that due diligence had been exercised by the process server in accordance with the provisions of section 20 (a) (iv) of the Act before alternative service was used. Mr. Masika for the petitioner contends that service was by alternative service and the licensing or otherwise of the process server should not affect service in this petition. This issue will be determined by the conditions prerequisite to alternative service. The relevant provision requires that the Petitioner has to satisfy the court that he used due diligence in his attempts to effect personal service. This must be done by analyzing and evaluating the efforts made by the process server.

The process server in this case was not authorized to serve which fact is not disputed by the petitioner. The correspondence from the Secretary to the Process Server Committee, High Court of Kenya is self-explanatory. This is the body to whom the Registrar High Court has delegated the duties of appointing and licensing court process servers. There is no evidence or even an allegation that the relevant correspondence is a forgery. The process server was indeed not qualified to serve court process on the 25th day of January 2008 when he served the 1st Respondent. The alternative service was based on the due diligence of the unauthorized process server. It has now been established that he was not qualified. Would such a process server who lacks capacity to serve be held to have satisfied the requirement of due diligence as required by the law?

In my opinion, the answer is in the negative. The reason for this is that any efforts he may have made in trying to serve the 1st Respondent were useless and a nullity for want of authority. It is on the basis of such efforts that the court

will rely on establishing due diligence. Due diligence therefore, can only be proved where the petitioner engaged an authorized process server. I therefore reject the argument by Mr. Masika that the alternative service will stand even in a case where a process server is not licensed. The alternative mode of service must have a ground to stand on which in this case is the due diligence.

The application dated 31st March 2008 was heard by Justice Karanja on 18th April, 2008. The first letter to request for confirmation of licensing of the process server was dated 10th April 2008. The ruling of the court was delivered on 27th May 2008. The first letter is evidence that the 1st Respondent was making efforts to obtain information to support his application which started before the said application was heard. A reminder was sent on 14th September 2009 and the response containing the information requested for was sent vide a letter dated 13th October 2009. This was about one and half years after the first letter was sent.

This information was not in the knowledge of the 1st Respondent at the time the application dated 31st March 2008 was heard. There is no doubt that new and important evidence as required by Order XLIV rule 1 has been discovered. I agree with the 1st Respondent that had the evidence been presented before the court at the time the application was heard, the same would have influenced the court to reach a different decision.

The Petitioner alleged that the 1st Respondent is guilty of larches since he had brought this application ***"abit late in the day***". After the application was heard and ruling delivered, the Applicant through his advocates sent a reminder to Nairobi. The information required was not received until on 13th October 2009. This application was filed on 19th October 2009. Under the provisions of Order XLIV, time should run from the date of discovery of the new evidence. The Applicant must also show that he exercised due diligence in trying to obtain that evidence and that it was not available at the time the first application was heard. The first letter dated 10th April 2008 and the reminder dated 14th September 2009 are in my opinion sufficient for purposes of exercise of due diligence. It is not correct to say that, the Applicant is guilty of larches since the application was filed only six (6) days after the discovery.

The Applicant asked the court to invoke its inherent powers to strike out the petition. The National Assembly and Presidential Elections Act does not provide the procedure for striking out an election petition. In the absence of an express power to strike out a pleading, the court can use its inherent powers provided for by section 60 (1) of the Constitution:

> ***"There shall subject to section 60 A be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other law."***

I rely on the petition of ***ALICEN CHELAITE*** where Justice Kwach found that the superior court has inherent powers to give such orders. The honourable judge relied on the case of ***C. DEVAN NAIR -VRS- YONG KWAN TEIK***

[1967] 2AC 31 where the Privy Council held on appeal:

> ***"The election judge must, however, have an inherent power to cleanse his list by striking out or better still by dismissing those petitions which have become nullities by failure to serve the petition within the time prescribed by the rules".***

This court has powers to strike out pleadings even where the law does not have any express provisions. The final issue for this court to decide is whether to proceed with the petition as regards the 2nd and 3rd Respondents in the event that this application succeeds in favour of the 1st Respondent. The prayer in the application is for review of this court's ruling to the extent that the petition be struck out for want of service. The service on the 2nd and 3rd Respondents has not been challenged. The issue is whether an election petition can survive without the 1st Respondent who is the sitting Member of Parliament for Sirisia Constituency. If the court ruled that the petition proceeds, any orders made are likely to affect the 1st Respondent without being heard because he will not be a party to the petition. Such a move would offend the principles of natural justice that no person shall be condemned unheard. In the case of ***DAVID WAKAIRU MURATHE*** Justice Kwach on appeal against a petition with similar facts said:

> ***The fact that the Electoral Commission was served timorously made no difference at all. The petition was rendered incompetent against all Respondents including those who had been served in accordance with the provisions of section 20 (1) (a) of the Act and rule 14 (1) of the Rules.***

I am therefore well guided by this decision that the fate of the petition is sealed by the act of non-service or improper service of the first Respondent.

In this petition, just like that of ***ADAN MOHAMED AHMED***, the process server Thomas W. Nduku by his deliberate and ill-advised action has scuttled the rights of the Petitioner. I would recommend that the necessary action be taken against that process server by the Registrar High Court which should be a lesson to others of his kind. To the advocates representing parties in petitions, it is important to ensure that only qualified process servers are engaged to serve court process. This will serve as a damage-control measure in matters affecting their clients.

I am satisfied that the application is merited having met the conditions under Order XLIV rule 1. The Applicant has established that service was not effected in accordance with section 20 (1) (a) of the Act. The ruling of Justice W. Karanja is hereby reviewed and orders made therein set aside. The petition is hereby struck out with costs to the Respondents.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma

This 18th day of November, 2009 in the presence of

Mr. Masika and Wangila for the Petitioners, Mr. Ateya for Odhiambo and Odhiambo for 2nd and 3rd Respondents and Mr. Makokha for 1st Respondent.

F. N. MUCHEMI
JUDGE

MR. MASIKA: The ruling is very painful to the Petitioner. I ask the court to ensure that action be taken against the process server. I apply for certified copies of ruling for purposes of appeal.

F. N. MUCHEMI
JUDGE

COURT: Certified copies of ruling to be supplied to the Petitioner.

F. N. MUCHEMI
JUDGE
18/11/2009