



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT KISII

Election Petition 3 of 2008

IN THE MATTER OF: SECTION 44 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL
ELECTIONS ACT (CHAPTER 7, OF THE LAWS OF
KENYA) AND THE REGULATIONS MADE THEREUNDER**

AND

**IN THE MATTER OF: ELECTION FOR THE SOUTH MUGIRANGO
CONSTITUENCY**

AND

IN THE MATTER OF: THE PETITION OF MANSON OYONGO NYAMWEYA

BETWEEN

MANSON OYONGO NYAMWEYA PETITIONER

VERSUS

1. JAMES OMINGO MAGARA 1ST RESPONDENT

2. JOSEPH SANGANYI OMAMBIA 2ND RESPONDENT

**3. THE ELECTORAL COMMISSION OF KENYA 3RD
RESPONDENT**

4. SAMUEL KIVUITU..... 4TH RESPONDENT

RULING

This ruling is in respect of an application by way of a notice of motion filed by the first respondent. The application was made under the provisions of **section 20(1)** and Proviso (iv), **section 22** of **The National Assembly and Presidential Elections Act** and the schedule to the **Statute Law (Miscellaneous Amendments) Act, 2007**. The first respondent prayed that the petition herein be struck out. The application was made on the following grounds:

“(a) There is no proper and valid petition before the

Honourable Court.

(b) The petitioner has not presented, filed and

served the petition within twenty – eight

days after the publication of the result of

the election in the Gazette.

(c) The petitioner has not exercised due diligence to

serve the petition in accordance

with *section 20(1) of the National Assembly and*

Presidential Elections Act.

(d) The petition and/or the notice of the presentation

of the petition has not been served in

accordance with section 20(1) and the

proviso (iv) of section 20(1) of the National

Assembly and Presidential Elections Act

and the schedule to the Statute Law

(Miscellaneous Amendments) Act, 2007.

(e) The Honourable Court lacks jurisdiction.”

The application was supported by an affidavit sworn by the first respondent. He deposed that he was the elected member of parliament for South Mugirango Constituency in the National Assembly following the general elections held on

27th December, 2007. The election results were published on 30th December, 2007. He further stated that he had not been personally served with the election petition herein but on 1st February, 2008, his attention was drawn to a publication in the “**Daily Nation**” newspaper of a purported notice of presentation of the petition. The notice stated that a true copy of the petition could be obtained on an application to the office of the Registrar/Deputy of the High Court. There was also a similar publication

in the “**Taifa Leo**” newspaper.

On the same day, that is, 1st February, 2008, the first respondent’s attention was again drawn to the Kenya Gazette of 25th January, 2008 where there was a notice addressed to each and all the respondents purporting to be service of the presentation of the petition herein. Thereafter he consulted his advocates and was advised that an election petition must be presented and served within twenty-eight days after the date of the publication of the results of the election in the Gazette and that, where after exercise of due diligence it was not possible to effect personal service, 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.

The first respondent went on to state that since the general elections and the publication of the results, he had been in Kenya and stayed in his normal residences at his constituency and at Ongata Rongai, which residences were well known to the petitioner as he had paid visits earlier.

In Nairobi, the first respondent frequents the parliament buildings and ODM party offices in Kilimani and Lavington areas, he stated, and all those places are accessible to members of the public. He added that nobody had attempted to serve him with any notice of presentation of the petition and therefore the petitioner had not exercised any due diligence to serve the petition. The petition was filed on 18th January, 2008 and therefore the petitioner had ample time to effect personal service, the first respondent contended. He ended up by deposing that he appointed his advocates herein, J. A. B. Orengo Advocates, on 8th February 2008.

Mr. Nyatundo held brief for Mr. Orengo for the first respondent and made brief but concise submissions in support of the application. He urged the court to strike out the petition for reasons as stated in the application.

The petitioner stated in his replying affidavit that he presented, filed and served the petition herein within twenty-eight days after publication of the result of the election in the Gazette. The petition was **filed on 18th January, 2008** which was 19 days from the date of the publication of the election result in the Gazette. The petition was **served vide a Notice in the Kenya Gazette on 25th January 2008** and notice of presentation of the petition was also published in two daily newspapers as admitted by the first respondent in his affidavit. That mode of service was resorted to after exercise of due diligence in effecting personal service of the petition upon the first respondent, the petitioner added. Although the affidavit of service by Mr. Isaac O. Oichoe, an authorized process server, was not annexed to the replying affidavit as alleged in paragraph 2(d) of the replying affidavit, the same is on record, having been filed on 28th January, 2008. I will revert to the contents of the said affidavit later in this ruling.

The petitioner pointed out that some contents of the first respondent’s affidavit were not entirely correct, for example, his assertion that he knew of the presentation of the petition on 1st February, 2008 whereas his Notice of Appointment of Advocates is dated and filed on 31st January 2008. The first respondent’s averment in paragraph 15 of his affidavit that he appointed his advocates in this petition on 8th February, 2008 was also false, the petitioner added. The petitioner stated that this court had jurisdiction to hear and determine the petition and further urged it to do so without undue regard to technicalities in terms of the Provisions of **Section 23(1)(d) of the National Assembly and Presidential Elections Act** (hereinafter referred to as “**the Act**”).

Mr. Imende for the petitioner submitted that the petitioner exercised due diligence in an effort to effect personal service upon the first respondent but was unsuccessful. He further urged the court to take Judicial notice of the state of insecurity that existed shortly after the general elections upto and including the time of filing and service of the petition.

Counsel Cited the Court of Appeal decision in **ABU CHIABA MOHAMED VS MOHAMED BWANA BAKARI & 2 OTHERS**, civil Appeal No.238 of 2003 (unreported) regarding the issue of service. I will revert to that authority later in this ruling.

Regarding the first respondent's deposition that he had not personally been served with the petition and became aware of it on 1st February 2008, Mr. Imende urged the court to find that the first respondent was less than candid and had indeed perjured himself in view of the fact that the first respondent was aware of the matter as at 31st January 2008 when he appointed his advocates in this election petition. He cited the case of **JOHN KIPKEMOI KILEL VS DIAMOND TRUST BANK (K) LTD**, Civil Application No.NAI 314 of 1999 (unreported), where the Court of Appeal refused to exercise its discretion in favour of the applicant to set aside an ex parte judgment. In that case, the applicant had stated in his affidavit in support of the application that he was neither served with summons to enter appearance and the plaint nor did he have any notice whatsoever of the proceedings in the suit yet he had filed a memorandum of appearance in person. He could not have done so had he not been served with summons to enter appearance, the court stated.

Having set out the main arguments that were raised in this application, I will proceed to determine the issues that were raised and thereby decide on the application as hereunder:

1. Whether the petition was presented, filed and served within twenty-eight days after the publication of the result in the Gazette.

It is not in dispute that publication of the 2007 parliamentary election result was gazetted on 30th December, 2007. The petition herein was presented on 18th January, 2008. Isaac O. Oichoe, a Process Server, deposed that on the same day he received a bundle of documents, that is, petition, Notice of presentation of an election petition, Notice of Appointment of Advocates, Notice of acceptance of Appointment and Receipt of an election petition by the Registrar from the petitioner's advocates with instructions to serve the same upon the respondents herein. The Process Server went on to state as follows:

*“3. THAT on 18th January 2008 I proceeded to
to Gucha District, Kisii, where I attempted
to serve the 2nd Respondent over the weekend
through the District election co-ordinator
Gucha District Offices at Ogembo, the
District Headquarters without success as,
the Respondent's whereabouts could not be
known.*

*4. THAT I came back on 20th January 2008 and
on 21st January 2008 I proceeded to the
Electoral Commission of Kenya offices at
Anniversary Towers and served the bundle
of documents aforesaid upon the 3rd and
4th respondents respectively who accepted*

service by stamping and signing on the reverse of the document entitled Receipt of an election petition returned herewith duly served.

5. *THAT on 21st January 2008, I attempted to serve the 1st respondent at Continental house and Pentagon house without success, as I was always referred to the other offices.*
6. *THAT during my several visits to the 1st respondent's offices aforesaid, I was always kept hopping from one office to another by the Security Officers and finally was informed by the same officers at Pentagon house on 21st January 2008 that the 1st respondent had actually left Nairobi to link up with other ODM leaders at a destination they did not disclose to me and therefore could not effect service of the documents aforesaid.*
7. *THAT I now return to this Honourable Court the bundle of documents aforesaid duly served upon the 3rd and 4th respondents but not served upon the 1st and 2nd respondents.*
8. *THAT what is deponed herein is true to the best of my knowledge, information and belief."*

The affidavit was sworn on 22nd January but was filed on 28th January, 2008. On 25th January, 2008 service of the Election Petition was served upon the first and the second respondents by means of publication in the Kenya Gazette. Notice of presentation of the petition was also published in the "**Daily Nation**" and "**Taifa Leo**" newspapers as required by paragraph (iv) of the proviso to **section 20(1)** of the Act.

In my view therefore, the petition was presented, filed and served within twenty-eight days after the publication of the result of the election in the Kenya Gazette. The whole process took twenty-six days.

2. Did the Petitioner exercise due diligence to serve

the Petition?

The amendment that was introduced to **Section 20(1)** of the Act by **The Statute Law (Miscellaneous Amendments) Act, 2007** regarding service of petitions brought into existence subsection (iv) which provides that:

“(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.”

What amounts to due diligence in a matter of this nature is dependent upon the efforts that are evidently shown to have been made by the petitioner or through a process server to effect personal service.

Before substituted service is effected, a petitioner must demonstrate that he has made considerable and careful effort to trace and effect personal service of a petition upon a respondent. He must, for example, make due effort to locate the respondent's home, office or other places where he can most likely be found.

Even before the aforesaid amendment to **section 20** of the Act was made, the Court of Appeal in **ABU CHIABA MOHAMED VS MOHAMED BWANA BAKARI** (Supra) had made it clear that personal service was the best form of service in all area of litigation but where it was not possible, other forms of service may be resorted to.

I have already reproduced the salient parts of the affidavit of service by the Court Process Server. The same reveals that on 21st January 2008 the process server went to the first respondent's office at Continental house but was unable to trace him. He also went to Pentagon house where the ODM party has its offices but the first respondent was not there. Later on, he was informed that the first respondent had left Nairobi to link up with other ODM leaders who were at an undisclosed venue. Faced with that information, I do not think that it was necessary for the process server to enquire about the first respondent's residence since he was said to be out of Nairobi. An alternative mode of service had to be resorted to as time was of the essence.

The Petitioner's advocate asked this court to take judicial notice of the fact that around that time of attempted service of the petition, there was an unprecedented state of insecurity in most parts of the country. That I agree. It was indeed not easy for ordinary citizens of this country to move from one place to another due to the chaos that arose after announcement of Presidential elections. In the City of Nairobi there were running battles between the police and members of the public. Movement outside Nairobi was also insecure.

If it were not for the state of insecurity that prevailed at the time and which made it difficult for ordinary people to travel from one place to another, especially for any purpose relating to the elections which had just been concluded, I would have said that the Process Server should have made more effort to trace the first respondent at his Ongata Rongai home or his up-country home. But considering the

effort made by the Process Server at serving the first respondent and taking into account the state of insecurity that existed at the material time, I hold that the petitioner exercised due diligence in attempting to effect personal service of the petition upon the first respondent. When he failed, he served the same by way of advertisement in the Kenya Gazette and other local dailies.

Following service of the petition and notice of its presentation as aforesaid, the first respondent appointed M/S. J. A. B. Orenge Advocates to act for him in the petition. That appointment was done on 31st January, 2008. Notice of acceptance of instructions was filed on the same day.

On 30th January, 2008, the said advocates had written to the Deputy Registrar, High Court of Kenya at Nairobi, and indicated that they were acting for the first respondent. They requested for a copy of the petition. The said letter was delivered to the court on 31st January 2008. The first respondent's counsel paid for copies of all the documents on the same day and he collected the same.

That being the case, how can the first respondent state in paragraph 6 of his affidavit that it was on 1st February, 2008 when his attention was drawn to a publication in the “**Daily Nation**” newspaper regarding the notice of presentation of the petition as well as the publication in the Kenya Gazette being service of the petition? Equally, can there be any iota of truth when the first respondent depones in paragraph 15 of his affidavit that he instructed his advocates on 8th February 2008? I do not think so!

I find this application not only lacking in merits but also premised on allegations which are not totally correct and truthful. I dismiss the same with costs to the petitioner. I will not award any costs to the second, third and fourth respondents because they neither filed any replying affidavit nor attended court when the application was argued.

Their advocate, Mr. Mbeja, was in court when the hearing date was fixed by consent.

DATED, SIGNED AND DELIVERED at KISII this 13th March 2008

D. K. MUSINGA

JUDGE

13/3/2008

Before D. Musinga J.

Mobisa cc

Mr. Omboga – HB for Mr. Muigai for the Petitioner.

Mr. Nyatundo & Mr. Ochwangi H/B for Mr. Orenge for the first respondent.

Mr. Onyinkwa for the second third and fourth respondents.

COURT: Ruling delivered in the open court in the presence of the above advocates.

D. MUSINGA

JUDGE