



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ELECTION PETITION 2 OF 2008

**IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT
(CAP 7) LAWS OF KENYA AND THE PRESIDENTIAL ELECTIONS REGULATIONS, THE
NATIONAL ASSEMBLY ELECTIONS (ELECTION PETITION) RULES AND THE ELECTION
OFFENCES ACT (CAP 66) LAWS OF KENYA.**

AND

**IN THE MATTER OF THE PARLIAMENTARY ELECTIONS FOR BOMACHOGE
CONSTITUENCY**

BETWEEN

SIMON NYAUNDI OGARI 1ST PETITIONER

ZAPHANIAH MORARO NYANG'WARA 2ND PETITIONER

VERSUS

1. JOEL OMAGWA ONYANCHA) 1ST RESPONDENT

2. TOBIAS GITAHU MACHARIA) 2ND RESPONDENT

3. ELECTORAL COMMISSION OF KENYA) 3RD RESPONDENT

RULING

On 11th February, 2008, the first respondent filed an application by way of notice of motion brought under **Section 21(3)** of **The National Assembly and Presidential Elections Act** Cap 7 and **Rules 13** and **15** of the **National Assembly Elections (Election Petition) Rules**. He sought the following orders:

“1. That this Honourable Court be pleased to strike out and dismiss this petition.

2. That the petitioners be ordered to pay the costs of the petition and that of this application.”

The application was made on grounds that:

(a) The petitioners failed to comply with the mandatory Provisions of **section 21** of the **National Assembly and Presidential Election Act** Cap 7; (hereinafter referred to as “**The Act**”)

(b) The first respondent has never been served with the Notice of the presentation of a petition as mandatorily required by the provisions of **rule 15(sic)** of the National Assembly Elections (Election Petition) Rules, hereinafter referred to as “**Election Petition Rules**”.

(c) The “**Receipt**” of the petition by the Registrar is defective.

(d) There is no provision for joint petition under our election Laws and Rules.

However, during the hearing of the application grounds (c) and (d) above were not argued and they were deemed as having been abandoned. This ruling is therefore in respect of grounds (a) and (b) only.

The application was supported by an affidavit sworn by the first respondent. He deposed that he was duly elected as the Member of Parliament for Bomachoge Constituency in the 10th Parliament. He stated that he was made aware of this petition through an advertisement in “**The Standard**” newspaper of 24th January, 2005 (sic). I believe the correct date is 24th January, 2008. The applicant purported to have annexed a copy of the advertisement that was carried by the said newspaper but what was annexed and marked as

“**OJO 1**” is a copy of an advertisement published in “**The East African**” newspaper and not “**The Standard**” newspaper.

He further deposed that he had been advised by his Advocates that it was a mandatory requirement under the provisions of Election Petition Rules that a party named in an election petition must be served with a Notice of Presentation of the Petition accompanied by a copy of the petition within ten (10) days of presentation of the petition. In this matter, he was not served with the notice of presentation of the petition, he stated.

The applicant went on to state that he had further been advised by his advocates that the petition had never been received by the Registrar and the document that was purported to be a “**Receipt**” by the Registrar was undated and did not bear the name of the Registrar who allegedly received the petition and also did not have a stamp of the Registrar.

The applicant added that on 28th January, 2008, his advocates wrote to the Deputy Registrar, High Court of Kenya at Nairobi, and requested to be supplied with copies of the petition, Notice of receipt of the petition, Receipt of filing fees, Notice of filing petition and Receipt for payment of security for costs. His advocates then realized that no deposit for security had been made by the petitioners.

Mr. Osoro for the applicant made brief submissions in support of the application. Regarding service of the petition, he submitted that the applicant had on 21st January, 2008 filed a Notice of Appointment of Advocates through his advocates, Osoro Juma & Company. The said notice disclosed both physical as

well as postal addresses of the said advocates. The notice was served upon the petitioners' advocates yet the petitioners did not serve the applicant through his advocates or by registered post, Mr. Osoro stated. Counsel cited **ABU CHIABA MOHAMED VS MOHAMED BWANA BAKARI & 2 OTHERS** Civil Appeal No.238 of 2003.

I will revert to the relevant holding of this decision later in this ruling.

On the issue of deposit of money as security for costs, Mr. Osoro conceded that the Act does not expressly prohibit filing of a joint petition but added that where there are more than one petitioners, each of them should deposit

Kshs.250, 000/=. In this petition, only the first respondent had made that deposit, he submitted.

Touching on the grounds of the petition, Mr. Osoro submitted that there were no specific and separate allegations of malpractices made against the first respondent by each of the petitioners. In his view, the allegations were jumbled up and that rendered the petition incompetent.

The applicant's counsel also took issue with the first petitioner's replying affidavit, saying that it bore the court date stamp of 5th February, 2008 whereas the applicant's application was filed on 11th February, 2008.

In my view, this was not an issue worth raising because it is clear that the replying affidavit was sworn on 14th February, 2008 and the filing Receipt No.1326080 is dated 15th February, 2008. It is unfortunate that the court date stamp was not properly set or was malfunctioning and it did not indicate the proper date of filing. It showed 5th February 2008 instead of 15th February, 2008. I say so because even the first respondent's application which was clearly filed on 11th February, 2008 had a date stamp of 1st February, 2008 and someone had to correct the date by hand to read 11th February, 2008.

Mr. Omwanza for the second and third respondents supported the first respondent's application. He submitted that under **section 21** of Act, security for costs should be given not more than three days after the presentation of a petition. In an affidavit sworn on 20th February, 2008 by Samuel Mutua Kivuitu, the chairman of the third respondent, he deposed that he had been informed by the third respondent's advocates, and which information he believed to be true, that there was no deposit for security for costs which had been made within the stipulated period of time and therefore the petition was incompetent.

Alternatively, Mr. Omwanza argued that if at all the first petitioner made the deposit on 18th January, 2008 as alleged, that payment was made on the fourth day after the filing of the petition which was not within the time prescribed under section 21 of the Act. Counsel urged the court to read

section 21 of the Act together with **Rule 12** of the **Election Petition Rules** which provides:

“12(1) The deposit of money by way of security for payment of costs, charges and expenses payable by the petitioner shall be made by payment to the Registrar, and such deposit shall be vested in and drawn upon from time to time by the Chief Justice for the purposes for which security is required by these Rules.

(2) The Registrar shall give a receipt for any such deposit and shall file the duplicate of the receipt, and shall keep a book, open to the inspection of all parties concerned, in which shall be entered from time to time the amount and the petition to which it is applicable.”

Mr. Omwanza further stated that at the time of perusal of the petition file and the book or Election Petition Register, there was no indication that any deposit had been made.

He cited the Court of Appeal decision in **ROTICH SAMUEL KIMUTAI VS EZEKIEL LENYONGOPETA & 2 OTHERS**, Civil Appeal No.273 of 2003 (unreported) where the Court held that **section 21** of the Act was expressed in peremptory language that the requisite deposit had to be made “**Not more than three days after the presentation of a petition**”.

He urged the Court to dismiss the petition in terms of the provisions of **section 21(3)** of the Act.

In response, Mr. Katwa for the petitioners submitted that under **section 21** of the Act, the security required to be deposited was fixed by the legislature at Kshs.250, 000/= and no more. There was no requirement that where there were more than one petitioners each petitioner had to deposit Kshs.250,000/= as submitted by the applicant’s advocate.

He added that the petition was filed on 15th January, 2008 and the deposit for security for costs was made on 18th February, 2008. He referred to Receipt No.B511736 dated 18th February, 2008 which was issued to his firm upon payment of Kshs.250, 000/= vide cheque No.107021 of the same date. A copy of the said Receipt was annexed to the first petitioner’s replying affidavit. The petitioners were not responsible for any mistake that may have been occasioned by the court staff or the Registrar in the Election Petition Register by failing to enter therein the aforesaid payment, Mr. Katwa added.

Counsel further denied that the deposit was made outside the stipulated period of time as alleged by Mr. Omwanza. He asserted that the deposit was made on the third day after presentation of the petition. In his view, Mr. Omwanza was not right in his computation of time.

Mr. Katwa went on to submit that **section 2** of the Act did not state how time is computed in petition related issues.

Where the Act or the Rules are silent, the Civil Procedure Rules can be called in aid as was held in **JAHAZI VS CHEROGONY** [1984] KLR 814, he added. In that regard, he referred to **Order XLIX rule 7** of the **Civil Procedure Rules**.

The same provides that:

“7. In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.”

Regarding service of the petition, Mr. Katwa submitted that the petitioners exercised due diligence in an effort to effect personal service upon the first respondent. The Process Server was unable to trace the first respondent and as a result the petitioners decided to effect service by substituted service. He referred to the affidavit of service that was sworn by one Harrison Ogola, a licenced Court Process Server, on 8th February, 2008. The Process Server detailed what he did between 18th January, 2008 when he was instructed to serve the petition and 23rd January, 2008 when he realized that his efforts to effect personal service were unfruitful.

It is important that I reproduce a few paragraphs of that affidavit of service as hereunder:

“AFFIDAVIT OF SERVICE

I HARRISON OGOLA of Post Office Box Number 22110 –00100 Nairobi in the Republic of Kenya do make oath and state as follows:

1. THAT I am a licenced Court Process Server duly authorized by this honourable court to effect its

process.

2. ***THAT on 18th day of January 2008, I received an election petition dated 15th January, 2008 from M/S KATWA & KEMBOY ADVOCATES with instructions to serve the same upon the respondents herein.***
3. ***THAT on the same date at 2.30 p.m. I proceeded to Continental house where the 1st respondent has an office as a member of Parliament for Bomachoge Constituency with intent to serve him but to no avail.***
4. ***THAT on the 21st day of January 2008, at 11 a.m I proceeded to Ministry of sports, Gender and Social services situated in NSSF building where the 1st respondent is an Assistant minister with intent to serve him but was not in office.***
5. ***THAT on the 22nd of January 2008, at 10.30 a.m. I proceeded again to Continental house to effect service on the said 1st respondent but to no success.***
6. ***THAT on the same date at the same time I was reliably informed by the Police Officer Manning the Continental house gate that the 1st respondent was attending a party of National Unity (PNU) meeting at KICC where I proceeded to effect the said service on him.***
7. ***THAT I waited at KICC till 1.00 p.m. when the meeting was over after which I confronted the said 1st respondent with service who in turn became arrogant by throwing the papers at me and ordering his security detail to shove me away who did exactly that.***
8. ***THAT on the same date at 3.30 p.m. I proceeded to the 3rd respondent's offices situated in Anniversary Towers where I effected service on the Legal Officer to the said 3rd respondent who accepted service by stamping and signing on the back side of the original copy which I return to this court duly served.***
9. ***THAT on the 23rd day of January, 2008, I was reliably informed from the Continental House that the 1st respondent was attending a PNU re-treat at Safari Park Hotel where I proceeded to serve him but arrogantly refused to accept service.***
10. ***THAT on the same date after discovering that my effort to serve the 1st respondent were unfruitful, I therefore advised my Principals to conduct the said service by way of advertisement pursuant to section 20(1) (c) (iv) of the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya."***

On 24th January, 2008 service was effected by an advertisement in the "DAILY NATION" newspaper and on 26th January, 2008 in a Kiswahili newspaper known as "TAIFA LEO." There is also evidence by way of an official Receipt issued by the Government Press that on 24th January, 2008 the Petitioners' advocates paid a sum of shs.8, 205/= for publication of service of the petition in the Kenya Gazette.

It was not denied that such service was published in the Kenya Gazette. In Mr. Katwa's view, personal service was effected upon the first respondent but when he refused to accept service, substituted service was resorted to as an act of abundant caution. Counsel also cited **ABU CHIABA MOHAMED VS. MOHAMED BWANA BAKARI & 2 OTHERS** (Supra) as the leading authority on the issue of service of an election petition.

Regarding the Notice of Appointment of Advocates wherein the first respondent instructed the firm of Osoro Juma & Company Advocates to act for him in this matter,

Mr. Katwa stated that the notice that was filed on 21st January, 2008 was defective because the same had not been signed by the first respondent as required under **Rule 10** of the Petition Rules. The Petitioner's advocates could not therefore serve M/s. Osoro Juma & Company Advocates because they were not properly on record. He urged this court to dismiss the first respondent's application as lacking in merits.

Having summarized the main arguments that were raised by all the parties, it is clear that the issues for this court's determination are:

- (a) Whether service of the Petition was properly effected upon the first respondent.
- (b) whether the petitioners gave security for costs as required under **section 21(1) and (2)** of the Act.

I now proceed to determine the above issues as hereunder.

A) **SERVICE OF THE ELECTION PETITION**

The first respondent was declared as the duly elected Member of Parliament for Bomachoge Constituency following Parliamentary and Presidential elections that were held on 27th December, 2007. The Petitioners were among the unsuccessful candidates in the said elections.

They were dissatisfied with the outcome of the elections and on 15th January, 2008 filed a petition to question the validity of the election in the said Constituency.

Section 20(1) (a) of the Act requires that such petition shall be presented and served within twenty-eight days after the date of publication of the result thereof in the Gazette. There is no allegation that the same was not presented within the stipulated period of time. What the first respondent is arguing is that he was not served with a Notice of the presentation of the Petition accompanied by a copy of the petition within ten days of the presentation of the petition in terms of **Rule 14** of the **Election Petition Rules**, although in his application he referred to Rule 15 which is not relevant.

However, following the filing of the petition, the petitioner's advocates instructed a Process Server to effect personal service upon the first respondent. The Process Server deposed in his affidavit that on 22nd January, 2008 at about 1.00 p.m. outside KICC, Nairobi, he served the first respondent with the Petition documents but the first respondent threw back the papers at him. Again on 23rd January, 2008, at Safari Park Hotel, the Process Server served the first respondent with the Petition documents but the latter refused to accept service. The affidavit of service was filed on 11th February, 2008, the same date the first respondent's application was filed.

When this matter was mentioned before this court on 11th February, 2008 for purpose of fixing hearing dates, the affidavit of service was on record. Since then, no effort was made by the first respondent to challenge the contents of the said affidavit either by filing a reply thereto or by applying to cross examine the Process Server. In the circumstances, it must be taken that the said depositions by the Process Server are factually correct.

This Court was referred to the Court of Appeal decision in **ABU CHIABA MOHAMED VS MOHAMED BWANA BAKARI** (Supra) on the issue of service of election petition documents.

I have carefully perused that decision. My understanding of the **ratio decidendi** of that authority is that the court appreciated that personal service was the best method of service in all areas of litigation but where concerted effort had been made to effect personal service without any positive results, alternative modes of service could be resorted to.

In that case, the petitioner and his advocate had made strenuous and concerted efforts to personally serve the member of parliament but were unsuccessful. Omolo J. A, commenting on the issue stated:

“Put simply, the appellant in this case cannot be allowed to rely on his having successfully hidden himself from the attempts of the 1st Respondent to personally serve him to defeat the 1st Respondent’s petition challenging the validity of his election as Member of Parliament for Lamu Constituency. The effort made by the 1st Respondent to personally serve him amounted to personal service on him and the learned Judge was right in holding that he had been served.”

In the matter before me, I hold that the first respondent was personally served but refused to accept service. That notwithstanding and for avoidance of doubt as regards service, the petitioners also served the first respondent by way of advertisement in the Kenya Gazette, the “**Daily Nation**”

and “**Taifa Leo**” newspapers.

That was done pursuant to the provisions of section 20(1)(c) (iv) of the Act which provides:

“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 said advertisements, the first respondent was notified that true copies of the petition could be obtained at the office of the Registrar of the High Court of Kenya at Nairobi or from the offices of the Petitioners’ advocates. The first respondent’s advocates proceed to write to the Deputy Registrar to supply them with all the petition documents as detailed in their letter of 28th January, 2008. The documents that were filed by the petitioners were or ought to have been supplied to the first respondent upon the said request. The Notice of presentation of a petition which the first respondent alleged he was not served with is in the court file and it must be presumed that it was furnished to his advocates. If for any reason the said notice was not supplied by the court, the first respondent cannot blame the petitioners because he had earlier refused to accept the full set of election petition papers that were tendered to him by the court Process Server.

My conclusion on the issue of service is that personal service of the petition was effected upon the first respondent. The petitioners went further to effect substituted service, having exercised due diligence in serving the first respondent with the petition and the latter having refused to acknowledge personal service.

B) SECURITY FOR COSTS.

Section 21 (1) and (2) of the Act stipulates that:

“(1) Not more than three days after the presentation of a petition, the petitioner shall give security for the payment of all costs that may become payable by the petitioner.

(2) The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money.”

Both Mr. Osoro for the first respondent and Mr. Omwanza for the second and third respondents urged this court to dismiss the petition in accordance with the provisions of **section 21(3)** of the Act because the petitioners had not provided the required security for costs. Alternatively, Mr. Osoro argued, each petitioner should have deposited Kshs.250, 000/= as security for costs. Mr. Omwanza further contended that if at all the petitioners had deposited the said security, they did so outside the stipulated period of time.

From the evidence on record, I am satisfied that the petitioners paid Kshs.250, 000/= as security for costs and they were issued with a receipt. The payment was made vide **Cheque No.107021** on **18th February, 2008**. The High Court registry at Nairobi may have made a mistake in filing the Receipt for the aforesaid payment in a different file. I say so because on 8th February, 2008 when several Election

Petition files were forwarded to this High Court Station from the High Court registry at Nairobi, upon perusal of the files, this particular file did not contain any receipt evidencing payment of any security for costs whereas the file in respect of Election Petition No. 3 of 2008, **MANSON OYONGE NYAMWEYA VS JAMES OMINGO MAGARA & 2 OTHERS**, contained two such receipts. It was clear that the Receipt in respect of this matter had inadvertently been misfiled. The clerk to this court removed the misfiled receipt from the aforesaid file and filed it in its proper file. I must add, that was done on 8th February, 2008 before the first petitioner filed his application. It is something that the Court Clerk did administratively.

The payments for security for costs in the two matters were made on the same day and the serial numbers on the respective Deposit Receipts follow one another closely and in my view, the misfiling of the receipt was purely inadvertent. In any event, this fact was brought to the attention of all the advocates herein on 11th February, 2008 when the matter came up for mention. Mr. Nyakeno was holding brief for Mr. Osoro for the first respondent and he had informed the court about the application which had just been filed. He indicated that they had perused the court file at the High Court registry, Nairobi, and noted that no security for costs had been provided.

My finding on the question whether the petitioners paid Kshs.250, 000/= as security for costs is that they did so on 18th February, 2008. Mr. Osoro urged the court to find that since the payment was effected by way of a cheque and not **“by deposit of money”** as required under **section 21(2)** of the Act, the petitioners were in breach of a mandatory provision of law and consequently their petition was incompetent. In his view, **“money”** meant cash and not a cheque.

To construe the definition of money in the manner suggested by Mr. Osoro would be vain pedantry and contrary to the Court of Appeal holding in **ROTICH SAMUEL KIMUTAI VS EZEKIEL LENYONGOPETA & 2 OTHERS** (Supra) that a deposit made upon the filing of an election petition towards security for costs in the form of cash, banker’s cheque or personal cheque is sufficient compliance with the provisions of **section 21** of the Act.

The next issue that I have to decide regarding the deposit of money for security for costs is whether, where there are two petitioners each is required to deposit Kshs.250, 000/=. I do not think so. The language of **section 21(2)** of the Act is clear beyond peradventure. The subsection reads:

“(2) The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money.”

In my view, where an election petition is presented by more than one person (I may add that I am not aware of any legal provision that prohibits so doing) the deposit for security for costs remains Kshs.250, 000/=. If the intention of the Legislature was otherwise, nothing would have been easier than to state so clearly. The words of Githinji J. A. in **ABU CHIABA MOHAMED VS MOHAMED BAKARI & 2 OTHERS** are apt in construction of the above subsection.

He stated:

“The purpose of the construction of a statute is to find out the intention of Legislature. If the words of the statute are clear and unambiguous effect must be given to them for the statute speaks the intention of the Legislature. It is not permissible in construction of statutes to imply a provision in the statute which is inconsistent with the words expressly used.”

With respect, I am in total agreement with Githinji J. A. and I do not see how the provisions of the said subsection can be construed to require deposit of any sum in excess of Kshs.250, 000/-. I reject Mr. Osoro’s submissions on the issue.

Turning to Mr. Omwanza’s submissions, I have already held that the petitioners deposited the required security. Once a litigant pays money into court and is issued with an official receipt in acknowledgment of that payment, he cannot be held liable for any failure on the part of the court to keep its records

properly. The Election Petition Register is maintained by the Registrar. The Petitioners herein had nothing to do with it. It is a matter of common sense that the information in the Register is extracted from the contents of an election petition file. It follows, therefore, that if a receipt for a payment that has been made is not filed in a given election petition file, that omission will be replicated in the Register. That explains why the Register did not show that the petitioners had paid the deposit, the payment receipt having been misfiled as already stated.

Mr. Omwanza's alternative submission was that the deposit was not paid within the stipulated period of time.

The petition was filed on 15th January, 2008 and the deposit was paid on 18th January, 2008. According to his computation of time, the last day for payment of the deposit in this case was 17th January, 2008.

This submission raises the issue of computation of time in election petitions. The National Assembly and Presidential Elections Act is silent as to how time ought to be computed under the Act. Whereas the Act is a complete Code for all matters of election petitions, where the Act and the Rules made thereunder are silent about any procedural matter, resort may be had to the Civil Procedure Rules; see ALICEN CHELAITE VS DAVID MANYARA & 2 OTHERS, Civil Appeal No.150 of 1998 (unreported).

I agree with Mr. Katwa that if time is computed as stated in Order **XLIX rule 7** of the **Civil Procedure Rules**, that is, excluding the 15th of January when the petition was filed, the last day for paying the deposit would be 18th January, 2008. In my views the words "**Not more than three days after the presentation of a petition**" mean that the deposit of Kshs.250, 000/= must be paid within three days **after** the date on which the election petition is presented. It logically implies that the date on which the election petition was presented has to be excluded from the three days but the last and third day has to be included. To construe **section 21(1)** in the manner that was suggested by Mr. Omwanza would be to reduce the statutory period to two days.

I am satisfied that the security for costs was given within the required period of time.

Having dealt with all the issues that were raised in this application, the end result is that the application is dismissed with costs to the petitioners.

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

D. K. MUSINGA

JUDGE

13/3/2008

Before D. Musinga J

Mobisa – cc.

Mr. Osoro for the first Respondent

Mr. Ochwangi H/B for Mr. Momanyi for the second and third Respondents and also H/B for Mr. Katwa for the Petitioner.

Court: Ruling delivered in the Open Court in the presence of the above advocates.

D. MUSINGA

JUDGE

