REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Election Petition 1 of 2008

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

AND

IN THE MATTER OF THE ELECTIONS FOR KITUI CENTRAL CONSTITUENCY

BETWEEN

BERNARD MWENDWA MUNYASIA ……...……..…. PETITIONER

VERSUS

CHARITY KALUKI NGILU ……..…..... 1ST RESPONDENT

GEOFFREY N MUTHINJA ……..….... 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA ……..…..… 3RD RESPONDENT

RULING

Introduction

1. The Petitioner herein, Bernard Mwendwa Munyasya, was one of the candidates in the 2007 Parliamentary Elections in Kenya and his campaigns were conducted in Kitui Central constituency. The 1st Respondent, Charity Kaluki Ngilu was another such candidate and was eventually declared the Member of Parliament for the Constituency when her name was published in a notice in the Kenya Gazette of 30/12/2008 by S.M. Kivuitu, Esq, Chairman of the Electoral Commission of Kenya.

2. On 25/1/2008, the Petitioner filed his Petition challenging the election of the 1st Respondent and at paragraphs 11,12, 13, 14 and 15 thereof detailed out allegations of impropriety on the part of all the Respondents leading to his conclusion that the election was rigged, unfairly conducted, interfered with, unduly influenced and that the same should be nullified.

3. On 11/2/2008, the 1st Respondent (hereinafter referred to as "**the Applicant**") filed a Notice of Motion premised on section 20 (1) and proviso (iv) thereof, section 22 of the National Assembly and Presidential Elections Act, the schedule to the Statute Law (Miscellaneous Amendments) Act, 2007, the inherent power and jurisdiction of the Honourable Court and all other enabling provisions of the law. The

simple prayer was that "**the petition be struck out and/or dismissed"** and that costs be provided for.

Submissions and Case for the Applicant and 2nd and 3rd Respondents

4. In an Affidavit sworn on 9/2/2008, the Applicant, depones that her election was published in the official Gazette on 30/1/2008 and by dint of section 20 (1) (a) of the Act, the Petitioner ought to have presented (by filing) and served the petition on her within 28 days of that date. That the Petitioner never served her personally but on 1/2/2008 she saw a notice in the "**Daily Nation"** newspaper of 26/1/2008 informing her that a Petition against her had been filed and that she could obtain a copy of the Petition from the Registrar of the High Court. She also saw a copy of the Kenya Gazette for 29/1/2008 where the same notice had been published. Advice, given by her lawyers subsequently, was that the petition was invalid for reasons that it had not been properly served on her and the same should be struck out.

5. Mr Orengo, learned advocate for the Applicant argued that no service under section 20 (1) (a) was made on the Applicant and the attempts at service as explained by the Petitioner and a process server, Ibrahim Wafula Lubia in their Affidavits in reply could not amount to "**due diligence"** in terms of proviso (iv) to section 20 (1) of the Act. The reason for that submission was that the last practical date for filing the Petition was 25/1/2008 and the Petitioner's attempts to serve the Petition at Safari Park Hotel and Intercontinental Hotel, both in Nairobi, on the same day would show that the Petitioner was desperate and had no opportunity to exercise due diligence. In court, Mr Orengo pointed me to the case of **Abu Chiaba Mohamed vs Mohamed Bakari – C.A. 283/2003** where the process server made spirited efforts to serve the Petition but the Respondent cunningly went underground to avoid such service. Similarly, he highlighted the attempts, later futile, to serve the Petition in **Ntoitha M'mithiaru v Richard Maoka Maore & Others – C.A. 272/2003.**

6. That since therefore the Petition was not properly served within 28 days, then the same must be struck out as is the law. In support of this point, Mr Orengo relied on the decisions in:

i. Muiya vs Nyaga & Others (2003) 2 EA 616

ii. Alicen Chelaite vs David Manyara C.A. 150/1998

iii. Devan Nair vs Yong Kuang Teik (1967) 2 AC 31

iv. David Murathe vs Samuel Macharia C.A. 171/1998

v. Kibaki vs Moi (2000) 1 E.A. 115

vi. James Osogo vs Nicholas Mberia C.A. 238/2003

vii. Ephraim Njugu Njeru vs Justin Muturi C.A 314/2003.

7. In all the decisions, it was generally held that where a Petition is not filed and served within the requisite period, the same is rendered invalid and ought to be struck out and in the **Devan Nair** case (supra), it was in fact dismissed.

8. Mr Mutua for the 2nd and 3rd Respondents while supporting the applicant's position, saw a lack of clarity in proviso (iv) of section 20 (1) of the Act and he was uncertain as to its exact import with regard to service of the Petition.

Submissions and Case for the Petitioner

9. Mr Katiku who appeared for the Petitioner forcefully opposed the Application and relied on two affidavits sworn on 4/3/2008 by the Petitioner and one Ibrahim Wafula Lubia, a process server. With regard to the matter before me, their response is straight-forward; that the Petition was filed on 25/1/2008 and that "**newspapers"** had ran a story that "**there would be a seminar for MPs in Safari Park Hotel**

on the subject of Constituency Development Fund usage" and that at 12.00 p.m they proceeded to "**Safari Park Hotel in order to serve the Petition on the 1st Respondent"** but they could not find her there. On the same day at 2.00 p.m they proceeded to the Intercontinental Hotel but again the 1st Respondent was not there. Thereafter, no other efforts were made to serve the Petition personally but the notice of filing of the Petition was published in the "**Daily Nation"** and "**Taifa Leo"** daily newspapers on 26/1/2008 and in the Kenya Gazette on 29/1/2008. That although the payment for the Kenya Gazette notice was made on 25/1/2008, the notice was only published on 29/1/2008 but either way, the Petitioner had fully complied with the 28 days rule for presenting and serving the Petition. Mr Katiku relied on the case of **Gitobu Imanyara vs D.T Arap Moi E.P 4/1993** where it was held in passing that once a notice is presented to the Government Printer within time, the Petitioner had no control over the actual date of publication and is deemed to have acted within the required time.

10. Further, that the Petitioner had met the "due diligence" test as he had actually made attempts at personal service but had failed, hence the substituted service. Mr Katiku relied on **Mulla, Act v, 1908** for a definition of "**due diligence"** which includes attempts made to effect service at a place where a process reasonably believes that the Respondent would be, at a particular time.

11. He distinguished all the authorities cited by Mr Orengo because they were decided long before proviso (iv) aforesaid was enacted. He asked that the Application be dismissed with costs for all the above reasons.

Issue (s) for Determination and Findings thereon

12. To my mind, having heard the very able submissions by all the advocates appearing, certain matters cannot be contested viz:

i. that no personal service of the Petition was made on the Applicant;

ii. the notices in the "Daily nation" and "**Taifa Leo"** were made within 28 days of the publication of the election results;

iii. the Kenya Gazette Notice was paid for within the 28 days aforesaid but actually published after the 28 days.

13. The only issue that therefore arises for determination is whether the Petition has been served in accordance with section 20 (1) (a) as read with proviso (iv) thereof. To address the issue, it is important that I should attempt an historical analysis of the situation leading to proviso (iv) aforesaid which for clarity of issues 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. ……

Provided that:-

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."

14. To my understanding, the problem that the proviso was attempting to address was one that was raised in a number of election petitions following the 1997 and 2002 General Elections. The problem was that Petitioners were faced with what looked like a legally and practically insurmountable hurdle viz personal service was impossible on powerful personalities in the names of the President and sitting members of Parliament. For example in **Kibaki vs Moi (2001) 1 E.A. 115** the Appellant had contended in the High Court that the massive security surrounding the Respondent, then the President, precluded personal service and therefore no effort had been made to do so. Similarly in **Abu Chiaba Mohamed vs Mohamed Bwana Bakari C.A. 238/2003** the same issue was discussed at length by the Court of Appeal which also dissected the reasoning behind **Kibaki vs Moi** (Supra) and upheld it. In the course of his judgment, Omolo J.A. stated as follows:-

"… **Parliament appears to have taken the matter in its own hand and will be dealing with it in due course. The published "The Statute Law (Miscellaneous Amendments) Bill, 2005 proposes in the 1st schedule thereof, the amendment of section 20 (1) (a) of the Act by deleting the words "and served" whenever they appear in paragraphs (a) and (b) of the section. If the amendment goes through, we shall revert to the old position which obtained before the passing of Act No. 10 of 1997 in the section which precipitated the decision in KIBAKI VS MOI and if those words are removed there will be no further problem."**

15. In fact what happened, so far as I know is that the amendment was not effected but by Statute Law (Miscellaneous Amendments) Bill 2007 proviso (iv) above was inserted and its meaning now confronts me. My view is that based on the mischief that the amendment sought to address, the operative words are "**due diligence"** and "**service."** This means that the holding in **Kibaki vs Moi** is still the law save for an answer to the problem of other modes of service inserted by the proviso aforesaid. Omolo J.A. stated as follows in the **Abu Chiaba** Case;

"…….**Kibaki vs Moi did not establish any principle that even where it is proved that a party to be served evaded service by hiding himself, or used physical force to prevent personal service or took refuge in a place where service of documents is not permissible, such as the House of Parliament, or used such other subterfuge to avoid being personally served, such a party must still be served or else the Petition would be struck out. The law will not and cannot permit such a party to rely on his wrong to defeat an otherwise valid petition."**

16. The learned Judge on the issue of personal service had this to say:

"**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 these applicable to other Kenyans cannot support the principle of equality before the law."**

17. In the **Abu Chiaba** Case, although the Respondent was not served, personally both the High Court and the Court of Appeal held firmly that he deliberately went underground to avoid service. To put that statement in its perspective, this is what was said by the Court of Appeal about attempts at serving him;

"**Faced with the motion to strike out his petition, the 1st Respondent swore a relying affidavit of some twenty two paragraphs and in that affidavit he set out in detail, the efforts his lawyers had made in order to serve the Appellant personally. Right from paragraph 5 of the 1st Respondents replying affidavit, he sets out how he knew that the Appellant was residing in House No. 12 along Ole Shapara Avenue in Nairobi, South 'C' Area and that he passed that information to his legal advisers to enable them serve the Appellant personally, obviously in order to comply with the decision of the Court in KIBAKI VS. MOI. That his legal advisers sent a process server Mwangi Kabaria to serve the Appellant at that known residence, how Mwangi Kabaria visited House No. 12**

on 28th January, 2003, how a grandson of the Appellant named Jamal Domilla and a watchman known as Mohamed Omar Ali Rotich were found there and told the process server that the Appellant had gone to Saudi Arabia. It was then suspected that the Appellant was hiding in order to evade service (paragraph 8) and that it was thought prudent to go and look for him at his Mombasa residence; that an Advocate called William Mogaka of Mombasa in the company of another process server Alexander Kaluve Musembei went to the Appellant's residence in Mombasa to personally serve him. This was still on 28th January, 2003. The process server was denied entry into the premises in Mombasa and when enquiries were made as to the whereabouts of the Appellant the advocate and the process server were told that the Appellant was away in Nairobi. Attempts were then made to determine the whereabouts of the Appellant and the 1st Respondent learned that the Appellant was in Nairobi and that he had not travelled to Saudi Arabia. The information was passed to the 1st Respondent's lawyers and on the same day, the lawyers sent documents by registered post to the Appellant's last known postal address. On 29th January, 2003, Joseph Mwangi Kabaria again visited the Appellant's South 'C' residence; once again the watchman informed Kabaria that the Appellant was in Mombasa. On 30th January, 2003 the 1st Respondent again accompanied William Mogaka and Alexander Kaluve Musembei went to the Appellant's residence in Mombasa and on arrival they met a lady who was identified by a watchman as the Appellant's wife and who drove off from the premises without acknowledging Musembei's attempts to explain the purpose of the visit. Musembei then pinned the documents intended to be served on the Appellant on the gate to the Appellant's premises and photographs showing this happening were attached to the replying affidavit. Mr Moses Gitau, who argued the 1st Respondent's appeal before us, also had published in the Gazette the filing of the petition. This was after the attempts to personally serve the Appellant had failed. There were also affidavits of service by Mr Moses Gitau and Alexander Kaluve Musembei. All these affidavits were served upon the Appellant's advocates and had the Appellant been minded to contest the veracity of their contents, he could have done so. The Appellant did nothing of the kind. All that Mr Mutula Kilonzo junior did on his behalf was to contend before us that all the allegations made in the affidavits show that the Appellant was not properly served according to law. Because the Appellant thought the judge was wrong in holding that he had been properly served and thus dismissing his motion to strike out the petition he now appeals to this court."

18. Compare those attempts at service with what allegedly transpired in the case before me. In paragraphs 5 and 6 of his Replying Affidavit aforesaid, the Petitioner depones as follows:-

"**THAT upon the presentation of this petition, I made various attempts to serve the Petition on Respondent 1 in the following ways:**

I had learnt from the Newspapers that on 25/1/08, there would be a Seminar for MPs in Safari Park Hotel on the subject of Constituency Development Fund Usage. Accordingly on that day at 12.00 O'clock or thereabouts accompanied by the Court Process Server by the name of Ibrahim Lubia, I went to Sarari Park Hotel in order to serve the petition on Respondent 1, but did not find her there.

On the same day at 2.00 O'clock or thereabouts, again accompanied by the Process Server Ibrahim Lubia I went to Intercontinental Hotel where I had information Respondent 1 was, in order to serve on her the petition. Unfortunately we did not find her.

That the process server has sworn an affidavit indicating the various attempts made by myself to serve this petition on Respondent 1 (annexed hereto and marked "BM 1" is a copy of the process server's affidavit).

THAT having failed in my attempts to serve Respondent 1 with the petition, I instructed my Advocates to publish the presentation of the Petition in the Kenya Gazette, Taifa Leo and in the Nation newspaper."

19. Since personal service is still the best mode of service, for a party, in my view to invoke proviso (iv)

he must show that he tried with "**due diligence"** to effect service and having failed to do so, used the substituted mode of service in the proviso. This is why the proviso commences with the words "**where after due diligence it is not possible to effect service under paragraphs (a)…"** Granted, and I agree with the submissions by Mr Mutua to that extent, the proviso may not be elegant in expression but the intention of the Legislature from what I have said elsewhere above was neither to extend the time of service nor the period of presentation of the petition but the mode of service where personal service was impossible. If it were otherwise, then the amendments proposed in 2005 would have been passed as well set out by Omolo J.A. (above). In any event, I am not minded to think that the proviso was ever intended to take away the mandatory provisions of section 20 (1) (a) regarding the time within which a petition was to be presented and served.

20. But in any event, what is "due diligence?" In **Wikipedia,** the **Free Encyclopedia** (www.wikipedia.org or fr. Wikipedia.org) it is said that the term first came to use as a result of the US Securities Act, 1933 which included a defense that was referred to as "**due diligence"** which could be used by Brokers-Dealers when accused of inadequate disclosure to investors of material information with respect to the purchase of securities. So long as the Broker-Dealers conducted a "**due diligence"** investigation into the company whose equity they were selling and disclosed to the investor what they found, they would not be held liable for information that failed to be uncovered in the process of that information.

21. Over time however, the term has slowly been adopted for use in other situations including criminal law, environmental law, information security law and civil litigation. Of relevance to the issue at hand are the following two definitions:

i. In **Black's Law Dictionary**, 8th edition;

"**diligent"** – "careful, attentive; persistent in doing something."

"**due diligence"** – "the diligence reasonably expected from, and ordinarily exercised, by a person who seeks to satisfy a legal requirement or to discharge an obligation."

ii. **Mulla the Code of Civil Procedure Act v of 1998** – in discussing substituted service of civil process the authors used the expression that "**after using all due and reasonable diligence"** to effect personal service then other modes of service can be resorted to. They add as follows:-

"**To justify such service, it must be shown that proper efforts were made to find the defendant e.g. that the serving officer went to the place or places and at the times when and where it was reasonable to expect to find him. Where there is no material on record to show that the applicant refused to receive the notice nor any effort on the part of the postal authorities to deliver the registered letter to any of the applicant's relations at the given addresses, then there is no justification to resort to substituted service "by way of publication."**

22. All these definitions are in line with the Court of Appeal decisions in **Kibaki vs Moi** and **Abu Chiaba** and which are now given effect by proviso (iv) to section 20 (1) of the Act. The question is, was the Petitioner in this case diligent enough to serve the Applicant personally and having failed, can the substituted service be of effect? Suppose he was not diligent, can the service still be upheld and the Petition left on record?

23. I have elsewhere above contrasted the service in **Abu Chiaba** with that in this case. Any reasonable tribunal can only but find that whereas in the former, there was genuine and proper exercise of due diligence, in this case, the Petitioner was in too much of a hurry to avoid section 20 (1) (a) and clutch onto the easier option of service under proviso (iv). I say this with respect because he had 28 days from 30/12/2008 to file and serve the Petition. As was said in **Alicen Chelaite David Manyara Njuki & Others – C.A 150/1998;**

"**By Act No. 10 of 1997… The words "and served" were inserted immediately after "presented" in**

it. The effect of this amendment is that not only that the petition must be presented within a period of 28 days but also served within the same period of 28 days of gazettment of the result of the election."

24. The Petitioner with 28 days to do both of the above acts waited until the last available day, a Friday, to file and attempt to serve the Petition. He made the first attempt at 12 p.m and the next at 2 p.m and then invoked his option to substituted service. I agree with Mr Katiku that it is entirely open to the Petitioner to exercise his rights at any time but the truth is that when he does nothing for 25 days and at the dawn of a weekend, wakes up to the reality facing him, then his space of maneuverability within the time given is that much limited. Even if, the 1st January 2008 was a holiday and the time was extended to 28/1/2008, the Petitioner acted nowhere near a diligent litigant ought to. This is what led the election court in **James Osogo vs Nicholas Mberia & Another E.P. No. 14/83 (Nairobi)** to state that the Petitioner and his advocates ought to have taken into all account all factors surrounding their Petition including the time by which the Government Printer must receive notices for publication in the Friday Gazette as well as the time within which to effect personal service.

25. Turning to the attempts at personal service, I have said that two attempts were made in a span of two hours to serve the Applicant in two separate hotels. The only reason why the process server went to Safari Park Hotel is because the Petitioner had seen a newspaper item that members of Parliament were attending a meeting there. The newspaper is not named and no reason or basis for saying that the Applicant would be there is given. What happened at Safari Park Hotel is completely left out of the explanation. How did the two know that the Applicant was going to be there and how did they know that in fact she was not there? Who did they speak to or inquire of the whereabouts of the Applicant? What of the visit to Intercontinental Hotel? Who informed them that the Applicant would be there at 2 p.m and what transpired when they went there? It is not enough, I think, to say that they could not get the Applicant and leave all details to conjecture.

26. It is clear that the Applicant's whereabouts is not limited to hotels in Nairobi. She has deponed that she has a home in Nairobi and at the Kitui Central Constituency (a place called Ithookwe). There is no evidence that any of these places were visited with the petition for service and that the Applicant deliberately avoided service, went underground or repelled such service. There is in fact no evidence of any contact between the Applicant and the Petitioner or process server during the relevant period and not one word has been put on record to explain that anomaly. Diligence denotes persistence and there was completely none exhibited in this case.

27. Having so said, it is not contested that the "**Daily Nation"** and "**Taifa Leo"** notices were published within time. I have said that even if the Petitioner was exercising the option under proviso (iv), the publications including the Kenya Gazette one must be done within the required 28 days. Can payment for publication be taken to be the same as publication? I have seen a receipt and pro forma invoice for publication of the Notice. In the **Gitobu Imanyara** (case) the court held as follows:-

"**In the instant case the petitioner has offered an explanation based on the fact that upon delivery in good time of the notice to the Government Printer he thereafter ceased to have any further control of its actual publication…"** (emphasis added).

28. In the present case, if the last attempt at service on the Applicant was made on 25/1/2008 at 2 p.m and thereafter payment made to the Government Printer, the Petitioner had no chance that the notice would be published on that late Friday afternoon. He cannot be in the same league as the **Gitobu Imanyara** case where the invoice was taken in good time and where Imanyara alleged direct and deliberate discrimination by the Government Printer to publish the notice in the earliest possible copy of the Gazette. In this case, in fact the Printer published the notice on 29/1/2008, a Tuesday, meaning that he only had Monday to prepare it for publication. The indolence is on the part of the Petitioner and I maintain that in all regards he acted without due diligence (see also **Ephraim Njugu Njeru vs Justin Bedan Muturi (2006) e KLR – C.A. 314/2003** on the status of a desperate Petitioner with little time to comply with the law.)

29. What then should I do in this case? I have taken time to reflect on the matter and I note that no personal service was effected on the Applicant and no due diligence was exercised to do so, yet partly there was compliance with the substituted service option available under proviso (iv) aforesaid – should I strike out the Petition as prayed? In **Devain Nair vs Yong Kuan Teik (1967) 2 A.C. 31**, it was held as follows:-

"**With respect to the Federal Court, their Lordships cannot attribute weight to the circumstances that the rules contained no express power to strike out a petition for non-compliance with rule 15… The election court must however have inherent power to cleanse its list by striking out or better by dismissing those petitions which became nullities by failure to serve the petition within the time prescribed by the rules."**

30. In the course of preparing this Ruling, I came across the decision of Ibrahim J in Mwita Wilson Maroa vs Gisuka Wilfred Machage & Another, E.P. No. 5/2008 (Kissi) where the learned Judge struck out the Petition where the Petitioner made only one attempt at personal service on 25/1/2008 at 12 p.m. I am alive to the emotive nature of election petitions and the requirement of public interest that the matters be heard and determined on their merits. In this case however, where the Petitioner fails to comply with section 20 (1) (a) and partly fails to comply with proviso (iv) to it, he is no better than one who has failed to file his petition within time and having failed to serve it within the law, it has to be struck out.

Conclusion

31. Striking out of any pleading is a drastic remedy and this court would be the last to wield that painful knife but the law as I understand it can only be upheld in that regard. To do otherwise would be to encourage parties to half–heartedly attempt compliance with section 20 (1) (a) and quickly rush to invoke the simpler option in proviso (iv). To allow them to do so would be tantamount to giving parties a free hand to abuse the process so painfully crafted into the law and by so doing abuse the process of this court.

32. With sympathy to the Petitioner, the Petition herein is struck out with costs to all the Respondents.

33. Orders accordingly.

Dated and delivered at Machakos this **29th** day of **April** 2008.

ISAAC LENAOLA

JUDGE

In the presence of: **Mr Mulyungi holding brief for Mr Katiku for Petitioner**

N/A for 2nd and 3rd Respondent

Miss Mutai for 1st Respondent

ISAAC LENAOLA

JUDGE