



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Election Petition 3 of 2008

JOSHUA MBITHI MWALYO.....PETITIONER/RESPONDENT

VERSUS

STEPHEN KIAO.....1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA.....2ND RESPONDENT

BENSON ITWIKU MBAI.....3RD RESPONDENT/APPLICANT

RULING

Introduction

1. On 25.1.2008, Joshua Mbithi Mwalyo (hereinafter referred to as “the Petitioner”) filed the present Petition challenging the election of Benson Itwiku Mbai as the member of Parliament for Masinga Constituency. In the Petition, a number of allegations of irregularities in the conduct of the Parliamentary elections in that Constituency are detailed out.

2. On 30.1.2008, the Petitioner filed a Notice of Motion under section 20(1)(iv) and section 23(1)(d) of the National Assembly and Presidential Elections Act, Order XLIX Rule 5 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking orders that time to effect service of the Petition on the 1st Respondent, Stephen Kiao and the 3rd Respondent, Benson Itwiku Mbai, be extended and that service be effected by notices in the Kenya Gazette and an English and Swahili languages daily newspaper. On 6.2.2008, the motion was placed before Kihara Kariuki, J who ordered it to be placed before the High Court in Machakos for directions. It was subsequently withdrawn on 11.2.2008 before this court could determine it.

3. On 8.2.2008 the 3rd Respondent, (hereinafter referred to as “the Applicant”) filed an Application under section 20(1) (a) of the National Assembly and Presidential Elections Act, Cap 7 Laws of Kenya (hereinafter referred to as “the Act”) seeking orders that the Petition be struck out on the ground that it had not been served on the Applicant within 28 days after the date of publication of the result of the Parliamentary Election in the Official Gazette.

Submissions and Case for the Applicant

4. The applicant in his Affidavit sworn on 8.2.2008 depones that the Petitioner has to-date not served the Petition on him and that he became aware of its existence when the Honourable the Chief Justice

published a notice on 1.2.2008 in local daily newspapers regarding the appointment of Election Courts, including this one. That apparently the Petition herein was one of those listed in that notice, and the Applicant having seen that he was a party to the Petition thereafter appointed counsel who obtained copies of the Petition from the court registry. Further, that since 25.1.2008, he was available in Nairobi and Masinga Constituency and the Petitioner had all the opportunities to effect service of the Petition but failed to do so.

5. Mr. Katiku, Advocate for the Applicant in clear and insightful submissions before me, urged the point that service of an election petition is mandatory and must be made within 28 days of publication of the results of an election by the 2nd Respondent, the Electoral Commission of Kenya. That in this case, neither personal service nor substituted service under section 20(1) (iv) was undertaken and no explanation for failure to do so was given by the Petitioner. That in the Replying Affidavit sworn by the Petitioner, it is merely stated that some unclear effort was made to effect service but particulars of such efforts are lacking. The consequence of such failure on that part of the Petitioner would result in the Petition being struck off and in support of that proposition, Mr. Katiku pointed me to the following authorities;

i. David Murathe vs Samuel Macharia C.A. 171/1998 where Pall J.A. held *inter alia* that a Petition not presented and served in accordance with the Act and the Rules is incompetent.

ii. Ephraim Njugu Njeru vs Justin Bedan Muturi [2006]eKLR- C.A. 314/2003 where it was held that where no service is effected on a Respondent to an election Petition within the given period under section 20(1) (a) then there is no valid Petition to be heard and determined.

Submissions and Case for the 1st and 2nd Respondents

6. Ms Muteti, Advocate for the 1st and 2nd Respondents wholly supported the position taken by the Applicant and argued that, like the Applicant, the 1st and 2nd Respondents take the view that there was before court an invalid Petition and the same ought to be struck out.

Submissions and Case for the Petitioner

7. The Petitioner filed a Replying Affidavit sworn on 6.3.2008 and in it, he depones at paragraphs 6,7,8,9 and 10 as follows:-

“6. That further, I was totally unable to get the results from the Electoral Commission offices at Anniversary Towers earlier until that day as they continually used to inform me that the same had not been received from Kenyatta International Conference Centre, where the results were being received and which place I had no access to.

a. That on the principle of due diligence on filing the Petition, travelled to the Applicant’s rural home at Masinga where I was unsuccessful in tracing him.

b. That I had, at the same time, sought to trace the residential premises of the Applicant, at the said time.

c. That between the 25th and the 28th of January, 2008, I only had three days to serve the Applicant and on which after due diligence I was unable to do so.

d. That subsequently filed an application to seek leave from the court to extend time of service, which application was deemed redundant by the Applicant coming on record.”

8. In his submissions in support of the above statements, Mr. Mbindyo, Advocate for the Petitioner spiritedly opposed the Application and argued that in an Affidavit sworn on 30.1.2008 in support of the withdrawn application for substituted service, one Julius Mutinda, a Process Server explained the various

attempts he had made to effect service on the Applicant. In that Affidavit, the said Mutinda merely stated at paragraph 2 thereof;

“ That I have perused the affidavit of Joshua Mbith Mwalyo and am in agreement with the contents relating to the attempt of service, upon the 3rd Petitioner herein as I accompanied the Petitioner to the rural home of the 3rd Respondent.”

9. Mr. Mbindyo on behalf of the Petitioner admitted that neither personal service nor substituted service was made on the Applicant but in his view section 20(1) (iv) of the Act allowed for service to be made after 28 days and once the Applicant instructed Counsel, then the need for service was spent. That therefore the Application was misguided and should be dismissed.

Issue for Determination and Findings.

10. To my mind, the Application before me is simple because it is admitted that no service of the Petition was effected on the Applicant as is the mandatory expectation of section 20 (1) (a) and proviso (iv) of the Act. For avoidance of doubt, the section provides as follows:-

“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.”

11. I should of course note that proviso (iv) was inserted by Act No. 7/2007 to address an issue which had bothered election courts in the past; deliberate avoidance of service by Respondents. One such case was Abu Chiaba Mohamed vs Mohammed Bwana Bakari [2005] eKLR- C.A.No. 238/2003 where the Court of Appeal held firmly that the Appellant had deliberately ***“gone underground with the sole purpose of evading personal service and that was why he could not be found in his two houses in Nairobi and Mombasa. Put simply he was hiding from those who intended to effect personal service.”*** The court went further to lay the law regarding service generally in matters of election petitions by reference to the case of Mwai Kibaki vs Daniel Tiroitich Arap Moi – C.A. 172/1999 and stated as follows:-

“Did Kibaki vs Moi establish any proposition that even where it be proved that a party was hiding with the sole purpose of avoiding personal service, yet such a party must still be served personally? The decision established nothing of the kind...”

The decision clearly recognized that if personal service is not possible other forms may be resorted to. Otherwise why would the court have expected to be given reason or reasons why personal service was not effected? Why would the High Court and this court have expected that some attempt at

personal service be tried on the President and be shown to have been repelled?”

12. Quite aware that Parliament was shortly to deal with the question, the court of Appeal remarked that **“Parliament appears to have taken the matter in its own hands and will be dealing with it in due course”** and the result is proviso (iv) to section (1) of the Act above.

13. What is my understanding of the proviso? Clearly, it was intended to aid a petitioner who after exercise of **“due diligence”** to effect personal service is unable and still unable to do so, then he may be allowed to serve by publication in the Gazette and an English and Kiswahili language daily newspaper with the highest national circulation.

14. Mr. Mbindyo has however urged an interesting point; that the proviso removed the need for a Petition to be presented and served within 28 days after the date of publication of the result of the election. That in fact service could properly be effected under the proviso outside of the 28 days. His authority for the proposition is the meaning and definition of **“proviso”** in the Law Lexicon at page 1552 but with tremendous respect to him, neither the law as I know it nor in fact the Law Lexicon supports his ingenious argument. One of the explanations /definitions in the Law Lexicon relating to a **“proviso”** is this;

“The office of a ‘proviso’ is to limit or restrict the general language preceding it. And not to enlarge the enacting clause.”

15. This is what proviso (iv) does because it does not enlarge or oust section 20(1) (a) which is the enacting clause. Section 20 (1) (a), it has been said time and again, expects that the Petition must be presented and served within 28 of the publication of the results. The Proviso does not change that mandatory provision but allows for other modes of service (other than personal service) but within 28 days as is clear from the enacting clause. Githinji J.A. said this in Ntoitha M’Mithiam vs Richard Maoka Maore & 2 others [2007] KLR- CA 272 2003- ***“section 20(1) (a) does not however present any mode of service. All it says is that it must be served upon the other parties within 28 days of the gazetting of the results.”***

16. As I said earlier, the proviso was inserted to address the modes of service where personal service cannot be effected, after exercise of due diligence. The period of presentation and service is not affected by the proviso otherwise if we were to take Mr. Mbindyo’s argument, the proviso would be akin to a repeal of the mandatory provision of section 20(1) (a) but clearly that interpretation is mistaken.

17. Mr Mbindyo argued that there was exercise of **“due diligence”** by the Petitioner. Sadly, the point is moot because it is admitted that service under section 20(1) (a) was not made, neither was service under proviso (iv). The Application to extend time to do so is a clear example of misguided reading of the law by the Petitioner. That Application would have been struck out had it not been withdrawn, but the fact remains that to-date no service by whatever means has ever been made on the Petitioner.

18. What then should this court do with a Petition which as not been served on the Applicant/3rd Respondent as is required by Law? No doubt such a Petition must be struck out. In David Wakahiu Murathe (supra) it was the holding of Pall ,J.A. that;

“Once a Respondent the validity of whose election is in issue in the Petition is served out of time, the Petition against all Respondents becomes incompetent including those who may have been served in time and it should be struck out straightaway against all of them as otherwise it would cause grave miscarriage of justice.”

19. In the instant case, apparently only the 2nd Respondent has been served at all and the Petitioner’s position is much worse than any case that I have perused because in fact not only did he fail to serve the 1st and 3rd Respondents within time, he in fact failed to serve them at all. It is of course as I said earlier, a mistake for him to have imagined that he could obtain more time to do so or that by the Respondents appointing advocates after the mandatory 28 days, the provision for service on them was dispensed with.

That position may have been tenable had the Statute Law (miscellaneous Amendments) Bill, 2005 become law. That Bill proposed to amend section 20(1) (a) of the Act by deleting the words “**and served**” whenever they appeared in paragraphs (a) and (b) of the section. The Court of Appeal in Kibaki vs Moi (supra) remarked as follows in that regard:-

“If the proposed amendment goes through, we shall revert to the old position which obtained before the passing of Act No. 10 of 1997. It was the introduction of the words “and served” in the section which precipitated the decision in Kibaki vs Moi and if those words are removed there will be no further problem.”

20. Sadly for the Petitioner, the Bill was not passed and Act No. 7 of 2007 did not remove the requirement for service within 28 days but only provided for alternative modes of service.

21. I need not belabour the point and will only refer parties to the following other decisions;

i. James Charles Nakhwanga Osogo vs Nicholas Kipchumba Mberia & Another - Election Petition No. 14/1998(Nairobi); where failure to serve a Petition within time led to its being struck out.

ii. C.Devan Nair vs Yong Kuan Teik[1967] 2A.C 31 where it was held that an election judge must have the inherent power to cleanse his lit by striking out or better by dismissing those

iii. petitions which have become nullities by failure to serve the petition within the time prescribed by the rules.

Conclusion

22. The Applicant beseeches this court to relieve him of the burden of defending this Petition. The law is on his side and without a measure of sympathy to the Petitioner, I must oblige. Granted, elections and not least the 2007 General Elections are time-consuming, pocket-draining and emotive. They have a way of engulfing one and all; the interest in post-election Petitions is always heightened by the great public concern it attracts but the law of this country must at all times have its way and this court will vigilantly uphold it.

23. I have said enough to show that the Application dated 8.2.2008 has merit and I am obligated to allow it and in so doing, order that the Petition dated 25.1.2008 be struck out and consequently dismissed with costs to all the Respondents.

24. Orders accordingly.

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

ISAAC LENAOLA

JUDGE

In the presence of: Mr. Makau h/b for Mr.Mbindyo for Petitioner

Mr. Mulyungi h/b for Mr. Katiku for Applicant

Mr. Mulwa h/b for Miss Muteti for 2nd Respondent

ISAAC LENAOLA

JUDGE

29/4/2008