



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Election Petition 4 of 2008**

MASUMBUKO MOHAMED OMAR PETITIONER

- Versus -

- 1. GUNDA BENEDICT FONDO 1ST RESPONDENT**
- 2. AHMED MOHAMED BASHIR 2ND RESPONDENT**
- 3. ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT**

R U L I N G

Following the National Assembly and Presidential Elections which were held in Kenya on 27th December, 2007, one Benedict Fondo Gunda was declared the duly elected member of the National Assembly for Bahari Constituency. That declaration was published in a special issue of the Kenya Gazette Vol. CIX-No. 103 Gazette Notice No. 12615 dated 30th December, 2007.

Dissatisfied with those results, one of the contestants who lost at Bahari Constituency, one Masumbuko Mohamed Omar, filed Election Petition No. 4 of 2008 on 29th January, 2008, challenging the election of Mr. Gunda, hereinafter referred to as the first respondent. In that petition, the returning officer who was one Ahmed Mohamed Bashir, and the Electoral Commission of Kenya were joined as the second and third respondents, respectively.

Before the court now is an application by Notice of Motion, dated 6th February, 2008. It is made under Section 20(1) and provision (iv) of Section 20(1), Section 22 of the National Assembly and Presidential Elections Act; 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. By that application the first respondent seeks from the court orders that:-

1. *The petition be struck out.*
2. *Costs be provided for.*

The application is supported by the annexed affidavit of GUNDA BENEDICT FONDO, the applicant therein, sworn on 6th February, 2008, and is premised on the grounds that:-

- (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 Petition and/or the notice of the presentation of the petition has not been served in accordance with Section 20(1) and 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.*
- (d) *The Honourable Court lacks jurisdiction.*

In opposition to the application, on 7th March, 2008, the petitioner swore and filed a replying affidavit. In that affidavit he deposes that the election result in issue was "published in the Kenya Gazette on 30th January, 2008" (sic). There were, however, public holidays immediately thereafter, to wit, on 31st December, 2007 and 1st January, 2008. Consequently, the 28 days provided for filing a petition to challenge the

said result expired on 29th January, 2008, and the petition herein was therefore filed within the prescribed time. He further avers that the first respondent was duly served with not only the petition but also the notice of presentation of the petition in time, and that the application herein is an abuse of the process of the court.

During the hearing of this application, Ms. Aulo appeared for the applicant while Mr. Gikandi appeared for the petitioner. Both the second and 3rd respondents were represented by Mr. Musyoka Annan. After considering the pleadings and the submissions of the three counsel, I find that there are four main issues for consideration and determination. These are:-

- (i) *Was the Election Petition herein presented within the period prescribed by law?*
- (ii) *Was the Election Petition served within the period prescribed by law?*
- (iii) *Was it served on the respondents as required?*
- (iv) *If any of the foregoing questions is answered in the negative, does the court have jurisdiction to strike out the petition?*
- (v) *If the court finds that the petition was presented and served out of time, should the court extend the time?*

With regard to the issue as to whether the petition was presented within the prescribed period, Ms. Aulo for the applicant argued that the determining date is the date when the results are published in the Kenya Gazette. In the instant case, the results were published on 30th December, 2007. In her submission, therefore, time started running on 31st December, 2007, and 28 days expired on 27th January, 2008. Consequently, anything filed after that date was time barred. She referred the court to DAVID WAKAIRU MURATHE v. SAMUEL KAMAU MACHARIA, Nairobi Civil Appeal No. 171 of 1998 and submitted that the Court of Appeal seemed to suggest therein that the only day to be excluded in computing the 28 days is the last day if it falls on an excluded day. For that reason she urged the court to reject the petitioner's plea that time started running on 2nd January, 2008, and that the petition was therefore presented on time. Mr. Musyoka Annan associated himself with these sentiments.

Opposing the application, Mr. Gikandi for the petitioner argued that the election court was only a branch of the High Court, and therefore the court was still sitting as the High Court as established by Section 60 of the Constitution. Arising from that, he submitted that the practice and procedure of the election court is to be found in the Judicature Act, Cap. 8 of the Laws of Kenya. Under rule 3 of the High Court (Practice and Procedure) Rules made under that Act, the Christmas Vacation in the Coast Province commences on the 21st December and terminates on the 4th February. Referring to Section 57 of the Interpretation and General Provisions Act, counsel submitted that time does not run during the vacation, and that it starts to run from 5th February.

Secondly, Mr. Gikandi argued that 31st December, 2007, was declared a public holiday. The next day was new year's day, which was also a public holiday. Therefore, these two days should not have been computed, and the 2nd January, 2008, was the first day of the 28 day period within which to present and serve the petition. It was therefore mischievous for the applicant to urge this court to find that the petition was filed out of time.

The genesis of these arguments may be traced to Section 20(1) (a) of the National Assembly and Presidential Elections Act which states:-

"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."

There is no dispute that the election results in this matter were published in a special issue of the Kenya Gazette dated 30th December, 2007. Since any petition questioning the validity of that election is required to be presented and served within twenty-eight days after that date, the question posed by Mr. Gikandi's argument was this – on what date did the 28-day period start running? Was it on 31st December, 2007, or on 2nd January, 2008? Common sense dictates that it should have started running on 31st December, 2007. However, that day was declared a public holiday. The following day, to wit, 1st January, 2008, was new year's day and, therefore, a public holiday. For these reasons, Mr. Gikandi submitted that the 1st day of the 28-day period was 2nd January, 2008. In so saying, he said that he stood guided by Section 57 of the Interpretation and General Provisions Act.

Section 57 of the Interpretation and General Provisions Act is in the following words:-

"In computing time for the purposes of any written law, unless the contrary intention appears:-

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.

(b) If the last day of the period is Sunday or a public holiday, or all official non-working days (which days are in this Section referred to as excluded days), the period shall include the next following day, not being an excluded day."

From paragraph (a) herein above, it is clear beyond peradventure that in computing 28 days in this matter, the 30th day of December, 2007,

on which the election results were published is to be excluded. The section does not say that the following day should also be excluded if it falls on a Sunday or public holiday. Therefore, it seems to me, and I so hold, that the first day of the 28-day period was 31st December, 2007, and not 2nd January, 2008, as claimed by Mr. Gikandi. Commencing the count on 31st December, 2007, if the 28th day fell on a Sunday, as it did, or on a day which was a public holiday, then the deadline automatically stood extended to the next following day. And if that next day were itself to be declared a public holiday, then the two day moratorium alleged by Mr. Gikandi would certainly have applied. In other words, the extension of time occurs if and when the last day for the doing of any act or thing falls on a Sunday or a public holiday or an official non-working day. It does not operate in the reverse when it is the first day for the doing of the act or thing which falls on an excluded day.

This view gains support from DAVID WAKAIRU MURATHE v. SAMUEL KAMAU MACHARIA, Nairobi Civil Appeal No. 171 of 1998. In that case the result of a by-election was published in the Gazette on 6th January, 1998. The petition was served on 5th February, 1998. Referring to the meaning of Section 57 of the Interpretation and General Provisions Act, Pall, JA, said:-

“What it means is that the period of 28 days for service should be computed excluding 6th January, 1998 and commencing from 7th January, 1998. It also means that if the said 28th day happens to be an excluded day or a holiday, service be considered as done on the next day afterwards not being an excluded day. As the 28th day was not an excluded day, the petition should have been presented and served on the appellant on 3rd February, 1998 ... Therefore, if the result of the election was published on 6th January, 1998, the period of 28 days would start running from 7th January, 1998 and end on 3rd February, 1998 unless 3rd February was an excluded day which it was not.”

Going by these words, I can therefore say that in the matter before this court, since the result of the election was published on 30th December, 2007, the period of 28 days started running on 31st December, 2007, and ended on 27th January, 2008, which was a Sunday. Therefore, the petition should have been presented by 28th January, 2008.

Mr. Gikandi introduced into the arguments the issue of court vacation at the Coast. He argued that the High Court was on vacation from 21st December, 2007 to 4th February, 2008, and that time did not run during that period. With respect, that cannot be so. The way I understand it, the court vacation does not constitute a barrier to the filing and service of court process. Pleadings should be and are always filed freely. The petition in this matter is itself a case in point. It was presented on 29th January, 2008, when the court was still on vacation. The court vacation, per se, was not a reason for not presenting the petition before 29th January, 2008. The presentation could have been made before that date, and without any let or hindrance.

This brings me to the issue of service. Section 20(1) (a) of the National Assembly and Presidential Elections Act is explicit that a petition questioning the validity of an election shall be presented and served within 28 days after the day of publication of the result of the election in the Gazette. The publication in this matter was effected on 30th December, 2007. Thereafter, it became incumbent upon the petitioner to effect service on the respondents within 28 days from that day. There is on record an affidavit of service sworn on 8th February, 2008, by one Abelazo M Mutua, an authorized court process server of this court. He deposes in that affidavit that on 31st January, 2008, he received notice, notice of acceptance and the petition of Masumbuko Mohamed Omar, all dated 28th January, 2008, from the firm of M/s G. A. Okumu & Co. Advocates, with instructions to effect service upon the respondents herein. In that affidavit he deposes in paragraph 3 thereof as follows:-

“THAT on 5th day of January, 2008, I while accompanied by the petitioners (sic) employee one SAID we proceeded to Kilifi Town where 1st respondent has personal office (sic) and we found his secretary one MARIAM OMAR whom we introduced ourselves (sic) and told her the reason and purpose of my visit and the said MISS MARIAM OMAR confirmed to me in the presence of the petitioners employee (sic) one SAID that she was authorized to receive all the documents on behalf of the 1st respondent. I therefore served all the documents herein upon her of which she accepted the same by signing and dating at the back of the originals.”

It is contradictory for the process server to aver that he served the documents on 5th January, 2008, when he received them on 31st January, 2008. All the parties are agreed that this was a clerical error and that the documents were indeed served on 5th February, 2008. Therefore nothing turns on that self contradiction.

Coming to the substance of that service, having found that the period of 28 days within which the petition should have been presented and served expired on 28th January, 2008, service on 5th February, 2008, was clearly out of time. Even if the time to present and serve the petition were to expire on 29th January, 2008, as claimed by the petitioner in his replying affidavit, service on 5th February, 2008 would still be out of time. Mr. Gikandi argued that Sundays should not be counted while computing the relevant period, and that if Sundays are counted out, then service was effected on time. He further argued that service was effected under rule 14 of the National Assembly Elections (Election Petition) rules. Rule 14(1) is in the following words:-

“Notice of the presentation of a petition, accompanied by a copy of the petition, shall, within 10 days of the presentation of the petition be served by the petitioner on the respondent.”

To the extent that this rule requires a copy for the petition to be served on the respondent within 10 days of the presentation of the petition, it is in direct conflict with Section 20(1) (a) of the Act whose requirement is that the petition be presented and served within twenty-eight days. This conflict has been acknowledged severally in the past, and if the debate thereon is still raging, I take the humble view that express statutory provisions take precedence over subsidiary legislation. In the event of any conflict between the two, the former prevails.

In this matter, therefore, I would hold that Section 20(1) (a) of the National Assembly and Presidential Elections Act takes precedence over rule 14(1) of the National Assembly Elections (Election Petition) rules, 1993. Being of that persuasion, I stand guided by Section 20(1) (a)

and find that since the result of the election was gazetted on 30th December, 2007, the petitioner had 28 days after the gazettelement both to present and serve the petition on all the respondents. The 28th day for effecting a valid service, as I observed earlier, fell on 27th January, 2008, which was a Sunday. I therefore hold that the purported service of the petition on the 1st respondent on 5th February, 2008, was well outside the 28 days allowed from the date of publication of the election results. There is no basis whatsoever for excluding Sundays from the computation of that period as urged by Mr. Gikandi. I therefore hold that the election petition in this matter was purportedly served on the 1st respondent out of time.

As regards the 2nd and 3rd respondents, in the affidavit of service sworn by Mr. Mutua, the court process server avers that he served the 2nd respondent on 7th January, 2007. That cannot be so, especially seeing that the election petition was not filed in court until 29th January, 2008. Assuming that this was a clerical error, and that the deponent meant to say 7th February, 2008, this conflicts with a statement made from the bar by an advocate for the petitioner. When this matter first came for mention on 11th February, 2008, Ms Okumu for the petitioner told the court, and her statement is on record, that she had not yet served the 2nd and 3rd respondents, and that she intended to serve them that morning. She then asked the court to mention the matter in seven days time. When the matter came for mention on 19th February, 2008, she confirmed that she had by then served the 2nd and 3rd respondents.

Whether the 2nd and 3rd respondents were served on 7th February or 11th February, 2008, that service was equally outside the 28-day period allowed after the date of gazettelement of the election results. Consequently, I find that both the 2nd and 3rd respondents were also served out of time.

This brings me to the issue as to whether the 1st respondent was properly served. The affidavit of service on the 1st respondent makes it clear that the petition was served, not on the 1st respondent, but on the 1st respondent's secretary. Although Section 20(1) (a) does not prescribe the mode in which service should be effected, the Court of Appeal has repeatedly made it clear that because of their nature, election petitions must be served personally. When personal service proves impossible, then service may be effected by publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest circulation in each case pursuant to Section 20(1) (a) proviso (iv). Suffice it to say that in the case of KIBAKI v. MOI [2000] I EA 115, the Court of Appeal summarized their guidelines on the service of election petitions thus:-

“What we are saying, however, is that election petitions are of such importance to the parties concerned and to the general public that unless Parliament has specifically dispensed with the need for personal service, then the courts must insist on personal service. We cannot read from Section 20(1) (a) that Parliament intended to dispense with personal service ... Section 20(1) (a) does not prescribe any mode of service and in those circumstances, the courts must go for the best form of service which is personal service ... In the event, we are satisfied that the three Learned Judges of the High Court were fully justified by holding that as the law now stands only personal service will suffice in respect of election petitions filed under Section 20(1) (a) of the Act ...”

While I agree with Mr. Gikandi for the petitioner that the purpose of service is to inform, I must also add that where the mode of that service is prescribed, then it ought to be followed to the letter. In any event, I am bound by the doctrines of *precedent* and *stare decisis*. I should therefore insist on personal service.

In the circumstances of the application now before this court, the 1st respondent was not served personally. The court process server does not give any reason as to why he did not try and effect personal service. He did not even make any effort to do so. He was quite contented to walk into the 1st respondent's office and serve the documents on his secretary without much ado. He did not, therefore, effect personal service, nor did he even attempt to do so. Keeping an eye on the guidelines of the Court of Appeal, I am constrained to find that there was no personal service on the 1st respondent as required. For that reason, I also find that he was not properly served with the petition.

Mr. Gikandi made a spirited effort to persuade the court that it had no jurisdiction to strike out an election petition allegedly presented or served out of time. He submitted that striking out was so final, drastic and draconian that there ought to be an express statutory provision conferring any such power before an election petition can be struck out. And there was no such provision. He therefore urged the court to strike out the notice of motion for lack of jurisdiction to grant the orders sought, or dismiss it on the basis that the presentation and service were effected within time. Alternatively, if the court cannot strike out the application or dismiss it, in the exercise of its inherent jurisdiction, the court has power to extend time to cover the event which has occurred so that both parties may have their day in court and have the petition heard on merits instead of locking out the petitioner on technicalities.

Mr. Musyoka Annan for the 2nd respondent invited the court to see the mundane aspect of this argument. He submitted that if the petition was filed arithmetically out of time, and the court had not granted an extension of time, then there was no petition. Ms. Oula associated herself with Mr. Musyoka Annan's submissions and added that strictness in dealing with election petitions was intended to facilitate the disposal of those petitions expeditiously, and that the issue of service was not a technicality. She referred the court to ALICEN CHELAITE v. DAVID MANYARA NJUKI & 2 ORS., Nakuru Civil Appeal No. 150 of 1998, and urged the court to strike out the petition.

Having considered these submissions, I take the view that in the course of administering justice, the courts have been provided with an orderly system which includes a road map through statutes and subsidiary legislation. These constitute the radar which guides the courts to justice. In the event of any lacuna, the omnibus provision of the courts' inherent powers automatically comes into play. This power is invoked in order to enable the court to make such orders as may be necessary for the needs of justice or to prevent abuse of the process of the court. Where a specific time frame is prescribed for commencing court proceedings, such as the presentation and service of an election petition within 28 days, any petition which is not presented and served within that time frame is only for striking out. The court will do so in exercise of the court's inherent jurisdiction. In the first instance, when such a petition is filed out of time, it is not properly before the court. By striking it out, the court thereby ensures that its process is not subjected to abuse. Even if the court is not expressly endowed with jurisdiction to strike out an election petition which is filed out of time, therefore, it has inherent power to do so, for such a petition is incompetent.

Some of the authorities cited by Mr. Gikandi, such as PETER NG'ANG'A MUIRURI v. CREDIT BANK, NAIROBI C.A. NO. 203 OF 2006, and ALBERT RUTURI AND ANOR. v. MINISTER FOR FINANCE [2000] EA. 253, do not have a direct bearing on election matters. However, in ALICEN CHELAITE v. DAVID MANYARA NJUKI & 2 ORS Nakuru Civil Appeal No. 150 of 1998, commenting on the absence of an express provision empowering the election court to strike out an election petition, Pall J.A., had this to say:-

“... But that does not mean that the election court cannot invoke its inherent powers to strike out a petition ... Once the election court is satisfied that due to failure to serve the petition within the time prescribed by law, the petition has become incompetent, it surely has the power to strike it down without more ado.”

Pall J.A. then went on to quote with favour from a judgment of the Privy Council in DEVAN NAIR v. YONG KUAN TEIK [1967] A.C. 31, an appeal from the Federal Court of Malaysia, in which the Privy Council said at p.45:-

“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 ... The election court must however have an inherent power to cleanse its list by striking out or better by dismissing those petitions which have become nullities by failure to serve the petition within the time prescribed by the rules.”

I hold, therefore, that an election court has jurisdiction to strike out a petition which has not been presented and served within the time prescribed under Section 20(1) (a) of the National Assembly and Presidential Elections Act.

On the issue of whether service of a petition is a technicality, Pall J.A was emphatic that it is not. He said:-

“Section 20(1) (a) is in mandatory terms. It is not directory. According to it a petition questioning the validity of an election shall be served within 28 days ... non compliance with these provisions makes the petition incompetent. These matters are not technicalities which an election court could disregard. They are fundamental provisions which cannot be ignored ... They are there to ensure fair play and avoid miscarriage of justice. No law can survive without necessary rules of procedure. They are important instruments in the administration of justice. They cannot be ignored particularly when the legislature makes them mandatory.”

Guided by the above statements by the Court of Appeal, and the mandatory statutory provisions, I find that the deadline for presenting and serving the election petition in this matter was 28th January, 2008. It was not served on the 1st respondent until 5th February, 2008, nor was it served on the 2nd and 3rd respondents until 11th February, 2008. That was done hopelessly out of time. Should I be wrong in finding that the 28 day period expired on 28th January, 2008, and should it turn out that the deadline was 29th January, 2008, service was still not effected until some days in February which was still out of time. Either way, therefore, there was a breach of the mandatory provisions of S.20(1) (a). Worse still, the petition was never served personally on the 1st respondent, nor was S. 20(1) (a) proviso (iv) complied with.

For these reasons, I find that the election petition in this matter was rendered incompetent by the late presentation and service, and the failure to serve the 1st respondent personally. The plea for an extension of time is belated.

The election petition herein is accordingly struck out as prayed, with costs of both the application and the petition to the respondents.

Dated and delivered at Mombasa this 28th day of April 2008.

L. NJAGI

JUDGE