



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA OF KISII**

**Election Petition 5 of 2008**

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

**AND**

**IN THE MATTER OF THE PRESIDENTIAL AND PARLIAMENTARY ELECTIONS  
REGULATIONS AND THE NATIONAL ASSEMBLY (ELECTION PETITION) RULES**

**AND**

**IN THE MATTER OF THE ELECTION OFFENCES ACT, CHAPTER 66 OF THE LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF ELECTION FOR THE KURIA CONSTITUENCY**

**MWITA WILSON PAUL MAROA ..... PETITIONER**

**VERSUS**

**GISUKA WILFRED MACHAGE ..... 1<sup>ST</sup> RESPONDENT**

**ELECTORAL COMMISSION OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**ANDREW RIANGA ..... 3<sup>RD</sup> RESPONDENT**

**RULING:**

This is an application by the 1<sup>st</sup> Respondent, under the Provisions of Section 44, and 60 of the Constitution of Kenya, Section 3 of the Judicature Act Cap 8, Section 20 and 23 1(d) and 2 of the National Assembly and Presidential Elections Act Cap 7 and the Rule 14 of the National Assembly Elections (Election Petition) Rules, 1993.

The Petitioner was one of the candidates and also a person who had a right to vote and did vote in the parliamentary Elections for the National Assembly seat for the Kuria Constituency held on 27<sup>th</sup> day of December, 2007 under the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya.( hereinafter referred to as the “Act”) and the Presidential and Parliamentary Elections Regulations (hereinafter referred to as “ the Regulations”).

The First Respondent was one of the other candidates in the said election and was declared to be the successful candidate for the said parliamentary seat for Kuria. The second Respondent is the Electoral Commission of Kenya established under the Constitution of Kenya whose conduct and the conduct of whose officials is complained of in relation to the said election. The third Respondent was the Returning Officer for the said constituency on the said election, appointed by the second Respondent as its official and is joined herein by reason of his conduct and the conduct of its officials complained of in the said election.

Being aggrieved with the declared results, the Petitioner presented this Petition on 24<sup>th</sup> January, 2008. The 1<sup>st</sup> Respondent then filed this application on 28<sup>th</sup> Feb 2006 seeking the following orders:-

- 1. That the Petition herein be and is hereby struck off for the reason that it is fatally defective, invalid and a nullity.***
- 2. That costs of this motion and the petition be awarded to the 1<sup>st</sup> Respondent.***

The 1<sup>st</sup> Respondent raises two substantive grounds in support of the application. These are:-

- 1. That the petition was not served upon the 1<sup>st</sup> Respondent within the period of time prescribed by law.***
- 2. That there is no valid petition before this court on which the Honourable Court can exercise its competent jurisdiction to determine:***

The Application is supported by an affidavit sworn by Wilfred Gisuka Machage, the 1<sup>st</sup> Respondent on 25<sup>th</sup> February, 2008. In the said affidavit the Applicant depones inter alia that:-

- The Chairman of the Electoral Commission declared election results in respect of his constituency on 30<sup>th</sup> December 2007 vide a special issue of the Kenya Gazette published on the same day.***
- The Petitioner did not serve him with the petition or notice of the same at any time before the said publication.***
- No proper service of the petition was effected upon his person within the period prescribed by law or any at all.***

The Application was supported by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Petitioner opposed the application by filing a Replying Affidavit. In the said affidavit sworn by Mwita Wilson Paul Maroa, he inter alia stated that:-

- The applicant had admitted service and filed a regular Notice of Appointment and not one under protest.***
- The Applicant's documents annexed clearly show that the Applicant was served as mandated provided for and regulated by law.***
- In any event, the applicant could not be served otherwise as attempts to serve him at his offices proved futile for the reasons explained in the affidavit of service of one Samuel Hawuori sworn on the 8<sup>th</sup> February, 2008 and filed in court on the 11<sup>th</sup> February 2008.***
- I and my Advocates exercised due caution and proceeded to serve the petition by way of publication in the Kenya Gazette when the Applicant perfected the art of evading service.***
- The petition is properly before this Honourable Court and is valid for determination by this***

**Honourable court.**

- ***The Affidavit by the Applicant fails to demonstrate the alleged invalidity, nullity, voidity, misconception or defect.***
- ***This application is purely intended to delay the hearing of the petition.***

The Application was prosecuted by Mr. T.J. Kajwang and Mr. Ayacko Advocates who represent the 1<sup>st</sup> Respondent while the petitioner was represented by Mr. Murage Advocate. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were represented by Mr. F. Tuiyott.

I have considered the application, the rival affidavits and submissions by counsel. I am grateful to them for their concise but clear articulations of their respective client’s cases and positions.

This application is substantively about service of the petition. Was the 1<sup>st</sup> Respondent duly served with the petition in accordance with the law?

Section 20 (11 of the Act (Cap.7) deals with the question of presentation of and service of the petition.

Section 20 (1) (a) provide as follows:-

**“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) -----**

**(i) -----**

**(ii) -----**

**(iii) -----**

**(iv) *where after due diligence it is not possible to effect service under paragraph (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.***”

The Petitioner in his Replying Affidavit claims that firstly, he duly served the applicant with the petition personally through his personal Secretary on 25<sup>th</sup> January, 2008 in his office on the 16<sup>th</sup> Floor of Co-operative House, along Haile Selassie Avenue, Nairobi.

In an annexed affidavit of service the Court Process Server, one Samuel Hawuori deponed inter alia :-

“ .....

**6. *That at about 12.00 p.m. on the 25<sup>th</sup> January, 2008, I went to the offices of the 1<sup>st</sup> Respondent herein at the Co-operative House, 16<sup>th</sup> Floor along Haile Selassie Avenue, Nairobi.***

**7. *That I was informed by the 1<sup>st</sup> Respondent’s personal secretary that the 1<sup>st</sup> Respondent was not going to be in the office for a week but that she was authorized to receive documents on his behalf.***

**8. *That at about 12.30 p.m. I served a copy of the petition upon the 1<sup>st</sup> Respondent’s Personal***

*secretary who though requested to sign my copy declined to do so.*

.....”

Secondly, the petitioner claims that due to caution he still went ahead to serve the petition by way of publication in the Kenya Gazette. In the process server’s affidavit of service which is also on record, he said:

“ .....

**8. That on the 31<sup>st</sup> January, 2003, I again proceeded to the Government Printer, where I paid for the Gazettement of the Notice of the lodging of this petition against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents respectively .....**”

The Law requires at the first instance that the petition be “presented” within 28 days after the date of publication of the result of the election in the Gazette. It is common ground that the result for the Kuria Constituency like most of the other constituencies in Kenya was published in the Kenya Gazette on 30<sup>th</sup> December, 2008 vide Gazette Notice No. 12615 which is annexed to the affidavit in support of the application. The presentation of the petition in my interpretation means the lodgment or filing of the petition with the court. Rule 3 of the National Assembly Elections (Election Petition) Rules 1993 stipulates:-

**“ 3 (1) the presentation of an election petition shall be made by delivering it at office of the Registrar, and the Registrar or the officer of his department to whom the petition is delivered shall give a receipt in the following form –**

----- ”

In the definition clause, “Registrar” means the Registrar of the High Court and involves a district or deputy registrar.

I do find and hold that presentation of the petition contemplated by Section 20(a) in really the lodgment or filing of the petition with the court. It is the institution of the election petition. Was it done within 28 days of 30<sup>th</sup> December, 2008. The answer is in the affirmative as the petition was presented on 24<sup>th</sup> January, 2008 within the prescribed period of 28 days. The twenty eight days lapsed on **27<sup>th</sup> January, 2008.**

What of service under Section 20 (a)? First and foremost it is now certain that the existing law in Kenya today is that service of election petitions under Section 20 (a) must be personal service, that is, physical service on the respondent/s.

In the Court of Appeal case of **KIBAKI –V- MOI**(2000) 1 EA, 117 (in which I was one of the counsel for the Electoral Commission of Kenya, a fact which I disclosed during the proceedings herein), the five eminent Justices of Appeal stated that:-

**“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 itself specifically dispensed with the need for personal service, then the courts must insist on such service. We cannot read from section 20 (1) (a) that Parliament intended to dispense with personal service. Even under 14 (2) of the Rules personal service was not dispensed with. The other modes of service were only alternative modes of service.**

**That is why in the various other cases quoted to us personal service was always described as the best form of service.**

**Section 20(1) (a) of the Act 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.”**

This decision was delivered on 10<sup>th</sup> December, 1999 after the 1997 Elections. This court recalls that the said decision raised a lot of discussion and debate in Legal circles and the public domain due to the practical difficulties and obstacles that a petitioner is likely to face in attempting to serve an election petition on an incumbent President or even on a successful parliamentary candidate who is best on going underground to evade service during the prescribed period.

It is therefore not surprising that by Act No. 7 of 2007 Section 20(a) of the Cap 7 was amended to include the following provision:-

**“(IV) where after due diligence it is not possible to effect service under paragraphs (a) and (b), the presentation may be effected by the publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest national circulation in each case.”**

This amendment clearly was intended to give relief to Petitioners where personal service was impossible or difficult due to any given circumstances including a situation whereby there is calculated deliberate evasion of service by a Respondent leaving jurisdiction or going into hiding or causing violent obstruction of service.

In my view if section 20 (1) is now read together with the amendment in 20 1 (c) (iv), then it will become even more certain and clear that service under section 20 1 (a) is personal service while service under 20 1 (c) (iv) are alternative modes of service by way of statutory substituted service.

In the Court of Appeal case of **ABU CHIZABA MOHAMED –V- MOHAMED BWANA BAKARI & 2 OTHERS** CIVIL APPEAL NO. 238 OF 2003, the Court of Appeal followed the **KIBAKI –V- MOI** Case when it said:-

**“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 those applicable to other Kenyans cannot support the principle of equality before the law.”**

The first question with regard to service under Section 20 (1) (a) is, did the petitioner serve the petition personally on the 1<sup>st</sup> Respondent? The answer is in the negative, No. The process server in his affidavit of service does not claim at any one time that he met and or found the 1<sup>st</sup> Respondent or served the petition on him. The process server made only one attempt of personal service on the 25<sup>th</sup> January, 2008. He went to the office of the 1<sup>st</sup> Respondent at 12 noon but did not find him. He claims he was told that **“the 1<sup>st</sup> Respondent was not going to be in the office for a week”**.

As a result he served a copy of the petition on his personal secretary who accepted it but declined to sign for the same.

If the court were to assume or deem that indeed the person he found in the office was the personal secretary to the 1<sup>st</sup> Respondent did that service amount to personal service? I do hold that **“personal service”** means actual physical direct service on the party intended or required to be served. The so called personal secretary was not and could not be the person of the 1<sup>st</sup> Respondent.

The second question on this aspect of the issue is whether the alleged service on the personal secretary was a proper and valid service of the petition. Again, this is on the assumption that the person served was truly a personal secretary to the 1<sup>st</sup> Respondent at the time.

I have carefully perused the National Assembly and Presidential Elections Act, Cap 7. There is no provision that allows service of election petition through a spouse, adult child, relative, employee,

servant, agent or any other person. Service must be directly on the Respondents through the mode prescribed by the law, i.e. personal service or the stipulated alternative mode of service.

In the petition of **EMANUEL KARISA –VS- YAA & ANOTHER ELECTION PETITION NO. 1 OF 1993**, (unreported) the Court of Appeal opined as follows:-

***"We do not envisage that it would be a valid application/response to say that service on the Respondent's wife, adult child etc or agent is a valid service ....."***

In the case of **JAMES NYAMWEYA –V- COSMOS F.C. OLUOCH** Election Petition NO. 74 of 1993, the Court of Appeal dealt with a similar situation where it was alleged that service had been effected through a personal secretary. The Court observed:-

***"It is thus abundantly clear as our view that service on an agent is invalid service. .... This were repeated a few days later after the Emanuel Karisa Maitha petition, we heard submissions on service in the Peter Goko petition.***

***In this later case we heard that the principal documents were served on a Respondent's personal secretary.***

***We rejected that as an improper and invalid service. .... We conclude with service on the 5<sup>th</sup> Respondent and we say that service if any at his office (on his personal secretary) was invalid. We have already stated above that service on an agent under the election petition rules is not proper or valid."***

I went into the aforesaid references on the factual assumption that we are dealing with service on a personal secretary. In the present case, there is no admission that the 1<sup>st</sup> Respondent's personal secretary was indeed served. The process server does not give the name of the personal secretary and whether she told him that she held such a capacity. He did not identify who otherwise introduced the lady to him as a personal secretary of the 1<sup>st</sup> Respondent. If she held such an office, there is no evidence that she was authorized to receive court process or election petitions on behalf of the 1<sup>st</sup> Respondent.

An office secretary may have actual or ostensible authority to receive routine documents in the course and within the scope of the 1<sup>st</sup> Respondent's duties as a public servant. However, for a secretary to accept service of Court Process or in this case an election petition on behalf of her boss, she had to have express and clear instructions and authority. In the absence of such evidence, the process server failed in his duties and obligations not only as a process server but as an agent of the petitioner. As stated by the Court of Appeal in the **NYAMWEYA CASE**:

***" ..... again may we state that election petitions are important matters of public interest. Going about them is a subject of special jurisdiction, forms, procedures and remedies etc that require careful and strict compliance. This includes the process of service of the principal documents which we had found to have been either totally lacking or was invalidly effected."***

On the basis of the amendment of section 20 1 (c), Act No. 7 of 2007, as stated earlier Parliament expressly provided for alternative mode of service. For clarity, I need to refer to the words contained in Section 20 1 (c) IV, and accept repetition of the same in this ruling:

***"(iv) where after due diligence 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 to the highest national circulation in each case."***

The petitioner in his affidavit claims that he and his advocate exercised due caution and proceeded to serve the petition by way of publication in the Kenya Gazette when the applicant perfected the art of

evading service. I have carefully looked at both affidavits, the one by the petitioner and the affidavit of service by the process server there is no single evidence to prove that the 1<sup>st</sup> Respondent tried to or evaded service. This is a wild and misplaced allegation without any foundation whatsoever. From the evidence, it is clear that the process server and therefore the Petitioner, if true, only made one attempt to serve the 1<sup>st</sup> Respondent. This was on 25<sup>th</sup> January, 2008 between 12 noon and 12.30 p.m. The court will give them the benefit of doubt though there is no corroboration.

Firstly, it was only two days before the expiry of the prescribed period of 28 days (it was to end on 27/01/08). There was no follow up. There was no investigation and inquiry as to the whereabouts of the 1<sup>st</sup> Defendant.

No attempt was made at Parliament or his residences or at his constituency. The attempt to serve him was feeble, weak and almost with shocking disinterest. Can it be said that there was due diligence as demonstrated by the consistent and elaborate attempts of service in the **ABU CHIABA CASE**? Certainly not. This was even worse than the case of **NTOITHA M' MITHIARU -V- MAOKA MAORE** Civil Appeal No. 272 of 2003, where the court held that there were no satisfactory attempts made to serve. Just like the said case this was also perhaps because the election petition was filed rather late (3 days before lapse) in time and so the petitioner had no sufficient time available to effect the service.

I do hold that the petitioner has not shown that he exercised due diligence and that it was impossible for him to effect personal service as required by paragraph (a) for him to be entitled to invoke the alternative modes of service of the election petition. It is the court's duty to inquire into and determine whether there was due diligence and whether it can be said that it was impossible to serve the Respondent. This discretion and option may lie with the Petitioner at the first instance but it has to be ascertained and confirmed by the court. This discretion or option is not an automatic right since personal service is the best and most fair mode of service of a petition.

The other aspect is whether the petitioner effected the presentation of the petition in the Kenya Gazette and in one English and one Kiswahili local daily newspaper with the highest national circulation in each case. I must point out that the petitioner is required to do all three acts i.e. publish the presentation in the gazette and the two newspapers. The word used is "**and**" which makes it conjunctive and not disjunctive. The petitioner must within 28 days of filing the petition in court and after the due diligence process, publish the presentation of the petition in not only the Gazette but also one English and one Kiswahili local daily newspaper with the highest national circulation in each case.

This court takes judicial notice that as of today, the two such English local dailies are the '**Daily Nation**' and '**The Standard**' while the Kiswahili one is "**Taifa Leo**".

I do find that the petitioner did effect presentation of the petition by publication of the same in the Kenya gazette of 1<sup>st</sup> February, 2008 vide Gazette Notice No. 653. Upon consideration I do not think that is necessary or required that the petition itself also be published. This would be unreasonable, expensive and punitive.

Having said that, the court finds that the said publication was clearly out of time, time-barred. This publication as a mode of service should have been done within the aforesaid 28 days i.e by 27<sup>th</sup> January 2008. The petitioner was late by five (5) days having published it on 1<sup>st</sup> February, 2008.

In the absence of a valid gazette, then the petition was fatally defective, invalid and a nullity. Sadly again, even if the Gazette was filed in time (which it was not,) the petitioner did not cause the publication of the presentation in any local English and Kiswahili daily. This would have still made the petition invalid, and a nullity.

I find that the petitioner almost filed the petition as an after-thought due to the timing which has subsequently given rise to the aforesaid disastrous incurable defects.

I finally find and hold that the petition was not served upon the 1<sup>st</sup> Respondent within the period of time prescribed by law. The petition therefore must and I do hereby strike it out, i.e. the petition dated 24<sup>th</sup> January, 2008.. The petitioner shall pay the costs of this application and the petition to the Respondents respectively.

M.K. IBRAHIM

**JUDGE**

**4/04/08**

**Mr. Nyambati:** I seek leave to appeal against the ruling dated 4/04/08. It is a right. I ask for 14 days stay to enable Mr. Murage make a formal application if necessary. I ask for certified copies of proceedings and the ruling.

**M.K. IBRAHIM**

JUDGE

**4/04/08**

**Mr. Tuiyot:** Section 33 (4) of the Act - an appeal lies as a matter of right. Stay – We have no objection though there is nothing to stay. We have not filed any bill.

Superfluous.

**Mr. Nyambati:** Petition is struck out. Execution is possible. It is in the interest of justice to give stay of 14 days.

**M.K. IBRAHIM**

**JUDGE**

**4/04/08**

**ORDER:** Appeal is a statutory right. I grant leave if at all necessary. With regard to the application to stay I see that it is really impractical to give such an order. There is nothing to stay. There were no interim orders. The 1<sup>st</sup> Respondent was declared and Gazetted as a member of Parliament of Kuria. Having dismissed the petition, the court cannot interfere with the Gazette and the M.P. discharging his duties to the Electorate. There is nothing capable of being executed/enforced. No bill of costs has been filed or taxed at this stage. Application for stay is rejected.

**M.K. IBRAHIM**

**JUDGE**

**4/04/08**

Coram: Ibrahim J.

CC – Omwenga

Mr. Nyambati h/b for Mr. Murage

Mr. Tuiyott for Mr. T. Kajwang for the 1<sup>st</sup> Respondent

Mr. Tuiyott for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Ruling delivered.

**M.K. IBRAHIM**

**JUDGE**

**4/04/08**