REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

ELECTION PETITION CAUSE 27 OF 2008

THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT (CAP. 7) OF THE LAWS OF KENYA

ELECTION PETITION FOR LANG'ATA CONSTITUENCY

THE PETITION OF STANLEY LIVONGO LIVONDO

STANLEY LIVONGO LIVONDO …….....……
PETITIONER

VERSUS

1. **RAILA AMOLO ODINGA …….....…….…….. 1ST**
RESPONDENT

2. **JOSEPHINE MWENGI (Returning Officer for Lang'ata Constituency)…..… 2ND**
RESPONDENT

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

RULING

This Ruling is in response to an oral application made by the Petitioner herein, to call viva voce evidence in support of his claim that the First Respondent, Hon. Raila Amolo Odinga, was indeed personally served with the Election Petition filed herein. What was before this Court at the time this oral application was made was a Notice of Motion application by the First Respondent to strike out the Petition on the ground that it had not been filed and served within the period provided by the statute, and was therefore incompetently before the Court.

The Petitioner wants to "**cross examine**" the First Respondent, the Hon. Raila Amolo Odinga, and the three process servers, namely John Musyoka, Leonard Visanya and Gabriel Munuhe, to demonstrate that the Petition was indeed served on the First Respondent.

In his submissions before this Court, Mr. Wamae, Counsel for the Petitioner, argued that it was necessary to call viva voce evidence, and examine the above-named four witnesses to show that the three process servers visited the First Respondent's house in Karen, and of the "**communication**" between them and the First Respondent that would show that the First Respondent was actually served with the Petition.

Counsel relied on Order 18 Rules 1 and 2 of the Civil Procedure Rules, and on the case of ***Karatina Garments Ltd v. Nyanarua*** Civil Appeal No. 6 of 1976 where the Court of Appeal for East Africa **held** as follows:

"***Where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter; if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth."***

Dr. Kamau Kuria, also representing the Petitioner, argued that once an election petition was struck out for non-service, the Petitioner had no other options left. The consequences are drastic, and, therefore, the Petitioner ought to be given the opportunity to present his evidence in Court, if necessary, by way of viva voce evidence. He relied on the case of ***Onalo v. Ludeki & 2 Others*** (2005) 2 KLR 520.

That is indeed a powerful argument, and I agree with Dr. Kuria that no litigant should be denied his day in Court, and the opportunity to present his evidence before the Court, including where necessary, the right to examine a deponent.

Although the ***Karatina Garments*** case (supra) was a civil case involving debt collection, where the Defendant sought to set aside summary judgment on the grounds that he had not been served with Summons, the principle outlined there, would, in my view, apply to election petitions. **The principle is that if the Court is faced with conflicting affidavit evidence regarding the alleged service of Court process, it is proper that the deponents should be examined on oath to establish the truth.**

So, then, is the case before me such a case? Are there indeed conflicting affidavits as to alleged service of process?

Let us examine the evidence presented to this Court by way of depositions. The First Respondent's case in simple and straight forward, that he learnt from his sentries and the media that some people came to his house in Karen on 26th January, 2008 at 8 pm and again on 27th January, 2008 at 7.30 a.m. and he later discovered that it was for the purpose of serving him with the election petition. However, they were denied entry, and he was not served with the petition.

The Petitioner's evidence does not contradict that of the First Respondent in substance and essence. The Petitioner says in his affidavit sworn on the 5th March, 2008 that when the process servers first visited the home of the First Respondent on 26th January, 2008, they were asked by the guard to return the following day (paragraph 45). The following day the same guard informed them that "***the First Respondent had refused to be served with the petition in his home and ordered that the petition be served on him at his Oginga Odinga offices on Kiambere Road, Upper Hill"*** (paragraph 50(e)). At that point they left the petition with the guard of the First Respondent and requested him to give it to the First Respondent (paragraph 50(j)).

I see absolutely no contradiction in substance in the evidence presented before the Court. The facts here are **not** the same, or anywhere close, to the facts in the **Onalo** case (supra) relied upon by Dr. Kuria. In **Onalo**, the Second Respondent alleged that he had not been personally served with the petition. The Petitioner produced affidavits of three persons who said that indeed he had been personally served at Dambusters Restaurant. The Petitioner said he was not at Dambusters at the time but was at Parliament Buildings. There was completely conflicting evidence: one saying he was physically and personally served; the other saying he was not. Clearly, in that situation the Court ordered the examination of deponents.

In the case before me, there is no such conflict. There is no allegation of physical and personal service. The Petitioner says his process servers were at the First Respondent's gate; and were denied entry. The First Respondent does **not** dispute this. So where is the conflict that requires cross-examination of the deponents? In my view there is none. The affidavit evidence as to service of process presented by the Petitioner, together with the affidavits of the three Court process servers is elaborate and sufficient for this Court to make a determination of the "**facts**". So is the deposition of the First

Respondent. There is no further need for examination of the deponents. The Petitioner's Counsels have not told this Court exactly what the conflict in evidence is, and what more they would wish to know from the First Respondent. For instance, they have not outlined to this Court what specific questions they would wish to ask, the answers to which are not provided in the deposition. Mr. Orengo, Counsel for the First Respondent, says that the Petitioner is only attempting to "**fill the gaps**" in evidence, by insisting on calling the deponents. He says he does not feel the need to examine the process servers, and will accept their depositions as presented. It is also instructive to note that although the First Respondent's affidavit had been filed in Court on 8th February, 2008 the Petitioner did not make a formal application to call the deponents until 20th March, 2008 and only after the First Respondent had made submissions on the application to strike out the Petition. In my view this is an after-thought, and an attempt to go on a fishing expedition of issues not relevant to the determination of the application before this Court.

Accordingly, and for reasons outlined, I disallow the Petitioner's application to examine the four deponents, with costs to the First Respondent.

Dated and delivered at Nairobi this 4th day of April, 2008

ALNASHIR VISRAM

JUDGE