REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Election Petition 1 of 2008

DICKSON DANIEL KARABA ……..…… PETITIONER

Versus

HON. JOHN NGATA KARIUKI ……..……. 1ST RESPONDENT

JAMES KARIUKI GITAHI

(*Returning Officer for Kirinyaga Constituency*) ….. 2ND RESPONDENT

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

RULING

The General Election of 27th December 2007 saw the successful election of the first respondent, **JOHN NGATA KARIUKI** as the Member of Parliament for Kirinyaga Central Constituency. The petitioner, **DICKSON DANIEL KARABA** has filed a petition against that election of the first respondent.

This ruling relates to the application by the first respondent dated 27th February 2008. That application is brought under ***Section 20(1)(a)*** of the National Assembly and Presidential Elections Act Cap 7 (hereinafter called the Act) and ***Rule 14 (1)*** of the National Assembly (Election Petition) Rules (hereinafter called the Rules). The application seeks the following prayers:-

1. The Petition herein be struck out on the ground that the same was not personally served upon the first respondent within 28 days after the date of publication of the results of the Parliamentary Election in the Kenya Gazette on 30th December 2007 or at all and that the notice of presentation of the petition was not served upon the first respondent within 10 (ten) days of presentation of the petition on 11th January 2008.

2. *That the petitioner do pay the costs of the first respondent in respect of this application as well as the petition.*

The application is anchored on the following grounds:-

i. That the petitioner herein did not personally serve the first respondent with the petition within 28 days after the date of publication of the results of the Parliamentary Elections in the Kenya Gazette on 30th December 2007.

ii. The petitioner did not serve the notice of presentation of petition upon the first respondent within 10 days of presentation of the petition on 11th January 2008.

iii. The petitioner's omissions in (i) above violated section 20(1)(a) of the National Assembly and Presidential Elections Act.

iv. That the petitioner's omission in (ii) above offends Rule 14(1) of the National Assembly and Presidential Elections (Election Petition) Rules.

v. Under the circumstances the petition is incompetent and invalid.

In this ruling I will begin by considering the second ambit of the first respondent main prayer namely:-

"***whether or not the petitioner served the notice of presentation of the petition on the first respondent and if not, what are the consequences of failure to serve that notice."***

At the outset it should be noted that the petitioner did not argue that the notice was served on the first respondent. Service of that notice is provided for in ***Rule 14(1)*** of the Rules. That Rule provides as follows:-

"***Notice of the presentation of a petition, accompanied by a copy of the petition, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent."***

In argument the first respondent's advocate stated that the aforestated Rule requires a notice of presentation be served on the respondent within ten days of presentation of the petition and in this case such notice ought to have been served by 21st January 2008. Rule 14(2) provides for gazettement of that notice. What the court needs to consider is whether the petition is invalid for lack of service of that notice. In order to consider that issue it is important to bear in mind the decided cases on the matter. In support of his argument the learned counsel **Mr. Wachira Mari** for the first respondent referred to the case of **TETT vs MORAA & 2 OTHERS (NO. 2) HIGH COURT ELECTION PETITION NO. 3 OF 1998.** He relied on the following holding:-

*"**A copy of the petition is required to be served being an integral part of the notice of presentation of petition under Rule 14(1) of the National Assembly Elections (Election Petition) Rules".***

Learned counsel therefore argued that failure by the petitioner to serve the notice on the first respondent as per the provisions of Rule 14(1) rendered the petition invalid and liable to be struck out. In response to that argument Learned Senior Counsel, **Mr. Paul Wamae** for the petitioner argued that there was an amendment to Section 20(1) of the Act which provided that a petition should be filed and served within 28 days after the date of publication of the election results. That amendment, learned counsel argued, had the effect of deleting Rule 14(1) of the Rules. In response learned counsel for the first respondent argued that the case of **KIBAKI vs MOI (2000)1 EA Page 115** shows that Section 20(1)(a) of the Act coexists with Rule 14(1) of the Rules. Further he argued that both the Act and the Rule had to be given their full force of application.

In considering those arguments, it is important for one to note the provisions of Section 20(1)(a) of the Act alongside with the provisions of Rule 14(1). At this point I would ask myself a rhetorical question, whether the provisions of Section 20(1)(a) of the Act and Rule 14(1) of the Rules conflict. It is clear that Section 20(1)(a) provides for the period of filing and serving a petition. On the other hand Rule 14(1) provides for the service of notice of presentation of the petition together with a copy of the petition which service ought to be within 10 days of presentation of the petition. In as much as Rule 14(1) talks about the service of a petition the said Section 20(1)(a) and Rule 14(1) can be said to be in conflict. The Court of Appeal in the case of **MAITHA vs SAID & ANOTHER 1998 (LLR 854)** in Considering the conflict between Section 23(4) of the act and the rules of the Court of Appeal in respect of the time allowed for filing a notice of appeal had the following to say;-

" At 302 of the 9 edition of the Construction of deeds and Statutes by Sir Charles Odgers, it is stipulated as follows in connection with interpretation of delegated legislation and in particular the Rules made under Act of Parliament.:

'Rules must be read together with their relevant Act; they cannot repeal or contradict the express provisions in the Act' If the Act is plain, the Rules must be interpreted so as to be reconciled with it or, if it cannot be reconciled, the Rule must give way to the plain terms of the Act. Where an act passed subsequently to the making of the Rules, is inconsistent with the (sic) unless it was clearly passed with a different object and then the two will stand together."

The same court in the case of **CHELAITE vs NJUKI & TWO OTHERS (NO. 3) (2008) 2 KLR(EP)** said the following:-

"*Assuming for the purposes of argument only that Rule 14(1) is in conflict with Section 20(1)(a) of the act then under the ordinary canons of statutory interpretation, the provisions of the Act must prevail. I am satisfied that parliament has properly exercised the powers given to it by Section 44 of the Constitution and that there is no conflict between that section of the constitution and Section 20(1)(a) of the Act. I am equally satisfied that in dealing with the issue of service under Section 20(1)(a) of the Act rather than leaving it to the Rules Committee, parliament acted within its legislative authority and did not unsurp the power of the Rules Committee. As a matter of construction rules 14(1) can still be reconciled with Section 20(1)(a) of the Act and there is really no conflict between the two provisions."*

Kwach JA in that case stated as follows:-

"*Although a notice or presentation of an Election Petition is a primary document, the failure to serve it on the respondent together with a copy of the petition as required by Rule 14(1) of the rules does not automatically render the petition incompetent."*

That Court in the case of **MURATHE vs MACHARIA (1998) LLR 2233** held that a petitioner had to comply with Section 20(1) of the Act as well as Rule 14(1) of the Rules. The Court of Appeal in deciding the case of **KIBAKI vs MOI** stated that the findings in both the cases of **CHELAITE** and **MURATHE** and in particular their finding in respect of Section 20(1)(a) and Rule 14(1) was not binding on the High Court. In making that finding, they stated as follows:-

"*We are ourselves satisfied that the issue of whether or not Section 20(1)(a) was in conflict with the Rule 14(1) was as it were still "terra rosa" and therefore, still open to the High Court to discuss".*

That Court in the **KIBAKI vs MOI** case did however make the following finding in respect of that Section and the Rule:

"*We accordingly agree with the High Court that Section 20(1)(a) of the Act is in direct conflict with Rule 14 and that being so Rule 14 must give way to the plain words of Section 20(1)(a) of the Act. Accordingly, Rule 14 of the rules can no longer apply to petitions which concern Section 20(1)(a) of the Act. Indeed, under Section 20(1)(a) of the Act, all that one needs to serve is a copy of the petition but we would have no quarrel with it if a party chose to include an unnecessary document like a notice of presentation, which, for the purposes of Section 20(1)(a) of the Act is really irrelevant."*

By that decision it is clear that in as far as the matter relates to that Section 20(1)(a) and Rule 14(1) the section would take precedence in respect of the document that ought to be served by the petitioner. That decision clearly answers the argument raised by the first respondent. The petitioner was not obliged to serve a notice of presentation of the petition. It was to use the words of the Court of Appeal "***unnecessary document".*** Accordingly the second limb of the first respondent's prayer does hereby fail.

The first limb of the first respondent's prayer attracted much more substantial argument from learned counsels. The issue was whether the first respondent was or was not served with the petition within 28 days of publication of the election results. The affidavit of service relating to the service of the petition

was drawn by John Musyoka. It narrates how on the first attempt to effect service on the first respondent, that is, on 11th January 2008 in the company of two other persons he went to Pan Afric Hotel on Valley Road Nairobi where he said that the office of the first respondent is situated. They did not find the first respondent who was said to be out on official duty. John Musyoka the process server said that he returned to that hotel on 12th January 2008 at 6.30 a.m. It is note worthy that he did not state in his affidavit of service sworn on 8th February 2008 that he was in the company of any other person on the second visit. Since the issue on the first limb of the first respondent prayer relates to service it is important to reproduce the salient paragraphs of the affidavit of service of John Musyoka:-

Paragraph 4:

That on 12th day of January 2008 I proceeded to the said Pan Afric Hotel where Mr. Kariuki's office is situated and at around 6.30 a.m I was in the said hotel where I took breakfast. That at the same time Mr. Kariuki came with a young man and they sat next to my table and ordered their breakfast too. When taking the breakfast I introduced myself to the said Mr. Kariuki and the purpose of my visit but he asked me to wait for him to finish his breakfast adding that thereafter we could move to his office to tell him there what I wanted.

Paragraph 5:

That after taking his breakfast the 1st Respondent stood up and as he walked away he told me to go to the second floor of the building where I found his secretary by the name Evelyn.

Paragraph 6:

That I took a lift to the second floor where I found a door to an office open and I entered to find a lady seated at a desk. I asked her if she was Evelyn and she answered in affirmative whereupon I introduced myself and told here what Mr. Kariuki had told me earlier.

Paragraph 7:

That Evelyn rang to someone and told that person that Mr. Musyoka was with her (Evelyn) and wished to call on the "MD" (Managing Director) who I understood to refer to Mr. Kariuki, the 1st Respondent. Evelyn then told me to go to fourth floor and ask for Rose, the personal secretary to the 1st respondent.

Paragraph 8

That I took a lift to the fourth floor where I found a door to an office open and entered. Inside were two ladies and a man each seated in front of a computer set placed on a large desk. I greeted the three persons and asked who Rose was. One of the two ladies said she was Rose whereupon I introduced myself to her as the person referred to her (Rose) by Evelyn.

Paragraph 9

Rose asked me to follow her across the office she was in to another door which she opened to lead to what appeared like a conference room as it has a number of chairs around a large desk. Rose closed the door and asked me to sit and she sat facing me. Rose had a writing pad and held a pen. Rose asked me whether I knew Mr. Kariuki, the 1st Respondent and whether or not I had an appointment to see him. I answered that I knew the 1st respondent, was with him at the restaurant on the ground floor and that he is the one who had asked me to go to his office. Rose stoop up, and left the room after asking me to wait which I did.

Paragraph 10

That after a short while Rose returned and asked me to follow her, which I did. We returned to the office where I had first found Rose and at the other side of that office was another door which she opened and while holding the door asked me to walk in which I did.

Paragraph 11

That inside the office I found Mr. Kariuki the 1st respondent seated behind a desk with what looked to me like a glass top. The newspapers and other documents on the desk. I again introduced myself to Mr. Kariuki, as a court process server whose mission was to serve an election petition upon him whereupon he asked me to sit down.

Paragraph 12

That while seated I tendered to the 1st respondent two copies of the of the election petition with annextures and asked him to retain one copy and acknowledge service by endorsing his signature on the reverse side of the copy. The 1st respondent retorted, "I won the election" adding "umefikisha" (you delivered it). I insisted that he signs my copy but he declined repeating that it had been delivered.

Paragraph 13

That I duly effected service of the petition upon the 1st respondent as described in the foregoing paragraph and I return herewith the petition that the 1st respondent declined to sign with my notes on the reverse side thereto as duly served

Paragraph 14

That the 1st Respondent Mr. John Ngata Kariuki was known to me during the time of the service

In the affidavit in support of the application the subject of this ruling the first respondent in his contention that he was not served personally with the petition stated that after the General Election he did not go to his office until the 29th January 2008. He attributed his failure to go to the office to the fact that he was fatigued due to the election campaign. On arriving at his office on 29th January 2008 he was handed a sealed used khaki A4 envelope. Attached to that envelop was a yellow gum note pad. He was informed by a secretary by the name of Rose that the person who had left the petition had written his name as John Nzive No. 0723109213. That he wrote this on the yellow gum note pad. The first respondent denied being served with the petition as stated in the affidavit of service of John Musyoka. His alibi was that on 12th January 2008 at 6.30 a.m. he was at Don Bosco Church. On the same day at 8.50 he had breakfast at Flame tree restaurant at Pan Afric Hotel. He denied having a secretary by the name of Evelyn. He also denied that he was the Managing Director of Pan Afric Hotel. He stated that the Managing Director of Sarova Hotel limited was Jaideep Vohra. The first respondent said that he was an Executive Director of the same hotel. In terms of the layout he said that the premises of Pan Afric hotel and of Sarova Hotel head office were distinct. Second floor of Pan Afric Hotel only contains guest rooms. Second floor of Sarova hotel head office has the sales offices. Fourth floor of Pan Afric hotel only has guest rooms. On the other hand the fourth floor of Sarova Hotel head office is where his office is to be found. He however denied that the lady mentioned in the affidavit of service by the name of Rose was his personal secretary but rather that she was a secretary of the senior officers and directors. Faced with that denial John Musyoka swore another affidavit. That affidavit was sworn on 29th March 2008. Again for clarity I will reproduce some of the pertinent paragraphs of that affidavit:-

Paragraph 5

That through an oversight I forgot to mention in my affidavit of service aforesaid that before I left the 1st respondent's office he wrote down his telephone number 0722769759 on a small yellowish chit of paper which he handed over to me with a request that I call him later at my convenience. Annexed

hereto is a photostart copy of the said chit bearing the 1st respondent's telephone number marked "JM1". That I did not at any time call the respondent as he had asked me to do.

Paragraph 6

That I served the 1st respondent as aforesaid in an office which I had reason to believe and did believe, was his office. I am a stranger to the allegation contained in paragraph 4 of his affidavit aforesaid, and I do not admit the same.

Paragraph 7

That Sarova Hotels Limited head office are in the same location as and behind Pan Africa Hotel Limited as alleged by the 1st Respondent, and I did verily believe at the time of the service that the said offices formed part of what is known as Pan Africa Hotel Limited.

Paragraph 8

That I did not put in an envelope a copy of the petition that I served upon the 1st Respondent. I handed the petition with the annextures to the 1st respondent and he received the same with his hand.

Paragraph 9

That I did not write my telephone number or give my name but it was made a condition at the reception counter on the ground floor of Pan Africa Hotel Limited and also by Rose, the secretary mentioned in my affidavit of service and in the 1st Respondent's affidavit, that I must give both my name and the telephone number before I could be allowed into the 1st Respondent's office. In the circumstances, I verbally gave both my name and telephone number as requested but I did not write the name or the telephone number as alleged. The document annexed to the Respondent's affidavit marked "JNK2" was not written by me.

Although he stated that he did not know the layout of Pan Afric Hotel Limited and head office of Sarova Hotels limited the process server however reiterated that he did serve the first respondent. In the paragraph where he reiterated that service the deponent stated that that paragraph was truthful according to his own knowledge information and belief. Those later words elicited arguments from the first respondent who argued that the deponent needed to state the source of information thereof. I am inclined to accept that argument for indeed the respondent having stated that the matters deponed were according to information and belief he ought to have disclosed the information and the belief. Failure to do so renders that paragraph liable to be struck out. Order 18 Rule 3(1) provides that affidavits have to be confined to such facts as the deponent is able on his knowledge to prove. Accordingly paragraph 11(a) of affidavit of John Musyoka sworn on 29th March 2008 is hereby struck out. John Musyoka in that affidavit annexed a copy of the official Nairobi 2008 telephone directory. This annexture indicated that Pan Afric hotel was known as Sarova Panafric Hotel. The petitioner additionally relied on the affidavit sworn by Peter Mwangi Karanja. This person described himself as a business man based in Nairobi who deals with car hire business which involves visiting hotels frequently. Again it is important to reproduce his affidavit for one to understand the argument of the petitioner:-

Paragraph 2

That on the 12th day of January 2008, I went to Pan Afric Hotel at around 6.40 a.m. and 6.50 a.m. I met Mr. Musyoka whom I have known for the last two years, seated on table No. 8 in Pan Afric hotel and I greeted him and joined his table for tea.

Paragraph 3

That upon asking Mr. Musyoka what he had come to do at the hotel in the morning, Mr. Musyoka told

me that he had come to serve an election petition upon Honourable John Ngata Kariuki.

Paragraph 4

That before he explained about the petition, Honourable John Ngata Kariuki came in and sat at a table next to us with another person.

Paragraph 5

That Mr. Musyoka drew the petition papers, stood up and proceeded to the table where Honourable John Ngata Kariuki was seated.

Paragraph 6

That he called him "Mheshimiwa", habari yako? Then introduced himself and the two of them exchanged greetings verbally.

Paragraph 7

That Mr. Musyoka then told the honourable John Ngata Kariuki that he is a court process server and that he had come to serve him with an election petition.

Paragraph 8

That honourable John Ngata Kariuki accepted service however he request Mr. Musyoka to wait until he finishes his breakfast to enable him formalize acceptance of service in his office as he did not want to attract unnecessary attention from on lookers and customer in hotel.

Paragraph 9

That immediately after taking his breakfast Honourable John Ngata Kariuki rose and he and Mr. Musyoka proceeded to his office which is located in the same hotel.

Paragraph 10

That I have known Honourable John Ngata Kariuki, the 1st Respondent since 1997.

The first respondent in a further affidavit sworn on 21st April 2008 denied having written his telephone number on a paper given to John Musyoka as stated in John Musyoka's affidavit sworn on 29th March 2008. He deponed in that affidavit that the paper had been subjected to examination by a handwriting expert. He annexed the handwriting report by Hezron W. Wamalwa. That report indicated that the first respondent gave specimen writing which was compared to the writing annexed to the affidavit of John Musyoka sworn on 29th March 2008. This is the writing which showed the telephone number 0722769759. In that report the handwriting expert found in his opinion that there was no agreement between the specimen writing and the writing in the affidavit of John Musyoka. The main differences appeared in respect of figures 7 and 5. The petitioner argued that the handwriting expert report could not be relied upon by the court. In this regard he relied on various decided cases. In **ASIRA vs REPUBLIC (1986) KLR 227** the Court of Appeal made the following holding amongst others:-

"***The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by a particular person or that the writings are so similar as to be undistinguishable."***

The court in that case also stated:-

"***In case where there is a problem about the writing it is the duty of the court to satisfy itself after examination whether the expert's opinion can be accepted and cannot blindly accept such opinion. In these areas of conflict it is prudent to look for other evidence ……"***

In the case of **WAINANA vs REPUBLIC (1978) KLR** the Court of Appeal stated:-

"***Whilst a handwriting expert may, in an appropriate case, say that he does not believe that a particular writing is by a particular person, the most that he should ever say on the positive side is that two writings are so similar as to be indistinguishable. He might, moreover, comment on unusual features which make the similarity the more remarkable. However, there is no rule requiring the corroboration of the evidence of a handwriting expert."***

Petitioner argued that applying the tests in those decided cases the expert report relied upon by the first respondent could not assist the court. Having considered that report I find that it does meet the tests of those cases. Having made that finding I am aware that I am not bound to accept that handwriting report. The duty of the court is well stated in the case of **DAVIES vs MAGISTRATES OF EDINBURGH 1953 SC 34:-**

"***Their duty is to furnish the judge ….. with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge ….. to form (his or her) own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge.***

I am also satisfied that the expert meets the requirements of Section 48 Evidence Act. He clearly stated the studies he undertook and the vast work experience with the Criminal Investigation Department. The first respondent in response to the further affidavit of John Musyoka stated that no visitors going to his office would be processed at the reception counter on the ground floor of Pana Afric Hotel but rather that such visitors would be processed at Sarova Hotels Limited head offices where he had his office. He again reiterated that at 6.50 am or there about he was not at the Pan Afric Hotel as stated in the affidavit of Peter Mwangi Karanja. He denied knowledge of the said Peter Mwangi Karanja and denied having a conversation with John Musyoka on the material date. The first respondent annexed an affidavit sworn by Rose Warigia Wateri. Although the petitioner objected to that affidavit on the basis that it was filed without leave of the court I have checked the proceedings prior to the hearing of the application and I found that the first respondent was granted leave to file a further affidavit. The first respondent filed the further affidavit which was sworn on 21st April 2008. The affidavit of Ms Wateri is annexed to that further affidavit of the first respondent. I find that the affidavit of Ms Wateri cannot be faulted for being on record and I will allow it. Again for clarity I proceed to reproduce the affidavit of Ms Wateri as follows:-

Paragraph 1

That I am a secretary working in the Sarova Hotels Ltd Head Offices situated along Kenyatta Avenue.

Paragraph 2

That I remember sometimes in mid January, a person who gave his name as Jonh Nzive came to the Sarova Hotels Ltd Head Office and requested to see the Honourable John Ngata Kariuki who is one of the directors of Sarova Hotels Ltd;

Paragraph 3

That I informed him that the said director was not in the office and was not expected as he was then, at that time, not attending his office;

Paragraph 4

That the said John Nzive requested me for an envelope to put documents he was carrying to which I gave him a used khaki A4 envelope which he cancelled the name of the previous addressee and wrote the name of the Honourable John Ngata Kariuki and handed it over to me to pass to the said Honourable John Ngata Kariuki which I then stapled.

Paragraph 5

That the said John Nzive wrote his name and cell-phone number on a leaf of a gummed yellow notes pad as "John Nzive 0723-109213" and asked me to hand over to the said Hon. John Ngata Kariuki and request him to call the said John Nzive at the High court, which note I took and stuck to the said envelope bearing the documents left behind by the said John Nzive.

Paragraph 6

That I took a piece of paper and wrote the cell-phone number of the said Hon. John Ngata Kariuki as "0722 769759" and handed the same over to the said John Nzive after he requested for the same.

Paragraph 7

That on 15/4/08 I was shown annexture "JM 1" annexed to the affidavit sworn on 19/03/08 of John Musyoka and I did recognize the said number written thereon as "0722 769759" as the said number which had been written by myself.

Paragraph 8

That what is deponed to herein is true to the best of my knowledge, information and belief.

Section 20(1)(a) of the Act requires service of the petition on the respondent within 28 days of the publication of their results of the elections. The decided cases of the Court of Appeal and in particular the case of **KIBAKI vs MOI** found that the best service required by that section is personal service. That being the case the burden to prove that service was effected lays squarely on the petitioner. ***Section 107(1)*** of the evidence act provides:-

"***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

In order to find whether the petitioner satisfied that burden one would need to look at what the process server said in his affidavit of service. As correctly argued by the learned counsel for the first respondent the process server failed to indicate how he identified the first respondent. All he stated in his affidavit was that the first respondent became known to him during service. What that means is not clear. Was the first respondent pointed out to him? If so who did the pointing out. That detail is not borne out in the affidavit of service. After describing the scene at the restaurant where the process server said he had breakfast he then stated that the first respondent after taking his breakfast walked away and told him to go to the second floor. What exactly the process server meant when he said first respondent walked away is not clear. Did he go out of the hotel and directed the process server to go to the 2nd floor? That will remain unanswered. The process server then describes how he went to the 2nd floor and then 4th floor. It is important to note that the process server did not say that he walked together with the first respondent to those floors. I am of the view that the fact he does not state that they walked together means that each went on his own way. That is, the first respondent went out of the hotel and the process server went to the 4th floor where he left the petition with the secretary Rose. However when one considers the affidavit of Peter Mwangi Karanja one gets a very different picture. Karanja said that he saw the process server serve the petition on the first respondent at breakfast time. He stated that the first respondent requested the process server to wait until he finished his breakfast for him to formalize the acceptance of service. That information was not contained in the all important affidavit of service of John Musyoka. Karanja further stated that he saw the first respondent on finishing his breakfast, rising up and walking together with the process server to his office located at Pan Afric Hotel. There are two things that arise out of that

statement. If that is correct, why did John Musyoka go through the process of introducing himself to Evelyn on 2nd floor who directed him to 4th floor? On 4th floor he met a secretary called Rose again he had to explain to her the purpose of his visit. All that explanation would not have been necessary if indeed first respondent walked together with the process server to his office. The process server did not say that he walked together with the first respondent from the restaurant. The second point is that Karanja who describes himself as a business man dealing in car hire and frequently visiting hotels did not seem to distinguish the Pan Afric hotel whether it is called Pan Afric Sarova or Pan Afric with the offices of Sarova Hotels Head offices. The process server in his further affidavit stated that the first respondent wrote his telephone number on a piece of paper when being served. That statement should be considered in the background that the process server indicated the first respondent refused to acknowledge service of the petition on a copy. If that be the case it is hard to accept that a person who refuses to accept service would turn round and write down his telephone number and much more request that he be telephoned. Rose Wateri stated in her affidavit that she was the one who wrote the first respondent's telephone number on request by the process server. That I find to be more believable than the allegation by the process server. This is more so because the process server did not allude to the writing of the telephone number in his initial affidavit of service. He only mentioned the writing of the number after the first respondent had filed an application to struck out the petition for lack of service. On the other hand first respondent presented an alibi and said that at the time of the alleged service he was attending church at Don Bosco. He supported that alibi evidence by attaching a receipt for breakfast he had at Sarova Pan Afric Restaurant on 12th January 2008 at 8.50 a.m. What is not clear however is whether the time indicated in that receipt 8.50 a.m. was the time he finished his breakfast or the time he began to have his breakfast. I am of the view that the alibi does not hold for the purpose of determining where the first respondent at around 6.30 a.m. on 12th January 2008. There is also the issue of the telephone number which the first respondent alleged was attached to the used envelope containing the petition. The name next to the telephone number was shown to be John Nzive. The process server confirmed that he left his number at the time of service because that was the procedure adopted by the hotel towards a visitor. He however denied that he wrote that number himself. The writing of that telephone number was not subject to examination by an expert. I am of the view however that if indeed it is a requirement of a hotel that a visitor entering has to leave his telephone number the reason for such requirement I believe would be to ensure that there is a record of such a visitor attending the hotel. If that be so then one would expect that a hotel would have a more formalized form to be filled by a visitor attending the hotel. That is, one would expect a chit requiring the name and contact of the visitor. It is difficult to accept the hotel, if it had laid down such a procedure would require the guest to indicate their number on a small piece of paper as seen in the first respondent's exhibit 'JNK2'. Looking at that exhibit it is clear that the piece of paper on which the number was written has two staple marks indicating that it was attached to something else. See the affidavit of Ms. Rose Wateri. She confirmed that on the process server noting his name and number she stapled it on the used envelope. Even if one was to accept the argument raised by the process server that he was required to give his name and telephone number on visiting the hotel the process server failed to explain why that paper had the following words "***high court pls call him".*** Since the process server did accept that paper indicated his contact as required by the hotel it was incumbent upon him to explain those words. Taking those words in their natural meaning it would mean that the person named therein did not find the person he was looking for and required to be called. That position would seem to fit in with what the first respondent says. That is he was not served but that instead the process server left the petition with Rose Wateri. That would explain why the paper with the process server's name would state '***pls call him'***. There was an argument raised by the first respondent counsel to the effect that since the process server failed to annex the copy of the petition allegedly served on the first respondent it made the affidavit of service to be incurably defective. I find no basis for that argument because after all the allegation was that the first respondent refused to acknowledge service. The copy of the petition that would have been annexed to the affidavit of service would not have assisted in view of that alleged non service.

I have in totality considered all the arguments ably put before me by the learned counsels. I am indeed indebted to the well thought out submissions. I have also considered the evidence in cross examination of the first respondent. Having considered the evidence in totality I find that the evidence of the first respondent has the more convincing force. I am more inclined to believe that the first respondent was not in his office on the 12th January 2008 and further that he was not served with a copy of the petition as

alleged by the process server. This finding is supported by the short comings and contradicts found in the petitioner's affidavit. The petitioner did not satisfy the burden of proof laid upon him in respect of service of the petition. I therefore find that the first respondent is entitled to the prayer sought in the notice of motion dated 27th February 2008. He has proved on a balance of probability that he was not served with the petition. The case of **KIBAKI vs MOI** provided that the best service of a petition is personal service of the respondent and not through his secretary as in our case here. The second and third respondents supported the first respondent's application and sought costs of the petition if the application was successful. The court therefore grants the following orders:-

1. The petition herein is struck out on the ground that the same was not served personally on the first respondent within 28 days after the date of publication of the results of parliamentary election.

2. The court grants the first respondent costs of the notice of motion dated 27th February 2008 and the costs of the petition as against the petitioner.

3. The court grants costs of the petition to the second and third respondents as against the petitioner.

DATED AND DELIVERED THIS 28TH DAY OF MAY 2008

MARY KASANGO

JUDGE