REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Election Petition 1 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 ELECTION FOR THE SIRISIA CONSTITUENCY

BETWEEN

JOHN KOYI WALUKE……...…….PETITIONER

VRS

MOSES MASIKA WETANGULA…….…1ST RESPONDENT

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

JAMES KULUBI OMWANGWE…….…..3RD RESPONDENT

RULING

JOHN KOYI WALUKE hereinafter referred to as the petitioner was a parliamentary candidate in SIRISIA CONSTITUENCY at the elections held on 27.12.2007. He was not satisfied with the results of the elections as announced and consequently filed this election petition which was the first election petition to be filed in respect of the 2007 General Elections. He filed the petition against *MOSES MASIKA WETANGULA* hereinafter referred to as the 1st respondent, Electoral Commission of Kenya (2nd respondent) and one *JAMES KULUBI OMWANGWE* (3rd respondent). The 1st and 3rd respondents however moved this court by way of notices of motion dated 31.3.2008 (by 3rd respondent) and one dated 14.3.2008 by 1st respondent respectively. They are both basically seeking orders that this petition be struck out. We agreed to hear these two applications together since they are basically seeking the same orders and then the court would prepare one ruling for both of them. This therefore is that ruling. The application by the 3rd respondent is premised on one ground only which ground is as hereunder:

(a) That the 3rd respondent was not served as required by the Provision of the National Assembly and Presidential Elections Act.

It is supported by the affidavit of the 3rd respondent dated 18.3.2008 and his supplementary supporting affidavit dated 17.4.2008. The 1st respondent's Notice of Motion on the other hand is premised on eight grounds as hereunder;

1. The Petition was not personally served upon the 1st respondent as per the Provisions of Section 20 of the National Assembly and Presidential Elections Act.

2. No effort or at all was made to personally effect service on the 1st respondent.

3. Request for particulars was served upon the petitioner on 4th March 2008.

4. The court gave order on 13th March 2008 that 1st respondent be served with particulars within 10 days.

5. That no particulars have been served to date.

6. The petitioner has not complied with the court order dated 13th March 2008 and has refused, ignored and/or neglected to provide the 1st respondent with particulars.

7. It is in the interest of justice that the application be allowed.

8. The application is made in good faith.

The same is also supported by the 1st respondent's supporting affidavit dated 28.3.2008; and another affidavit dated 15.4.2008 which has been misdescribed as a "***Replying Affidavit".*** I say misdescribed because you cannot file a "Replying Affidavit" to your own application. The same should have been a supplementary affidavit. The misdescription is not however material and I will overlook it. The applications are opposed by the petitioner vide his replying affidavit dated 14.4.2008 which has several annexures. These annexures include two affidavits of service sworn by one ***EVANS NANDOYA MISIGO, and THOMAS.W.O. NDUKU*** who are said to have effected service of the petition on the two respondents herein. It is not practically possible or even necessary to paraphrase the contents of all these affidavits for purpose of this ruling. Suffice it to say however that I have studied the contents thereof carefully and noted the same. I have also been duly informed by the several legal authorities cited by all counsel in this matter. I must indeed applaud them for exhibiting a high level of preparedness both in their research and their presentation of the materials to court. They have made my role of writing this ruling less onerous. I will now deal with the application by the 3rd respondent which is the one that was filed first. The 3rd respondent's only ground as stated earlier was that he was not served with the Petition as required by the law and more particularly section 20 of the National Assembly and Presidential Elections Act. He has deponed in paragraph 3 of his affidavit that:

"***I learnt from the Newspaper that the petitioner herein had filed the petition to challenge the outcome of the election."***

In paragraph 8 of the same affidavit, he depones that;

"***That no effort or at all was made to personally effect service on me."***

According to the petitioner however, the 3rd respondent was personally served and that is why they have not even raised the issue of substituted service in respect of the 3rd respondent. Annexure "***JKW 2b"*** which is the affidavit of service in respect of the 3rd respondent has clearly explained how the petition was served. That however is contested by the 3rd respondent. Before I delve into those issues, it is important that I deal with a pertinent point by counsel for the petitioner on the validity or otherwise of the 3rd respondent's affidavit in support of the application to strike out the petition. Mr. Masika for the petitioner urged the court to find that the 3rd respondent's affidavit is defective and implored the court to strike it out. His argument is that the affidavit fails to disclose the deponent's "***place of abode"*** which should be different from the postal address. I will quote OXVIII r.4 for purposes of clarity. The same provides as follows:-

"***Every affidavit shall state the description, true place of abode and postal address of the deponent ……."***

This rule clearly requires a deponent not to just state his postal address but also the "***true place of aboard***" which means the physical address. This rule is couched in mandatory terms and it is neither salutary nor directory. In my considered view, a deponent must disclose his true physical aboard and failure to do so renders his affidavit fatally defective. This is more so in a situation like this where the issue of personal service is of paramount importance since the deponent may deliberately want to cover up his place of residence in a bid to show that he was not personally served. This omission is therefore in my view a very material omission, and not merely a procedural one. I am in agreement with my brother judge Ochieng,J in **DAIMA BANK LTD -V- PATRICK MWAU MUSIMBA [2006] e KLR** where he held**;**

"***an affidavit which does not comply with the provisions of OXVIII Rules 3(1) and 4 is incurably defective. The only remedy is to have such affidavits struck out."***

The same view was expressed by Nyamu, J in **JOVENNA EAST AFRICA LTD -V- SYLVESTER ONYANGO & 4 OTHERS** where he held that;

"***failure to disclose a deponent's place of abode is not an irregularity in form but a substantive irregularity which went beyond the provisions of Order18 rule7".***

Lady Justice Mugo was of the same view in the case ***of BARE & 13 OTHERS -V- MAENDELEO YA WANAWAKE ORGANISATION - HCT, Nairobi Civil Case No.494 of 2004.***

Although these are High Court Authorities and they do not therefore bind me, I am afraid I share the same view. This affidavit was very important to the 3rd respondent's case as the issue of his place of aboard was a pertinent one. It is not excusable that he could have forgotten to include it in his affidavit. My finding like that of my brother and sister Judges cited above is that the 3rd respondent's affidavit in support of the Notice of Motion is fatally defective and calls for striking out. I accordingly strike it out. The same fate befalls his supplementary supporting affidavit dated 17/4/2008. With the exit of these 2 affidavits his motion cannot stand because there is nothing to controvert the process server's averments in annexure "***JKW -2 (b)".*** From these circumstances, the only holding I can make is that the allegation that the 3rd respondent was not served with the petition is totally unsupported and it must fail. The Notice of Motion dated 14.3.2008 is consequently dismissed with costs to the petitioner.

This now brings me to the 1st respondent's Notice of Motion dated 31.3.2008. The grounds on which it is premised have been enumerated earlier on in this ruling. If the 8 grounds are compacted, they can conveniently be reduced to 2 grounds without any of the grounds losing its importance, substance or thrust. These grounds would be, lack of personal service as provided for under section 20 of the National Assembly and Presidential elections Act (herein after referred to as '***the Act'***) and secondly, that the petitioner has failed to comply with a court order requiring him to serve the requested particulars within 10 days as ordered by the court and the petition should therefore be struck out. I will start with the analysis of the second ground. I was supplied with several authorities on this issue and I am duly informed by the same. It is correct to say that when a court gives orders to a party to perform some act e.g supply particulars, do discovery etc and gives a time limit within which that act must be done, if the party to whom the order is directed fails to comply, then the court may strike out the non-complying party's pleading. OX r.20 provides for such a situation in respect of failure to comply with an order for discovery. As held by the Court of Appeal in **EASTER RADIO SERVICE -VS- TINY TOTS [1967] E.A 392,**

"***Failure to give discovery and inspection may result in the striking out of a suit."***

The striking out of a suit for non-compliance with an order for discovery is not mandatory. It is at the discretion of the court and the court would have to consider the peculiar circumstances of each case before making orders for dismissal. In any event, the issue here is not one of failing to comply with an

order for discovery and order X of the Civil Procedure Rules does not apply. To counter the 1st respondent's counsel's submission on this issue, Mr. Masika for the petitioner submitted that the court order was mere directory and not obligatory and neither did the order have a default clause to say what would happen in the event it was not complied with. He implored the court not to strike out the petition on that ground saying that this is a very draconian move. I have gone through the proceedings of that day to confirm the nature of the order in question as this is the only way one can determine whether it was complied with or not. The court record of 13.3.2008 shows that Mr. Masika who appeared for the petitioner addressed the court as follows:

"***We were served with the application on 4.3.2008. We can avail the particulars within 10 days from today …. "***

In response to this undertaking, to which Mr. Makokha for the 1st respondent raised no objection, the court stated;

"***We shall take hearing dates but have a date for mention in between. Counsel for the petitioner has undertaken to provide the particulars within 10 days and I have no reason to doubt that undertaking."***

This is what Mr. Makokha refers to as the court order which the petitioner's counsel has failed to comply with. That statement by the court cannot in my considered view be said to have amounted to a court order. It was just an observation on my part to the effect that I had accepted counsel's undertaking to file and serve the particulars within the 10 days as he had offered. I did not convert that undertaking into a court order. Indeed, given the nature of the particulars sought by the 1st respondent, I was a bit surprised that counsel would manage to supply the same within 10 days. As rightly submitted by Mr. Masika for the petitioner, there was no penalty attached to my so called "***order".*** Indeed that was not a court order and it would not therefore attract any penalty for non-compliance beyond an admonishment to counsel for having misled the court to believe that he could supply the particulars within those 10 days as he had promised to do. It is indeed noted that by the time the matter came up for mention on 7.4.2008, counsel for petitioner had already filed the requested particulars. Counsel offered a plausible explanation as to why he was unable to file the particulars as he had promised earlier on. In my considered view, the circumstances surrounding the issue of the supply of the particulars, the nature of the 'order' in question and that there was actually compliance though late militates against an action as drastic as striking out the petition or even the particulars themselves. I echo the words of **DEVLIN J. in REISS –V- WOOLF [1952] 2 A 11 E.R3** at p5 where he stated;

"***The dismissal of an action for the failure to supply particulars imposes a drastic penalty. The same principles apply to the striking out of a particular defence as apply to the dismissal of an action."***

Our present case is on all fours with civil appeal No.5/1983 **BHANDARI CONSTRUCTION COMPANY -VS- STANDARD JOINERY & BUILDING COMPANY,** where the court of Appeal made the following observation;

"***With respect, the learned Judge erred. First, because he did not state in his order that unless the plaintiff carried it out, the action will be dismissed. Secondly, in addition to the required particulars having been already supplied, ….. Thirdly, because of the action may well cause serious injustice…"***

That is exactly what the Court of Appeal would say if I were to strike out this petition on that ground. For that reason, that ground must fail. Having found so, I reiterate that the said particulars did not breach any time deadlines and I will therefore deem them as having been duly filed and served.

That leaves me with the main ground of lack of service. The issue of lack of personal service is a notorious one which rears its head in almost every petition that is filed in our courts today. The law on presentation and service of a petition is contained in section 20 (1) of the Act (Cap7) which provides as hereunder:-

"***20(1) - A petition 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."

The provision on the face of it does not specifically and unequivocally state that the service must be personal. The Court of Appeal in the case of ***KIBAKI -V- MOI [2000] 1 EA, 117*** however made a firm finding in respect of the preferred mode of service when it held;

"……***.. Section 20(1) (a) of the Act does not prescribe any mode of service and in those circumstances, the court must go for the best form of service which is personal service ….. "***

This standard has subsequently been applied in many subsequent cases and many petitions have been struck out on the ground that they had not been personally served on the respondents. It is a position that has been grossly abused by respondents who have in turn developed perfection in the hide and seek game in order to avoid service; only to claim later that they were not personally served with the petition and that the same should therefore be struck out. The celebrated case of ***ABU CHIABA MOHAMMED –V- MOHAMMED BWANA BAKARI & 2 OTHERS*** nonetheless stepped in to stem this gross abuse of section 20 (1) (a) of the Act and the ratio decidendi as set out in the ***KIBAKI –V- MOI*** case by setting out clearly that a party who deliberately avoids personal service should not be allowed to benefit from that law. This however is not applicable in our case as there is no allegation that the 1st respondent herein hid himself in order to avoid personal service. The law has nonetheless changed with the amendment of section 20(1) by Act No.7/07. This amendment introduced the proviso to section 20(1) c (iv) which reads as follows:

"***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."***

In the present case, it is conceded that personal service was not effected on the 1st respondent and I will not therefore belabor that issue. The question before us is whether the process server who alleges to have tried to serve the 1st respondent exercised due diligence but was unable to find the 1st respondent in order to effect personal service on him. The process server one Thomas Nduku filed a 20 paragraph affidavit of service giving details of the attempts and efforts he made to serve the 1st respondent with the petition. He, in paragraph 2 has deponed that he was given copies of the petition on 10-1-2008 and he therefore had ample time to look for the 1st respondent.

In paragraph 3, he explains how he went to the Ministry of Foreign Affairs Head quarters along Harambee Avenue but after introducing himself and stating the purpose of his visit, he was turned back. He said he talked to one Keter at the reception. The 1st respondent in his affidavit has denied any knowledge of a Mr. Keter in his office. He has then explained in detail how he went to the 1st respondent's home in Spring Valley in Nairobi after "***Scouting for the house for sometime".***

In paragraph 12, he says:

"***that on the 18th day of January, 2008 I again went to Spring Valley through Peponi Road, Oilibya Petrol Station. I walked around, by so investigating the locality of his residence, I found that the minister's house is within Bandera Lane as you go through Spring Valley black main gate. Numbered 16 with a private guard who opened for me the gate leading to Honourable Wetangula's house No.16G."***

He goes on to describe the Minister's house. He said that he met a private guard/security officer who advised him that all appointments to see the Honourable Wetangula were done either at his Parliamentary Office or the Ministry Headquarters. He said that he could not do much and he therefore retreated. Not one to falter in spirit or be discouraged, he soldiered on and traveled all the way to Kanduyi in Bungoma District. He has given a graphic description of the Minister's home – which the 1st respondent nonetheless disputed in his affidavit dated 15.4.2008. According to the process server, he met the 1st respondent's farm manager who introduced himself as Moses Kimuna in company of one Tom

Wanyama. He said that they blocked him from entering the minister's compound. Whereas the 1st respondent admits that his farm manager is called Kimuna, he reiterated that Mr. Kimuna denied ever having sent anybody away from the 1st his farm. The process server has also described the other efforts he made to effect service at Parliament Buildings and at Simba Lodge in Naivasha where the 1st respondent and other members of his political party were meeting. It was after all these efforts failed that he returned the documents to the petitioner's advocates on 25th January 2008. Counsel for the petitioner therefore decided to effect service as provided for under proviso (iv) of section 20 (1) C. The petition was advertised vide Kenya Gazette No.443 of 25.1.2008; the Taifa Leo Newspaper and the Daily Nation Newspaper of the same date. These advertisements were done within the 28 days provided for under section 20 (1) a. The only issue in this application therefore is whether the petitioner exercised "***Due diligence"*** in trying to effect personal service which he eventually failed to do. The process server has graphically explained the steps he took to try and serve the 1st respondent personally. In his replying affidavit, the petitioner basically reiterates what the process server deponed in his affidavit. On his part, the 1st respondent has denied that the process server ever tried to serve him personally. He admitted that he owns a house at Spring Valley and a homestead in Bungoma. He nonetheless denied having private guards in his residence at Spring Valley. He admitted having attended a meeting for P.N.U Members at Naivasha but insisted that nobody tried to serve him with court processes at his Ministerial office, Parliamentary office or private office at the Ministry of Foreign Affairs, Continental House and Corner House 8th Floor respectively; or at Serena Hotel where he and others were holding consultative meetings. He has also deponed that he interacted with Hon.Orengo, who was counsel on record for the 1st respondent yet he never attempted to serve him. Counsel for the petitioner in answer to this cited section 9 of Advocates act (Cap 16 of the Laws of Kenya) which provides as hereunder:-

9. " ***No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if; while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear."***

Counsel for petitioner contended that this was/is a contentious matter and it would not have been proper for Hon. Orengo to try and serve the 1st respondent. I must agree with counsel for the petitioner on this point. Hon. Orengo though an advocate of this court and thus competent to serve process, was meeting with the 1st respondent in a totally different capacity. It would have been improper and discourteous for him to take advantage of that situation and digress from the agenda of the meetings to start serving petitions. It would also have been unprofessional given the provisions of section 9 of the Advocates Act.

That was not therefore an option which was open to the petitioner. Did or didn't the process server exercise due diligence in his attempts to serve the 1st respondent? I have considered all the material placed before me by all counsel herein. I have also considered carefully oral submissions made by counsel herein. It is not possible to repeat everything they said but I have been duly informed by all the contents therein.

Diligence is defined in Blacks' Law Dictionary as:

" ***1. A continual effort to accomplish something; 2. Care, caution; the attention and care required from a person in a given situation."***

Due diligence' on the other hand is defined as:

"***The diligence reasonably from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation."***

The operative words here are "***reasonably"*** and '***ordinarily'***. If you apply the meaning of the word

"***reasonable man"*** as we understand it in criminal law- and not necessarily "***the man in the Clapham Omnibus"*** like I was taught in my 1st year in University, it would mean, the ordinary man or the person on the Kenyan streets who the Kenyans like to call "***Wanjiku"*** these days. The diligence does not therefore have to be diligence of a 'super human' at the extreme end or that of an 'ignoramus' or 'imbecile' on the other. It has to be that of an ordinary person. A process server like the one who tried to serve the 1st respondent is such a person. From his description of all the places he visited, I have no doubt in my mind that he made those visits. There may have been misdescriptions; or in some cases names were not given; In other cases he got the right names but could not tell the difference between a kei apple fence and a cypress one. Why would a process server travel all the way to Bungoma in the height of the insecurity that was prevailing in some of the regions he had to pass through if indeed he had no intention to effect personal service of the petition?. How would he have known of house No.16G in Spring Valley if he had not gone there looking for the 1st respondent in order to serve him? Why make the trip to Naivasha when the situation on the road to Naivasha was so volatile.

Wouldn't these efforts be said to amount to a continual effort to accomplish personal service? I believe that Mr. Nduku the process server did make some serious and commendable effort to trace and serve the 1st respondent herein. The only thing he failed to do was to pin the petition to the 1st respondent's gate and take photographs- but would the 1st respondents administration police officers allow him to do that? On the other hand, he may not have read the Mohamed Abu Chiaba case and learnt the trick. He may also have been an ordinary process server and not an astute one. My considered finding is that although the 1st respondent may not have shirked or avoided personal service of the petition on him, his status and lifestyle made it difficult for the process server to permeate the wall of the A.Ps, receptionists, secretaries, farm managers, security guards etc in order to effect personal service. This was the very first election petition to be filed after the publication and gazettment of the election results. It was reported all over the print and electronic media by 11th January 2008 as can be seen in annexure "JKW3". This was 2 weeks before the publication in the Kenya Gazette and the 2 daily papers. The 1st respondent could not have missed it. The other issue I would like to deal with is that of the affidavits of service having been filed after the applications for striking out the petition having already been filed. I have always insisted on affidafits of service being filed immediately after service has been effected regardless of whether the other party has indicated he/she will be in court or not or whether service is contested or not. I have never understood why advocates wait until the last minute and only rush to court to file the affidavit of service when they realize that service may be contested. This is definitely a bad habit and one that must be discouraged at all costs. I am not convinced however that the affidavit of service was manufactured for purposes of this petition. The same was doubtlessly filed late but it is worth noting that the application to strike out the petition was also filed after the petition itself had been fixed for hearing and the petitioner may have erroneously concluded that the issue of service would not arise. My finding on this point is that the late filing of the affidavit does not lessen or otherwise impeach the veracity of the contents of these affidavits. In any event, it has not prejudiced the respondent in any way.

In sum, my finding is that the provisions of section 20(1) (c) iv were complied with to the letter. The 1st respondent was properly served by way of alternative service. None of the grounds advanced for striking out the petition have been proved.

Accordingly, this application must fail. The same is therefore hereby dismissed with costs to the petitioner.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 27th day of May 2008 in presence of:-