



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Election Petition 3 of 2008

**THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTION ACT CHAPTER 7, LAWS
OF KENYA**

AND THE REGULATION MADE THEREUNDER

AND IN THE MATTER OF

BY-ELECTION FOR THE KINANGO PARLIAMENTARY CONSTITUENCY

BETWEEN

SIMEON MWERO MKALLA.....PETITIONER

AND

DEVIS NGOYAWU.....1ST RESPONDENT

GONZI RAI.....2ND RESPONDENT

RULING

The Petitioner is a registered voter in Kinango constituency and was a candidate in the Parliamentary Election held in Kenya on 27th December 2007. On that date Kenya also held its Presidential and Civic Elections. The elections were held under the provisions of the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya (hereafter “the Act”) and the Parliamentary and Presidential Elections regulations made thereunder (hereafter “the regulations”). The 1st respondent Davis Ngoyawu was the Returning Officer and the 2nd respondent was declared the winner in the said constituency for the parliamentary seat aforesaid.

The result was published in the Kenya Gazette of 30th December 2007. The petitioner was aggrieved and on 25th January 2008 petitioned against that result by way of this Election Petition No. 3 of 2008. He raised various grounds in the petition and sought the primary order that the election of the 2nd respondent to the National Assembly by declared null and void.

On 25th February 2008, the 2nd respondent took out a notice of motion seeking the striking out of the petition. That motion on notice came up for hearing before me on 9th May 2008. The main ground for the application is that the petition was not served upon the 2nd respondent within 28 days of the presentation of the petition as mandatorily required by Section 20 (1) of the Act. The application is

supported by an affidavit sworn by the 2nd respondent in which it is deponed *inter alia* that the petition was never served upon the 2nd respondent nor were any other papers relating to the petition served upon him.

In his oral submissions made to me, counsel for the 2nd respondent contended that no personal service had been effected upon the 2nd respondent and the attempts made by the petitioner to effect personal service were casual. Counsel placed reliance upon the decisions of the Court of Appeal in the cases of **Kibaki – v – Moi (2000) 1 EA 115, Ntoitha M’mithiaru – v – Richard Maoka Maore and 2 others [Civil Appeal No. 314 of 2003] (UR) and Abu Chiaba Mohamed – v – Mohamed Bwana Bakari & 2 others [Civil Appeal No. 238 of 2003] (UR).** In counsel’s view, the attempts at personal service made in those cases were more serious than the attempt made by the petitioner in the matter at hand.

On the alternative service provided under proviso (iv) to Section 20 (1) of the Act, counsel for the 2nd respondent argued that the service attempted by the petitioner fell short of the requirements of the said proviso. He said so because there was no publication of the presentation of the petition in the Gazette and in one Kiswahili local daily newspaper with the highest national circulation. Counsel therefore submitted that there was no proper service of the petition within 28 days of the publication of the result which later event occurred on 30th December 2007. In the premises, counsel urged that the petition was incompetent and should be struck out. The 2nd respondent was supported by the 1st respondent in his application. The latter’s counsel associated himself with the submissions made by counsel for the 2nd respondent.

The petitioner opposed the 2nd respondent’s application and in that regard he has filed an affidavit in opposition. He depones in the affidavit that he did not expect the result of the election to be published in the Kenya Gazette on 30th December 2007 a Sunday or on a public holiday. He was therefore surprised when he learnt on 24th January 2008 upon reading the Kenya Gazette that he had upto 25th January 2008 to lodge his petition. Notwithstanding the filing of the petition on 25th January 2008, the petitioner swears that the attempt to trace the 2nd respondent at his house in Nyali Mombasa or the constituency in Kinango proved futile. He also depones that as the 2nd respondent had left no contact address with the Registrar’s Office at Mombasa, he had no option but to serve the presentation of the petition by advertising in the Standard Newspaper of 28th January 2008 which according to the petitioner is sufficient service. The petitioner’s counsel filed a supplementary affidavit whose primary purpose was to exhibit the publication of the presentation of the petition in the Standard Newspaper aforesaid.

In his oral submissions before me, counsel for the petitioner argued that the purpose of service is to bring notice of the petition to the respondents. Counsel referred to the affidavit sworn by the process server, Michael Thoya Mbwana of 6th March 2008 in which the process server swore that he tendered the “petition notice” to a gateman at the 2nd respondent’s house at Nyali estate who said he had instructions to receive any written messages or documents for “Mheshimiwa.” In counsel’s view, as no subsequent affidavit was filed to deny the averment of the process server, the 2nd respondent should be deemed to have been personally served especially as the 2nd respondent does not explain how he learnt of the petition.

I have considered the application, the affidavits filed, both in support of the application and in opposition thereto, the submissions of counsel and the authorities cited. Having done so, I take the following view of this matter. It is not disputed that the result of the Parliamentary election for Kinango Constituency was gazetted in the Kenya Gazette of 30th December 2007. It is also not in dispute that this petition was lodged on 25th January 2008. It is clear to me therefore that the presentation of the petition was within 28 days of the publication of the result in the Kenya Gazette. The presentation therefore complied with the provisions of Section 20 (1) (a) of the Act which reads as follows:-

Section “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.”

The Section also makes it clear that the petition was required to be served upon all the respondents within twenty eight (28) days from the date of the publication of the election result in the Gazette. In the matter at hand, the petitioner had to serve the petition latest by the 28th January 2008 as 27th January 2008 fell on a Sunday. The petitioner was aware of that position and in paragraph 6 of his affidavit in opposition to this application depones as follows:-

“6. That it was therefore an absolute suspense when I obtained the copy of Kenya Gazette on the 24th January 2008 only to realize that I had only upto 25th January as the last working day to file my petition.”

The petitioner annexed an affidavit sworn by the process server Michael Thoya Mbwana on 6th March 2008 which is headed “AFFIDAVIT OF NON-SERVICE.” The process server deponed as follows:-

“1. That I am an authorized process server of the High Court of Kenya and the entire subordinate courts thereto.

2. That on 25th January, 2008 I received an election petition notice herein from the Petitioner’s Advocate Cootow & Associates Advocates in triplicate with instructions to effect service of the same on the 2nd respondent Honourable Gonzi Rai.

3. That on the same day at around 2.00 p.m. I visited the Kinango Constituency Parliamentary member’s office to enquire whether I could see the Honourable M.P. Gonzi Rai and I was informed that he was not in but I could try and see him at his residence in Mombasa.

4. That I proceeded to Mombasa at Nyali Estate Links Road opposite Kenya Navy Barracks as directed by Councillor Salim Awadh a former area councillor in Kinango and the petitioner and reached there at around 5.30 p.m.

5. That upon arrival I enquired from the gateman whether I could see Honourable Gonzi Rai. The gateman who refused to tell me his name informed me that “Mheshimiwa” was not there nor was his wife but confirmed that this was his residence.

6. That I then went further to identifying myself to him and the purpose of my visit. The gateman who was not known to me before told me his name is Vatana informed me that he would not let me in but had instructions to receive any written messages or documents for “Mheshimiwa.”

7. That as it was approaching 6.00 p.m. and the day was Friday I tendered to him the petition notice for and on behalf of Hon. Gonzi Rai.

8. That I requested the said Vatana to endorse my copy of the notice but he declined and insisted he could only receive the same but not sign for it.

9. That during this time I was accompanied with one Salim Awadh the Petitioner agent (sic) who pointed out the house to me.

10. That I return the unsigned copy of the Petition notice to this Honourable Court duly unserved.

11. That what I have stated herein above is true to the best of my knowledge, information and belief.”

The process server’s affidavit is the only evidence the petitioner has availed on the personal service of the petition. In my view however, that affidavit is evidence of failure to serve the 2nd respondent personally

with the petition. The process server himself describes the document as an “affidavit of non-service”. He was in no doubt that he had not effected service upon the 2nd respondent. He said so as much in paragraph 10 of his affidavit of one-service.

It is also plain that what the 2nd respondent should have been served with under Section 20 (1) of the Act was the petition. But as it can clearly be observed, the process server was given an election petition notice to serve the 2nd respondent. The process server depones on the document he intended to serve in paragraphs 2, 7, 8 and 10 of his affidavit. He does not mention the petition anywhere in the affidavit. It would mean that even if the process server had found the 2nd respondent, all he would have served him with would have been the “election petition notice”. It is also plain from the petitioner’s own replying affidavit that he also knew that personal service of the petition had not been effected upon the 2nd respondent. That is why he depones as follows in paragraph 7 of that affidavit.

“7. That nevertheless upon filing the petition on 25th January, 2008, effort to trace the 2nd Respondent at his house in Nyali Mombasa or the Constituency office in Kinango proved futile. Annexed is an affidavit of service to this effect marked “SMMI.”

It is illustrative that the affidavit annexed as “SMMI” is the same one referred to above which the process server described as an affidavit of non-service. It is annexed not to prove personal service but the failure thereof. In my view therefore, the petitioner’s own documents show that the 2nd respondent was not personally served as required under Section 20 (1) (a) of the Act.

Counsel for the petitioner, on the strength of the process server’s said affidavit deponed that personal service had been effected upon the 2nd respondent. He submitted that personal service need not be on the person himself. No doubt counsel had in mind the decision of the Court of Appeal in Abu Chiaba Mohamed – v – Mohamed Bwana Bakari (supra) where that court held that the attempts made to serve a successful candidate amounted to personal service. However, the efforts to serve the successful candidate in the case the Court of Appeal was dealing with were such that, as the court found “any reasonable tribunal would be fully justified in concluding as those who wanted to effect service upon the appellant did, that the appellant had gone underground with the sole purpose of evading personal service and that was why he could not be found in his two houses in Nairobi and Mombasa.”

The Court of Appeal found as follows on the efforts made by the petitioner to serve the appellant:

“The 1st Respondent mentioned two places where he knew the appellant to be residing. He mentioned House No. 12 in Nairobi South C. He also mentioned the names of two people, the grandson Jamal Domilla and the watchman Mohamed Omar Ali Rotich; those two are stated to have told the process server that the Appellant was in Saudi Arabia. The appellant, as we have seen chose not to say anything on those matters. He for example did not say that he did not own House No. 12 along Ole Shapara Road, Nairobi South ‘C’, he did not say he has no grandson known as Jamal Domilla or a watchman called Mohamed Omar Ali Rotich. These people told the process server that the appellant was in Saudi Arabia. Those intending to serve the Appellant have sworn that they suspected the Appellant was hiding from them in order to avoid being personally served. That led the party intending to personally serve him to move to Mombasa. The Appellant, if it was true that he was in Saudi Arabia could have proved that fact by producing a copy of his passport. He did nothing of the kind. Then the search moved to Mombasa and once again, the Appellant did not say he had no house in Mombasa and that he knew nothing about the gate on which the documents to be served upon him were pasted. A woman identified as his wife was found there and refused to talk to the party intending to effect service. The Appellant chose to say absolutely nothing about these matters...”

On that material, those intending to effect personal service concluded that the successful candidate had gone underground and was evading personal service. We do not have such material in this case. The process server herein made a single attempt to serve the 2nd respondent at his Constituency office on 25th January 2008 at 2.00 p.m. He also made a single attempt on the same day at 5.30 p.m. to serve the second

respondent at his Mombasa residence at Nyali Estate Links Road. The process server did not conclude and indeed could not conclude on the basis of that single attempt that the 2nd respondent was hiding and was evading personal service. He knew that he had not effected personal service and said so in his affidavit of non-service. As I have already stated above, even the petitioner is not of the view that the 2nd respondent was hiding to evade personal service. Besides, the documents found to have been served in the Abu Chiaba Mohamed case were the notice of presentation of the petition and the petition itself. In this case, the process server only attempted to serve an election petition notice and not the petition.

In the premises, I find and hold that the effort to personally serve the 2nd respondent was casual. The attempt was more casual than the attempt made in the case of **Ntoitha M'Mithiaru – v – Richard Maoka Maora (supra)**. In that case, efforts were made by the process server to serve the successful candidate at his Continental House office on 30th January 2003 but the guards there informed him that the successful candidate was not in his office. The process server then proceeded to the constituency but failed to trace the successful candidate. The process server then visited the Nairobi residence of the candidate once on 30th January 2003 and again on 31st January 2003. On the latter occasion, the process server was denied access to the candidate's home. He sought assistance of Administration Policemen from Westlands District Officer but access to the candidate's home could not be obtained.

Onyango Otieno J.A. found that those efforts to serve the successful candidate in that case were casual and could not lead to an inference that the successful candidate was indeed served with the election petition and notice of presentation of the petition. The efforts made to serve the notice of presentation and the election petition in the Ntoitha M'Mithiaru case were more serious than the efforts made by the petitioner herein. Yet the Court of Appeal found those efforts casual. I have even more reason to hold that the petitioner herein made only feeble attempts to serve and not even the petition but an election petition notice. I do not find therefore that there was due diligence in the efforts to serve the petition under Section 20 (1) (a) of the Act. Having so found, it was not open to the petitioner to serve the 2nd respondent under proviso (iv) to the said section. The proviso reads as follows:-

“(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.”

It is plain that a petitioner who is to avail the provisions of the said proviso, must demonstrate that he had failed to effect personal service of the petition after due diligence. As I have found that there was no due diligence in the part of the petitioner to effect personal service upon the 2nd respondent, he was not entitled to serve the presentation of the petition under proviso (iv) to Section 20 (1) of the Act.

However, even if the petitioner had demonstrated due diligence of his efforts to effect service under paragraph (a) of Section 20 (1) of the Act, he did not comply with the proviso. He did not publish the presentation of the petition in the Gazette and in one Kiswahili local daily newspaper with the highest national circulation. He only published the presentation of the petition in the Standard Newspaper. The attempt fell far short of the requirements of the proviso since the publication must be carried in all the 3 media: the Gazette, one English and one Kiswahili daily newspaper with the highest national circulation in each case and all the publications must be within 28 days after the publication of the result of the election in the Gazette.

The upshot of my consideration of the 2nd respondent's application dated 21st February 2008 and filed on 25th February 2008 is that the same is allowed. The petition presented on 25th January 2008 against the respondents is incompetent as it was not served upon the 2nd respondent as required under Section 20 (1) (a) and proviso (iv) thereto of the National Assembly and Presidential Elections Act Chapter 7 Laws of Kenya. The petition is accordingly struck out.

The petitioner shall pay the respondents' costs.

Orders accordingly.

A certificate to issue to the Speaker as required by Section 30 (1) of the Act.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Weloba for the Petitioner and Gikandi for the 2nd Respondent and also holding brief for Gakuhi for the 1st Respondent.

F. AZANGALALA

JUDGE

26TH MAY 2008