



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITION 1 OF 2008

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

AND

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

AND

IN THE MATTER OF THE ELECTION FOR MALAVA CONSTITUENCY

NAMBWA SAKAYA MUSAVINI PETITIONER

V E R S U S

SOITA PETER SHITANDA.....FIRST RESPONDENT

ELECTORAL COMMISSION OF KENYA SECOND RESPONDENT

CATHERINE MULONGO KIKETE THIRD RESPONDENT

R U L I N G

On the 27th of December, 2007 Parliamentary and Presidential elections were held in the Republic of Kenya.

The petitioner and the 1st respondent herein were among the nine candidates for the parliamentary constituency for Malava.

It is common ground that after the votes cast had been counted, the third respondent, **CATHERINE MULONGO KIKETE**, who was the Returning Officer, declared the first respondent, **SOITA PETER SHITANDA**, the winner.

It is also common ground that the **ELECTORAL COMMISSION OF KENYA**, the 2nd respondent in this petition, declared the first respondent duly elected, and published the said declaration in the Kenya Gazette dated 30th December, 2007.

Being dissatisfied with the manner in which the elections had been conducted, the petitioner filed this petition, with a view to challenging the validity of the 1st respondent's election as the member of the National Assembly, for the Malava constituency.

The petition was filed on 24th January 2008, at Kakamega.

The 1st respondent has moved this court by way of a Notice of Motion dated 8th February, 2008. Through that application, the 1st respondent (hereinafter cited as "*SOITA SHITANDA*") asks this court to strike out the petition, and to award him the costs thereof.

The application is premised on the contention that Soita Shitanda was not served with the petition within the period of 28 days after the publication of the election results in the Gazette. Consequently, it is the submission of Soita Shitanda that there was no proper and valid petition before the court.

When the matter came up before the court on 10th March, 2008, leave was granted to the petitioner to file a supplementary affidavit. Corresponding leave was also granted to the respondents to file affidavits in reply to the petitioner's supplementary affidavit.

On 14th April, 2008 when the application came up for hearing, Soita Shitanda was represented by two advocates, namely Miss Aulo and Mr. Onsongo, whilst the petitioner (hereinafter cited as "*NAMBWA MUSAVINI*") was represented by Mr. P. L. O. Lumumba who was leading Mr. C. O. Samba. Finally, Mrs. Oloo Advocate represented the Electoral Commission of Kenya and the Returning Officer.

When canvassing the application Miss Aulo advocate submitted that this court lacked jurisdiction to hear and determine the petition as the petition before it had not been filed and served in accordance with the provisions of **section 21 (1) (a)** of the National Assembly and Presidential Elections Act, **Chapter 7** of the Laws of Kenya (hereinafter "*The Act*").

As far as Miss Aulo was concerned, there was ample legal authority that state that election petitions ought to be served personally upon the respondents' thereto. Learned counsel submitted that the dictum that personal service was the best mode of service was almost cast in stone.

Yet, in this case, Soita Shitanda was not personally served with the petition. If anything, there had been only one attempt at personal service, after which the petitioner caused advertisements to be made in one English daily newspaper and one Kiswahili daily newspaper.

In the light of those facts, as set out by the applicant, there had been a failure to properly serve the petition properly or within the period stipulated by the Act.

It is the contention of Soita Shitanda that the regime of law governing election petitions was so strict that non-compliance with the said regime was fatal to any such petitions. It was also submitted that the issue of service was not one of mere technicality.

Miss Aulo invited the court to hold that even if there might have been partial compliance with the provisions of the Act, that mattered not. Her reason for that invitation was based on her understanding, that the provisions of **section 20(1) (a)** of the Act were not directory, but mandatory. She also emphasized that the provisions of that section were so fundamental that the same could not be ignored.

In this case, it was contended by Soita Shitanda that Nambwa Musavini had not been diligent in his efforts to effect personal service of the petition. Therefore, it was Soita Shitanda's submission that the petitioner had no right to invoke the proviso *IV* in **section 20 (1) (a)** of the Act. The said proviso expressly authorizes a petitioner to serve a respondent in the Kenya Gazette, if the petitioner's diligent efforts to effect personal service had been unsuccessful.

As the process server had been informed that Soita Shitanda was not at home on the occasion then the process server ought to have made other attempts at personal service. Having not done so, the process server is said to have failed to make proper efforts to serve Soita Shitanda personally.

It was further submitted that it was reasonable to have expected Soita Shitanda to have had a home in Nairobi, as it is in that capital city that Parliament is situated. Therefore, as no attempts were made to serve him in Nairobi, the process server is said to have failed to exercise due diligence.

The other issue that was taken up by Miss Aulo advocate was as regards the publication in the Gazette. The same was effected on 14th March, 2008. Therefore, there is no doubt that it was published well outside the period of 28 days.

According to Soita Shitanda, the late publication of the notice in the Gazette was fatal to the petition.

For those reasons, this court was asked to strike out the petition, as it was said to be invalid and incompetent.

After Miss Aulo had concluded her submissions, the advocate for the Electoral Commission of Kenya and also for the Returning Officer, Mrs. Oloo associated herself with the said submissions, and supported the application to strike out the petition.

Thereafter, in answer to the application, Mr. P. L. O. Lumumba advocate submitted that the petition had not only been filed in time but had also been duly served.

First, he submitted that Soita Shitanda had readily conceded that the process server had visited his home at Butali, with a view to serving the petition. However, as Soita Shitanda was in Nairobi at the material time, the process server could not personally serve him at Butali.

According to Nambwa Musavini, once the process server had been unable to serve the petition upon Soita Shitanda personally, the petitioner became entitled to cause a notice about the petition to be published in the Gazette.

It is common ground that only one attempt was made to try and effect personal service. Notwithstanding that fact, the petitioner submits that the process server had exercised due diligence. His reasoning was that diligence does not mean repetitive.

The petitioner believes that diligence can only mean doing that which is right in the circumstances. And in this case, the petitioner says that the right thing to do was to visit the home of the 1st respondent. Having done so, and considering that the petitioner only had 3 days within which to serve the petitioner, the only other thing that he could do was to immediately thereafter cause a notice to be published in one English daily newspaper and one Kiswahili daily newspaper.

According to the petitioner, it would only have been reasonable for the process server to have traveled to Nairobi if the situation was normal in the country. However, as is well known, shortly after the elections were held on 27th December, 2008, there erupted chaos and mayhem across our country Kenya. That is a matter of common notoriety, about which I have no doubt that this court is entitled to take judicial notice, as I hereby do.

In taking judicial notice this court is guided by the provisions of **section 60 (1) (a)** of the Evidence Act, which provides as follows;

“The courts shall take judicial notice of the following facts -

(a) all matter of general or local notoriety.”

The petitioner submitted that in the light of the general lack of security in the country, to travel between Kakamega and Nairobi by road, required the reckless, not the diligent.

Therefore this court was invited to find that in the said circumstances the process server who had been mandated by the petitioner to serve the petition, had exercised due diligence in trying to serve Soita Shitanda personally. And, as the process server did not succeed in effecting personal service, the petitioner nonetheless believes that he complied with the law appertaining to the service of election petitions, as provided for in **section 20 (1) (a)** proviso IV.

To that end, Mr. P. L. O. Lumumba advocate submitted that the judgments in the following cases, all belonged to the past!

(i) KIBAKI Vs MOI [2000] 1 EA 105;

(ii) ALICEN J. R. CHELAITE Vs DAVID MANYARA NJUKI & 2 OTHERS – CIVIL APPEAL NO.150 OF 1998 (Unreported); and

(iii) JAMES OSOGO Vs NICHOLAS MBERIA & ANOTHER, ELECTION PETITION NO.14 OF 1983 (unreported).

To his mind, those cases had held that a respondent to an election

Petition could simply hide for 28 days, and then emerge after having avoided being personally served. As those decisions are said to have led to absurdities, Mr. Lumumba submitted that that was the reason which led the legislature to intervene by bringing about the proviso No. IV to **section 20 (1) (a)** of the Act.

Meanwhile, even prior to the said amendment, the Court of Appeal is said to have opened the gates for the new law through the decision handed down in **ABU CHIABA MOHAMED V. MOHAMED BWANA BAKARI & 2 OTHERS, CIVIL APPEAL NO.238 OF 2003.**

Mr. Lumumba invited this court to embrace the jurisprudence in the **ABU CHIABA case**, and thus tell Soita Shitanda that one cannot take advantage of his own actions which were meant to derail a petition.

But not only did the Court of Appeal open the gates, the legislature is said to have opened another window of opportunity for petitioners to effect service beyond the 28 days period, provided that they could show that during the said period of 28 days they had exercised due diligence in trying to serve the respondent personally.

As far as Mr. Lumumba was concerned, the legislature did not intend the new proviso to be bound by limitations as to time. That reasoning is pegged upon the usage of the word “*may*” instead of the word “*shall*”, in the proviso.

At this stage, I find it prudent to set out the provisions of **section 20 (1) (a)**, proviso IV, which is in the following terms;

“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.

.....

Provided that –

(iv) Where after due diligence it 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 with the highest circulation in each case.”

Proviso IV was enacted through The Statute Law (Miscellaneous Amendments) Act. 2007, which was published on 15th October, 2007, as Act No.7 of 2007.

Following the enactment of that proviso, the petitioner’s contention is that the issue of service is a factual one, to be governed by the circumstances of each case.

And for the matter before me, the petitioner submitted that it was necessary to bear in mind the fact that never before in the history of Kenya have petitioners been in such a situation as the one after the December, 2007 elections.

It was further submitted that proviso IV, which was an intervention by the legislature, on the eve of the 2007 elections, sought to introduce a new mode of service which would not be hamstrung by time that was incapable of extension.

In determining the issues raised before me I will give consideration to the authorities cited by the parties hereto, and will seek to apply the same in the light of the facts of this case, together with the amendments introduced in October, 2007.

In the case of **C DEVAN NAIR V. YONG KUAN TEIK [1967] 2 A. C. 31**, the House of Lords asked itself whether or not the failure to comply strictly with the times laid down, rendered the proceedings a nullity, or whether the literal compliance with the time schedule may be waived or excused or the time may be enlarged by a judge.

Their Lordships re-emphasized the need in an election petition for a speedy determination of the controversy. Therefore, it was their considered view that the omission to vest in the election judge the general power to extend time was a deliberate design.

Back at home, Mwera J. expressed himself thus in the case **of MUIYA V. NYAGAH & OTHERS [2003] 2 EA 616**, at page 621;

“Election petition law and the regime in general, is a unique one and only intended for elections. It does not admit to other laws and procedures governing other types of disputes, unless it says so itself. Here it spells out firmly and clearly that a petition must be presented and served within 28 days of the publication of election results. Anything outside that time is invalid and this one here is thus invalid.”

That decision was delivered on 11th July, 2003. Prior to that, the Court of Appeal had made it clear that the National Assembly Elections (Election Petition) Rules is a complete code for all matters of election petitions, which must be strictly complied with, because election petitions are a subject of special jurisdiction. That was stated by G. S. Pall J.A. in **ALICEN J. R. CHELAITE V. DAVID MANYARA NJUKI & 2 OTHERS, CIVIL APPEAL NO. 150 OF 1998**.

The learned judge went on to hold as follows, at page 15 of his judgment;

“Section 20 (1) (a) is in mandatory terms. It is not directory. According to it a petition questioning the validity of an election shall be served within 28 days. Similarly under rule 14 (1) Notice of presentation of a petition shall be served within the period thereby prescribed. As I have already said a non-compliance with these provisions makes the petition incompetent. These matters are not technicalities which an election court could disregard. They are fundamental provisions which cannot be ignored. It is true that the primary duty of a court is to do substantial justice but then there are

certain fixed rules of every game. They are there to ensure fairplay and avoid miscarriage of justice. No law can survive without necessary rules of procedure. They are important instruments in the administration of justice. They cannot be ignored particularly when legislature makes them mandatory.”

In the same case, Kwach, J.A stated as follows;

“Election petitions are governed by a special regime and they follow a rigid timetable under constant supervision of the court.”

Having spelt out the law, all the three judges of Appeal upheld the decision of Aluoch J. (as she then was), striking out the petition on the grounds that it had been served out of time.

Nowhere did the three judges hold, as was suggested by the petitioner herein, that a respondent could simply go into hiding for 28 days, so as to avoid service of an election petition, and then appear once it became too late to serve him.

In the case of **DAVID WAKAIRU MURATHE V. SAMUEL KAMAU MACHARIA – CIVIL APPEAL NO.171 OF 1998**, G. S. Pall J.A expressed himself thus;

“It is now established beyond a peradventure that a petition not presented and served in accordance with the Act and the Rules is incompetent.”

He added that if the respondent, the validity of whose election is in issue in an election petition, was served outside of the prescribed period of 28 days, the petition against all the respondents becomes incompetent including those who may have been served in time.

In the case of **KIBAKI Vs MOI [2000] 1 E.A. 115**, at page 133 the Court of Appeal said;

“As Kwach JA says in Chelaite, Parliament in its wisdom, and it is forever wise, can and often does decree certain things which may not seem wise to persons unschooled in its way of doing things. But the courts must accept the wisdom of Parliament, unless, of course, they are contrary to the provisions of the Constitution. It has decreed in section 20 (1) (a) that service of election petitions must be personal and whatever problems may arise from that, the court must enforce the law until Parliament should itself be minded to change it.”

Although Mr. P. L. O. Lumumba advocate did not pinpoint that or any other specific passage in the case of **KIBAKI Vs. MOI**, I think that the words above cited could possibly have been understood to imply that until and unless the law was amended by Parliament, election petitions would have to be served personally on the respondents.

But, as the five-judge bench of the Court of Appeal stated in **ABU CHIABA MOHAMED Vs. MOHAMED BWANA BAKARI & 2 OTHERS, CIVIL APPEAL NO.238 of 2003**, the decision in **KIBAKI Vs. MOI** did not establish the proposition that even where it be proved that a party was hiding with the sole purpose of avoiding personal service, he still had to be personally served. Their Lordships pointed out whereas personal service is the best form of service in all areas of litigation, if such service is not possible, other forms of service may be resorted to.

Omolo J.A stated as follows;

“First, as I have said, KIBAKI Vs. MOI did not establish any principle that even where it is proved that the party to be served evaded service by hiding himself, or used physical force to prevent personal service or took refuge in a place where service of documents is not permissible, such as the House of Parliament, or used such other subterfuge to avoid being personally served, such a party must still be served or else the petition would be struck out. The law will not and cannot permit such a party to rely on his own wrong to defeat an otherwise valid petition.”

That decision was handed down on 16th September, 2005, and the Court of Appeal dismissed the appeal which had been premised on the understanding that if an election petition was not served on the respondent personally, the same ought to be struck out. In arriving at that verdict, the Court made a finding that;

“the effort made by the 1st Respondent to personally serve him amounted to personal service on him.....”

In my understanding, the Court of Appeal is still of the firm view that personal service remains the best mode of service. However, if the respondent made it impossible for the petitioner to literally serve him personally, the court would be entitled to infer that personal service had been effected, if the petitioner satisfied the court that he had made every effort to effect personal service.

It is evident that as at the date of the decision in the **ABU CHIABA case** the pronouncement by the Court of Appeal did not have any express statutory backing. However, there is absolutely no doubt whatsoever that the decision was informed by the need to do substantive justice in the face of a loophole which served to benefit those who deliberately set out to subvert the course of justice by avoiding personal service.

Thereafter, Parliament introduced the proviso No. IV which made it clear that service could be effected through publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest national circulation in each case.

Through that proviso, the first thing that Parliament did was to make it absolutely clear that service could be effected through publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest circulation in Kenya.

To my mind, the specification of those modes of service was vital especially after the Court of Appeal had held that section 20 (1) (a) of the Act;

“does not provide for the mode of service i.e. it does not state how the service is to be done.”

That was stated in **NTOITHA M’MITHIARU Vs. RICHARD MAOKE MAORE & 2 OTHERS, CIVIL APPEAL NO. 272 of 2003.**

The Court of Appeal added that;

“If personal service, which is the best form of service in all areas of litigation, is not possible, other forms may be resorted to. Otherwise why would the court have expected to be given reason or reasons why personal service was not effected?”

In that case, the petitioner had failed to effect personal service. He therefore made an application to the High Court for leave to effect substituted service. His application was granted, whereupon he caused service to be effected through advertisement on both radio and television, on Kenya Broadcasting Corporation (KBC) and Citizen, respectively.

Notwithstanding compliance with the order which gave leave to the petitioner to effect substituted service, the Court of Appeal held that;

“the substituted service through radio announcement that the appellant relies on is not sanctioned by the law as a lawful means of serving election petitions.”

In the light of that decision, I think that it was a welcome development for Parliament to amend the Act so as to specify the modes of substituted service which were recognized by law, in the event that the petitioner had failed to achieve personal service, even after exercising due diligence.

However, in my considered view the amendment introduced through Act No. 7 of 2007 did not enlarge the period within which service was to be effected, as was suggested by Mr. P. L. O. Lumumba.

In the event, the failure by the petitioner to publish in the Gazette within 28 days after the date when the result of the election petition was published in the Gazette, constituted a failure to fully comply with the requirements spelt out in proviso (IV) to section 20 (1) (a) of the National Assembly and Presidential Elections Act.

In other words, there had, at best, been a partial compliance, assuming that the petitioner can be deemed to have exercised due diligence in first trying to personally serve the petition upon the 1st respondent.

But that still begs the question whether or not there had been due diligence on the part of part of the process server who had been engaged by the petitioner.

The petitioner has invited me and I have accepted and indeed I have taken judicial notice of the fact that following the elections held in Kenya on 27th December, 2007, there was an unprecedented state of insecurity in most parts of the country.

On the basis of those circumstances, this court was asked to find that the process server had exercised due diligence in trying to serve the 1st respondent, Soita Shitanda.

The Petitioner likened his situation to the situation in the case of MANSON OYONGO NYAMWEYA Vs. JAMES OMINGO MAGARA & 3 OTHERS, KISII ELECTION PETITION NO. 3 of 2008.

In that case, my learned brother, D. K. Musinga J. held as follows:-

“If it were not for the state of insecurity that prevailed at the time and which made it difficult for ordinary people to travel from one place to another, especially for any purpose relating to elections which had just been concluded, I would have said that the process server should have made more effort to trace the first respondent at his Ongata Rongai home or his up-country home. But considering the efforts made by the process server at serving the first respondent and taking into account the state of insecurity that existed at the material time, I hold that the petitioner exercised due diligence in attempting to effect personal service upon the first respondent. When he failed, he served the same by way of advertisement in the Kenya Gazette and other local dailies.”

What efforts did the process server make in that case? He went first to the offices of Hon. Omingo Magara at Continental House, but was unable to trace him. Next, he went to Pentagon House where the ODM Party had its offices. Later, the process server was informed that the first respondent had left Nairobi to link up with other ODM leaders, who were at an undisclosed venue.

In contrast, the process server herein went to the home of Soita Shitanda on 25th January, 2008. He was told that Soita Shitanda was not at home, however the security men at the gate refused to tell him whereabouts Soita Shitanda was.

The petitioner then suggested that the process server should attempt to effect service upon the first respondent in Nairobi. However, the process server declined to travel. In his own words, he

“could not dare travel”

because of the election violence that had rocked Nairobi and several parts of the country. It is noteworthy that in the authority cited by the petitioner, the process server not only made more than one attempt to effect personal service, but he was actually doing so within the City of Nairobi, where the process server in this case declined to travel to. Secondly, the process server did not make any effort to

travel, and then encounter difficulties. He simply declined to travel, even though the petitioner suggested that he should travel.

In my considered view, the process server herein was comparable to the process server in the case of KIBAKI Vs. MOI, to the extent that the process server did not demonstrate having made the effort to effect personal service, but was either repelled by the security surrounding the respondent or was unable to travel.

It is one thing to assume that service cannot be effected on a respondent because of insecurity which is believed to make it imprudent to travel from Kakamega to Nairobi; and it is quite another thing to demonstrate that the process server tried but failed to make the trip. When the process server simply declined to make the effort to travel because he believed that the insecurity rendered it unsafe to travel, he did not exercise due diligence.

Furthermore, I hold the considered view that if by bringing a petition to court only a few days before the expiry of the 28 days allowed for the filing and service thereof, the petitioner will find ready justification for making minimal attempts at personal service, that would tend to defeat the recognition of the fact that personal service is the best service, for which petitioners must exercise due diligence. In other words, such an approach would encourage petitioners to benefit from their own decisions to file petitions as close as possible to the expiry of the 28 days period, so that they could then argue that time was of the essence, hence the need to resort to the substituted mode of service after no more than a single attempt at personal service.

In the result, I find that the process server herein did not exercise due diligence in trying to personally serve Soita Shitanda with the election petition. However, even if he had done so, the petitioner failed to publish the petition in the Gazette within the prescribed period of 28 days.

For those reasons the petition herein is incompetent. It is therefore struck out against all the respondents, and the costs thereof are awarded to the respondents. I also award to the respondents the costs of the application dated 8th February, 2008. The said costs shall be paid by the petitioner.

It is so ordered.

Delivered, dated and signed at Kakamega this 14th day of May. 2008

FRED A. OCHIENG

J U D G E