



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Election Petition 2 of 2008

THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT

CHAPTER 7 OF THE LAWS OF KENYA AND

THE REGULATIONS MADE THEREUNDER

AND IN THE MATTER OF

THE ELECTION FOR THE LIKONI PARLIAMENTARY CONSTITUENCY

BETWEEN

- 1. JUMA MBUI SULEIMAN.....1ST PETITIONER**
- 2. YOPHES GITTEYA OGWOKA.....2ND PETITIONER**

AND

- 1. MWAHIMA MWALIMU MASUDI.....1ST RESPONDENT**
- 2. AHMED ABDULKADIR HASSAN.....2ND RESPONDENT**
- 3. THE ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT**

RULING

Presidential, Parliamentary and Civic Elections were held in this country on 27th December 2007. The 1st respondent Mwahima Mwalimu Masudi was one of 6 candidates for the parliamentary elections in Likoni Constituency. He will be referred to hereinafter as “the 1st respondent.” The 2nd respondent Ahmed Abdulkadir Hassan was the Returning Officer (hereafter “the 2nd respondent”) while the 3rd respondent The Electoral Commission of Kenya conducted and supervised the elections. It will hereinafter be referred to as “the 3rd respondent.” On the conclusion of the exercise, the 2nd respondent certified the 1st respondent as having had the greatest number of votes in the said parliamentary elections. The 1st respondent was therefore declared the winner and Member of Parliament for Likoni Constituency.

The 3rd respondent then published the result in the Kenya Gazette of 30th December 2007.

Juma Mbui Suleiman and Yophes Gitteya Ogwoka (hereinafter “the petitioners”) who are voters in the said constituency, were not satisfied with the results, and on 25th January 2008 petitioned against the same by way of this Election Petition No. 2 of 2008 seeking primarily that the election of the 1st respondent as Member of Parliament for Likoni Constituency be nullified on various grounds which do not fall for consideration at this stage.

The respondents have taken out notices of motion mainly under Section 20 (1) of the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya (hereafter the Act). The 1st respondent’s Notice of Motion is dated 8th February 2008 and was filed on 11th February 2008. The 2nd and 3rd respondent’s Notice of Motion is dated and was filed on 15th February 2008.

The two applications primarily seek one order of the court namely that the petition be struck out. The 1st respondent has given 4 grounds for his application. They are as follows:-

- (a) That there is no proper and valid petition before the court.**
- (b) That the Petitioner has not presented, filed and served the petition within 28 days after the publication of the result of the election in the Gazette.**
- (c) That the petition has not been served in accordance with Section 20 (1) and proviso (iv) to Section 20 (1) of the Act.**
- (d) That the Petitioner has not filed and served the petition within 28 days after the publication of the result of the election in the Gazette.**

The application is supported by an affidavit sworn on 8th February 2008 by the 1st respondent. In the affidavit he has deponed that his election as a Member of Parliament was published on 30th December 2007 in a Special Issue of Kenya Gazette Vol. CIX-103 Gazette Notice No. 12615. He has further deponed that he lives in Shika Adabu Location in Likoni within the Municipality of Mombasa. He has also deponed that between 24th and 30th January 2008, he was in Nairobi attending to parliamentary and party matters and his work generally as a member of parliament. On 30th January 2008, the first respondent further depones, his attention was drawn to a newspaper advertisement in the Daily Nation Newspaper of 29th January 2008 where there was a notice addressed to all the respondents herein stating that this petition had been filed against him and the other respondents. The Newspaper advertisement is exhibited as “MMM-1”. The 1st respondent then instructed his advocates but prior to 30th January 2008 he was not aware that this petition had been filed against him and no notice of its presentation had also been served upon him.

In those premises the 1st respondent swears, on advise of his advocates that the petition has not been filed and served in accordance with Section 20 (1) of the Act and proviso (iv) thereof. With respect to the notice of presentation of the election petition published in the Daily Nation of 28th January 2008, the 1st respondent depones that the same was published one day out of time and in any event there was no such publication in the Kenya Gazette and in a Kiswahili newspaper with the highest national circulation as required by proviso (iv) to Section 20 (1) of the Act.

The 2nd and 3rd respondents’ application is premised on the primary ground that the petition was served upon the 3rd respondent on 29th January 2008 well after the mandatory 28 days and in contravention of the Law. The application is supported by an affidavit sworn by Samuel Mutua Kivuitu, the Chairman of the 3rd respondent, on 13th February 2008. In the affidavit, it is deponed that the petition and the Notice of Presentation of the same were received under

protest by the 3rd respondent' Senior Litigation clerk on 29th January 2008 and no publication of the said documents was done in the Kenya Gazette. It is further deponed that as the results for Likoni Parliamentary Elections together with others were gazetted on 30th December 2007 this petition was served outside the statutory period of 28 days and should be struck out.

The applications are opposed and the petitioners have in that regard filed replying affidavits. The affidavits raise similar grounds of opposition. The petitioner's have deponed that the time for filing and serving the election petition did not commence to run until 2nd January 2008 since 31st December 2007 and 1st January 2008 were public holidays. Consequently, the period of 28 days lapsed on 29th January 2008.

The petitioners have further deponed that personal service could not be effected upon the 1st respondent in Mombasa as he was said to be in Nairobi attending a Parliamentary induction seminar and despite attempts at service in Nairobi the 1st respondent could not be traced since he had left without giving any address for service. The petitioners further depone that the 1st respondent was hiding since he knew that he could not be traced in Nairobi. The petitioners therefore made the presentation by publication in the Kenya Gazette on 29th January 2008, in the Daily Nation Newspaper on 30th January 2008 and in the Taifa Leo Newspaper of 31st January 2008. The affidavit of the process server and copies of the said publications are exhibited.

With respect to the 2nd and 3rd respondents, the petitioners have deponed that the former could not be found in his office in Mombasa where he works as a civil servant as he was on leave and the latter could not accept service at its Mombasa office. Those circumstances prompted the petitioners to publish the presentation of the petition in the Kenya Gazette of 29th January 2008, the Daily Nation Newspaper of 30th January 2008 and the Taifa Leo Newspaper of 31st January 2008. The process server's affidavit and copies of the said publications are exhibited. In their view therefore the requirements of service as set out by the Law were complied with and the petition is competent.

The two applications were ably debated together before me on 30th April 2008 by Ms Aullo Learned counsel for the 1st respondent, Mr. Munyithya, Leaned counsel for the 2nd and 3rd respondents and Mr. Kibe Learned counsel for the petitioners. Counsel relied upon their respective clients' affidavits and cited various authorities to buttress the positions taken by their respective clients. I will refer to some of those authorities where appropriate in this ruling but I have considered all of them. I have also carefully considered both applications, the affidavits filed and the annexures thereto. I have further given due consideration to the oral submissions made to me by counsel. Having done so, I take the following view of this matter.

It is not disputed that the petition herein was presented within 28 days after publication of the election results in the Kenya Gazette. The presentation was therefore within the period prescribed in Section 20 (1) (a) of the Act. But was it served within 28 days of the publication of the results in the Kenya Gazette as required by the same Section?

The Court of Appeal in **Mwai Kibaki – v – Daniel Toroitich Arap Moi [2007] 1EA 115** said the following of Section 20 (1) (a):

“Though Section 20(1) (a) did not prescribe any particular mode of service, the best form of service was personal and the courts were obliged to go for that form of service.”

The same decision also made it clear that where personal service is not possible other forms of service are to be resorted to. That position was clarified in the case of **Alan Chiaba Mohamed – v – Mohamed Bwana Bakari & 2 others [C.A. No. 238 of 2003]**. In that case, strenuous efforts were made in an attempt to personally serve the successful candidate without success.

Those who made those attempts concluded that the successful candidate was hiding from them to avoid being personally served. The Court of Appeal agreed and made the following observations (as per Omolo J. A.):

“The appellant in this case cannot be allowed to rely on his having successfully hidden himself from the attempts of the 1st Respondent to personally serve him to defeat the 1st Respondent’s petition challenging the validity of his election” The effort made by the 1st Respondent to personally serve him amounted to personal service on him”

It would appear that although where personal service is not possible other forms of service are to be resorted to, those other forms of service must be such as would be considered to amount to personal service. Parliament recognized the difficulties petitioners were having in their attempts at complying with Section 20 (1) (a), so by Acts No. 7 – Statute Law (Miscellaneous Amendments) Act 2007, proviso (iv) was added to Section 20 (1). The proviso reads as follows:

“(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 newspaper with the highest national circulation in each case.”

In the matter at hand the petitioners have annexed two affidavits on attempts at service. The attempt to serve the 1st respondent was made by one George Muchiri who describes himself as a duly licensed process server authorized to serve all court process. The pertinent paragraphs are 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 which I set out below:

“2. That on the 20th day of January 2008 I received a copy of an Election Petition filed by Juma Mbui Suleiman and Yophes Gitteya Ogwoka to wit Mombasa High Court Election No. 2 of 2008 dated the 24th day of January 2008 from Mureithi Kibe Advocate with instructions to serve one Mwahima Mwalimu Masudi, the 1st respondent.

4. That at about 11.30 a.m. I proceeded to his residence at Vyemani in Likoni area of Mombasa which was well known to me and found a lady who was seated at the verandah of the house but who declined to tell me her name.

5. That I explained the purpose of my visit and enquired from her whether the 1st respondent was at home whereupon she informed me that he was in Nairobi but she declined to reveal his exact whereabouts and or the location of his fixed abode at Nairobi.

6. That I went back to Mombasa where I then gathered from media reports that all first time elected Members of Parliament had been attending an induction seminar at Safari Park in Nairobi and that Mwahima Mwalimu Masudi was one of them.

7. That I then traveled to Nairobi where I arrived the next day on 26th day of January 2008 and proceeded to Safari Park Hotel and upon reaching the said establishment at about 8.30 a.m., I was informed by the reception staff that the seminar for members of parliament had ended and they did not have any information on the whereabouts of Mwahima Mwalimu Masudi or where he could be found.

8. That I then proceeded to Parliament Buildings at about 10.00 am. Where I was informed by the sentries manning the public gates whose names I was unable to obtain, that the House was in session and in any case, service of process could not be effected within its precincts.

9. That the said sentries were also unwilling to inform me if Mwahima Mwalimu Masudi

was within the precincts of Parliament so that I could effect service upon him, once he was outside.

10. That the position was the same at Continental House Offices where I was informed that I could not be allowed inside for the purposes of service which I had explained was the reason of my visit after identifying myself.

11. That I waited around the precincts of Parliament for much of the day but did not see Mwahima Mwalimu Masudi.

12. That I returned to Parliament on the 27th day of January 2008 and also on the 28th day of January 2008 but Mwahima Mwalimu Masudi was nowhere to be seen.

13. That in addition I also went to the Hotel Intercontinental, Grand Regency and Serena Hotel, which are frequented by dignitaries but still could not find Mwahima Mwalimu Masudi whereupon I then informed the Petitioners' Advocate of the situation and returned back to Mombasa having failed to trace the 1st Respondent.

14. That I am aware that the city of Nairobi is large and expensive and unless there is prior knowledge of a person's whereabouts it would be next to impossible to trace the person but I nevertheless made the effort I have stated.

The averments in the affidavit in my view succeed to show that the 1st respondent was not personally served with the petition herein. But were they entitled to serve under proviso (iv) to Section 20 (1) of the Act? For service to be valid under the proviso, the petitioners had to demonstrate that they had failed to effect personal service after due diligence. The affidavit of George Muchiri aforesaid indicates that he received the petition for service on 25th January 2008. He went to the home of the 1st respondent in Mombasa and did not find him. He travelled to Nairobi on 26th January 2008 and did not trace him. He then travelled back to Mombasa. It is clear therefore that attempts to serve the 1st respondent were made for the two days in Mombasa and in Nairobi. The predicament in which the petitioners found themselves was self created. They moved to court too late and that prevented them from effecting personal service upon the 1st respondent. There is no allegation by the process server that the 1st respondent was avoiding service and if the petitioners had given themselves more time by moving the court early, personal service would no doubt have been effected. A similar predicament faced the petitioner in **Ntoitha M. Mithiaru – v – Richard Maoka Maore & Others [C.A. No. 722 of 2003]**. In that case, the process server swore that on 30th and 31st January 2003 he had tried to serve the 1st respondent at his office, at his constituency and at his residence in Nairobi without success. Onyango Otieno J.A. held that those were not satisfactory attempts to serve the 1st respondent as required by Section 20 (1) (a) of the Act. The Learned Judge stated as follows:-

“I may also add that this was perhaps because the election petition was filed too late in time and so the appellant had no time available to effect the service as required by law.”

The same position obtains in this matter. In the premises, I am inclined to hold and do find that the petitioners were not entitled to effect service of the petition in the manner given in proviso (iv) to Section 20 (1) of the Act as they have not demonstrated that it was not possible to effect service of the petition under paragraph (a) of Section 20 (1) of the Act.

Even if I had found that the petitioners had been diligent in attempting to serve the petition under paragraph 20 (1) (a) aforesaid, it is clear to me that they did not succeed to comply with proviso (iv) (supra). They published the presentation of the petition in the Gazette of 29th January 2008, in the Daily Nation Newspaper of 30th January 2008 and in the Taifa Leo

Newspaper of 31st January 2008. As stated earlier, there is no dispute that following the general elections held on 27th December 2007 the 3rd respondent published the results in the Kenya Gazette of 30th December 2007. The 1st respondent was thereby declared the elected Member of Parliament for Likoni Constituency.

Under Section 20 (1) (a) of the Act, the petitioners had to lodge their petition and serve the same within 28 days after the said publication. The last day if my arithmetic is correct, for the petitioners to have published the presentation of their petition was the 28th day of January 2008. All the publications the petitioners made were after the 28th January 2008. There was clearly therefore no compliance with proviso (iv) to Section 20 (1) aforesaid.

The argument by counsel for the petitioners that proviso (iv) to Section 20 (1) of the Act enlarged the time within which to effect service of a petition beyond the 28 days is clearly in my view without merit. A proviso cannot give what the parent Section has not given. I also do not accept the argument made by counsel that all public holidays be removed from the computation of the prescribed period because that argument would fly in the face of the provisions of Section 57 (d) of the Interpretation and General Provisions Act (Cap 2 Laws of Kenya).

In the premises I find and hold that the petitioners did not make satisfactory attempts to serve the 1st respondent within 28 days as required by Section 20 (1) (a) of the National Assembly and Presidential Elections Act Chapter 7 Laws of Kenya. I further find that the publication of the presentation of the petition in the Gazette, Daily Nation, and Taifa Leo Newspapers was outside the prescribed period of 28 days. The petitioners therefore totally failed to comply with Section 20 (1) (a) aforesaid and their attempt at alternative modes of service besides being unavailable to them, also came to naught. The result is that this petition as against the 1st respondent is incompetent.

I turn now to the 2nd and 3rd respondents' application to strike out the petition. The application cites non-service of the petition as the primary ground for seeking striking out of the petition. The affidavit in respect of attempts at service upon the 2nd and 3rd respondents has been sworn by one Herbert M. Mwakundua. The pertinent paragraphs of the affidavit are 2, 3, 4, 5, 6, 7, 8 and 9. I will set out the said paragraphs in full.

“2. That on 25th day of January 2008, I received a copy of an Election Petition filed by Juma Mbui Suleiman and Yophes Gitteya Ogwoka to wit Mombasa High Court Election Petition No. 2 of 2008 dated 24th day of January 2008 from Mureithi Kibe Advocate with instructions to serve Ahmed Abdulkadir Hassan and the Electoral Commission of Kenya the 2nd and 3rd respondents respectively.

3. That at about 11.40 a.m. I proceeded to the Electoral Commission Offices situated along Makadara Road next to Central Police Station Mombasa.

4. That the staff at the reception who declined to give me their names informed me that they could not accept service of the Petition on behalf of the 2nd respondent who they stated could be found at his government office situated within Uhuru Na Kazi Building Mombasa which houses the Coast Provincial Administration.

5. That they further informed that they could not also receive the petition on behalf of the 3rd respondent since all such matters were supposed to be served to the Nairobi Headquarters at Anniversary Towers.

6. That I proceeded to Uhuru Na Kazi Building and went to the 3rd floor where the 2nd respondent has an office within the Provincial Livestock Offices but did not find him in.

7. That I was informed by his secretary, who declined to inform me of her name that he was on leave until the month of February.

8. That the said secretary further declined to inform me of the whereabouts of his residence.

9. That I made efforts to trace him within Mombasa thereafter on the 26th, 27th and 28th days of January 2008 without success whereupon I returned the copies of the petition to the advocate of the Petitioners unserved.

The affidavit of Herbert M. Mwakundua is clear beyond peradventure that the 2nd and 3rd respondents were not personally served. The 2nd respondent was said to be on leave and no effort was made to establish where he was on leave. The staff of the 3rd respondent in Mombasa informed the process server that documents such as petitions were supposed to be served upon the 3rd respondent's headquarters at Anniversary Towers. No attempt was made to effect service of the petition upon the 3rd respondent at its headquarters.

In the circumstances, I am unable to find that the petitioners were diligent in their efforts to personally serve the 2nd and 3rd respondents. In my view therefore, service upon them under proviso (iv) to Section 20 (1) of the Act was not available to them. Even if it had been available, the petitioners' attempts at service of the petition hereunder did not amount to much. They published the presentation of the petition in the Gazette of 29th January 2008, in the Daily Nation Newspaper of 30th January 2008 and in the Taifa Leo Newspaper of 31st January 2008. Those publications were clearly outside the prescribed period of 28 days. As I have already held proviso (iv) to Section 20 (1) did not enlarge the period prescribed in Section 20 (1) (a).

In the premises, I find and hold that the petitioners did not make satisfactory attempts to serve the petition upon the 2nd and 3rd respondents within 28 days as required by Section 20 (1) (a) of the National Assembly and Presidential Elections Act Chapter 7 Laws of Kenya and therefore could not avail proviso (iv) to the same Section. I further find and hold that the attempt made to serve the presentation of the petition against the 2nd and 3rd respondents under that proviso was not within 28 days as required by Section 20 (1) (a) of the Act.

The upshot is that the applications by Notices of Motion lodged by the respondents on 11th and 15th February 2008 respectively are allowed. The petition presented on 25th January 2008 against the respondents is incompetent as it was not served within the prescribed period of 28 days after the date of publication of the result of the election in the Gazette. The petition is accordingly struck out.

The Petitioners shall pay the respondents' costs.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Kibe for the Petitioner, Aullo for the 1st Respondent and Munyithya for the 2nd and 3rd Respondents.

F. AZANGALALA

JUDGE

13TH MAY 2008