



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Election Petition 28 of 2008

**IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT
(CHAPTER 7, LAWS OF KENYA)**

AND

**IN THE MATTER OF THE PRESIDENTIAL AND PARLIAMENTARY ELECTIONS
REGULATIONS AND THE NATIONAL ASSEMBLY (ELECTION PETITION) RULES**

AND

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

AND

IN THE MATTER OF ELECTION FOR THE DUJIS PARLIAMENTARY CONSTITUENCY

BETWEEN

NASIR MOHAMED DOLAL PETITIONER

VERSUS

DUALE ADEN BARE 1ST RESPONDENT

MR. BISHAR 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

RULING

The Petitioner was one of the Candidates in the Parliamentary Elections for the National Assembly seat for the Dujis Constituency held on 27th December, 2007 under the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya (hereinafter “the Act”) and the Presidential and Parliamentary Elections Regulations (hereinafter “the Regulations”).

He lost the election to the 1st Respondent, Duale Aden Bare, who was declared the winner by the 3rd Respondent, the Electoral Commission of Kenya (hereinafter “the ECK”). In a Petition presented on 25th January, 2008, the Petitioner has challenged the election result, and wants the election of the 1st

Respondent declared null and void.

Meanwhile, the 1st Respondent wants the Petition to be struck out for want of service in accordance with the law. In an application dated 5th February, 2008, and made under Sections 20 (1) and 22 of the Act, Cap 7, and the inherent jurisdiction of the Honourable Court, the Petitioner seeks that:

“(a) The petition be struck out.

(b) Costs be provided for.”

The Application is based on the following three grounds:

“(a) There is no proper and valid petition before the Honourable Court.

(b) The Petitioner has not presented, filed and served the petition within twenty-eight days after the publication of the result of the election in the Gazette.

(c) The petition and/or the notice of the presentation of the petition has not been served in accordance with Section 20 (1) and the proviso (iv) of Section 20 (1) of the National Assembly and Presidential Elections Act and the Schedule to the Statute Law (Miscellaneous Amendments) Act 2007.

(d) The Honourable Court lacks jurisdiction.”

The **issue** before this Court is whether the Petition was served on the 1st Respondent in accordance with the law. Let us first examine what the law is with regard to “**service**” of election petitions.

Section 20 (1) (a) of the Act provides as follows:-

“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.

(b)

(c)

(i)

(ii)

(iii)

(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.”

That is the plain reading of the law – that the Petition **shall** be “**presented and served**” within 28 days of publication of the result.

Section 20 (1) of the Act requires that the Petition be “**presented**” and “**served**” within 28 days of the publication of the election result in the Kenya Gazette. There is no dispute here that the Petition, which was filed on 25th January, 2008, was indeed filed on time. **The only issue is whether it was “served” on time.**

The Court of Appeal in Kenya has held on several occasions that service of election petitions envisaged under Section 20 (a) of the Act is “personal” service. “Personal service”, as Justice Ibrahim recently observed in the election case of *Mwita Wilson Maroa vs Gisuka W. Machage & Others (ELC No. 5 of 2008)* is “actual physical service”.

In *Kibaki vs Moi (C A 172 of 1999)* the Court of Appeal stated:

“What we are saying, however, is that election petitions are of such importance to the parties concerned and to the general public that unless Parliament has itself specifically dispensed with the need for personal service, then the courts must insist on such service.

We cannot read from Section 20 (1) (a) that Parliament intended to dispense with personal service. Even under 14 (2) of the Rules personal service was not dispensed with. The other modes of service were only alternative modes of service.

That is why in the various other cases quoted to us personal service was always described as the best form of service.

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

This decision, by a bench constituted of five (not three) eminent Judges of Appeal, became the subject of considerable debate within legal and judicial circles. The argument sought to be advanced was that there may be circumstances where it is simply not possible to effect “personal” service for example on a sitting President whose security detail would not allow personal service, or where a person deliberately hides or evades service. In those situations, the Court of appeal held that other modes of service could be utilized. Hence, in *Abu Chiaba Mohamed vs Mohamed Bakari (2005) eKLR* the Court of Appeal stated:

“Did Kibaki vs Moi establish any proposition that even where it be proved that a party was hiding with the sole purpose of avoiding personal service, yet such a party must still be personally served? The decision established nothing of the kind. At page 37 of the judgment in Kibaki vs Moi, the Court stated:-

“..... Section 20 (1) (a) of the Act does not prescribe any mode of service and in those circumstances, the courts must go for the best form of service which is personal service. Before this Court, the appellant did not offer any reason why he did not go for personal service though in the High Court, it had been contended that the 1st Respondent in his capacity as the President, is surrounded by a massive ring of security which is not possible to penetrate. But as the Judges of the High Court correctly pointed out no effort to serve the 1st Respondent was made and repelled

The decision clearly recognized 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.”

The Court emphasized once again that personal service is the best form of service. Here is what it said in *Abu Chiaba (supra)*

“The truth of the matter is that personal service remains the best form of service in all areas of litigation and to say that members of parliament are a different breed of people and different rules must apply to them as opposed to those applicable to other Kenyans cannot support the principle of equality before the law.”

It is important to note that since the decision in *Abu Chiaba*, which was rendered on 16th September, 2005, the Act was amended to provide for an alternative form of service should it become impossible to effect personal service. It was by Act No. 7 of 2007 that Parliament amended Section 20 (a) of the Act by adding sub-paragraph (iv) 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 the publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest national circulation in each case.”

Now, what this means is that “personal service” continues to remain the best form of service. And it means “physical and direct” service. Where, however, after **due diligence**, it is impossible to effect personal service, Section 20 (a) (iv) may be invoked.

That being the law, was the 1st Respondent personally served with the Petition?

The issue before me turns essentially on facts. There is no dispute that the Petition was filed within time. However, was it “**served**” within the time prescribed by law?

The 1st Respondent, in his supporting affidavit, sworn 5th February, 2008 says that he was never actually served with the Petition, and found out about it from a notice to that effect published in the Daily Nation newspaper of 31st January, 2008.

The Petitioner, on the other hand, says (in his Replying Affidavit) that the Process Server, Mr Felix Munuve, effected service personally on the 1st Respondent “at his residence in Lavington.” He avers that he and Mr Munuve drove to the 1st Respondent’s aforesaid house at 4.30 pm on 25th January, 2008, and on reaching the gate, he remained in the car, while Mr Munuve proceeded to talk to the watchman. The watchman then called the 1st Respondent to the gate, and on the latter’s arrival at the gate, he (the Petitioner) came out of the car, identified the 1st Respondent to Mr Munuve, who then served the 1st Respondent personally with the Petition. In his affidavit of service, sworn 28th January, 2008, Mr Munuve corroborates these facts, except that the service took place at 5.30 pm, not at 4.30 pm on 25th January, 2008.

The 1st Respondent, in his further Affidavit, sworn 7th March, 2008 says he has no residence in Nairobi; that the “house” referred to by the Petitioner appears to fit the description of his brother’s house in Kileleshwa (not Lavington); and that he was not at that house on 25th January, 2008 but was at the Parliament most of the day with his colleagues.

Clearly, the evidence presented by each side in their affidavits is diametrically opposed. There is simply no way of knowing from Affidavits alone, who, among them, should be believed. Accordingly, both parties agreed, and this Court directed, that oral evidence be presented in Court to help determine the issue of personal service.

The Petitioner gave oral evidence in Court, together with his Process Server, Mr Munuve. On the other side, the 1st Respondent presented his evidence, together with Mr Julias Mulau, a watchman at the residence of the 1st Respondent’s brother, and Hon. Sophia Abdi Noor, a Nominated Member of Parliament.

The Petitioner reiterated that the house he went to on 25th January, 2008 belonged to the 1st Respondent and that it is in “Lavington”. He was wrong on both the facts. The 1st Respondent exhibited title deeds to show that the house actually belongs to his brother; that it is in Kileleshwa; and that he has never lived there.

The Petitioner and Mr Munuve both testified that the watchman they had encountered at the 1st Respondent’s house on 25th January, 2008 was a “uniformed G4 guard”. The 1st Respondent exhibited proof that G4 does **not** provide any security guard service at that residence. The watchman at the residence also testified before this Court that he does not wear any uniform, and is employed by the 1st Respondent’s brother.

On the other hand, the 1st Respondent, in his testimony before this Court, gave a full account of his activities on 25th January, 2008. He was at the Parliament in the morning; walked to Jamia Mosque for prayers at lunch time in the company of Hon. Sophia Abdi Noor; had lunch with the latter at 2.00 pm; was at this Continental House office until 4.45 pm; had tea at the Parliament with his colleagues; and proceeded to Savannah restaurant in the city centre with Hon. Abdi Noor; and then to Parklands with her at 6.15 pm.

Hon. Abdi Noor corroborated this testimony, except that in her recollection, they left Savannah at 7.30 pm (not 6.15 pm). Mr Mutua, Counsel for the Petitioner, urged the Court to disregard the 1st Respondent and Hon. Abdi Noor's testimony on account of this "serious contradiction" as to "time". I am unable to accept Mr Mutua's argument. It is quite in the nature of human conduct to differ on basic things, such as time. People don't always remember everything in exactly the same way. Here also, the Petitioner and his Process Server have contradicted each other on the time they went to the 1st Respondent's "house" – the Petitioner said it was 4.30 pm, while Mr Munuve said it was 5.30 pm. That alone does not make them untruthful. And, unlike in a criminal trial, the precision of time is not so crucial in civil disputes, where the Court is required to decide issues of fact on a balance of probability.

In this case, **I find that the 1st Respondent has presented a credible and compelling case that he was indeed with Hon. Abdi Noor at the Savannah Restaurant at the time he is alleged to have been served at his brother's residence.** Indeed, the Petitioner and Mr Munuve went to the 1st Respondent's brother's house in the evening of 25th January, 2008, as is also borne out of the watchman, Mr Julius Mulau's testimony. I accept the watchman's testimony that two people came to the house with some papers looking for Aden Bare. He told them that he did not know who "Aden" was and they then dropped the papers under the gate. I uphold the submission of Mr Orenge, Counsel for the 1st Respondent, that that did not amount to "personal" service on the 1st Respondent. **Dropping off court process at the gate of the 1st Respondent's brother's house cannot possibly constitute "personal service" on the 1st Respondent.**

Accordingly, and for all the reasons cited, **I find and hold that the Petition was not served upon the 1st Respondent within the period of time prescribed by law, and I strike it out, with costs to all the Respondents.**

Dated and delivered at Nairobi this 12th day of May, 2008.

ALNASHIR VISRAM

JUDGE