



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

Election Petition 31 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 GITHUNGURI PARLIAMENTARY
CONSTITUENCY**

BETWEEN

TITUS KIONDO MUYA PETITIONER

VERSUS

PETER NJOROGE BAIYA 1ST RESPONDENT

ROBERT K. MUNGAI 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 Githunguri 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, Peter Njoroge Baiya, who was declared the winner by the 3rd Respondent, the Electoral Commission of Kenya (hereinafter “the ECK”). In a Petition presented on 28th 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 21st February, 2008, and made under Sections 20 (1) and 23 (2) of the Act Cap 7, Rules 14 and 34 of the National Assembly Elections (Election Petition) Rules and the inherent jurisdiction of the Honourable Court, the Petitioner seeks:

- “(a) That the petition herein dated and filed on 28th January, 2008 be forthwith struck out with costs.**
- (b) That the costs of this application be borne by the petitioner.”**

The Application is based on the following three grounds:

“(i) The said petition is wholly and/or fatally incompetent since the same was not served upon the applicant either personally or at all within 28 days after the date of the publication in the Kenya Gazette on 30th December, 2007 of the results of the Parliamentary election hereof.

(ii) The petitioner has never been served with the Notice of presentation of the subject petition as mandatorily required by Rule 14 of the National Assembly Elections (Election Petition) Rules thereby further fundamentally invalidating any purported service (which is denied) of the petition hereof.

(iii) For the avoidance of doubt, the purported service of the petition hereof vide the Kenya Gazette No. 486 published on 29th January, 2008 is fundamentally flawed, irregular and wholly ineffectual.”

The **issue** before this Court is whether the Petition was served on the 1st Respondent in accordance with the law. Was it? 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.

The 1st Respondent, in his supporting affidavit, sworn 21st February, 2008 says that he was never actually served with the Petition, and found out about it from a constituent on 1st February, 2008.

The Petitioner, on the other hand, says (in his Replying Affidavit) that the Process Server, Mr Cosmas Makau, effected service on the 1st Respondent by “leaving” a copy of the Petition with the latter’s secretary at his law office in Kiambu. Mr Makau, in his affidavit sworn the 10th March, 2008, states the same. He further elaborates that he went to the 1st Respondent’s law office at Kiambu at 2.30 pm on 28th January, 2008, and not finding him there, he “moved around” Kiambu town “looking for Mr Njoroge Baiya”. He failed to find him, and went back to the law office at 4.00 pm, and “left the documents in his office”.

Now, given the above facts, did the Petitioner comply with the law?

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. That publication was done on 30th December, 2007, and so the last day, the 28th day, was actually the **27th January, 2008**. However, that date, the last day, was a Sunday, and Mr Njagi, Counsel for the 1st Respondent rightly conceded that in the circumstances the last day for filing and serving the Petition was Monday, the 28th January, 2008. Indeed, Section 57 (b) of the Interpretation and General Provisions Act, Cap 2, states as follows:

“57. In computing time for the purposes of a written law, unless the contrary intention appears –

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day.”

In my view, therefore, the 28th January, 2008 was the last day for presenting and serving the Petition, and I find and hold that indeed the Petition was presented within the 28 days prescribed by law, albeit on the last day, which leads us to the next issue: **was it also served on 28th January, 2008? No. Not in my view.** I have to answer that question in the negative for the following reasons.

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, let us examine whether the Petitioner before me complied with the law.

The Petitioner and his Process Server, both say that the documents were left in the 1st Respondent’s office, after the Secretary said she did not know the whereabouts of the 1st Respondent. The 1st Respondent denies that any documents were left in his office. I am inclined to believe him for two reasons: first, that the Process Server failed to identify the name of the Secretary with whom he left the documents. That is the very least he should have done, if indeed he left the documents with someone. Second, he should have sworn and filed an affidavit of service immediately. He did not do this until 10th March, 2008, and then, too, only as an exhibit to the Petitioner’s Replying Affidavit.

In any event, even if I was wrong on that issue, and even if the Process Server indeed left the documents with the 1st Respondent’s secretary at his office, that in my view did **not** constitute personal service. There is no evidence that the unnamed secretary was indeed the secretary of the 1st Respondent, nor that

she had authority to accept service of Court process.

In James Nyamweya vs Cosmos F. C. Oluoch Election Petition No. 74 of 1993, the Court of Appeal dealt with a similar situation where it was alleged that service had been effected through a personal secretary. The Court observed:-

“It is thus abundantly clear as our view that service on an agent is invalid service. This were repeated a few days later after the Emanuel Karisa Maitha petition, we heard submissions on service in the Peter Goko petition. In this later case we heard that the principal documents were served on a Respondent’s personal secretary. We rejected that as an improper and invalid service. We conclude with service on the 5th Respondent and we say that service if any at his office (on his personal secretary) was invalid. We have already stated above that service on an agent under the election petition rules is not proper or valid.”

I, therefore, find that the 1st Respondent was not served personally with the Election Petition. There is also no evidence before me of “due diligence” required under Section 20 (a) (iv) of the Act before that Section could be invoked to serve the Petition in the mode specified therein. Going to the 1st Respondent’s law office once, and then “moving around” Kiambu town the same afternoon, can hardly qualify as “due diligence”. Due diligence requires some kind of a continual and consistent effort to accomplish the objective. There was no such effort here. It is apparent that the Petition was filed on the last day, and there simply was no time to effect personal service. And in any event, the publication in the Gazette and the two newspapers prescribed by the Act, was completely out of time, and of no effect. **I, therefore, conclude that the Petition was not served upon the 1st Respondent within the time prescribed by the law.** In coming to that conclusion I have taken into account the submissions made by Mr Mwenesi, Counsel for the Petitioner, who implored upon this Court to take into account the pressures on an election candidate, following the declaration of the results, and the short time available to present and serve the Petition. I completely empathize with the plight of Petitioners, and the up-hill task in filing and serving the documents, not to mention the huge financial outlay in prosecuting such applications. However, that is the law and procedure. I must interpret it as it is, not as it ought to be. And, finally Mr Mwenesi complained that the Petitioner did not follow Rule 10 of the Rules. The Rule states as follows:

“10: A person elected may at any time after he is elected send or leave at the office of the Registrar a notice in writing signed by him or on his behalf, appointing an advocate to act as his advocate in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address in Kenya at which notices addressed to him may be left or if no such writing is left all notices and proceedings may be given or served by leaving them at the office of the Registrar.”

According to Mr Mwenesi, if the Petitioner had complied with this Rule, and had left his address for service with the Registrar, the Petition would have been served on time. As Mr Mwenesi acknowledged, the Court of Appeal held in Kibaki vs Moi that **Rule 10 was not mandatory** upon the Petitioner. I am bound by that decision.

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 7th day of May, 2008.

ALNASHIR VISRAM

JUDGE