



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Election Petition 1 of 2008**

**AYUB JUMA MWAKESI .....PETITIONER**

**VERSUS**

**MWAKWERE CHIRAU ALI .....1<sup>ST</sup> RESPONDENT**

**ALI MAALIM HASSAN .....2<sup>ND</sup> RESPONDENT**

**THE ELECTORAL COMMISSION OF KENYA .....3<sup>RD</sup>  
RESPONDENT**

**RULING**

Ali Maalim Hassan, the Returning Officer for Matuga Parliamentary Election being the 2<sup>nd</sup> Respondent herein, took out the motion dated 17<sup>th</sup> May 2008 pursuant to the provisions of Section 20 of the National Assembly and Presidential Elections Act and under rule 14 of the National assembly Elections (Election Petition) Rules, 1993. In the aforesaid Motion the 2<sup>nd</sup> Respondent sought for the following order:

- (a) “The Petition herein be struck out on the ground that the petition was not personally served and/or otherwise served in a mode prescribed by the law on the 2<sup>nd</sup> Respondent within 28 days after the date of publication of the results of the Parliamentary Election under Gazette Notice No. 12615 published in the Kenya Gazette on 30<sup>th</sup> December 2007.
- (b) Pending the hearing of the motion all proceedings be stayed.
- (c) Costs of the petition as well as that of the motion

When the motion came up for inter partes hearing, the 2<sup>nd</sup> Respondent abandoned prayer (b) of the motion but instead pursued prayers (a) and (c). The motion is supported by the affidavit sworn by the 2<sup>nd</sup> Respondent. The aforesaid affidavit sworn on 17<sup>th</sup> May 2008, gave in detail the facts leading to the filing of this motion. The 2<sup>nd</sup> Respondent avers that while instructing his advocate on record regarding the manner in which the election was conducted, he made inquiries from his advocate as to how the petition was served upon him because he was not personally served. The 2<sup>nd</sup> Respondent claimed that he was then shown two affidavits of service which had been filed. He stated that the affidavits revealed that the petition had been left with two female colleagues of his. The 2<sup>nd</sup> Respondent depones that his advocate advised him that the service so effected is invalid in law. He denied sharing offices with two

female colleagues. He claimed that he was in his office at the T.S.C. headquarters on 25th January 2008 hence there was no need for the petition to be left with anybody because he should have been personally served. The 2<sup>nd</sup> Respondent further revealed that he was shown by his advocate copies of the Daily Nation and Taifa Leo Newspapers plus the Kenya Gazette issue which published the Notice of presentation of the petition. It is the averment of the 2<sup>nd</sup> Respondent that he was advised that the publication of the notice of presentation did not amount to substituted service. Copies of the aforesaid publications and the affidavits of service were attached to the affidavit filed in support of the motion.

Ayub Juma Mwakesi, the Petitioner herein, filed a replying affidavit he swore on 23<sup>rd</sup> May 2008 to resist the motion. He averred that the motion is calculated to delay the hearing of the petition. The Petitioner stated that it was extremely difficult to serve the Petition. Personally upon on the 2<sup>nd</sup> Respondent as he was not in his place of employment at the Teacher Service Commission Headquarters. He averred that the process server made attempts to have the 2<sup>nd</sup> Respondent served at the District Electoral Commission offices, in Kwale in vain. He said he was advised to serve him at the T.S.C. headquarters. The process server is said to have gone to room No. 107 first floor, Bazaar Plaza, where he left the petition with two ladies upon being informed that the 2<sup>nd</sup> Respondent had left his offices. The process server is said to have gone back to T.S.C. headquarters where he collected copies of the petition upon being told that the 2<sup>nd</sup> Respondent had collected his copy but declined to append his signature to acknowledge service. It is after exhausting these steps that the notice of presentation was published. It is the averment of the petitioner that the process servers exercised due diligence before using substituted service by way of publication.

Learned advocates appearing in this matter filed skeleton arguments. They also made oral submissions when they appeared before this court. It is the submission of Mr. Ngatia, who was the lead counsel for the 2<sup>nd</sup> Respondent that the Petitioner did not exercise due diligence to personally serve the petition upon the 2<sup>nd</sup> Respondent. The learned advocate claimed that the process server did not give himself sufficient time to locate the 2<sup>nd</sup> Respondent before resorting to the mode of substituted service. The learned advocate pointed out that the process server only made one trip to the T.S.C. headquarters. Mr. Balala, learned advocate for the petitioner was of the strong view that the Petitioner acted diligently before serving through substituted service. Mr. Balala further argued that since the Electoral Commission of Kenya (3<sup>rd</sup> Respondent) was properly served, then it should be deemed that the 2<sup>nd</sup> Respondent was equally served. The learned advocate's argument is that the 2<sup>nd</sup> Respondent was made a party to these proceedings in his capacity as a returning officer for the 3<sup>rd</sup> Respondent and not in his individual capacity so that service on the ECK was as good as service on him. This later argument was opposed by Mr. Ngatia, who was of the view that all the Respondents must be served. Mr. Mabeya, learned advocate for Mwakwere Chirau Ali, the 1<sup>st</sup> Respondent adopted the arguments of Mr. Ngatia. Mr. Mabeya was of the view that the petitioner should have employed more process servers so that one can say that the petitioner exercised due diligence before using the mode of substituted service. Mr. Muniyithya learned advocate for the Electoral Commission of Kenya (3<sup>rd</sup> Respondent) also adopted the arguments of Mr. Ngatia. It should be noted at this stage that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents did not file any affidavits but their advocates were nevertheless allowed to tender submissions.

I have considered the able arguments made by learned counsels appearing in this petition. I have also taken into account the grounds set out on the face of the motion and the facts deponed in the supporting and the replying affidavits. I have further considered the skeleton submissions and the authorities cited in support and against the motion. The following salient issues arose for any determination. First: Whether there was exercise of due diligence before effecting service by substituted service upon the 2<sup>nd</sup> Respondent? It is not in dispute that the 2<sup>nd</sup> Respondent was not personally served with the petition. The notice of presentation was published in the Daily Nation and Taifa Leo Newspapers of 25<sup>th</sup> January 2008 and through the Kenya Gazette of the same date pursuant to the provisions of Section 20(1)(c)(iv) of the National Assembly and Presidential Elections Act. Under this section service by publication as aforementioned can be undertaken where after exercising due diligence it is not possible to effect personal service. In order to establish whether or not the petitioner exercised due diligence the court must

critically examine the affidavits of service relied upon. In this petition two affidavits of service were filed. One is of Augustus Munywoki sworn on 6<sup>th</sup> March 2008 and the other is that of Philip Mailu Ngau sworn on 8<sup>th</sup> January 2008. Let me start with the affidavit of service of Augustus Munywoki. The relevant portions relating to the 2<sup>nd</sup> Respondent are paragraphs 4,5,6 and 8. In short Augustus Munywoki depones that he visited the offices of the Electoral Commission of Kenya (3<sup>rd</sup> Respondent) in Kwale, town with the purpose of serving the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents with the petition and the notice on 23<sup>rd</sup> day of January 2008. The process server avers that he met Mr. Chibwara, an Election co-coordinator in the Matuga Constituency who informed him that he had instructions to refer any one with documents upon E.C.K. and the returning officers for service to the head office, Nairobi. In paragraph 6, Mr. Munywoki depones that he was told Mr. Chibwara that the 3<sup>rd</sup> Respondent works at the Teacher Service Commission. Mr. Balala, learned advocate for the petitioner, orally applied to this court to infer that the deponent meant the 2<sup>nd</sup> Respondent instead of the 3<sup>rd</sup> Respondent. That application was not opposed by the advocates appearing for the Respondents. I am satisfied that there was a typographical error in paragraph 6 of the affidavit of service of Mr. Augustus Munywoki. It is obvious that the deponent meant to refer to the 2<sup>nd</sup> Respondent as opposed to the 3<sup>rd</sup> Respondent. In any case it is not denied that Ali Maalim Hassan (2<sup>nd</sup> Respondent) is an employee of the Teachers Service Commission. Mr. Augustus Munywoki avers that when he failed to trace the Respondents he promptly informed the firm of Balala Abed Advocates who in turn took and sent the documents to Philip Mailu Ngau.

What did Philip Mailu Ngau do? The answer can be seen from his affidavit of service sworn on 28<sup>th</sup> January 2008. Of importance are paragraphs 1,5,6,7,10, 11 and 12. In brief Philip Mailu Ngau avers that on 25<sup>th</sup> January 2008 at 11.00 a.m. he received the petition and the notice from the firm of Balala Abed Advocates through the firm of M/s V.A. Nyamodi & Co. Advocates with instructions to effect service upon the Respondents. The process server was informed by Paul Nyamodi that the 2<sup>nd</sup> Respondent was an employee of Teachers Service Commission located at Bazaar Plaza Building in Nairobi, at the corner of Moi Avenue and Biashara Street Nairobi. At 2.30 p.m. Philip Mailu Ngau visited the Bazaar Plaza, where a receptionist informed him that Ali Maalim Hassan's office was at room No. 107, 1<sup>st</sup> floor. The process server visited room No. 107 after being issued with a pass. At room No. 107, Philip Mailu Ngau avers that he met two female employees who informed him that they were colleagues of the 2<sup>nd</sup> Respondent and that room 107 was where the 2<sup>nd</sup> Respondent worked. He was also informed by these ladies that the 2<sup>nd</sup> Respondent had left the office at 10.30 a.m. and had not returned by the time of his arrival. The process server left the documents with those ladies with a request to hand over to the 2<sup>nd</sup> Respondent upon his arrival. The process server went back to the 2<sup>nd</sup> Respondent's office at 4.30 p.m. whereupon he was informed that the 2<sup>nd</sup> Respondent had returned to the office and that he had taken a copy of the petition and the notice and shortly left without appending his signature to acknowledge receipt of the same. The above is the chronology of steps taken by the petitioner to have the petition and the notice served upon the 2<sup>nd</sup> Respondent. Can it be said that the Petitioner did not exercise due diligence? Before answering the question I must point out that the facts deponed in the affidavits of service of the two process servers have not been controverted. Of course there is an attempt by the 2<sup>nd</sup> Respondent to deny service. It is not contested that the 2<sup>nd</sup> Respondent is an employee of the T.S.C. based at room 107, 1<sup>st</sup> Floor, Bazaar Plaza. The 2<sup>nd</sup> Respondent and his legal advisers have not made an application to even have the process servers cross-examined to test the veracity of their averments they made in the affidavits of service. 'Due diligence' is not defined in the National Assembly and Presidential Elections Act. In Blacks Law Dictionary, 8th Edition: Due diligence is defined as:

"The diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation."

The court of Appeal in Ephraim Njugu Njeru =vs= Justin Bedan Njoka Muturi & Two others C.A. No. 314 of 2003(Unreported) stated in part as follows:

"Generalized statements by a process server regarding service cannot justify resort to substituted service.

Substituted service is resorted after all reasonable and proper efforts have been made to trace the respondent but in vain.”

Having considered the definition of due diligence, the submissions, the authorities cited, and the facts deponed in the affidavits of service I am convinced that the Petitioner exercised due diligence to effect personal service upon the 2<sup>nd</sup> Respondent before effecting service by substituted service. There were efforts to trace the 2<sup>nd</sup> Respondent at Kwale town. There were also two attempts to have him served at the Teachers Service Commission Headquarters, 1<sup>st</sup> Floor, Bazaar Plaza, room No. 107. For the above reasons the petitioner was entitled to serve the petition the way he did in compliance with the provisions of Section 20(1)(c)(iv) of the National Assembly and Presidential Elections Act.

The second peripheral issue which arose from the arguments is whether or not a returning officer like the 2<sup>nd</sup> Respondent can be deemed to have served if the Electoral Commission of Kenya (3<sup>rd</sup> Respondent) is shown to have been validly served like in this case? According to Mr. Balala, it would appear that he is of the view that so long as the Electoral Commission of Kenya has been served then the Returning Officer is deemed as duly served. This view is not shared by the Respondents. According to Mr. Ngatia, the it is immaterial whether the Electoral Commission of Kenya is served, all the Respondents must be served. On his part Mr. Munyithya, learned advocate for the 3<sup>rd</sup> Respondent urged this court to critically examine the definition of a respondent given under rule 2 of National Assembly Election (Election Petition) Rules. I have considered the rival submissions over this issue. In my view all respondents must be served according to the manner prescribed. The fact that the electoral Commission has been served does not matter. The returning officer must equally be served. This will obviously enable the Returning officer to participate in the election petition. The returning officer is no lessor respondent than the Electoral Commission, he must be served. If the petition is not properly served upon all the respondents named then the entire petition will be rendered incompetent.

The submissions of Mr. Balala appear to be novel in that it is food for thought for our law makers to cause the law to be amended so that service upon the Electoral Commission of Kenya can be deemed to be as good a service upon the returning officer. Without the Electoral Commission, the returning officer cannot stand on his own. The Electoral Commission of Kenya is established pursuant to Section 41 of the Constitution of Kenya. Its duties include inter alia to conduct free and fair elections. At the end of any election it is the duty of the Electoral Commission of Kenya and its Returning Officers to ensure that it has left its physical address to enable election petition papers served. That includes that of its returning officers. It will be absurd and in derogation of its duty if the Electoral Commission releases its returning officers to their employers or to their homes leaving those who wish to challenge the Election outcome to go fishing everywhere to effect service. The Electoral Commission and its returning officers should not be seen to be evading service. The evidence of having conducted a free and fair elections must manifest itself in the manner its returning officers make themselves easily available to receive and accept service. In so doing, the Electorate will have confidence that there is nothing the Electoral Commission is hiding. Where returning officers make it extremely difficult to be located, to receive service, then the public will not be wrong to perceive that the election was not free and fair. For this reason no one envisaged returning officers to apply for election petitions to be struck out for want of service like in this case.

The third issue which was raised is whether the publication of the notice of presentation is equivalent to substituted service. When the parties sought to argue the issue, this court pointed out that the same had been heard and determined in this court’s ruling delivered on 21<sup>st</sup> April 2008. Consequently the issue was abandoned on the ground that the court was *functus officio* hence the matter was resjudicata. It suffices to state that this court is of the firm view that the notice of presentation of the Election Petition when published under Section 20 (1) (c) (iv) is as good as service of the petition. In any case the notice of presentation calls upon all the Respondents to visit the offices of the Registrar of this court to obtain true copies of the petition. By analogy it is like when one serves by advertisement the summons to enter appearance in respect of plaints.

In the end and for the above reasons I am convinced that the notice of motion dated 17<sup>th</sup> May 2008 lacks merit. It is dismissed with costs to the petitioner.

Dated and delivered at Mombasa this 30<sup>th</sup> day of June 2008.

**J. K. SERGON**

**J U D G E**

In open court in the presence of Mr. Mabeya for 1<sup>st</sup> Respondent,

Mr. Balala for Petitioner

Mr. Munyithya and Miss Ngugi for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.