



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

Election Petition 14 of 2008

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS
ACT (CHAPTER 7, LAWS OF KENYA) AND THE REGULATIONS MADE THEREUNDER,
THE NATIONAL ASSEMBLY ELECTION (ELECTION PETITION) RULES AND THE
ELECTION OFFENCES ACT**

AND

**IN THE MATTER OF: ELECTION FOR KAJIADO NORTH PARLIAMENTARY
CONSTITUENCY**

AND

IN THE MATTER OF: THE PETITION OF MOSES SOMOINE OLE SAKUDA

BETWEEN

MOSES SOMOINE OLE SAKUDA PETITIONER

VERSUS

GEORGE SAITOTI 1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA 2ND RESPONDENT

GEORGE MORARA OKENYE 3RD RESPONDENT

RULING

(1) Moses Somoine ole Sakuda (“**the Petitioner**”) filed a petition on the 21st January 2008, to challenge the validity of the election of Hon. George Saitoti (“**the first Respondent**”) as the Member of Parliament for Kajiado North Constituency at the General Election held on the 27th December 2007. The Petitioner was one of the candidates in the contest which attracted no less than fifteen candidates in all.

(2) According to the returns compiled by George Morara Okenye, the Returning Officer, (“**the third Respondent**”), the first Respondent garnered 40,376 votes against the Petitioner’s 21,602. The Electoral Commission of Kenya (“**the ECK**”) is the body entrusted with the conduct of Presidential, Parliamentary and Civil elections in Kenya. The third Respondent was at all material times the servant and agent of the ECK who appointed him as the Returning Officer for Kajiado North Constituency.

(3) The Petitioner alleges numerous irregularities on the basis of which he wants the court to determine that the first Respondent was not validly elected.

(4) On the 10th March 2008, the second and third Respondents filed a Notice of Motion seeking to strike out the Petition on the ground that the third Respondent had not been formally served the notice of presentation accompanied by a copy of the petition. It is also alleged that the very first time the third Respondent became aware of the election petition was when he was summoned by the ECK to record a statement on the allegations made in the petition.

(5) The affidavit in support of this Notice of Motion is sworn by the third Respondent who, as I have already said, was the Returning Officer for the Kajiado North Constituency. I will return to the contents of this affidavit later in this ruling.

(6) A little later, on the 20th March 2008, George Saitoti, the first Respondent, jumped into the fray and took out a second Notice of Motion seeking the same order that the petition be struck out on the ground that it was not served on the third Respondent personally or in a mode prescribed by the law. It is also alleged that the Petitioner did not carry out any due diligence to effect service on the third Respondent. And further that the Petitioner did not effect alternative service of the Petition upon the third Respondent in the manner prescribed by law.

(7) The supporting affidavit in this Motion is sworn by Hon. (Professor) George Saitoti, the first Respondent. In his affidavit dated the 18th March 2008, he repeats the averments contained in the affidavit of George Morara Okenye, the Returning Officer and third Respondent in the Petition. I will return to this affidavit in due course.

(8) The Petitioner filed a replying affidavit on the 20th March 2008 in opposition to the Notice of Motion filed by the second and third Respondents. In that affidavit, he deponed *inter alia*:

“4. THAT prior to the filing of the Petition I was advised by my Advocates on record that the Notice of Presentation of the Petition together with a copy of the Petition would be required to be served upon each Respondent personally and that I needed to locate the whereabouts of each Respondent for the purposes of the said service.

6. THAT between 15th January 2008 when my Advocates started preparing this Petition and 21st February 2008 [sic] when the same was filed I made several efforts to trace the 3rd Respondent through his said mobile telephone but the said telephone was switched off each time I called it.

7. THAT in the same period, I visited the 2nd Respondent’s Offices at Ngong town three times where the 3rd Respondent had an office but in each occasion the said offices were locked and without anybody to attend to me.

8. THAT I also sought the assistance of

various electoral officials to help me trace the 2nd Respondent namely the District Election Coordinator for Kajiado (one Mr. Ole Sekento), the Registration Officer Kajiado District (one Mr. Shukuru) and the Deputy Returning Officer for Kajiado North Constituency (Mrs. Kasuku) and none of them knew the whereabouts of the 3rd Respondent as they informed me and I believed them that they too were looking for the 3rd Respondent in order to address office matters such as

payment of electoral staff but were unable to trace him.

9. **THAT I had only met the 3rd Respondent at his said Ngon’g office during the election period firstly on 24th November 2007 when I presented my nomination papers and secondly at the vote tallying hall on 28th and 29th December 2007 during the tallying of the votes and as such I did not know his place of residence or any other place of work from where I could trace or locate him.**

11. **THAT when it became apparent therefore, that I would not be able to trace the 3rd Respondent for purposes of personal service my Advocates on record advised me and I reasonably believed the advise as sound that I should serve the Notice of Presentation of this Petition by publications in the Gazette and in the local daily newspapers as allowed by the law.”**

(9) The Petitioner also swore a replying affidavit on the 28th March 2008 in opposition to the Notice of Motion by Hon. (Professor) George Saitoti. Basically, it is a repeat of the affidavit in reply to the Notice of Motion taken out by the second and third Respondents to which I have already alluded.

To this affidavit, the Petitioner has annexed the affidavit of service sworn by Thomas Nduku, a court process server, dated the 28th January 2008. In that affidavit, Mr. Nduku explains in detail the steps he took to trace the third Respondent which were not successful. I will also return to Mr. Nduku’s affidavit later.

(10) In paragraph 18 of his affidavit, Mr. Ole Sakuda depones that he came to learn from the third Respondent’s own affidavit dated the 10th March 2008 that the third Respondent is a resident of Gesonso Market within Kisii District, a fact which was not within his knowledge when he was looking for the third Respondent to serve him with process.

(11) In paragraph 19, Mr. Ole Sakuda deponed that he knew and it is a matter of public notoriety and common knowledge that at about the time of filing the petition, there was violence in some parts of the country arising from the disputed Presidential Election as a result of which communication and transport to some parts of the country particularly in the Rift Valley, Western and Nyanza Provinces were seriously affected. For that reason it would not have been possible for him to travel to Kisii in Nyanza Province to serve the third Respondent.

(12) I now return to the affidavit of Thomas Nduku dated the 28th January 2008. He is a process server and was instructed by the Petitioner’s Advocates to effect service on ALL the three Respondents. He served the ECK at its Nairobi Anniversary Towers offices by serving it on a Mr. Matolo who appeared to be the officer designated to accept service of process on behalf of the ECK.

(13) Mr. Nduku also depones that while serving Mr. Matolo on behalf of the ECK, he asked Mr. Matolo if the third Respondent was within their offices but Mr. Matolo answered in the negative and told him that the ECK was also unable to trace or reach the third Respondent on the phone.

(14) Not surprisingly, these two affidavits prompted the third Respondent and John Matata Matolo to file supplementary affidavits, both of which are dated the 2nd May 2008. The firepower in both such affidavits is directed towards what the process server said transpired at the offices of the ECK when Mr. Nduku served the Petition on Mr. Matolo and what the Petitioner said about post election violence in the Rift Valley, Western and Nyanza Provinces which disrupted travel and communication generally.

(15) I consider first the affidavit of John Matolo dated the 2nd May 2008. In paragraph 4, he admits meeting Thomas Nduku, the process server, but says he has no recollection of having informed Mr. Nduku that he did not know where or how to trace the third Respondent. He also denies having said he could not reach the third Respondent on the phone. Further, he also says the ECK has the full details of all Returning Officers. He adds that since Mr. Nduku had the third Respondent's telephone number, it was pointless asking him for his contact.

(16) Clearly, the whole object of Mr. Matolo's affidavit is to create the impression that Mr. Nduku was not telling the truth and that he, Mr. Matolo, was the more credible. Mr. Matolo is, of course, an employee of the ECK – a point I have to take into account in assessing his credibility. Thomas Nduku is a court process server and an officer of the court. He is not an employee of the Petitioner nor, I presume, of his Advocates on record. He has no axe to grind in this matter and would have no reason at all to talk about things he did not see or hear. No application has been made to bring him before the court for the purpose of being cross-examined on his affidavit. I accept his evidence as to what transpired at the ECK offices and reject the account given by Mr. Matolo as false. I find as a fact and hold that Mr. Nduku inquired about the third Respondent and Mr. Matolo declined to give him any information.

(17) In paragraph 7 of his affidavit, the third Respondent disputes the Petitioner's claim that he was completely unable to get any assistance from the various officers who worked in the Constituency. He admits having spoken to the Petitioner on the telephone and confirming to him that he had returned to his rural home in Kisii.

In paragraph 9, the third Respondent arrogates to himself the duty of saying that Mr. Matolo could not have told the process server that he did not know where the third Respondent was. How could he know what Mr. Matolo said or did not say and yet he was not present when the two met?

(18) In paragraph 7 of his affidavit, the third Respondent says in part in relation to the officers who were working under him –

“The said officers have always had my contacts since my appointment as the Returning Officer for Kajiado North Constituency. It would have been impossible to discharge my functions as a Returning Officer if the above persons were in the dark about my whereabouts.”[Emphasis added].

The third Respondent should also understand that although those officers might have known where he was, on this particular occasion they declined to tell the Petitioner where he was. But one thing is clear and beyond dispute. The third Respondent did not remain in the Constituency after the elections. He himself says he had returned to Kisii.

(19) In paragraphs 13 and 14, the third Respondent depones:

“13. That I am aware that there was violence in the upper North Rift, Nyanza and Western provinces after the announcement of the Presidential Election Results. However, the said violence spared Kajiado, Narok and Kisii Districts which offer a safe corridor for passage to Kisii for the Petitioner and/or his process server to effect personal service as required by law, but apparently no effort was made to that effect.

14. That as a matter of fact, I personally traveled back to Kisii on 19th January 2008 through the Nairobi/Narok/Bomet/Kisii Road during the height of the violence, but I never experienced any difficulties or threat to my life or limb or safety.”

(20) To say the very least, it is very sad to hear a senior election official make such utterly irresponsible and incredible utterances in relation to the unfortunate violence that rocked Kenya post elections. One is left wondering if the third Respondent was in this country at the material time.

(21) In paragraph 15, the third Respondent admits that Mr. Steve Adere had informed the court that he, the third Respondent, had been served. The third Respondent now says he has never met Mr. Adere and that Mr. Adere had no instructions from him to tell the court he had been served. That is a very serious allegation to make against one's Advocate. Mr. Adere is a very senior Advocate of long experience. I would have expected, at the very least and also as a matter of professional courtesy, that the third Respondent's supplementary affidavit would have been served on Mr. Adere if for no other reason but so that he knows what is being alleged against him.

(22) These applications were heard together. Mr. Matthew Kyalo, learned counsel for the second and third Respondents, said the first and second Respondents were served within the statutory period. As far as the third Respondent is concerned, Mr. Kyalo says he learnt about the petition on the 6th March 2008 when he was asked by the ECK to respond to the allegations made against him in the Petition.

(23) Mr. Kyalo very correctly pointed out to the court that the sole question to be decided in these applications is whether the Petitioner made diligent effort to serve the third Respondent. It is the Respondents' contention and Mr. Kyalo's submission that the Petitioner did not make diligent effort. Mr. Kyalo says that the steps taken by the Petitioner before the petition was filed were wasted because at that time there was no petition in existence to be served on anyone. I think the simple answer to this submission is that any prudent petitioner would be better served to find out where a respondent is even before filing a petition because he would be expected to inform the process server where to find the respondent.

(24) The third Respondent himself says he left the Constituency after the elections and returned to his rural home in Kisii. Mr. Kyalo also blames the Petitioner for not producing evidence that he attempted to travel to Kisii but was prevented from doing so by clashes. It is common knowledge that there were clashes in the areas mentioned and there is no need to call evidence to prove the fact. Apart from that, what would have been the point of the Petitioner traveling to Kisii when he had no indication as to the exact location in Kisii the third Respondent was to be found. The third Respondent had turned off his telephone and left no information with anyone in the Constituency where he could be contacted.

(25) Mr. Kyalo also relied on the affidavit of Mr. Matolo dated the 2nd May 2008 for his submission that the Petitioner could have enlisted the assistance of the ECK to trace the third Respondent. That is precisely what the Petitioner did when he sent Mr. Thomas Nduku, the process server, to the offices of the ECK and he was told by the same Mr. Matolo that they did not know where the third Respondent was and were also looking for him. I have already said that on this point, I accept the evidence of the process server as true and reject Mr. Matolo's account as false.

(26) Mr. Kyalo also submitted that since the Petitioner had the third Respondent's cell phone, he should have had no difficulty in tracing him. That would only have been possible if the third Respondent had kept his line open but for reasons best known to himself, he had turned off his telephone at the material time. Mr. Kyalo submitted that the Petitioner failed the test of due diligence and consequently, his petition should be struck out.

(27) Alternative mode of service is provided for under section 20(1)(iv) of the National Assembly and Presidential Elections Act [Cap.7] ("**the Act**") which provides –

"(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 national circulation in each case."

(28) This is the mode which the Petitioner used after failing to trace the third Respondent. The Respondents say that the Petitioner did not exercise due diligence in tracing the third Respondent and cannot therefore fall back on service by publication.

Mr. Odhiambo Wakla, learned counsel for the Petitioner, opposed the applications. He pointed out that Parliament by amending section 20 of the Act did not introduce substituted service but merely provided

an alternative mode of service leaving personal service as the best mode. He said that this alternative mode is permissible only in circumstances where for one reason or another it is not possible to effect personal service as envisaged under the section.

(29) Mr. Wakla further submitted that before the Petitioner can resort to this mode of service he must satisfy one fundamental condition. It must be shown that he had exercised due diligence to effect personal service but had failed. As to what constitutes due diligence for the purposes of the section is not defined. That is left to the courts to decide on the basis of the evidence. The amendment was necessitated by the fact that there were numerous cases where Respondents deliberately put themselves beyond reach to avoid service, in some cases only to resurface after the period limited for service had lapsed. And there were cases where a respondent could not be reached because he would not give the process unimpeded access or removed himself out of jurisdiction.

(30) In the present case, the Petitioner encountered no difficulty in serving the first and second Respondents. But for the third Respondent, every trail the Petitioner followed went cold. The Petitioner went to the third Respondent's office at Ngong but he was not there. He asked the senior officers who worked under the third Respondent where he was but they had no clue. He had left the station apparently without telling anyone where he was going or how he could be contacted.

The Petitioner did not stop at that. He obtained the third Respondent's mobile telephone number. The first time he called the number, the third Respondent answered the call. Subsequent attempts to contact the third Respondent on his telephone were unsuccessful. It would appear that the third Respondent had smelt a rat and turned off his telephone.

(31) The next step the Petitioner took in this endless saga was to send Thomas Nduku, a process server, to the offices of the ECK to obtain some information on the whereabouts of the third Respondent. There, Mr. Matolo told the process server that they (the ECK) had no idea where the third Respondent was and that they too were looking for him. Mr. Matolo subsequently denied this conversation but I have already found as a fact that the conversation took place and Mr. Matolo did tell Mr. Nduku that they had no information regarding the whereabouts of the third Respondent.

(32) Having taken all those steps, what else was the Petitioner expected to do before he could be said to have exercised due diligence in his attempt to trace such a reclusive Respondent?

In the case of *Abu Chiaba Mohamed v. Mohamed Bwana Bakari and Two Others* (Civil Appeal No.238 of 2003)[2005] eKLR, the Court of Appeal dealt with the problem of service in election petitions and more specifically the difficulty of serving respondents who deliberately evade service. The leading judgment was written by Omolo, J.A. In the course of His Lordship's judgment, the learned Judge said:

“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.

In the appeal before us, unlike in the *KIBAKI v. MOI* case, the 1st Respondent and his lawyers made strenuous and concerted efforts to personally serve the Appellant; they proved the efforts they had made to personally serve him but they were unable to physically get hold of him and serve him because he was hiding from them. Can the Appellant now be allowed to, in effect tell courts:-

“I knew the 1st Respondent was looking for me to personally serve me. I also knew that as per the decision in *KIBAKI v. MOI* he had to personally serve me or his petition would be of no legal

consequence. With this knowledge I hid myself from them so that it was impossible for them to find me in order to effect personal service on me. I was successfully in hiding from them and they were accordingly unable to serve me. I now ask you (the court) to strike out his petition as being of no legal consequence as it was not personally served on me.”

I know that the law has often been said to be an ass. But I equally know that the law cannot be such an ass that it would even forget its other well-known principle, namely that no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man. Put simply, 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 as Member of Parliament for Lamu East Constituency. The effort made by the 1st Respondent to personally serve him amounted to personal service on him and the learned trial Judge was right in holding that he had been served. He made it impossible for the 1st Respondent and his agents to physically get hold of him and personally hand over the documents to him, but as I have said, he cannot be allowed to take advantage of his own wrong in hiding from those wanting to serve him and defeat the claim of the 1st Respondent on that basis.”

(33) That is exactly what the third Respondent did in this case. He went underground to avoid service and sadly, he appears to have been actively aided in that shameful behaviour by some officers of the ECK. I can see no reason why the ECK did not give the Petitioner the information he needed to trace the third Respondent. The way the third Respondent behaved clearly shows that he did not understand what the duties of a Returning Officer entail. In bringing his petition, the Petitioner is simply exercising his legal right under the law and he is entitled to expect every legitimate assistance from the ECK and the Returning Officer. There is no need to treat him with disdain or hostility or blatantly obstruct him from lodging his petition.

(34) As I have already observed earlier in this ruling, what constitutes due diligence for the purposes of the Act is not defined but is left to the courts to decide on the basis of the evidence.

Black’s Law Dictionary [Sixth Edition] defines due diligence as:

“Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.”

In my considered view, the efforts made by the Petitioner to find the third Respondent were of a reasonable and prudent man in the particular circumstances in which the Petitioner found himself. Accordingly, I am satisfied that the steps taken by the Petitioner to trace the third Respondent so as to serve him constituted due diligence within the meaning and for the purposes of section 20 (1)(iv) of the Act. The third Respondent put himself beyond reach with intent to avoid personal service. In the circumstances, the Petitioner was entitled to serve him by advertisement. I find and hold that he was properly served.

(35) There is one final aspect raised by Mr. Kioko Kilukumi, learned counsel for the first Respondent, which, I think, I should deal with briefly before I conclude this matter. As I understood him, Mr. Kilukumi submitted that the Notice published in the *Kenya Gazette* and the newspapers did not comply with the statutory requirements under the relevant section of the Act. Learned counsel drew my attention to a notice issued in another petition.

(36) Mr. Kilukumi refers to this mode of service as “substituted service.” I suspect that he may be equating this alternative mode of service with substituted service under the Civil Procedure Rules. One must not lose sight of the fact that substituted service under the Civil Procedure Rules cannot be used except with the order of the court. The court decides the circumstances under which it should be used. And there is also the form to be used once the order has been granted.

(37) That is not the case with regard to service by advertisement in election petitions. The Petitioner does not need a court order to use this mode of service. All that he is required to do is to exercise due diligence to locate the Respondents. But there is an element of risk in this because if the Respondents challenge his decision to serve by advertisement and can show that the Petitioner could have served them personally, the court will disallow the service by advertisement. It is at that point that the Petitioner will have to show that he exercised due diligence in his search for the respondents but could not find them.

(38) The alternative mode of service was introduced by amendment of the relevant section to deal with respondents who evaded service of process but no particular form was devised or prescribed to be used. I have looked at and considered the format used in this case and it serves the purpose in essential respects. In all material respects, the Notice used by the Petitioner meets the prescription of the Court of Appeal in *Alicen J. R. Chelaite v David Manyara Njuki and Two Others* [Civil Appeal No.150 of 1998 (Unreported)]. It tells the Respondents what they need to know - that a petition has been presented - and directs them to the place where they can obtain a copy of the Petition.

(39) Mr. Kilukumi objected to the inclusion of the first and second Respondents’ names in the Notice since both of them had been served personally. While that inclusion was really unnecessary, I cannot see that it has done anyone any harm or rendered the Notice ineffectual.

(40) For the reasons I have given, I have come to the conclusion that these applications must fail and both the Notices of Motion respectively filed on the 10th March 2008 and the 20th March 2008 be and are accordingly hereby dismissed with costs to the Petitioner.

It is so ordered.

Dated and delivered at Nairobi this thirteenth day of June 2008.

P. Kihara Kariuki

Judge.