REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Election Petition 2 of 2008

FRANCIS MWANZIA NYENZE …….....…….PETITIONER

VERSUS

CHARLES MUTISYA NYAMAI…….....…..1ST RESPONDENT

GABRIEL KOBIA…….…..2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA…….....3RD RESPONDENT

RULING

Background

1. **Francis Mwanzia Nyenze**, the Petitioner herein was one of the candidates for election as Member of Parliament for Kitui West Constituency in Kitui District. On 30.12.2007, the Electoral Commission of Kenya in a Special Gazette Notice of the same date, declared **Charles Mutisya Nyamai** as the duly elected Member of Parliament for that Constituency and the Petitioner was dissatisfied with that declaration because in his Petition dated 23.1.2008 and filed on 25.1.2008 he set out a number of irregularities which led him to conclude that the Election held on 27.12.2007 was null and void and prayed for this court to so declare.

2. Before the Petition could he heard on its merits, the 1st and 2nd Respondents filed two separate Applications seeking orders that the Petition be struck out because it was not properly served on either of them. The Application by the 1st Respondent is dated 11.2.2008 and that by the 2nd Respondent is dated 13.2.2008.

Submissions and Case for the 1st Respondent

3. In the Application dated 11.2.2008, the 1st Respondent's case is that;-

i. there was no proper and valid Petition before the court

ii. the Petitioner has not presented, filed and served the Petition within twenty-eight (28) days after the publication of the result of the election in the Kenya Gazette

iii. the Petition and/or notice of 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 Amendment) Act, 2007.

4. In the Affidavit in support sworn on 9.2.2008, the 1st Respondent deponed that he has not been personally served with the Petition and that he only became aware of its existence on 27.1.2008 when he saw a Notice in the "***Sunday Nation"*** newspaper informing him that a copy of the filed Petition could be obtained from the Registrar or Deputy Registrar of the High Court at Nairobi. He also saw a notice in the Kenya Gazette of 29.1.2008 informing him that the said Notice was published for purposes of purported service of the Petition upon him. That on 4.2.2008, he appointed advocates to represent him and the advise given to him was that there was no valid Petition before the court as the same was not served on him within 28 days as is the law and therefore what is on record is an invalid Petition and the same should be struck out.

5. **Mr. Karori** who appeared with **Mr. Maema** for the 1st Respondent in elaborate and inciseful submissions stated that 1st Respondent ought to have been personally and Physically served with the Petition as was held in Otieno Karan vs Minister of Local Government & Another [2004] eKLR.

6. That personal service is always the best service as was held in the cases of Abu Chiaba vs Mohamed Bakari C.A. 238/2003 and Ephraim Njugu Njeru vs Justine Muturi C.A. 314/2003. Where however personal service is frustrated by the deliberate efforts of the Respondent, then the Petitioner could exercise the option of inferred service under proviso (iv) to section 20(1)(a) of the National Assembly and Presidential Elections Act, Cap 7 and publicise the Petition in an English and Swahili daily newspaper as well as the Kenya Gazette but all the actions must be undertaken within 28 days of publication of the results of the election by the 3rd Respondent, the Electoral Commission of Kenya.

7. It was argued further that until the Application dated 4.3.2008 was filed, no Affidavit of service was filed by the Petitioner to show what attempts at service had been made on the 1st Respondent. On the latter point, reliance was placed on the decision in Francis Kangunyi vs Daniel Henry Gathua, C.A. 238/2003.

8. The other and crucially important issue raised by **Mr. Karori** was that proviso (iv) to section 20 of the Act could only be invoked after the Petitioner has exercised due diligence in attempting personal service on the Respondent which service has failed.

9. That in this matter the attempts made to serve the Petitioner personally did not meet that expectation because;

i. the purported attempt to serve the Petitioner at Safari park Hotel at 12p.m. on 25.1.2008 could not be validated because neither the Petitioner nor the Process Server, saw, spoke to, nor had any contact with the 1st Respondent.

ii. The purported attempt at service at Box Bar in Nairobi West was not valid because it was unclear who informed the Petitioner that the 1st Respondent was not there or was in fact expected to be there.

iii. The purported attempt at service at an unclear hour at a house in Kileleshwa on 25.1.2008 was not proper because it was unclear whether the house visited by the Petitioner and the Process Server in fact belonged to the 1st Respondent and in any event since it is not denied that the house guard said that the 1st Respondent was allegedly not in the house, it cannot be said that he deliberately avoided personal service.

iv. The alleged visit on 27.1.2008 to the 1st Respondent's house at Kasayani Village was not authenticated because there was no evidence that the 1st Respondent would be at Kasayani Village on that day.

10. Regarding the notices placed in the "***Sunday Nation"*** newspaper of 27.1.2008 and "***Taifa Jumapili"*** newspaper of the same day, **Mr. Karori** conceded that the same were made within time but said that the "***Kenya Gazette"*** notice of 29.1.2008 was out of time and to that extent, proviso (iv) of section 20(1) of the Act had not been complied with. That being the case, the Petition, it is argued, should be struck out as was done previously in;

i. Ephraim Njugu Njeru vs Justine Muturi C.A. 314/2003 and

ii. Ntoithia M'Mithiaru vs Richard Maoka Maore & Others – C.A 272/2003.

Case and submissions on behalf of the 2nd Respondent

11. In the Application dated 13.2.2008, the 2nd Respondent urges the point that he was not served within 28 days of the Publication of the result of the elections in Kitui West Constituency and;

a. that any "**mild effort made"** to serve the Petition was not in conformity with the law and decided cases on the subject.

b. that being the case, the Petition should be struck out.

12. In the Affidavit in support, sworn on 13.3.2008, **Mr. Gabriel Kobia,** ,the 2nd Respondent deponed that he was not served with the Petition personally and that the purported service made on his behalf to an official of the 3rd Respondent was improper. That he personally became aware of the filing of the Petition on 1.2.2008 when he saw a notice by the Honourable the Chief Justice appointing election courts across the country.

13. That he never authorized any one to receive the Petition on his behalf and there being no exercise of due diligence to serve it on him, the same should not be allowed to stand and should instead be struck out.

14. **Mr. J.A.Makau** who appears for the 2nd and 3rd Respondent argued that no affidavit of service was filed until 4.3.2008 long after the present Applications had been filed and the same was only filed to defeat the said Application.

15. The other point made by **Mr. Makau** is that one **Mr. Matolo** had no authority to receive the Petition on behalf of the 2nd Respondent and this point is borne out, he added, by the fact that the Petitioner still went ahead to make feeble attempts at serving the petitioner personally.

16. Lastly that, there being no service properly made, the Petition against the 2nd Respondent ought to be struck out even though the 3rd Respondent was properly served and Mr. Makau relied on David Murathe vs Samuel Macharia C.A. 171/1998 to reinforce this point.

Case and Submissions for the Petitioner

17. The Petitioner upon being served with the two Applications responded as follows:-

i. On 4.3.2008 he swore two Replying Affidavits and in the first one, he deponed that after the 1st Respondent had been declared the Member of Parliament for Kitui West, he instructed his advocate to "***prepare and file this Petition at the earliest time possible."*** That the Petition was then filed "***on 25.1.2008 at about 9. 00 a.m."*** and then he and the Process Server, **Richard Muriungi Kobia,** begun the exercise of "***locating and identifying the 1st and 2nd Respondents for purposes of effecting personal service on him (sic)."*** That since he had become aware through the Kenya Television Network TV news on 24.1.2008 that all Members of Parliament would be attending an induction course at Safari Park Hotel, he proceeded there at about 11.30 am and "***requested"*** an unnamed person to direct him "to where the 1st Respondent was." An unnamed lady at the Reception confirmed that the 1st Respondent "***had***

registered on 25th January 2008 and that he was in attendance." That a gentleman, whose designation and name are not given, then went to the Bougainville Hall with the 1st Respondent's name written on it. The unnamed gentleman came back from the Hall which was about 100 meters from where the Petitioner and Process Server were and said that the 1st Respondent was indeed at the meeting but had requested that the duo should wait for him until 12.30 p.m. when the Members of Parliament would take their lunch break. That he waited patiently but by 12.45 pm there was no sign of the 1st Respondent and he was neither in the Bougainville Hall nor in Kigwa Restaurant where lunch was being served.

18. The Petitioner having failed to find the 1st Respondent, then called one **Michael Mbuvi** who is said to be a friend of the 1st Respondent and the said **Mbuvi** told him that the 1st Respondent was "***believed to have gone to Box Bar and Restaurant next to Zinos along Ngathi Avenue, Nairobi West."*** At 2.30 p.m when the Petitioner got there, there was no sign of the 1st Respondent but **Michael Mbuvi** again informed the Petitioner that the 1st Respondent had gone to his residence in Kileleshwa. Knowing the said residence, the Petitioner said that he went there and after a security guard took his identity card and that of the Process Server, the guard returned a few minutes later to announce that the 1st Respondent was not there. The Petitioner attempted to enter the residence but was barred by the guard and he was convinced that the 1st Respondent was inside because he "***could see a white car which the 1st Respondent regularly uses***" parked in the compound.

19. The Petitioner further deponed that he saw the Process Server affixing that entire Petition on the gate to the 1st Respondent's compound and upon consulting his advocate, it was agreed that the Petition's filing should be advertised in the "***Sunday Nation"*** newspaper and the "***Taifa Jumapili"*** newspaper.

20. The Petitioner further deponed that on 27.1.2008, he drove to Kisayani Village, Kanyangi Location in Kitui District where the 1st Respondent has a house but "***a lady at his home who declined to disclose her name"*** told him that the 1st Respondent had not been there in two weeks.

21. It was the Petitioner's further deposition that the 1st Respondent certainly became aware of the Petition because on 28.1.2008 at 7.30 am, one **Ruth Kilonzi**, employed by Mbaluka & Co. Advocates went to the offices of the advocates for the Petitioner and collected a copy of the Petition on the 1st Respondent's instructions. That therefore the Petition should not be struck out as is the wish of the 1st Respondent.

22. (ii) The second Replying Affidavit was in relation to attempted personal service on the 2nd Respondent. The Petitioner's point was that on 25.1.2008 having failed to trace the 1st Respondent by 4p.m on the same day, the Petitioner and the Process Server proceeded to Anniversary Towers to serve the 3rd Respondent. At the offices, the two were directed by an unnamed person to go and serve one Mr. **Matolo**, who was said to be known to the Process Server. The said **Mr**. **Matolo** received the Petition on behalf of the 3rd Respondent and also claimed that since "***the 2nd Respondent was the 3rd Respondent's employee and that since the Petition was official he had authority to receive court process for and on behalf of all returning officers for which he did."*** On calling the 2nd Respondent on his cell phone, the latter told the Petitioner that he will be at the 3rd Respondent's offices on Saturday 26.1.2008 and that he was going to meet the Petitioner on that day. On 26.1.2008, the Petitioner camped at the 3rd Respondent's offices for an unknown period and when the 2nd Respondent failed to show up, the Petitioner and his advocate decided to place an advertisement of the Petition in the "***Sunday Nation"*** and "***Taifa Jumapili"*** newspapers.

iii. The Petitioner attached an Affidavit of service sworn on 4.3.2008 by **Kobia Richard Muriungi** which was almost word by word the same as the two sworn by the Petitioner in detailing out what he did together with the Petitioner in attempting to effect personal service on the 1st and 2nd Respondent. The actions are set out at length above and I see no need to repeat them. Suffice it to say however that the Affidavit is an annexure to that of the Petitioner and is made to give weight and credence to that sworn by

the Petitioner.

23. **Mr. Kilukumi,** who appeared alongside **Mr. Simiyu** for the Petitioner submitted forcefully that the 1st Respondent for purposes of the law was properly served by way "***inferred personal service***" and this was at his residence in Kileleshwa, at his rural home at Kanyangi location, Kitui and through his advocates, Mr. M/S Mbaluka & Co. Advocates in circumstances highlighted above. That even if there was no inferred personal service, the Petitioner has shown that he exercised due diligence in serving the Petition personally and only after failure to do so did he exercise the option available in proviso (iv) to section 20 of the Act and that is when he publicised the existence of the Petition.

24. Regarding the meaning of the words "***due diligence",*** **Mr. Kilukumi** relied on the definition set out in Black's Law Dictionary that it means the diligence expected of a person seeking to satisfy a legal requirement. That the diligence ought not to be extraordinary but merely reasonable and the purposive interpretation of proviso (iv) to section 20 should be applied. I was pointed to Rotich Kimutai vs Ezekial Lenyongopeta C.A. 273/2003 for the argument that purposive interpretation as opposed to literal interpretation would be the best approach to unravelling the purpose of Act No. 5/2007 in introducing proviso (iv) aforesaid. I was also referred to the Hansard of the Parliament for 6.9.2007 when the amendment was being moved by the Attorney- General. I will return to it later

25. Regarding service on the 2nd Respondent, **Mr. Kilukumi** urged the point that **Mr. Matolo** had authority to receive the Petition on behalf of the former because as Returning Officer within the meaning of the Act, he was an employee of the 3rd Respondent Commission.

26. That even if the 2nd Respondent had not been properly served, the Petitioner exercised due diligence and failing which he properly publicised the filing of the petition.

27. **Mr. Kilukumi** as does his client urged that the Petition should proceed to hearing on its merits as it was properly served upon the 1st and 2nd Respondent.

Issues for Determination

28. From the Affidavits on record and the eloquent submissions by the advocates appearing and the authorities submitted, I consider it prudent to answer the following questions:-

i. Were the 1st and 2nd Respondents personally served with the Petition herein?

ii. If they were not, was there due diligence on the part of the Petitioner to do so and was proviso (iv) to section 20(1) of the Act properly invoked?

iii. Did the Petitioner advertise the filing of the Petition within time? and

iv. Should the Petition be struck out or not?

29. On the first question, section 20(1) (a) of the National Assembly and Presidential Elections Act provides as follows:-

"A Petition -

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.

(a) ….

(b) ….

(c)….

Proviso (iv) provides as follows**:-**

"***(i)….***

(ii)…

(iii)….

(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 Kiswahili local daily newspaper with the highest national circulation in each case."

30. **Mr. Kilukumi** has urged the point that in interpreting this section, the purposive approach should be taken and that the purpose of the insertion of proviso (iv) was as set out in the Hansard of Parliament for 6.9.2007. I wholly agree because on that day, the Hansard captured the speech by the Honourable the Attorney-General as follows;

"**The Attorney-General** *(Mr. Wako): Mr. Temporary Deputy Chairman, Sir I beg to move,*

THAT, the Clause relating to the National Assembly and Presidential Elections Act be amended by deleting the amendments proposed to the National Assembly and Presidential Elections Act (Cap 7) and substituting therefor the following new amendment-

s.20(1) Insert the following new paragraph in the proviso in proper numerical sequence-

(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 and local daily newspaper with the highest national circulation in each case.

Mr. Temporary Deputy Chairman, Sir, the whole purpose of this amendment is as follows; Although it was proposed to do away with serving the election petition, it is thought that it is wiser that the petition be served, but that a provision be made that where due diligence fails, it can be effected by publication in the two dailies; one in Kiswahili and one in English and also in the official Kenya Gazette."

31. Reading the Hansard above together with section 20(1) (a) and proviso (iv) I am clear in mind that the problem sought to be solved by Act no. 5/2007 which inserted proviso (iv) was precisely the one that arose after the 2002 and other General Elections where personal service was impossible on say on the President and also on Members of Parliament either because they had a retinue of muscled personal bodyguards to hamper any access to them or deliberately went underground to avoid service. These issues were the subject of much deliberation in Kibaki vs Moi [2001] I.E.A 115 as well as Abu Chiaba Mohamed vs Mohamed Bakari C.A. 283/2003. The amendment was supposed to cure that deficiency in the law by providing an avenue to a diligent Petitioner who after failing to serve the Petition personally can then exercise the option of publicising the filing of the Petition. **Mr. Kilukumi** has however urged the point that the exercise of the option in the proviso can be made outside the 28 days set by section 20(1) (a) but I disagree. The Attorney-General in moving the amendment never said so and in fact said it clearly that "***it is wiser that the petition be served"*** which is an echo of the language used in Kibaki vs Moi (supra) that:-

" ***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 these applicable to other Kenyans cannot support the principle of equality before the law."***

32. In the Encyclopedia of Forms and Precedents, Lord Atkin Edition, Vol.14 under the preliminary

note, "***Service of Process",*** it is stated thus:-

"***The object of all service is to given notice to the party on when it is made, so that he may be aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the court may feel perfectly confident that service has reached him, everything has been done that is required."***

33. Since it is not generally disputed that personal service is therefore still the best form of service, before a party can invoke proviso (iv) above he must exercise "***due diligence"*** in attempting to serve the Petition personally, and therein lies the problem. What efforts on the part of the Petitioner and his Process Server should amount to proper exercise of due diligence? I would agree that the definition in Black's Law Dictionary would best sum up the proper meaning to be attributed to the term "***due diligence."*** It is as follows:-

In **Black's Law Dictionary**, 8th edition

"**diligent"-** careful, attentive; persistent in doing something."

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

34. Applying that definition to this case, the Petitioner is required by law to satisfy the obligation of attempting to serve the Respondent's personally before he advertises the existence of the Petition and in doing so he and the Process Server must show that they went to the place or places and at the times when and where it was expected that the 1st and 2nd Respondents would be found. I say this because it is admitted that the Petitioner had only 25.1.2008, 26.1.2007and 27.1.2008 to effect service on the Petitioner because 28 days from 30/12/2007(when the Gazette Notice was published declaring the 1st Respondent as Member of Parliament for Kitui West) lapsed on 27.1.2008 (see David Wakairu Murathe vs Samuel Kamau Macharia C.A. 171/1998 for the view that 28 days are computed strictly). It is also admitted that in fact none of the Respondents, save the 3rd Respondent, actually personally received the Petition. Can the Petitioner and his Process Server be taken to have exercised diligence in what they did in those 3 days?

35. My view is that the Petitioner was less than diligent because although he advised his lawyer to lodge the Petition as soon as possible after 30/12/2007, in fact the Petition was lodged 4 weeks later and it is unclear why nothing was done in the intervening period. Further and more importantly, by choosing to file his Petition on the last possible day, he denied himself the benefit of time to do all it would take to serve the 1st Respondent personally. Instead, what he did was to run around Nairobi for six hours and exhausted by 4 p.m, take the easier option of serving by publication. It would be noted that even after failing to serve the 1st Respondent at Safari Park Hotel and Box Bar and Restaurant as well at his Nairobi Residence, the Petitioner made no attempts whatsoever to serve the Petition on 26.1.2008, which was the second last day for doing so. If indeed he had reason to believe that the 1st Respondent was present at his residence on 25.1.2008 and refused to accept service, why not make another attempt on 26.1.2008? Instead what the Petitioner did thereafter is completely incomprehensible to me. He and the process server packed their bags and went to Kitui where the 1st Respondent has a rural home where they were informed that he had not been seen for 2 weeks. Service at a place is preceded by a proper reason to believe that the Respondent would be at that place. In this case, no reason has been offered as to why the long trip to Kitui was made when a day prior to that trip the Petitioner believed that the 1st Respondent was in Nairobi.

36. Turning back to the attempts at service on 25.1.2008, I cannot but fault the actions of the Petitioner. I say this with respect because, granted, there was good reason from the press statement to think that the Petitioner would be at Safari Park Hotel on 25.1.2008 and the 1st Respondent has indeed admitted that he was there but where is the evidence that he deliberately avoided service?. In Ntoitha M'mithiaru vs Richard Maoka Maore & 2 others [2007] eKLR it was stated as follows:-

"***Thus in the case of Abu Chiaba Mohamed vs Mohamed Bwana Bakari &2 others (supra) this Court established that personal service is the best form of service, and that personal service need not be actually handing over the papers to the respondent. It can be inferred if the petitioner makes all reasonable efforts to serve the respondent but fails to do so simply because the respondent evades service by hiding, refusing to a knowledge service, causing his agents or servants to restrain in anyway the process server from reaching him or by use of any other tactics to avoid service."***

37. Where is the evidence as was the case in Abu Chiaba's case that the 1st Respondent went into hiding at Safari Park? I see none on my part.

38. At Box Bar and Restaurant, the situation is even more unclear. It is said that one **Mbuvi** pointed the Petitioner in that direction. The same **Mbuvi** has sworn no Affidavit to justify his source of information and in any event, at Box Bar, the 1st Respondent was not seen. It cannot be said that there was reason to believe that the 1st Respondent would be there on that fateful Friday afternoon. Attempts at service at that time and place cannot fit the test of due diligence.

39. The attempt at service at the 1st Respondents house in Kileleshwa brings out the difficulties that Petitioner's face and although the 1st Respondent denied that he was at his house at the time that the Petitioner went to attempt service but evidence my only problem with the service by pinning the Petition at the gate is this; assuming that it had been done and the 1st Respondent had indeed received it, why then would he, as is claimed by the Petitioner, go on to ask M/S Mbaluka & Co. Advocates on Monday, 28.1.2008 to get a copy of the same Petition from the Petitioner's Advocate on "***grounds that they had been instructed by the Respondent"?*** I note that Mbaluka & Co. Advocates were appointed by a Notice signed by the 1st Respondent on 4.2.2008, 3 days after the 1st Respondent claims that he got information about the filing of the Petition. It would seem to me that the 1st Respondent's version of events is more believable than that of the Petitioner with regard to that aspect of service. In any event, the pinning of a Petition to the gate of a Respondent should only be done when all attempts at personal service have failed and in this case, even if it was done, the fact remains that lack of diligence otherwise exhibited means that the Petitioner's position is still weaker than that of the 1st Respondent and on the whole and without saying more, the attempts at service were feeble and the inference of due diligence cannot be made.

40. I would in any event agree with Visram, J. in E.P. No.28/2008 (Nairobi)- Nasir Mohamed Dolal vs Duale Aden Bare & Others that dropping off court process at a gate of a resident cannot per se constitute personal service.

41. Suppose I am wrong and the position would be that the Petitioner was entitled to invoke proviso (iv) above? My position would be that the publications in the "***Sunday Nation"*** and "***Taifa Jumapili"*** on 27.1.2008 were within time but the Petitioner failed to have the Kenya Gazette Notice on time. The Notice was published on 29.1.2008, two (2) days after time. Proviso (iv) in my mind never contemplated publication after 28 days and the excuse that it is the Government Printer who controls publication cannot be taken seriously. Payment for the publication was made on 28.1.2008 when time for filing and service had lapsed and the case of Imanyara vs Moi E.P.4/1993 cannot be of help to the Petitioner as the circumstances in that case were wholly different because Imanyara the Petitioner had submitted his Notice within time but claimed discrimination on the part of the Government Printer which then led to the Notice being published after time had lapsed.

42. Without meeting all the conditions set out in proviso (iv) the Petitioner cannot benefit from its provisions.

43. In addressing the alleged service on the 2nd Respondent, I should start by saying that the service on **Mr. Matolo** cannot by any measure of imagination be said to be personal service on the 2nd Respondent. Who is this **Mr. Matolo** in rank and designation with regard to the 3rd Respondent and what lawful authority did he have to receive a Petition in which the 2nd Respondent has been sued in his own name? The 2nd Respondent in his Affidavit sworn on 13.2.2008 deponed that "***the 3rd Respondent did not***

receive the Petition and the Notice of Presentation of Petition on my behalf nor had I authorized any person to be served on my behalf and as such I maintain that I have not been served as required or at all." I wholly agree with him because if **Mr. Matolo** had authority to receive the Petition, the authority should have been stated or at least the source of it authenticated and the authority must be lawful, in any event. It has been argued that the said **Mr.Matolo** offered to receive the Petition because the 2nd Respondent was an employee of the 3rd Respondent, he having been a Returning Officer during the disputed election. That may be so but the 2nd Respondent was sued as *"**Gabriel Kobia"*** and it was that person who ought to have been personally served and no other, **Mr. Matolo** included.

44. As regards the proposition that the Petitioner had to wait for the 2nd Respondent to be served on 26.1.2008, even if the Petitioner had done so, the wait cannot be attempt at service because no Respondent has any duty to present himself to the Petitioner so that he can be served with an adverse Petition. In any event, if indeed the Petitioner had properly served the 2nd Respondent through **Mr. Matolo**, why wait to serve him again? The fact either way remains that the 2nd Respondent was not served personally with the Petition and the Petitioner failed to exercise due diligence and proviso (iv) aforesaid cannot be availed to him.

45. Suppose however, again I am wrong and the proviso can be invoked with regard to the 2nd Respondent? Then I would reiterate my views as elsewhere above expressed regarding that issue and in respect of the publication with regard to the 1st Respondent. I see no need to repeat that position.

46. In answer therefore to the first question earlier posed, my categorical holding is that the 1st and 2nd Respondent were never served personally and in answer to the second question, the invocation of proviso (iv) to section 20(1) of the Act was in error and in answer to question three, the publication of the Notice of Presentation of the Petition was done without justification and partly within time but in any event was of no consequence for reason elsewhere explained.

47. Having said all these things and in answer to the fourth question above, the law in Kenya is settled that a Petition not properly served and within time should be struck out. In Devain Nair vs Yong Kuan Teik [1967] 2 A.C.31, it was stated as follows:-

"***With respect to the Federal Court, their Lordships cannot attribute weight to the circumstances that the rules contained no express power to strike out a petition for non-compliance with rule 15… The election court must however have inherent power to cleanse its list by striking out or better by dismissing those petitions which became nullities by failure to serve the petition within the time prescribed by the rules."***

48. It follows that the two Applications dated 11.2.2008 and 13.2.2008 should be allowed and the Petition must be struck out as was also held recently in Mwita Wilson Maroa vs Gisuka Wilfred Machage & Another , E.P. 5/2008 (Kisii), and Nassir Mohamed Dolal vs Duale Aden Bare & 2 Others (2008) eKLR(supra).

Conclusion

49. I have firmly held that the Petitioner was less than diligent in his feeble attempts at the eleventh hour to serve the Petition on the 1st and 2nd Respondents and the alternative mode of serve cannot be availed in the absence of the exercise of due diligence. The case of Abu Chiaba (supra) is a classic example of proper exercise of diligence and contrary to **Mr. Kilukumi's** view, the Petitioner in that case did not exhibit extraordinary diligence but the expected reasonable diligence. In this case, all I can say is that as was stated in the case of James Osogo vs Nicholas Mberia & Another E.P. 14/93 (Nairobi) a Petitioner before filing a Petition must take into account all factors necessary to ensure that he has sufficient time to do all the things statutorily expected of him. A Petitioner who wakes up to the reality of his situation on the last possible day can only be termed indolent and not one acting with diligence. The attempts at service on the 2nd Respondent were particularly deplorable and even if this court had

taken the view that there was due diligence in serving the 1st Respondent, and I have not, there is no way that the matter of the 2nd Respondent could be excused and either way this Petition was rendered a nullity by the morning of 28.1.2008 and it cannot be salvaged.

50. I have taken time to read the Petition in this matter. It raises serious issues that this court would have been more than happy to hear and resolve on its merits. Sadly, the court's hands are tied and there being no valid Petition before it, the issues raised cannot be delved into. It is a painful thing for a Petitioner and certainly a difficulty decision for this court that those matters cannot be resolved now but the law must take its course.

51. I wish to thank all the advocates who appeared in this matter for their diligence and well framed and argued eloquently submissions.

52. The final orders, with sympathy to the Petitioner, is that for reasons given above, the Petition herein is ordered to be struck out. The Petitioner will pay the costs thereof to all the Respondents.

53. Orders accordingly.

Dated and delivered at Machakos this **9th** day of **June, 2008**

ISAAC LENAOLA

JUDGE

In the presence: Mr. Simiyu for Petitioner

Mr. Karori and Mr.Maema for 1st Respondent

Mr.Makau Jnr for 2nd and 3rd Respondents

ISAAC LENAOLA

JUDGE