



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

Election Petition 1 of 2008

ESPOSITIO FRANCO PETITIONER

VERSUS

AMASON KINGI JEFFAH 1ST RESPONDENT

AMINA KALE 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

RULING

The petitioner filed a petition contesting the election of Amason Kingi Jeffah, the sitting member of parliament for Magarini Constituency. The petition states, *inter – alia*, that the elections were held on 27th December, 2007. The first respondent, *Amason Kingi Jeffah*, was declared to be the successful candidate for Magarini Constituency. The second appellant, *Amina Kale*, was the Returning Officer. The third respondent, Electoral Commission of Kenya, conducted the elections.

The petitioner claims that the said elections were not carried out in accordance with the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya. The elections were marred by violence, thereby disrupting the tallying process, counting and tallying was tilted in favour of the first respondent and a recount, though requested for, was refused. The petitioner thus requested for a scrutiny and recount of the votes, recount of the ballot papers cast and that there be a declaration by the election court that the election was invalid.

The petitioner failed to comply with Section 21(1) of the National Assembly and Presidential Elections Act (Cap) 7 Laws of Kenya. Accordingly no further proceedings could be had on the petition courtesy of Section 21(3) of the said Act.

By a notice of Motion, dated 5th February 2008, pursuant to the provisions of section 23(1) of the National Assembly and Presidential Elections Act [Cap 7] Laws of Kenya and Sections 3 and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, the petitioner sought for enlargement of time to enable him comply with Section 21 (1) of the Act. The said application was heard *inter partes* by the Election Court and dismissed on 24th April, 2008.

In the meantime, the first respondent filed a Notice of Motion dated 8th February, 2008, pursuant to the provisions of Section (20 (1) and 21 (1), (2) and (3) of the National Assembly and Presidential Elections

Act (Cap 7) Laws of Kenya and the National Assembly Elections [Elections Petitions] Rules, 1993 and the inherent powers of the court, seeking to strike out the petition dated 10th January, 2008 and filed on 11th January 2008. The ground relied on is that the petition was not served, upon first respondent, within 28 days after the date of publication of the results of the Parliamentary Election in the Kenya Gazette, on 30th December, 2007.

The second and third respondents also filed a Notice of Motion dated 13th February, 2008, pursuant to the provisions of Section 21 (1), (2) and (3) of the National the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya and the inherent jurisdiction of the court, seeking to strike out the petition dated 10th January, 2008 and filed on 11th January 2008, for offending the provisions of Section 21 of the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya.

The Notice of Motion, of the first respondent, aforesaid was supported by the affidavit of Amason Kingi Jeffah sworn on the 8th day of February, 2008. A replying affidavit (unsworn) in response by Churchill Midwa advocate was filed on 21st February, 2008.

The Notice of Motion, of the second and third respondents, aforesaid was supported by the affidavit of Samuel M. Kivuitu sworn on 13th February, 2008. No replying affidavit was filed by the petitioner in rebuttal. The evidence in support of the said application is thus uncontroverted.

The two applications were, by the consent, consolidated and heard together, before me, on 22nd May, 2008. Counsel for the first respondent was heard first. Subsequently, counsel for the second and third respondents were heard. Mr. Kilonzo holding brief for the firm of Kittony Maina Karanja, advocates for the petitioner, purported to withdraw midway citing lack of further instructions. The application, in law, thus proceeded *inter partes* (*see DIN MOHAMED VS. LALJI VISRAM & CO (1937) VOL. 4. EACA 1.*

Firstly, for and on behalf of the first respondent, I was urged to strike out the petition courtesy of section 21 (1) and (2) of the National Assembly and Presidential Election Act [Cap 7] Laws of Kenya. This is by reason of failure to give security for payment of all costs that may become payable.

In addition thereto, for and on behalf of the first respondent, I was urged that under Section 21 (3) of the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya, where no security has been furnished, no further proceedings shall be had on the petition, and the respondent may apply to the Election Court for an order dismissing the petition and for payment of costs. That section 21 (3) does not leave room for any further proceedings including even service of the petition.

That in view of the court's ruling on 24th April, 2008, refusing extension of time within which to pay the deposit, the only action left is for the court to dismiss the petition.

Equally, counsel invited me to strike out the affidavit (*unsworn*) of Churchill Midwa, in response to the application, on the grounds that the same is unsworn and, in law, is of no evidential value. That the said affidavit was also "*sworn*" by counsel instead of the petitioner which goes against the grain.

Secondly, that there was no service, of the petition on the first respondent within the period prescribed by law. The affidavit of service of *Lucas Omay*, sworn on 25th January, 2008, does not demonstrate the due diligence exercised in an effort to serve the first respondent. The averments in paragraph 5 of the said affidavit does not amount of personal service. It does not state how the process server was able to identify the first respondent, or whether the person who accompanied him, personally knew the first respondent, so as to be able to identify him for purposes of service.

Mr. Churchill Midwa, at paragraph 4 of his unsworn affidavit, confirms that their firm did publish in the Kenya Gazette, a notice of presentation of the petition. That notice marked "*CM3*" appears in the Gazette Notice of 1st February, 2008.

The time of service of the petition lapsed on 28th January 2008. Accordingly, by 1st of February, 2008 it was out of time courtesy of Section 20 (1) (a) of the National Assembly and Presidential Election Act (Cap 7) Laws of Kenya and Rule 14 (1) of the National Assembly Elections (Election Petition) Rules, 1993.

I was urged to find that Section 20 (1) (iv) of the Act was most germane to the discussion because there was need to gazette and advertise, in one English and one Kiswahili local daily newspaper with the highest national circulation in each case, after due diligence to effect personal service failed. In respect of this petition, there was only the Gazette Notice and no newspaper advertisement at all.

That by gazetting the petition in the Kenya Gazette, the petitioner clearly admitted that he had failed to effect personal service. In other words, if personal service was effected then there would be no need for gazettment.

Counsel for the second and third respondents associated himself with the submissions of counsel for the first respondent.

By way of further submission, he urged me to take into consideration the fact that the petition never filed any affidavit challenging the application. Consequently, he argued that the application is unopposed.

Last but not least, he urged me to comply with the provisions of Section 30 of the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya, and order a notice to be issued to the Speaker of the National Assembly that the petition has been dismissed with costs.

I am grateful to all counsel for their assistance in this application. I have considered all the relevant facts, admissible evidence and legal issues raised. In addition thereto I have equally considered all the authorities cited before me, even though I have not set the same down in extenso. Having done so, I now wish to address the issues which, in my view, falls to be decided; to wit:

- i) What happens where no security for costs have been furnished as enjoined by Section 21 of the Act?
- ii) When does time begin to run, for the purposes of computing the 28 days, from the time of publication of the election results in the Kenya Gazette?
- iii) Was the petition served in accordance with the provision of Section 20 (1) (a) of the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya?

In respect of the first issue, Section 21 of the National Assembly and Presidential Elections At [Cap 7] Laws of Kenya settles the same.

Section 21 provides as follows:

“ (1) Not more than three days after the presentation of a petition, the petitioner shall give security for the payment of all costs that may become payable by the petitioner.

(2) The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money.

(3) If no security is given as required by this section, or if an objection is allowed and not removed, no further proceedings shall be had on the petition, and the respondent may apply to the election court for an order directing the dismissal of the petition and for the payment of the respondent’s costs; and the costs of hearing and deciding that application shall be paid as ordered by the election court, or if no order is made shall form part of the general costs of the petition.”

It is clear to me, from the foregoing, that no further proceedings shall be entertained on the petition, and

the respondent may apply to the election court for an order directing the dismissal of the petition and the payment of the respondent's costs, and the cost of the hearing. Hence this application.

In respect of the second issue, it is not in dispute that, the elections were held on 27th December, 2007. The first respondent was declared elected as the member of parliament of Magarini constituency. Consequently, publication was made in the special issue of the Kenya Gazette of 30th December, 2007.

That the petitioner filed a petition on 11th January, 2008 challenging the said results. The petition, in law, was enjoined to serve the petition upon the first, second and third respondents within 28 days from 30th December, 2007 courtesy of section 20 (1) (a) of the National Assembly and Presidential Elections Act [Cap 7] Laws of Kenya, which 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”

for purposes of computing the 28 days, I fall back to the Interpretation and General Provisions Act [Cap 6] Laws of Kenya.

Section 57 of *The Interpretation and General Provisions Act [Cap 6]* Laws of Kenya provides as follows:

“in computing time for the purposes of any written law, unless the contrary intention appears”

a) a period of days from the happening of any event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.

b) If the last of the period is on a Sunday or a public holiday (which days are in the section referred to as excluded days), the period shall exclude the next following day, not being an excluded day.”

Accordingly, the 30th day of December 2007, on which the election results were published is to be excluded. Hence, the first day of the 28th day period was 31st December, 2007. Counting from 31st December, 2007, the 28 days lapsed, on 27th January, 2008, which was a Sunday. In line with Section 57 (b) [*Supra*] the petition should have been served latest by 28th January, 2008.

In the premises, if the time of service of the petition lapsed on 28th January, 2008, then by 1st of February 2008 when service was effected, the said service was out of time courtesy of Section 20 (1) (a) of the National Assembly and Presidential Elections Act [Cap 7] Laws of Kenya as read together with Rule 14 (1) of the National Assembly Elections [Election Petition] Rules 1993.

In respect of the third issue, the answer lies in a critical analysis of the facts and evidence on record. On the one hand, on the disputed facts and evidence, the first, second and third respondents contend that they have not been served with the petition and notices as enjoined by the law. On the other hand, the petitioner claims to have served the petition in accordance with the law.

The first respondent, at paragraph 5 of the affidavit in support of the Motion dated 8th February, 2008, avers that he learnt of service of the petition on 28th January, 2008, through the Daily Nation newspaper of even date exhibited as “AKJ 2”. His advocates then sought and confirmed the fact of filing from Malindi High Court.

Subsequently, by a letter dated 28th January, 2008, his advocates wrote to the Deputy Registrar High Court Malindi, to be allowed to peruse the Court file, and also enquired if deposit for security for costs had been made. By a letter 29th January, 2008, the Deputy Registrar Malindi High Court, confirmed that no deposit for security had been made.

I have carefully perused the court record, motions and all affidavits filed herein. In my view, the averments at paragraph 5 of the affidavit of service of *Lucas C. Omayo*, sworn on 28th January, 2008, does not amount to proper service either in terms of the provisions of Order V of the Civil Procedures Rules or Rule 14 of the National Assembly and Presidential Elections (Election Petition) Rules, 1993. Karisa Katana who purportedly identified the first respondent is not held out as having personally known the first respondent before 24th January, 2008. Equally, the affidavit of service does not disclose how the process server was able to identify the first respondent. In addition thereto, the said Karisa Katana does not qualify as an agent of the petitioner within the meaning of Rule 9 of National Assembly Elections (Election Petition) Rules, 1993. His role is therefore inconsequential. Accordingly, I find as a fact, and as a matter of law, that there was no service on the first respondent and even the rest of the respondents within the period prescribed by the law.

The other affidavit of Churchill Midwa filed on 21st February 2008 is *unsworn* and consequently, in law, of no evidential value. But even if the said affidavit is to be taken in account, it confirms that the firm of Kittony Maina and Karanja published in the Kenya Gazette, a notice of presentation of the petition. That Notice appeared in the Gazette Notice of 1st February, 2008.

In the premises, if the time of service of the petition lapsed on 28th January, 2008, then by 1st of February, 2008, the service of the petition was out of time, courtesy of section 20 (1) (a) of the National Assembly and Presidential Elections Act [Cap 7] Laws of Kenya as read together with Rule 14 (1) of the National Assembly Elections [Election Petition] Rules, 1993.

Quite apart from the foregoing, there is a legal requirement to gazette and advertise the petition, in one English and one Kiswahili local daily newspaper with the highest national circulation in each case, after due diligence to effect personal service fails. [See Section 20 (1) (iv) of the Act.]. In respect of this case, there was only the gazette notice and no newspaper advertisement at all. By gazetting the petition in the Kenya Gazette, the petitioner thereby clearly admitted that he had failed to effect personal service. Seen in that light, the affidavit of service of Lucas Omayo flies in the face of the gazettement. In other words if personal service was effected, then there would have been no need for gazettement anyway.

In the final analysis, on the facts and evidence, no security for costs was paid within 3 days as required by Section 21 (1) of the Act. Hence the respondents application for an order directing the dismissal of the petition and the payments of the respondents costs is justified. It has a sound basis in law.

In law, time began to run from 31st December, 2007. The 28 days ended on 27th January, 2008, which was a Sunday. The petition should have been served latest by 28th January, 2008.

Equally, in law, the petition was not served within 28 days as required by Section 20 (1) (a) of the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya.

In the final analysis, on facts and evidence, the application is merited. On law, it is well grounded. Accordingly, the consolidated application succeeds. The upshot is that the petition is dismissed with costs to the first, second and third respondents.

In consonance with Section 30 of the National Assembly and Presidential Election Act (Cap 7) Laws of Kenya, I hereby order that the Deputy Registrar, of the Election Court, do notify the Speaker of the National Assembly that the petition has been dismissed with costs.

By reason of the fact that the petitioner failed to deposit security for costs, the respondents be at liberty to file separate bill of cost to be taxed by the Deputy Registrar, of the Election Court, as by law enjoined.

DATED and delivered at Malindi this 10th day of July 2008.

N.R.O. OMBIJA,

JUDGE

Dated, delivered and countersigned at Malindi this 17th day of July, 2008.

HELLEN A. OMONDI,

JUDGE