



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
ELECTION PETITION 4 OF 2008**

**THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT, CAP 7 OF THE
LAWS OF KENYA**

CTION FOR KITUTU MASABA CONSTITUENCY

THE PETITION OF MOSE NYAMBEGA

BETWEEN

MOSE NYAMBEGA PETITIONER

VERSUS

WALTER ENOCK NYAMBATI OSEBE 1ST RESPONDENT

LAWRENCE OLE SEMPELE 2ND RESPONDENT

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

R U L I N G

This is an application by the 2nd Respondent under the provisions of Section 20 1 (a) (IV) of the National Assembly and Presidential Elections Act Chapter 7 of the Laws of Kenya.

The 2nd Petitioner, Lawrence T. Sempele was the Returning Officer for the Parliamentary Elections for the National Assembly seat for the Kitutu Masaba Constituency held on the 27th day of December, 2007 under the National Assembly and Presidential Elections Act. He was appointed by the 3rd Respondent, the Electoral Commission of Kenya as its official and was joined in this Petition by reason of his alleged conduct and the other officials complained of in the said election.

The Second Petitioner in this application seeks the following orders:-

1. That the Petition filed herein be struck out with costs for want of service.
2. That the costs of this application be provided.

The 2nd Petitioner raises two substantive grounds in support of the application. These are:-

1. That the Petition was never served upon the 2nd Respondent.

2. That the Petitioner has failed to comply with the law regarding service.

The application is supported by an affidavit sworn by the said Returning Officer and Second Petitioner on 5th September, 2008. He depones, inter alia, that:-

- On the 2.09.2008 he received a call from Mr. F. N. Orora Advocate Esq. Counsel on record for the 2nd and 3rd Respondents requesting him to go to his Chambers to give him instructions on how the election of Kitutu Masaba Constituency were conducted.
- That he asked the Counsel why he wanted the details and to his surprise the Counsel informed him that there was a pending Petition in respect of Kitutu Masaba Constituency, wherein he was the 2nd Respondent.
- That he had never been served with any Petition papers or at all.
- That the Petition herein was filed in Nairobi High Court Registry on 22.01.08 and given Election Petition No. 17 of 2008 which is now Kisii High Court Election Petition Number 4 of 2008.
- That he strongly believes that as a Second Petitioner, the Petitioner should have personally served him with the Petition documents.
- That he is informed by his advocates on record that:-
 - (a) The 1st Respondent filed an application dated 07.02.2008 and a ruling made on 11.07.2008.
 - (b) That thereafter, the High Court started its Vacation.
 - (c) That the Petition is set to be heard on 16th, 17th, 18th and 19th September, 2008.
- That the Petition herein should not be allowed to proceed for the lack of proper personal service upon him.
- That the Petition should not be allowed to proceed for lack of personal service.

The application was supported by the 1st Respondent, the successful candidate and the 3rd Respondent the Electoral Commission of Kenya.

The Petitioner opposed the application and filed two affidavits. The first one was sworn by Mose Nyambega the Petitioner while the second one was sworn by one of the Petitioner's advocates, Geoffrey Ondieki Ayuka, both on 9th September, 2008.

The Petitioner in his affidavit inter alia, stated, that:

“

25. That in any event, I as the Petitioner herein served this particular Petition on the Respondents who include the Applicant herein on the 27th day of January, 2008 in terms of the provisions of Section 20 of Cap. 7 Laws of Kenya personal service having failed.

26. That I the Petitioner herein made effort to trace and serve the Applicant personally to no avail prompting me to serve by way of substituted means of advertisement in the Newspaper issue of 27th January, 2008 (Standard and Taifa Leo).

27. That on the 22nd day of January, 2008 I did not know the instant Applicant's residence. That I

knew that he hails from Narok District although I did not know the particular Village he hails from.

28. That I therefore put in place a mechanism of tracing him at Nyamira ECK office where he could not be found as he had travelled to his rural home in Narok.

29. That on serving ECK on 23rd January, 2008, I learnt from the ECK officer who received our documents that the Applicant hails from Narok District and other particulars on how to trace him were not available. The said officer stamped to acknowledge receipt arguing that ECK and Lawrence Sempele shall be travelling jointly in terms of representation in this Petition and other particulars were not available.

.....”

The application was prosecuted by Mr. Orora who represents the 2nd and 3rd Respondents. The 1st Respondent who supported the application was represented by Mr. Maosa. The Petitioner was represented by Mr. Ongoya and Mr. Murugu.

Section 20 (1) of the Act provides for the requirement and procedure for presentation and service of the Election Petition.

Section 20 (1) provides as follows:-

“20 (1) A Petition

(a) to question the validity of an election, shall be presented and served within twenty eight days after the date of publication of the result of the election in the Gazette.

(b)

(c)

(i)

(ii)

(iii)

(iv) Where after due diligence it is not possible to effect service under paragraph (a) and (b); the presentation may be effected by its publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest National circulation in each case.”

The Petitioner in his Replying Affidavit claims that he made effort to trace and serve the Applicant personally to no avail prompting him to serve by way of substituted means and advertisement in the Newspaper issue of 27th January, 2008 in the ‘Standard’ and ‘Taifa Leo’.

The Election Petition herein was presented on 22nd January, 2008 which was within 28 days of 30th December, 2008 after publication of the result of the elections in Kitutu Masaba Constituency. It was presented within the prescribed period. There is no dispute on this fact.

What of service on the 2nd Respondent? It is now certain that under Section 20 (1) (a) of the Act that service of election Petitions must be effected also within 28 days of the publication of the election results. At the first instance service must be personal service, i.e. direct and physical service on the respondent/s.

Under the National Assembly Elections (Election Petition)

Rules, 1993 a Respondent is described as follows:-

“2.

“respondent”, in relation to an Election Petition, means the person whose election is complained of, or if the Petition complains of the conduct of the Returning Officer or any person under him, that officer and includes any other person whose conduct is complained of in relation to the Election.”
(emphasis mine).

This Petition names and enjoins the Returning Officer who is the 2nd Respondent as a Respondent. The Petitioner complains of, inter alia, the conduct of the 2nd Respondent as the Returning Officer. In fact, a careful perusal of the Petition shows that most of the serious allegations refer and relate to the conduct of the Returning Officer and his officials in the Constituency. I do hold therefore that the service of the Petition on the 2nd Respondent was a mandatory legal requirement. It is therefore a prerequisite condition that the Petitioner proves service before the hearing of the Petition, if service of the Petition is questioned or challenged.

The first question this Court must determine is whether the Petitioner served the 2nd Respondent with the Election Petition herein and any accompanying requisite documents under the provisions of Section 20 (1) (a) of the Act? The answer is found in paragraphs 25, 26, 27, 28 and 29 of the Petitioner’s Replying Affidavit. The Petitioner in paragraph 25 states that personal service failed. In paragraph 26 he says that he **“made effort to trace and serve the Applicant personally to no avail prompting me to serve by way of substituted means of advertisement in the newspaper**”.

In paragraph 27, he says that he did not know the Applicant’s residence or Village though he knew he hailed from Narok District. In paragraph 28 he says that he thereafter put in place a mechanism of tracing him at Nyamira ECK office where the 2nd Respondent could not be found as he had allegedly traveled to his rural home in Narok. And in paragraph 29 he says that on serving ECK on the 23rd of January, 2008, he learnt from the ECK officer who received his documents that the applicant hails from Narok District and other particulars on how to trace him were not available.

It is clear from the aforesaid facts given by the Petitioner himself that he did not serve or cause the Petition to be personally, directly and physically served upon the 2nd Respondent.

The second affidavit filed on behalf of the Petitioner and sworn by one of his Advocates, Geoffrey Ondieki Ayuka does not touch on or refer to any aspect of the service of the Petition. It is therefore of no assistance or relevance in this regard whatsoever.

On the basis of the amendment of Section 20 (1) (c) (iv) of Act No. 7 of 2007, Parliament expressly provided for an alternative mode of service. For emphasis, the provision stipulates as follows:-

“(IV) where after due diligence it is not possible to effect service under paragraphs (a) and (b), the presentation may be effected by its publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest national circulation in each case.”

This is the mode which the Petitioner used after allegedly failing to trace the Applicant.

The Petitioner in his Replying Affidavit claims that failing to trace and serve the Applicant personally, he in effect exercised his right to serve by this alternative mode of service by advertisement in the newspapers. However, it is now trite law as pronounced in various decisions of the Court of Appeal and more recently in the High Court that for a Petitioner to apply or invoke this alternative process of service he/she must show that he/she first exercised due diligence to effect personal service before deciding on and effecting the alternative mode of service. He must show to the Court that he/she exercised due

diligence and that it was impossible for him/her to effect personal service as required by Section 20 (1) (a) for him/her to be entitled to invoke the alternative mode of service of the Election Petition.

In ELECTION PETITION NO. 5 OF 2008 AT KISII MWITA WILSON PAUL MAROA –V- GISUKA WILFRED MACHAGE & TWO OTHERS which was referred to me, this Court observed that:-

“

It is the Court’s duty to inquire into and determine whether there was due diligence and whether it can be said that it was impossible to serve the Respondent. This discretion and option may lie with the Petitioner at the first instance but it has to be ascertained and confirmed by the Court. This discretion or option is not an automatic right since personal service is the best and most fair mode of service of a Petition.”

According to the Black’s Law Dictionary as found by the Honourable Justice Kihara Kariuki in ELECTION PETITION NO. 14 OF 2008 AT NAIROBI, MOSES S. OLE SAKUDA VERSUS GEORGE SAITOTI & 2 OTHERS, Black’s Law Dictionary (6th 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 cause.”

In the 8th Edition of the Black’s Law Dictionary I found the following definition:-

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

Diligence itself is defined as:-

- “1. A continual effort to accomplish something.**
- 2. Care, caution, the attention and care required from a person in a given situation.”**

In the Ruling delivered by this Court on 11-07-08 in this very Petition in respect of a similar application by the 1st Respondent, I stated that:-

“

It is my view that it is the duty of the Election Court to inquire and determine whether the standard was met or achieved by the Petitioner in attempting to serve the Petition. It is a matter for investigation, inquiry and determination by the Court. The Court will weigh all facts and circumstances and exercise its discretion in reaching a conclusion/finding. It is my view that the use of the terms “reasonably” and “ordinarily” give the Court the latitude and discretion to consider each case against its special facts and circumstances.”

From the evidence before the Court and in particular on the basis of the rival affidavits, I do find that the Petitioner did not obtain the address of and particulars as to where he could find the 2nd Respondent. He claims that the ECK offices did not give him any particulars about the residence or Village of the 2nd Respondent in Narok District. But after that what efforts did he make to look for, trace and serve the 2nd Petitioner?

The Petitioner did not disclose the name of the officer at ECK he or his agents spoke to. He did not say he took any other step towards tracing the said official. He did not look for his cell phone number, if any. He did not carry out any inquiry or investigation in Nairobi. He does not state if he is the one who

went to the Nyamira ECK office or his agent. He does not state which officer at the Nyamira ECK office he spoke to. He does not disclose the name or title of the person who made inquiries at the Nyamira ECK office. Even the date and time of the inquiry is not disclosed.

I do find that there was no single serious effort which was made by the Petitioner to attempt to serve the 2nd Respondent with the election Petition. He did not exercise any care, caution, attention or continuous effort in serving the Election Petition. It is this Court's view that he was under an obligation to insist and demand from the ECK Headquarters the address and all particulars relating to the Returning Officer. He does not allege that the ECK Headquarters refused to supply him with these details which is their duty to supply to any Petitioner as a matter of right. If there was evidence that ECK suppressed or refused to give such information or provide such particulars, it would have made quite a difference.

The Petitioner was reasonably expected to send a process server or investigator to Kitutu Masaba Constituency to inquire about the whereabouts of the Returning Officer since there is all possibility that someone knew about him, having supervised the elections on the ground. It does not matter whether he would have succeeded or not. What is required to be demonstrated here is the efforts he made, the degree and seriousness of the efforts and the circumstances that made it impossible to get the information and particulars. It is not enough to in effect explain that **"I could not serve because I did not have the information or know the address, residence or whereabouts of the 2nd Respondent."**

The Petitioner did not even tell the Court that after he learnt that the 2nd Respondent had traveled to his rural home in Narok he made inquiries as to the particulars and location of the said Village.

I do find that after serving the 3rd Respondent, the Electoral Commission of Kenya with the Petition, the Petitioner did not take a single step in attempting to serve the 2nd Respondent with the Petition. In fact, considering all the facts and circumstances, I conclude that there was no attempt at all to do so.

I do find that the Petitioner has not shown that he exercised due diligence and that it was impossible for him to effect personal service as required by Section 20 (1) (a) of the Act for him to be entitled to invoke the alternative mode of service of the Election Petition.

Apart from the allegation that the 2nd Respondent was properly and lawfully served with the Petition which the Court has found to have not been proved, the Petitioner raised other defences and/or responses to the Application herein. In his Replying Affidavit he, inter alia, asserted that:-

- This application dated 5th September, 2008 is an afterthought, brought in bad faith and patently calculated to circumvent the programme of this Honourable Court regarding quick disposal of this Petition on priority basis.
- That the 2nd Respondent together with the Third Respondent, the Electoral Commission of Kenya timeously, jointly and severally instructed their Counsel, Nyairo Orora & Company Advocates to file Notice of Appointment and secured capacity to attend and participate in the proceedings herein.
- That the firm of Nyairo Orora filed the Notice of Appointment dated 7th February, 2008 on the 11th day of February, 2008 on the strength of which the said law firm or its representative addressed the Court and fully represented the interest and participation of the Applicant herein in the Petition.
- That on the 11th of February, 2008, the Applicant who is known to the Petitioner attended Court, openly and conspicuously and that the Petitioner even had the opportunity of shaking hands with him in the Court room.
- That since then as the Court records clearly indicates, Mr. Fred N. Orora Advocate of Messrs. Nyairo Orora & Company Advocates has been attending and addressing the Court very explicitly on behalf of the Applicant herein and the 3rd Respondent in the substantive Petition and that all along the Applicant has

been in constant attendance of all the Court sessions commencing 11th February, 2008 up to and including the 11th day of July, 2008 when this Honourable Court gave dates for the hearing of this matter on the 16th, 17th, 18 and 19th September, 2008.

- That during the arguments and proceedings of the similar application filed by Messrs. Jackson Omwenga & Company Advocates for and on behalf of Mr. Walter Nyambati Osebe, the 1st Respondent in the substantive Petition, the current Applicant's Advocate(s) participated actively, addressed the Court, made able contribution urging the Court to expedite the said application and for the matter to proceed to full trial on merit. The said Advocate is also on record as having urged this Honourable Court not to be bogged down by technicalities.
- The records of this Honourable Court regarding the extent, veracity and effectiveness of this Applicant's participation during the hearing for the similar application can bear him out that this application is riddled with mischief calculated to delay this matter.
- This application is copy and paste from the application of the 1st Respondent in the substantive Petition filed herein on the 11th day of February, 2008 in respect of which this Honourable Court delivered a ruling on the 11th day of July, 2008.
- That on the 11th day of July, 2008 the Honourable Court delivered a Ruling dismissing a similar application filed by the First Respondent and that the said Ruling was delivered in an open Court in the presence and participation of Mr. Fred Orora Advocate on record for the second and third Respondent and in the presence of Mr. Lawrence Sempele who was seated in the dock reserved for suspects to my direct right clad in blue.
- That following the said Ruling the said Advocate on record for the second and third Respondent in the substantive Petition addressed the Court alongside the Petitioner's Advocate and the Advocate for the 1st Respondent and took directions regarding the hearing of the substantive application.
- That the Applicant through his Lawyer on record applied to be allowed to file his request for particulars within fourteen (14) days whereof the Court granted the Petitioner, herein, a corresponding leave to supply the particulars sought by the Respondent.
- That in compliance with the directions of this Honourable Court the instant applicant requested for particulars through request dated 24th July, 2008 and filed on 25th July, 2008 through the law firm of Nyairo Orora & Company Advocates which law firm has clearly indicated that it acts for the Applicant and ECK.
- That in further compliance with the Court Order or directions of 11th July, 2008 he also through his Lawyer Nyawara & Company Advocates filed answers to the request for particulars which reply is dated 5th August, 2008 filed on 6th August, 2008 and served on the same day on the law firm of Nyairo Orora & Company Advocates at 4.30 p.m.
- That on the 11th of July, 2008 this Honourable Court gave unequivocal direction that **“any party in this Petition intending to file an application had to do so in good time to enable the Court give directions and/or proceed in a manner that will not interfere with the hearing of the substantive Petition as from the 16th September, 2008”**, thus his filing of this Replying Affidavit under protest.
- That the Court was categorical that any application sought to be filed by any party must be filed and brought to the attention of this Honourable Court in good time and in any event not to coincide with the hearing of this case slated for the 16th, 17th, 18th and 19th days of September, 2008.
- That the hearing dates of 16th, 17th, 18th and 19th days of September, 2008 were negotiated and settled

upon with input of the instant Applicant through his Lawyer on record to the effect that the issue of service being invoked belatedly herein is totally untenable, an after thought and an outright abuse of the due process of the Court and that the Applicant is estopped from raising any issue regarding service.

- That at the stage of requesting for better particulars the issue of service was foregone conclusion, fully settled as the matters of particulars appertained the confirmed readiness for hearing of the substantive petition and that the supply of the particulars makes concrete and conclusive the readiness for the hearing of the substantive Petition.
- That the particular application screams of bad faith on the part of the Applicant.
- That the particulars of the Petition have been sought by and supplied to Messrs Nyairo Orora & Company Advocates and this application is a reaction to the particulars supplied.
- That it is apparent that the Applicant herein has had occasion through the particulars supplied to have an overview of the case against him and brings this application as a stalling strategy to delay the hour of reckoning.
- That the Applicant has in filing this application trampled under foot the directions, instructions and programs of this Honourable Court in regard to disposal of this matter expeditiously on priority basis.

On the basis of the foregoing matters raised in the Petitioner's Replying Affidavit, his Counsel raised further grounds of challenge to the application, namely:-

1. The propriety of the affidavit sworn by Geoffrey Ondieki Ayuka Advocate,
2. The credibility of the parties as emergent from the proceedings and Court record and its impact on the bona fides of the application.
3. Whether the application is not constructively Res Judicata.
4. Whether the application amounts to an abuse of the due process of the Court.
5. Whether the Applicant is estopped by his conduct from bringing this application or from raising issue of service at the point of time he did.

With regard to the question of the affidavit of Geoffrey Ondieki Ayuka Advocate, I have dealt with its relevance or import in respect of the question of service. I have already held that it is of no assistance or relevance in respect of the question of service. It does not touch or refer to any aspect of service of the Petition. The affidavit is not of service. If anything its contents substantially are intended to prove that the Applicant attended Court from time to time and participated in the proceedings to date through his Advocate.

With regard to the question of the conduct of the Applicant in respect of filing the application herein, his credibility and bona fides, I wish to reiterate that ideally the application ought to have been brought by the Applicant promptly and timeously. The Petition was filed on 22nd January, 2008 and the 2nd and 3rd Respondents i.e. the Applicants as the Returning Officer and the Electoral Commission of Kenya respectively did file in Court a Notice of Appointment of Advocates in which they appointed the firm of Nyairo Orora & Company Advocates to act for them in this Petition.

The Applicant did not file the present application until 5th September, 2008. By this date, the Court had disposed of a similar application to strike out the Petition for lack of service filed by the 1st Respondent. The Court had then set down the hearing of the application for hearing on the 16th, 17th, 18th and 19th September, 2008.

This application was not filed promptly and the Applicant is guilty of inordinate delay in filing the application. This application has caused a delay in the hearing of the Petition as the Court in a preliminary issue and after hearing the parties ruled that it must be heard first before the Petition. The hearing of the Petition could not commence.

I find that all the facts set out in the Replying Affidavit relating to delay and participation of the Applicant in the proceedings to date to be true.

However, I do not think that this can be a ground for dismissing the application. While the court is not happy with the delay by Applicant in bringing the application, the question of service is a fundamental question of law that goes to the very root of the application. The issue must be decided on the merits and in accordance with the law. I would say that the question of service of the Petition goes to the validity of the Petition and even possibly the jurisdiction of the Court to hear the Petition.

I do not think that the conduct of the Applicant outrightly amounts to an abuse of the Court process despite the long and inordinate delay in bringing the application. An abuse of the court process is a willful and deliberate act or conduct of subverting the course of justice. It is an act intended to steal a match on the other party or undermine the authority or dignity of the Court.

I do not find that the Applicant intended to abuse the process of the Court in filing the present application and at the time he did.

The Applicant in his supporting affidavit claimed in effect that he learnt of the existence of the Petition on 2.09.2008 when he received a call from his Advocate requesting him to go to his offices to give instructions in respect of the elections of Kitutu Masaba Constituency. This cannot be true since the Applicant together with the 3rd Respondent filed a Notice of Appointment of Advocates on 11th February, 2008. The Notice was dated 7th February, 2008. He could not feign surprise about the existence of the Petition when his Advocates called him on 2nd September, 2008. Also I do agree that he personally attended Court on various occasions during the hearing of the earlier application by the 1st Respondent and when the ruling was delivered. I find that the Applicant has made a false statement in his affidavit with an intention to mislead this Court on the said question. I do not know why he had to lie to the Court as it was absolutely not necessary. This is indeed sad for a senior election official as a Returning Officer to tell a blatant lie to this Court under oath. This Court reprimands the Applicant in this regard and it is hoped that this is brought to the attention of the Electoral Commission of Kenya.

Be that as it may, I do hold that this cannot be a legal ground to disallow the present application. The question of service is a mandatory legal requirement that cannot be compromised by or set aside on the basis of the moral conduct or turpitude of an election official or other person.

Is this application constructively Res Judicata? It is true that this Court did consider and determine a similar application by the 1st Respondent regarding service of the Petition or lack of it on the 1st Respondent. The question before the Court in the earlier application was whether or not the Petition was served on the 1st Respondent by the Petitioner.

The question before the Court now is whether or not the Petitioner served the Petition on the 2nd Applicant. These are two different questions of fact and law though in the same Petition. The 2nd Respondent could not raise the question of service of the Petition on him in the earlier application by the 1st Respondent. He could only challenge the Petition on this ground through a separate substantive application by himself. The service on the 2nd Respondent was not directly or otherwise in issue in the earlier application. The purported concept of constructive Res Judicata is novel and ingenious but is not supported by any law or authority.

Lastly there is claim that the Applicant is estopped from bringing this application by his conduct in appointing Counsel, participating in the earlier proceedings, seeking particulars of the Petition, and being a party in fixing the hearing dates etc. The requirement to service the Petition is expressly provided for

by a Statute or legislation, i.e. the National Assembly and Presidential Elections Act, Chapter 7 Laws of Kenya. The provision is mandatory. It is trite law that the doctrine of estoppel of any kind cannot and does not operate against or oust the express provisions of a Statute. The Applicant's conduct cannot estop him from making an application to strike out the Petition for want of service on him as required by written law. The principle of estoppel by conduct as suggested here is not therefore applicable.

The net result is that I do find and hold that the Petitioner did not serve or cause the Petition to be personally, directly and physically served upon the 2nd Respondent. I also find that the Petitioner has not shown that he exercised due diligence and that it was impossible for him to effect personal service as required by Section 20 (1) (a) of the Act for him to be entitled to invoke and use the alternative mode of service of the Election Petition under the provisions of Section 20 (1) (c) (iv).

In all, the Petitioner did not serve the 2nd Respondent with the Petition as required in law. The Petition dated 22nd January, 2008 is therefore hereby struck out. There shall be no order as to costs in respect of the application herein due to the inordinate delay in bringing it and the Applicant's lack of candour. However, the Petitioner shall pay the costs of the Petition to the Respondents respectively.

DATED AND DELIVERED AT KISII ON THIS 7TH DAY OF NOVEMBER, 2008.

M. K. IBRAHIM

JUDGE

In the presence of: