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

Election Petition 27 of 2008

STANLEY LIVONGO LIVONDO …....…… PETITIONER

VERSUS

RAILA AMOLO ODINGA ……...…….. 1ST RESPONDENT

JOSEPHINE MWENGI ……...…….…....… 2ND RESPONDENT

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

RULING

The Petitioner was one of the Candidates in the Parliamentary Elections for the National Assembly seat for the Langata Constituency held on 27th December, 2007 under the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya (hereinafter "the Act") and the Presidential and Parliamentary Elections Regulations (hereinafter "the Regulations").

He lost the election to the 1st Respondent, Raila Amolo Odinga, who was declared the winner by the 3rd Respondent, the Electoral Commission of Kenya (hereinafter "the ECK"). In a Petition presented on 25th January, 2008, the Petitioner has challenged the election result, and wants the election of the 1st Respondent declared null and void.

Meanwhile, the 1st Respondent wants the Petition to be struck out for want of service in accordance with the law. In an application dated 8th February, 2008, and made under Sections 20 (1) and 22 of the Act, Cap 7, and the inherent jurisdiction of the Honourable Court, the Petitioner seeks that:

"***(a) The petition be struck out.***

(b) Costs be provided for."

The Application is based on the following three grounds:

"***(a) There is no proper and valid petition before the Honourable Court.***

(b) The Petitioner has not filed and served the petition within twenty-eight days after the publication of the result of the election in the Gazette.

(c) The petition and/or the notice of the 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 Amendments) Act 2007.

(d) The Honourable Court lacks jurisdiction."

The **issue** before this Court is whether the Petition was served on the 1st Respondent in accordance with the law. Let us first examine what the law is with regard to "**service"** of election petitions.

Section 20 (1) (a) of the Act 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."

That is the plain reading of the law – that the Petition **shall** be "**presented and served**" within 28 days of publication of the result.

Section 20 (1) of the Act requires that the Petition be "**presented" and "served"** within 28 days of the publication of the election result in the Kenya Gazette. There is no dispute here that the Petition, which was filed on 25th January, 2008, was indeed filed on time. **The only issue is whether it was "served" on time**.

The Court of Appeal in Kenya has held on several occasions that service of election petitions envisaged under Section 20 (1) (a) of the Act is "personal" service. "Personal service", as Justice Ibrahim recently observed in the election case of ***Mwita Wilson Maroa vs Gisuka W. Machage & Others (ELC No. 5 of 2008)*** is "actual physical service".

In ***Kibaki vs Moi (C A 172 of 1999)*** the Court of Appeal stated:

"***What we are saying, however, is that election petitions are of such importance to the parties concerned and to the general public that unless Parliament has itself specifically dispensed with the need for personal service, then the courts must insist on such service.***

We cannot read from Section 20 (1) (a) that Parliament intended to dispense with personal service. Even under Rule 14 (2) of the Rules personal service was not dispensed with. The other modes of service were only alternative modes of service.

That is why in the various other cases quoted to us personal service was always described as the best form of service.

Section 20 (1) (a) of the Act does not prescribe any mode of service and in those circumstances the courts must go for the best form of service which is personal service."

This decision, by a bench constituted of five eminent Judges of Appeal, became the subject of considerable debate within legal and judicial circles. The argument sought to be advanced was that there may be circumstances where it is simply not possible to effect "personal" service for example on a sitting President whose security detail would not allow personal service, or where a person deliberately hides or evades service. In those situations, the Court of appeal held that other modes of service could be utilized. Hence, in ***Abu Chiaba Mohamed vs Mohamed Bakari (2005) eKLR*** the Court of Appeal stated:

"***Did Kibaki vs Moi establish any proposition that even where it be proved that a party was hiding with the sole purpose of avoiding personal service, yet such a party must still be personally served? The decision established nothing of the kind. At page 37 of the judgment in Kibaki vs Moi, the Court stated:-***

"……. ***Section 20 (1) (a) of the Act does not prescribe any mode of service and in those circumstances, the courts must go for the best form of service which is personal service. Before this Court, the appellant did not offer any reason why he did not go for personal service though in the High Court, it had been contended that the 1st Respondent in his capacity as the President, is surrounded by a massive ring of security which is not possible to penetrate. But as the Judges of the High Court correctly pointed out no effort to serve the 1st Respondent was made and repelled …….***

The decision clearly recognized that if personal service which is the best form of service in all areas of litigation, is not possible, other forms may be resorted to."

The Court emphasized once again that personal service is the best form of service. Here is what it said in ***Abu Chiaba (supra)***

"***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."***

It is important to note that since the decision in ***Abu Chiaba***, which was rendered on 16th September, 2005, the Act was amended to provide for an alternative form of service should it become impossible to effect personal service. It was by Act No. 7 of 2007 that Parliament amended Section 20 (1) (a) of the Act by adding sub-paragraph (iv) 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 the publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest national circulation in each case."***

Now, what this means is that "personal service" continues to remain the best form of service. And it means "physical and direct" service. Where, however, **after due diligence**, it is impossible to effect personal service, Section 20 (1) (a) (iv) may be invoked.

That being the law, was the 1st Respondent personally served with the Petition?

The issue before me turns essentially on facts. There is no dispute that the Petition was filed within time. However, was it "**served"** within the time prescribed by law?

The 1st Respondent, in his supporting affidavit, sworn 8th February, 2008 says that he was never actually served with the Petition, and found out about it from the media and his sentries. Here is what he has deponed to in paragraphs 6 and 7 of his supporting affidavit:

"***6. On Sunday 27th January, 2008 I came to learn from the media and my sentries that some people in the company of the police had come to my house in Karen on Saturday night on 26th January, 2008***

at about 8.00 pm but were not allowed in the compound because of security considerations and on suspicion of mischief.

7. I have also been informed by my sentries that a group of people in the company of ten police officers came to my house at about 7.30 am on Sunday 27th January, 2008 but they did not disclose the purpose of their visit to my home and I came to learn that they had come to serve me with an election petition which I did not see or get a copy thereof."

The Petitioner, on the other hand, says (in his Replying Affidavit sworn 5th March, 2008) that the Petition was served upon the 1st Respondent by three Process Servers, namely John Musyoka, Gabriel Munuhe and Leonard Visanya at the 1st Respondent's home in Karen between 26th and 27th January, 2008. Here is what he says:

"***39. THAT I am further informed by Mr John Musyoka and I verily believe the same to be true that on 26th January, 2008, he, Leonard Visanya and Gabriel Munuhe accompanied by three police officers who were in a police vehicle, a Toyota Land Cruiser bearing the names Karen Police Station, went to the 1st Respondent's home in Karen and arrived at just before 7.00 pm.***

45. THAT on 26th January, 2008 Mr Musyoka further informed me and I verily believed the same to be true that he, Leonard Visanya and Gabriel Munuhe informed the four guards that they were there to serve the petition in this suit on the 1st Respondent, that one of the guards had gone to the house and informed the 1st Respondent of that fact, and that when that guard returned, he told them, and they verily believed the same to be true that the 1st Respondent had asked them to return the following day and serve the petition on him then.

47. THAT on the following day i.e. 27th January, 2008, a Sunday, at about 8.00 am, John Musyoka called me on my mobile telephone and informed me and I verily believe the same to be true that he and Leonard Visanya, one of the three process servers, had arrived at the 1st Respondent's house at 8.00 am, accompanied by Inspector Muthoka, and that they were waiting for the gates to be opened.

50. (e) the same guard returned to them and informed the

process servers that the 1st Respondent had refused to be served with the petition in his home and ordered that the petition be served on him at his Oginga Odinga offices on Kiambere Road, Upper Hill

(j) Leonard Visanya gave to the guard of the 1st Respondent a copy of the petition and requested him to give it to the 1st Respondent."

That is indeed the evidence also of the Process Servers who have filed separate affidavits outlining the above facts. Interestingly, Mr Leonard Visanya, Process Server, in his affidavit sworn 5th March, 2008 makes an admission that the 1st Respondent was indeed not served. Paragraph 60 of his deposition states:

"***60. That I have reason to believe and verily believe that it was not possible to serve the 1st Respondent unless he ordered his guards to allow I and my colleague Musyoka to have access to him which he never did."***

As I observed in my Ruling in this case dated 4th April, 2008, I find the summary of facts indisputably as follows:

The First Respondent's case is simple and straight forward, that he learnt from his sentries and the media that some people came to his house in Karen on 26th January, 2008 at 8 pm and again on 27th January, 2008 at 7.30 a.m. and he later discovered that it was for the purpose of serving him with the election petition. However, they were denied entry, and he was not served with the petition.

The Petitioner's evidence does not contradict that of the First Respondent in substance and essence. The Petitioner says in his affidavit sworn on the 5th March, 2008 that when the process servers first visited the home of the First Respondent on 26th January, 2008, they were asked by the guard to return the following day (paragraph 45). The following day the same guard informed them that "***the First Respondent had refused to be served with the petition in his home and ordered that the petition be served on him at his Oginga Odinga offices on Kiambere Road, Upper Hill"*** (paragraph 50(e)). At that point they left the petition with the guard of the First Respondent and requested him to give it to the First Respondent (paragraph 50(j)).

Now, based on these facts, was the 1st Respondent indeed served with the Petition as required by the law?

Mr Wamae, Counsel for the Petitioner, submitted that the 1st Respondent was properly and effectively served at his residence when the Petition and Court Papers were left at the gate. Mr Wamae's argument is that the 1st Respondent deliberately avoided service, and hence is said to have been effectively served when documents were left with his security guards. Here is his argument:

"***When a Process Server locates the party to be served, and is in a position to deliver documents, and is prevented from doing so, by intervention of Third Parties, acting under the control and direction of the party to be served, that is effective personal service."***

He relies on the cases of ***Kibaki vs Moi (supra)*** and ***Abu Chiaba Mohamed vs Mohamed Bakari (supra)***.

Essentially, Mr Wamae's argument is that the 1st Respondent either obstructed service, or deliberately avoided service, and was accordingly deemed to have been served. He cites the following passage from the case of ***Abu Chiaba Mohamed vs Mohamed Bakari (supra)*** at page 204 (Per Omolo, JA):

"***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 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."***

Now, is that argument really sustainable? I do not think so. The reasons are as follows:

1. As I noted before in this Judgment, since the decision in ***Abu Chiaba (supra)*** which was delivered on 16th September, 2005, the Act was amended to provide for an **alternative** form of service should it become impossible to effect personal service (see pg 6). Section 20 (1) (a) (iv) now provides that "**where after due diligence it is not possible** ***to effect service under paragraphs (a) and (b), the presentation may be effected by the publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest national circulation in each case."***

Now, the efforts the Petitioner made in serving the 1st Respondent both at home, and at other public places, such as at the Serena Hotel, can at best be described as "due diligence". Mr Orengo, Counsel for the 1st Respondent, conceded as much. All he then had to do was to invoke the alternate form of service available under Section 20 (1) (a) (iv) of the Act. The Petitioner did indeed publish the Petition in the Gazette, but failed to do so also in the two newspapers as specified in the aforesaid section.

In my humble view the ***Abu Chiaba case*** has no application to the facts of this case, and because of the amendment in law through Section 20 (1) (a) (iv) it is now of limited value.

2. Secondly, I would wish to note at this point, for what it is worth, that although Mr Orengo conceded that the efforts to serve the 1st Respondent at his residence constituted, at best, "due diligence", **I am not of the same view**. I say so because the attempted service at the 1st Respondent's house took place over the week-end - on Saturday night, and early Sunday morning. I would wish to record my strong displeasure and objection to litigants chasing citizens at their homes at ungodly hours and over week-ends. Given the security situation in Kenya, no person in his right mind is expected to open doors to strangers at night, or on early Sunday mornings. **I find the practice despicable, and hold that in my view it does not constitute "due diligence"**. I am not alone in this thinking. The Hon. Githinji, JA in ***Ntoitha M'Mithiaru vs Richard Maoka Maore (C A 272 of 2003)*** said:

"**In my view, it would be against public policy perhaps a breach of constitutional right to privacy to serve election petitions outside the official hours and times specified for service of other court processes. The superior court holding that the 1st respondent should have been served before the hour of five in the afternoon was in my view undoubtedly correct".**

Mr Wamae, Counsel before me in this case, was also the Counsel before Githinji, JA in the above case, and is fully aware of the highest Court's sentiments about effecting service over week-ends.

And, finally, I reiterate here, as I did in ***Nasir Mohamed Dolal vs Duale Aden Bare (Election Petition No. 28 of 2008)***, that dropping off court documents at the gate of the 1st Respondent's house or with his security guards cannot possibly constitute "personal service" on the 1st Respondent.

Accordingly, and for all the reasons cited, **I find and hold that the Petition was not served upon the 1st Respondent within the period of time prescribed by law, and I strike it out, with costs to all the Respondents.**

Dated and delivered at Nairobi this 17th day of December, 2008.

ALNASHIR VISRAM

JUDGE