



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Election Petition No 15 of 2003

Wabidonge.....APPLICATON

v

Okemo & others.....RESPONDENTS

The appellant filed a petition to challenge the election of the 1st respondent. The 1st respondent consequently filed an application to strike out the petition mainly on the ground that it had not been filed and served in accordance with Section 20(1) (a) of the National Assembly and Presidential Elections Act (Cap.7). The petitioner did not file a replying affidavit to controvert the allegations made by the 1st respondent, neither did he file any return of service.

Held:

1. The onus was on the petitioner to show that he had complied with the mandatory service requirements contained in Section 20(1) (a) of the Act. He had not done so.
2. The 1st respondent's evidence remained uncontroverted, therefore there was no valid petition before the court.

Petition struck out.

Cases

No cases referred to. Statutes

1. National Assembly and Presidential Elections Act (cap 7) section 20(1) (a)

2. Election Offences Act (cap 66) Advocates

Mr Orengo for the 1st Respondent

June 27, 2007 Visram J delivered the following Ruling.

On 3rd January, 2003, the Electoral Commission of Kenya, the third respondent herein, published a gazette notice, declaring Chrysanthus Okemo, the first respondent, the duly elected Member of Parliament for the Nambale Constituency following the general elections held in Kenya on 27th December, 2002.

The appellant, Patrick Olasa Wabindonge, who was one of the candidates in the said elections in the

Nambale Constituency, and who lost the election to the first respondent, filed a petition on 28th January, 2003 to challenge the election of the first respondent.

The first respondent, faced with the challenge to the validity of his election, took out a notice of motion on 5th May, 2003 to strike out the petition, mainly on the ground that it had not been filed and served in accordance with section 20(1)(a) of the National Assembly and Presidential Elections Act, chapter 7 of the Laws of Kenya (hereinafter "the Act"), and on other grounds, all of which are quoted here below:

"(a)The petition has not been filed and served in accordance with the mandatory provisions of section 20(1)a of the National Assembly and Presidential Elections Act, chapter 7 of the Laws of Kenya.

(b)The petition has not been served within the time and the manner stipulated by the law including the National Assembly Elections (Election Petition Rules).

(c) There is no petition or proper petition before the Court.

(d) There are no sufficient grounds for granting the relief or order claimed or prayed for.

(e) The petitioner has not supplied and served the particulars as requested and in compliance with the orders of this honourable Court.

(f) The petitioner has disobeyed the order of this honourable Court to file an answer to the request for particulars on or before 21st April 2003.

(g) The petitioner does not disclose any reasonable cause of action.

(h)The petitioner does not disclose the specific provisions of the Election Offences Act, cap 66, or of the section or subsections thereof, alleged to have been breached."

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

The crucial words in the above section are "presented and served within

28 days." (emphasis mine).

Mr Orengo, counsel for the first petitioner, in his submissions before this Court acknowledges that the petitioner was indeed "filed" on time, on the 28th January, 2003. However, it was not served in time. In fact, according to him, it was never served, not even at this time. In an affidavit in support of the application to strike out the petition, Mr Orengo states that he personally made searches at the High Court Registries and found no evidence of service upon his client.

The petitioner has not filed a replying affidavit to controvert the allegations made by the first respondent, nor has he filed any return of service. Indeed, there is no evidence of service. The onus is on the petitioner to show that he has complied with the mandatory service requirements contained in section 20(1)(a) of the Act. He has not done so. The first respondent's evidence remains uncontroverted, and, accordingly, I find that there is no valid petition before this Court, and the same is struck out with costs to the respondents.

Based on the above findings, I do not find it necessary to consider other grounds outlined by Mr Orengo, in support of the application to strike out the petition.