



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Election Petition 2 of 2005

1. SAID A. SALIM.....1ST PETITIONER

2. EDWARD C. ODUOR.....2ND PETITIONER

VERSUS

1. HOTHAM NYANGE.....1ST RESPONDENT

2. ANANIA MWABOZA.....2ND RESPONDENT

RULING

Before me is a Notice of Motion dated the 17th October 2005 and brought under Section 20(1) (a) of the National Assembly and Presidential Elections Act, (Chapter 7 Laws of Kenya) (the Act). It seeks:

“1. THAT that the Petition herein be struck out on the ground

that the same was not personally served on the 2nd

Respondent within 28 days after the date of the publication of

the Parliamentary Election in the Kenya Gazette on 24th

December 2005 or at all and

2. THAT pending the hearing and determination of this

application all proceedings herein be stayed and

3. THAT the Petitioner do pay the costs of the 2nd Respondent

in respect of the Petition as well as of this application.”

The Application is supported by the affidavit of the second Respondent sworn on the 17th October 2005 and a further affidavit he swore on the 28th March 2006.

In both the affidavits the second Respondent categorically denies having been served with the Petition and or the other documents in this Petition on the 18th January 2005 or at all. While admitting that he was indeed at Moi International Airport Mombasa on the morning of 18th January 2005 about to board a flight bound for Nairobi, he says he was served with the Notice of Motion in Nairobi **Petition No. 1 of 2004,**

Hassan Joho – Vs - Hotham Nyange and Annania Mwasambu Mwaboza dated the 17th January 2005. He annexed copies of that Petition, its supporting affidavit and the annexures thereto. He further deposes that he learnt of this Petition from the Daily Nation Newspaper report of 19th January 2005. To protect his interest in the matter he instructed his advocates who entered appearance under protest and obtained copies of the Petition and other accompanying documents from the Court Registry at Nairobi.

The second Respondent's Advocate Mr. Buti, teaming up with Miss Ngugi, after withdrawing prayer 2 of this application, submitted that the Petition having not been served on their client as required by section 20 (1) (a) of the Act or at all, the same should be struck out with costs.

In opposition to the Application the first Petitioner, Said Abdallah Salim, swore a replying affidavit on the 30th November 2005 and caused the process server, one Stephen Muli, who said he served the second Respondent with the Petition and other accompanying documents, to file an affidavit of service sworn on the 19th January 2005. He says he did not see any need of filing it earlier as he did not know service would be an issue the second Respondent having instructed counsel who had entered appearance.

Mr. Khagram teaming up with Mr. Balala for the Petitioners submitted that the second Respondents affidavits contain a lot of falsehoods. For instance the Notice of Motion dated the 17th January 2005 and filed in Nairobi Election Petition No. 1 of 2004 on the 18th January 2005 could not have been served upon the second Respondent just before 9.00 a.m. on the same day, that is, 18th January 2005 at Moi International Airport, Mombasa.

Mr. Khagram further submitted that if the second Respondent was not served with the Petition in this case, his Advocates could have summoned the process server for cross examination. The fact that they did not, he said, tells a lot.

From the averments in the supporting and opposing affidavits as well as from counsel's rival submissions it is clear that it is the process server's word against that of the second Respondent as to what documents were served upon the latter on the 18th January 2005. That being the case I am surprised that counsel did not seek to cross examine the two on the averments in their respective affidavits.

Be that as it may, having considered the matter I am inclined to believe the process server for two reasons. First, the second Respondent, apart from being a honourable member of parliament, he is also an Advocate of this court. As such he understands that acknowledging receipt of service of court process is no admission of the contents of whatever documents that are served on him. I cannot therefore understand why he refused to sign for whatever documents that were served upon him, and like most laymen do, refer the process server to his Advocate. Besides that there is nothing on record to show that he had pursuant to Rule 10 of the National Assembly Election (Election Petition) Rules, 1993 appointed an advocate to represent him in any petition that could be filed challenging his election. If he had signed for the Notice of Motion in Nairobi Election Petition No. 1 of 2004 which he claims is the one that was served on him, the matter could have been easily resolved in his favour.

The second reason why I am unable to believe the second Respondent has to do with the documents he alleges he was served with. That is the Notice of Motion dated the 17th January 2005 and filed in Nairobi Election Petition No. 1 of 2004. It is clear from the court stamp on that Notice of Motion that it was filed at the High Court at Nairobi on the 18th January 2005. I agree entirely with Mr. Khagram that as court registries do not open until 8.00 a.m. it is practically impossible for a document filed at the High Court Registry at Nairobi on 18th January 2004, even if it was filed at exactly 8.00 a.m. to have been transmitted in the original hard copy to Moi International Airport at Mombasa and served upon the second Respondent on the same day before 9.00 a.m. The second Respondent therefore lied when he claimed that what he was served with was a Notice of Motion in Nairobi Election Petition No. 1 of 2004. I find that the second Respondent was duly served with the Petition and the accompanying documents in this matter on the 18th January 2005. Consequently I dismiss this application with costs to the Petitioners.

DATED and delivered this 25th day of May 2006.

D. K. MARAGA

JUDGE