REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 5 OF 2003

IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT CAP. 7

AND

IN THE PARLIAMENTARY AND PRESIDENTIAL REGULATIONS AND THE RULES MADE THEREUNDER

AND

IN THE ELECTION PETITION REGULATIONS

AND

IN THE ELECTION OFFENCES ACT CAP. 66

AND

IN THE MATTER OF THE ELECTION FOR KIAMBAA CONSTITUENCY

THE HUMBLE PETITION OF

ROBERT NELSON NGETHE……PETITIONER

VERSUS

MBOGORI NJERU…….1ST RESPONDENT

JAMES NJENGA KARUME…….2ND RESPONDENT

RULING

1. The Background

This matter first came before me on 20th January, 2004 when the

Petitioner was represented by Mr. Ndambiri, the first Respondent by Ms. Sitati, and the second Respondent by Mr. Monari and Mr. Kerongo. While the Petitioner was concerned to proceed with his

petition, there were preliminary objections being raised by the second Respondent. These objections were contained in different applications; and I did on that occasion direct that the Petitioner's Notice of Motion of 31st July 2003 be set down for hearing on ***10th February, 2004.***

On 10th February, 2004 the Petitioner was represented by Ms. Judy Thongori and Mr. Ndambiri; the first Respondent was represented by Ms. Sitati; the second Respondent was represented by Mr. Monari and Mr. Kerongo.

Learned counsel, as she then was, Ms. Ruth Sitati, reported that with regard to the Petitioner's Notice of Motion of 31st July, 2003 a consent had been reached. I recorded the consent as follows:

"By consent, the Petitioner be and is hereby granted leave to file a further replying affidavit to the second Respondent's Notice of Motion dated 30th April, 2003 subject to the second Respondent's right to raise issues concerning privileged communication."

The matter had to be taken out of the cause list on 18th March, 2004 and the date 12th May, 2004 was subsequently taken at the Registry. Mr. Monari on that occasion represented the second Respondent; Ms. Thongori represented the Petitioner; the Electoral Commission was not represented, as their counsel, Ms. Sitati had just been elevated to the Bench and so would be unavailable. It became necessary, due to lack of representation for the Electoral Commission, to adjourn. And subsequently the parties made an appearance in Court, on 18th May, 2004 when Mr. Ndambiri and Ms. Thongori represented the Petitioner, Mr. Monari the second Respondent, and Mr. Kulecho the Electoral Commission. There were several subsequent appearances before the Duty Judge and before myself; but it is at the hearing of 9th September, 2004 that directions were taken for the disposal of pending interlocutory applications.

Appearances on 9th September, 2004 were: Ms. Thongori and Mr. Ndambiri for the Petitioner; Mr. Kulecho and Mr. Wesonga for the Electoral Commission; and Mr. Monari for the second Respondent. There were four pending applications on file, and I gave directions as follows:

"The directions to move the Petition of 22nd January, 2003 ahead centre on ***consolidation*** of the four interlocutory applications now pending, being brought by the Respondents. These applications are as follows:

(a) 2nd Respondent's Notice of Motion dated ***30th April, 2003;***

(b) 2nd Respondent's Notice of Motion dated ***7th April, 2004;***

(c) 2nd Respondent's Notice of Motion dated ***5th June, 2003;***

(d) 1st Respondent's Notice of Motion dated 24th July, 2003.

"These four applications are hereby consolidated into two tranches: (a) and (b) to be heard together; and (c) and (d) to be heard together."

The hearing of the first tranche (2nd Respondent's Notice of Motion of ***7th April,2003*** and that of 30th April, 2003) took place on 22nd September, 2004 when Ms. Thongori and Mr. Ndambiri represented the Petitioner while Ms. Waindi represented the Electoral Commission, and Mr. Monari and Mr. Kerongo represented the second Respondent.

By his Notice of Motion of 30th April, 2003 (brought under S. 20(1)(a) of the National Assembly and Presidential Elections Act; rule 23(2) of the National Assembly Elections Rules; Order V rule 16 of the Civil Procedure Rules) the second Respondent sought Orders -

(i) that, the process-server**,** ***Ismael Mwaura Kamau*** be cross-examined on his affidavit sworn on 5th February, 2003;

(ii) that, the Petition dated and filed on 22nd January, 2003 be struck out on the ground that the same was ***not personally served*** on the second Respondent;

(iii) that, all proceedings be stayed pending the hearing and determination of the present application;

(iv) that the Petitioner be made to pay the costs of the second Respondent in respect of the Petition and of this application.

The second Respondent's Notice of Motion of 7th April, 2004 carried the following prayers.

(a) that, the further affidavit of ***Alfred Njeru Ndambiri*** sworn and filed on 16th February, 2004 be struck out in part or in whole;

(b) that, the Petitioner ***be ordered*** to pay the costs of this application.

What is the content of the further replying affidavit of ***Alfred Njeru Ndambiri*** thus being impugned? It may be recalled that Mr. Ndambiri is one of the Advocates having the conduct of this matter on behalf of the Petitioner. In his further replying affidavit he is adding his voice to that of the process server, ***Ismael Mwaura Kamau*** whose affidavit of service dated 5th February, 2003 is also being impugned in the first application in the tranche, the Notice of Motion dated 30th April, 2003.

In his affidavit of 16th February, 2004 ***Alfred Njeru Ndambiri*** depones as follows:

(a) that, he has read and understood the contents of the affidavit by ***James Njenga Karume*** (2nd Respondent) sworn on 30th April, 2003 and that of ***James Gatheru Mukora*** (2nd Respondent's driver) sworn on 30th April, 2003;

(b) that, the deponent has also read the affidavit of ***Ismael Mwaura Kamau*** sworn on 9th May, 2003;

(c) that, the deponent and his firm, A.N. Ndambiri & Co. Advocates, are aware that the second Respondent herein, James Njenga Karume, was served and indeed, that he did admit that on 29th January, 2003 he was personally served with the Petition documents but he refused/failed to acknowledge receipt.

In verification of the content of his affidavit, the deponent attached a letter on the second Respondent's letterhead, dated 30th January, 2003 and addressed to the firm of M/s. Kilonzo & Co. Advocates. The letter is signed by the second Respondent, and thus reads:

"Enclosed herewith is the election petition documents filed by Mr. Robert Ngethe. The gentleman who was to serve me came to my car, found the window and threw the documents through the window. He did not wait for me to sign.

"This is to kindly request you to represent us in this matter."

2. The Issues

The reason for consolidating the second Respondent's Notice of Motion of 30th April, 2003 with that of 7th April, 2004 is obvious: they address one question, namely whether ***for the purposes of the Election***

Petition which has been filed against the second Respondent who currently holds the parliamentary seat for the constituency of Kiambaa, the Respondent was duly served with the essential petition documents. The Petitioner through his counsel states without doubt, that service was duly effected as required by law, and that service was ***personal service.*** It is precisely this assertion which the second Respondent is denying, and he is doing so by challenging all the depositions affirming that service was effected as required.

This is the question that came before me on 22nd September, 2004 and I must resolve this question by determining the truth, from the two Notices of Motion, from the depositions in support and those against, and from the submissions of counsel. It is only by resolving this preliminary dispute, that I will be in a position to give further guidance on the matter before the Court.

3. Submissions for the Applicant

The Applicant in respect of the two Notices of Motion (that of 30th April, 2003; and that of 7th April, 2004) is the second Respondent in the main proceedings (the Petition). For him, learned counsel Mr. Monari maintained that personal service of the petition papers ***had not*** been done, and therefore the Petition must be struck out, for failure to comply with a mandatory requirement of the National Assembly and Presidential Elections Act (Cap. 7) and the regulations made thereunder.

Mr. Monari anchored his arguments on facts which he excerpted from two affidavits - one by the second Respondent, ***James Njenga Karume*** dated 30th April, 2003 and the other by Mr. Karume's driver, ***James Gatheru Mukora*** also dated 30th April, 2003. The depositions of the two are responding to the very detailed affidavit of service sworn by ***Ismael Mwaura Kamau*** on 5th February, 2003 and filed on 28th March, 2003. I may set out the most material elements in that affidavit:

> (i) that, on 22nd January, 2003 the deponent received from M/s. A.N. Ndambiri & Co. Advocates for the Petitioner, a ***Notice of Appointment of Advocates***; ***Receipt; Notice of Acceptance; Notice; and Petition*** dated 22nd January, 2003 all in triplicate, "with firm instructions to personally serve the same upon one ***Mbogori Njeru*** the first Respondent herein and one ***James Njenga Karume*** the 2nd Respondent herein";
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> (ii) that, on both 23rd January, 2003 and 24th January, 2003 the deponent visited the premises of a business called Karume Investments Ltd. at Cianda House, 11th Floor Koinange Street in Nairobi, but had to go away without making service upon the second Respondent as he was not available;
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> (iii) that, on 28th January, 2003 at about 4.50 a.m. the deponent went to the second Respondent's Cianda Farm, in Kiambu District and was asked to wait for Mr. Karume, which he did for three hours; but at 7.25 a.m. one of the security officers at the residence told him that the second Respondent had already left the compound, using a different gate (the dairy gate) and gone to his Kiambu office situated at Tobacco House; at about 9.00 a.m., the deponent visited the said Kiambu Town office, but was told that the second Respondent had gone towards Cianda House in Nairobi; he proceeded to Cianda House but was told that the second Respondent had not arrived there; whereupon the deponent proceeded to Meru Town and effected service on the first Respondent;
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> (iv) that, on 29th January, 2003 at about 5.45 a.m. the deponent visited the second Respondent's Cianda Farm Residence, where he was asked to wait to see the second Respondent; and that after waiting for one hour, he saw the second Respondent's vehicle moving towards the main gate; and he ran towards the gate waving the vehicle down; his efforts were fruitless, as he saw the second Respondent sitting in the vehicle and signalling to the driver to drive on;
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> (v) that, the deponent followed the second Respondent's vehicle in his own car; that the second Respondent made as if to enter Stanbic Bank in Nairobi, but then was speedily driven off, and the deponent gave chase, right up to the Cianda Farm residence; and as the second Respondent was

going to drive out again before the deponent could approach him, another vehicle came in and caused an obstruction, so that the second Respondent had to stop; and at this moment the deponent approached the second Respondent; and ***"when he saw me, he asked me why I was following him yet he already had obtained a copy of the Petition from the High Court Registry and that that was enough for him***;

(vi) that, the deponent spoke to the second Respondent**: *"I informed the second Respondent that the purpose of my visit to his residence was to personally serve the copies of documents relating to a petition and that I couldn't wait for a fortnight to serve the documents on him as the Petitioner in the matter had a time limit within which the Respondents ought to be served. The 2nd Respondent then explained to me that he was ready to receive the documents but was under strict instructions from his lawyers not to sign the same…";***

(vii) that, at about 9.15 a.m. on the said 29th day of January, 2003 at Cianda Farm, Kiambu District the deponent personally managed to effect service upon the 2nd Respondent by tendering and/or delivering copies of the said ***Notice of Appointment of Advocates; Receipt; Notice of Acceptance; Notice and the Petition***; and he willingly accepted service but declined to acknowledge receipt on the principal copies.

Now the second Respondent, by his affidavit of 30th April, 2003 states:

(para. 2)

"that, I have never been served with the petition and Notice of Presentation of the Petition…"

Of the affidavit of ***Ismael Mwaura Kamau,*** the second Respondent claims (para.4) that it ***"contains serious falsehoods and lies to the effect that he served me personally***." He avers (para. 6) "that, I was not in the company of my driver on 29th January, 2003 as I did not leave my house at Cianda Farm in Kiambu." He goes on to say: "my driver ***James Gatheru Mukora*** came to the house at around 11.00 a.m. saying a man he did not know had thrown papers into the car saying that these papers should be sent to me and he refused to come into the compound." The second Respondent claims (para.8) to have seen ***"a petition, and a Notice of Appointment of Advocates but there was no such document as Notice of Presentation."***

The said driver, ***James Gatheru Mukora*** has sworn a long affidavit in which he avers that the affidavit of ***Ismael Mwaura Kamau*** "contains blatant lies and untruths". He says that the whole day of 29th January, 2003 he drove alone in the second Defendant's car. He says he did on that day perform errands in town , and returned to Cianda Farm at 11.00 a.m. He avers as follows (para. 11):

"That, on…29th January, 2003 as I negotiated the right turn from the main road I saw a parked white Toyota vehicle by the side and a man I had not seen before he threw a number of [papers] into the car."

He goes on to say (para. 20)

"***That, the alleged papers were simply thrown at me in the car by a man never seen before."***

The veracity of these depositions stands to be judged from their inherent logic as explicated by counsel. From those averments as they stand and proclaim, learned counsel, Mr. Monari affirms that: "The affidavit of ***Ismael Mwaura Kamau*** contains lies and untruths." Counsel places complete reliance on the sworn statements of the second Respondent's driver, and asserts that this is where the truth lies; and this leads him to the submission, perfectly consistent with the driver's deposition (para. 21), that ***"the petition was not personally served on the second Respondent as required by law***." Counsel has also taken the second Respondent's affidavit as representing the absolute truth. So Mr. Monari submits, on the hypothesis of there not having been personal service, that the Petition is defective for want of the Notice

of Presentation of Petition, and that, therefore, it ought to be struck out.

This submission is puzzling in at least one respect. If it is allowed, then it would follow that the Petitioner's case is afflicted by one and only one defect: absence of the ***Notice of Presentation of Petition***. This would logically imply that all the other legal documents in the package were indeed personally served and are therefore not tainted by any procedural defect, that is – (i) the Petition itself; (ii) the Notice of Appointment of Advocates; (iii) the Receipt; (iv) the Notice of Acceptance. In that case, it will not lie in the mouth of the second Defendant to say that those named documents at least, were not personally served. And the implication would be that the affidavits sworn by the second Respondent and by his driver are not attended with conviction. I will return to this point late when I will be making my final Orders.

The affidavit of service by ***Ismael Mwaura Kamau*** is dated 5th February, 2003; the affidavits by the second Respondent and his driver are dated 30th April, 2003. But this sequence of events appears not to be quite well reflected in Mr. Monari's submissions when he says:

"Long after the application is filed, the process server seeks to swear an affidavit on 9th May, 2003. He is trying to answer to the contents of the affidavits of the second Respondent and his driver."

I have not, with respect, been able to see anything unusual about ***Ismael Mwaura Kamau's*** affidavit of 9th May, 2003 and the deponent's substantive averments are contained in his affidavit of service. In that affidavit he states that the second Respondent had willingly accepted service, except that he had not formally acknowledge service by signing at the back of the principal copy. He repeats the same point at paragraph 8 of his affidavit of 9th May, 2003: ***"That, it is at Cianda Farm where I served the 2nd Respondent with the copies of the Notice of Appointment of Advocates, Receipt, Notice of Acceptance, Notice and the Petition."***

Counsel objected to the affidavit by Mr. A.N. Ndambiri which sought to confirm that the Petitioner's Petition and the required papers had been personally served on the second Respondent. Mr. Monari's main objection is that the said confirmatory affidavit bears as an annexure a letter written by the second Respondent himself, which would confirm that, indeed, he, the second Respondent, had been served with the papers in question.

Mr. Monari argued this point on the basis that the annexed letter in question was a confidential one and was covered by privilege under the Evidence Act (Cap. 80), Section 134. In aid of this argument, counsel referred to several cases. He cited the Court of Appeal case, ***Ratemo v. Michira*** [2002] LLR 3696. The following passage is relevant:

"some of the letters the Appellant wishes to put in as additional evidence were written on 9th August, 1999; 6th October, 1999; 15th February, 2000; and 20th March, 2000. These were letters exchanged between United Insurance Company Limited and a firm of Advocates called Olima & Company Advocates. These are communications between an Advocate and a client which are privileged under Section 134 of the Evidence Act and cannot in normal circumstances be disclosed without their express consent."

Counsel also cited ***Virji & Others v. Sood*** [1973] E.A. 145, where Trevelyan, J in this Court had held as follows (P.146):

"I do not doubt that not every communication made by a client to his advocate is privileged. ***Ratanlal and Thakore on the Law of Evidence*** (11th ed.) says on P. 257, that the 'word "disclose" shows that the privileged communication must be of a confidential or privileged nature…. The privilege extends only to communications made to him confidentially, and with a view to obtaining professional service'…"

4. Submissions for the Petitioner/Respondent

Learned counsel, ***Ms. Thongori*** laid a basis for her submissions by enumerating her client's papers which had been filed and served: (i) the affidavit of service, of ***Ismael Mwaura Kamau*** sworn on 5th February, 2003; (ii) the replying affidavit by Ismael Mwaura Kamau sworn on 9th May, 2003; (iii) the Petitioner/Respondent's grounds of opposition dated 5th May, 2003; (iv) the further affidavit of Alfred Njeru Ndambiri dated 6th August, 2004; and (v) the Petitioner/Respondent's grounds of opposition dated 4th May, 2004.

Counsel contested the Applicant's case for leave to cross-examine the process-server on his affidavit of service, of 5th February, 2003. She noted that the legal basis for such cross-examination can only be Order V, rule 16 of the Civil Procedure Rules, but that rule relates to summons, rather than to petitions such as the one herein. The instant matter, counsel contended, belongs entirely to the regime of the National Assembly and Presidential Elections Act (Cap. 7) which makes no provision for the cross-examination of process servers. She noted, and with respect, quite properly, that had the said Act provided for such cross-examination, then the Applicant's Notice of Motion of 30th April, 2003 would have been brought under it. Counsel submitted that the National Assembly and Presidential elections Act (Cap. 7) represents a complete regime on the law governing elections, including the conduct of service therein. To validate this contention, learned counsel cited the Court of Appeal decision in ***Mwai Kibaki v. Daniel Toroitich arap Moi***, Civil Appeal No. 172 of 1999, in which the following passage occurs (p. 29):

"We can now discuss the mode in which an election petition is to be served. We agree with Mr. Nowrojee and Mr. Orengo that the Act and the Rules both form a complete regime and other legislation or rules can only be applicable to election petitions if they are made applicable by the Act itself or the rules. We also agree that the purpose of the regime is to have election petitions dealt with in as quick a manner as is reasonably possible and the reason for this is not difficult to understand. The voters in a particular constituency and also the general voters in Kenya are interested in knowing who their legitimate representative in Parliament is."

Ms. Thongori submitted that the present application to cross-examine just does not lie, as it does not fall within the framework of the National Assembly and Presidential Elections Act (Cap. 7); and that even if Order V of the Civil Procedure Rules were to be applicable, its application would be purely discretionary; and hence there was no right to seek leave to cross-examine the process-server.

Counsel went further to submit that the Applicant had not proved the necessity to have the process-server cross-examined. Ms. Thongori submitted that the process-server had sworn an affidavit of service detailing how he had effected service upon the second Respondent, and the affidavit was clear and unambiguous, and its details were entirely untraversed except by the general counter-averment that personal service had not been done. Counsel observed that there was no contradiction between the two affidavits sworn by the process-server; and she drew attention to several vital paragraphs of these affidavits to show their fundamental consistency: paragraph 5 of the affidavit of 9th May, 2003 and paragraphs 12 and 13 of the affidavit of 5th February, 2003. Since there was no sensible contradiction between the two sets of depositions, counsel submitted, there was no basis for calling the process-server to be cross-examined.

Counsel underlined as evidence of truthfulness on the part of the process-server, the fact that the second Respondent had not denied that he received the Petition and annexed papers on the same day, 29th January, 2003 the process-server averred he had effected service; and even the time-difference between the driver's receipt of those documents, and the service said to have been done by the process-server, is infinitesimal. Counsel attributed the said time-difference to a possible endeavour by the second Respondent to create a "time crisis" since he swore his affidavit only after seeing the depositions of the process-server.

Miss Thongori submitted that Mr. Ndambiri as an Advocate for the Petitioner, and being concerned to demonstrate how service had been effected upon the second Respondent, was entitled to rely on the letter which had been written by the second Respondent himself to a firm of lawyers on 30th January, 2003 just

one day following the day of service of papers upon the second Respondent. Counsel submitted that the said letter was eminently relevant; for it discounts two claims of the second Respondent: (i) that he remained at his Cianda Farm residence throughout the 29th of January, 2003; and (ii) that he was not in his car with his driver at the time the process-server effected service upon him, on the 29th of January, 2003 at about 9.15 a.m.

Learned counsel submitted that the Petition and its accompanying papers were duly served on the second Respondent personally, but he declined to indicate acknowledgement of receipt by signature. The said letter to M/s. Kilonzo & Co. Advocates, counsel submitted, shows clearly that the second Respondent was inside the car, at the time service was effected upon him. Since the second Respondent has, in effect, admitted such service, there would be no reason, counsel submitted, for calling the process-server for cross-examination by counsel for the second Respondent.

With regard to the replying affidavit of the second Respondent's driver, counsel questioned, and with definite propriety, with respect, how the process server could have accurately aimed a bundle of papers into his car while he was in motion executing a corner as he claims. This spectacle, counsel submitted, was not believable.

Ms. Thongori submitted that the Notice of Motion application of 30th April, 2003 amounted to an abuse of the process of the Court and should be dismissed with costs. She also considered both that application and the second one, of 7th April, 2004 to fly in the face of the trenchant principle enunciated by the Court of Appeal in ***Mwai Kibaki v. Daniel Toroitich arap Moi***, Civil Appeal No. 172 of 1999: ***"We also agree that the purpose of the regime is to have election petitions dealt with in as quick a manner as is reasonably possible…"***

Counsel noted that it is nearly two years since the second Respondent went to Parliament, and yet his legitimacy as an M.P. had not yet been determined through the hearing of the outstanding election petition. This concern, I have no doubts at all, is a genuine one. It is undesirable that any further technical delays should be allowed to lie in the way of a resolution of the electoral dispute in hand.

Learned counsel contested the propriety of the second Respondent's Notice of Motion of 7th April, 2004 which seeks to strike out the affidavit sworn by ***Mr. Alfred Njeru Ndambiri*** on 16th February, 2004. Counsel made the submission, which I take to be correct, that the impugned affidavit had been filed out of time, but with leave, and that no objection had been raised by counsel for the second Respondent. The only reservation counsel for the Respondent had made was that he would question the validity of the affidavit in relation to issues of ***privileged communication***. From this position, that the said affidavit arose from a consent order, I did expect counsel for the Petitioner/Respondent to deal only with the point taken by counsel for the second Respondent regarding privileged communication.

Ms. Thongori submitted that there was no law which barred Mr. Ndambiri from deposing on facts within his personal knowledge; and the facts set out in the affidavit in question were well and truly within his personal knowledge. Counsel cited in support the Court of Appeal decision in ***Kenya Horticultural Exporters*** (***1977) Ltd. v. Pape (trading as Osirua Estate)*** [1986] KLR 705 to support the principle and the legal requirement that depositions in an affidavit are required to be based on personal knowledge, in general.

The issue of privilege has to be seen in the context of Section 134 (1) of the Evidence Act (Cap. 80). It thus stipulates:

"No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the cause and for the purpose of his employment as such advocate, by or on behalf of his client, or as to the contents or condition of any document with which he has become acquainted in the course of and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment."

Counsel defended the use by Mr. Ndambiri of a letter written by the second Respondent to Advocates, in proof of the Petitioner's contention that the second Respondent had indeed been duly served with the petition and the attendant documents notwithstanding the formal denials made by the second Respondent. Ms. Thongori noted that the said letter had not been addressed by the second Respondent to Mr. Ndambiri; rather it had been addressed to M/s. Kilonzo & Co. Advocates, and thus there was no Advocate-client relationship between Mr. Ndambiri and the second Respondent. Counsel noted that the M/s. Kilonzo & Co. Advocates have never been on record in the instant matter, and so the letter in question is to be regarded as no more than a neutral document which, like any ordinary document, may be used in evidence. Ms Thongori went further to submit that since the second Respondent himself had annexed the same letter to his affidavit which was a document filed and served, the said letter had become properly available to Mr. Ndambiri who, too, could use it to prove matters pertaining to the second Respondent. ***By thus using the letter himself,*** counsel contended, ***the second Respondent had himself waived any such privilege as could possibly attach to it***. Without any coercion, the second Respondent had himself circulated the said letter and made it part of the Court record; and the Court was now entitled, learned counsel submitted, to look more closely at this letter. This argument is unanswerable and is well supported by respectable authority. Ms. Thongori cited ***Cross on Evidence***, 2nd Australian Edition (J.A. Gobbo, David Byrne, J.D. Heydon, 1980), at pages 262-263, paragraphs 11.2 and 11.3. At para 11.2:

"In the first place, as the privilege is that of a particular person or class, matters covered by it may always be proved by the evidence of other witnesses. Parke, B once said:

*'**Where an attorney entrusted confidentially with a document communicates the contents or suffers another to take a copy surely the secondary evidence so obtained may be produced.** Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it? – Lloyd v. Mostyn (1842) 10 M & W 478, at 481-2'."*

It is noted that on the authority of ***Lloyd v. Mostyn*** the English Court of Appeal had allowed copies of proofs of witnesses, with notes on the evidence "in a former action brought by the Plaintiff's predecessor in title to be used by the Defendant in ***Calcraft v. Guest*** [1898] 1QB.759." The learned authors thus further observe:

"Similarly if someone obtains possession of a confidential letter written by a husband to his wife it may be proved against the husband although, had it been received by her, the wife could not have been compelled to disclose it ……"

The learned authors further observe (para. 11.3).

> *"…..it follows from the fact that the privilege attaches to a particular person that the **privilege can be waived by that person.** Waiver has the effect of releasing the person bound by the privilege from some or all of the consequences which might attend his breach of confidence….."*

Counsel, on the basis of these authorities, submitted that no privilege existed between the second Respondent and Mr. Ndambiri; and that even had any privilege attached to the said letter emanating from the second Respondent, ***he would be taken to have waived the privilege out of personal choice.***

From what is, in my opinion, a secure position in law, counsel proceeded to submit that the Petitioner was entitled to introduce the said letter from the second Respondent to M/s. Kilonzo & Co. Advocates, as part of the evidence to show that proper service upon the second Respondent had indeed taken place. She submitted that the second Respondent had neither denied the contents of the said letter nor claimed it was a forgery. Counsel distinguished the case of ***Ratemo v. Ratemo*** [2002] LLR 3696 which counsel for the second Respondent had sought to rely on. That authority, counsel argued, was concerned with an Advocate who had acted for a party but was now abandoning that party, to act for another; whereas in the instant matter the subject was an election petition, involving constituents who had a constitutional right to determine how they are to be represented in Parliament.

Counsel also distinguished ***Virji & Others v. Sood*** [1973] E.A. 145 on which counsel for the second

Respondent had sought to rely – because Mr. Ndambiri had not at any stage been the Advocate for the second Respondent.

5. Submissions for the Second Respondent/Applicant - in Reply

Learned counsel, Mr. Monari submitted that this was not the first time cross-examination of a process-server in an election petition was taking place. He cited the High Court Proceedings in ***Elias Bare Shill v. Aden Sugow Ahmed & 2 Others***, E.P. No. 2 of 2003 in which the Honourable Lady Justice Angawa granted leave to the first Respondent to cross-examine the process-server. Counsel maintained that there were glaring differences in the content of the several affidavits, and this justified grant of leave to cross-examine the process-server.

6. Analysis and Orders

My broad lines of analysis have, I believe, already emerged in the earlier part of the Ruling. As I have indicated earlier, the fate of the second Respondent's Notice of Motion of 30th April, 2003 and that of 7th April, 2004 is dependent on the ***true position regarding service of the Petition and its attendant documents upon the second Respondents***.

The Court does not arrive at the truth by any mysterious process. The truth invariably emerges from asking quite simple and practical questions. That is what I will do herein, and, if I determine that the petition and its attendant papers were duly served upon the second Respondent, then I will inevitably dismiss the two applications and give directions for the hearing of the Petition. If, on the other hand, I find that there was a failure of service as required by law, then I will be constrained to strike out the Petition, apart from making other consequential Orders.

I will ask the following questions:

> ***(i)*** In his affidavit of 30th April, 2003 the second Respondent's driver, ***James Gatheru Mukora*** avers (para. 21 – "THAT, the petition was not personally served on the second Respondent." Now since the deponent states (paras. 1 – II) that for much of 29th January, 2003 he was not in the company of the second Respondent, would he be speaking from personal knowledge and saying the truth, when he deposes that "***the petition was not personally served on the second Respondent"?***
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> (ii) When the second Respondent's driver, ***James Gatheru Mukora*** says (para. 11) that "on the material day 29th January, 2003, as I negotiated the right turn from the main road I saw a parked white Toyota vehicle by the side and a man I had not seen before threw a number of [papers] into the car", is he saying something that is, ***in the normal course of nature,*** feasible?
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> ***(iii)*** The said driver, ***James Gatheru Mukora*** says (para. 14) he later on handed them to the second Respondent at the house; but this is inconsistent with the content of the letter written by the second Respondent to M/s. Kilonzo & Company Advocates the following, 30th January, 2003 which letter leaves no doubt that the second Respondent received the said ***papers while he was sitting in his car***, at the gate. How can this inconsistency be explained? ***And why is the driver (para. 17) deposing that "it is not true that the second Respondent was with me in the vehicle"?***
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> (iv) Can it be true, as the second Respondent's driver deposes (para. 20), that "the alleged papers were simply thrown at me in the car by a man never seen before"; and why is he speaking of "***alleged papers"*** when the identity of the papers is already acknowledged by the second Respondent himself, and when he himself deposes that he delivered those papers to the second Respondent?
>
> (v) Why is the second Respondent, in his affidavit of 30th April, 2003 (para. 2) saying: "I have never been served with the Petition and Notice of Presentation of the Petition," but in his letter of 30th January, 2003 to M/s. Kilonzo & Co. Advocates he in effect acknowledges service of at least

some of the Petition set of documents? And why is he averring (para.4) that the affidavit of the process server "***contains serious falsehoods and lies to the effect that he served one personally***", and why is his denial couched in such broad and condemnatory language?

(vi) Why is the second Respondent averring (para. 6) that he was not in the company of his driver on 29th January, 2003 "as I did not leave my house at Cianda Farm in Kiambu", when in his letter to M/s. Kilonzo & Co. Advocates of 30th January, 2003 he leaves no doubts that he was sitting in his car and in the company of his driver at the gate when the petition and attendant documents were served on him?

(vii) Is it true that the second Respondent received service of the Petition at 11.00 a.m. as he deposes, or at about 9.15 a.m. as the process-server deposes?

(viii) Why is the second Respondent stating that when he was served with the Petition and attendant papers at his Cianda residence gate on 29th January, 2004, ***specifically the Notice of Presentation of Petition was missing?*** Clearly he is here acknowledging that all the other documents were in the dossier served upon him, but, is he the one saying the truth as to the Notice of Presentation or the process-server who deposes that the package he had served upon the second Respondent was a complete one?

(ix) If service of the petition and its attendant documents had not been duly effected upon the second Respondent, why would he not only write to M/s. Kilonzo Advocates acknowledging due service, but also proceed to an analysis together with his Advocate on record, Mr. Evans Monari, of ***a document which might be missing from the package*** thus duly served, namely the ***Notice of Presentation of Petition?***

I have found all the above questions most intriguing. Many as those questions are (nearly a dozen), ***they show claims of fact that would not coincide, all at the same time, with the normal course of nature***; and I have to state, with great respect, that alleged facts of such a nature, and more particularly when they are so choreographed as to happen all at or about they same time, ***must be held to be inconsistent with the truth.*** I have assessed all such claims in the context of the depositions of the process-server, which I have found to be mostly candid, consistent and conscientious. I have to state, in all the circumstances, that neither the second Respondent nor his driver has, in his depositions, said the truth. The truth is that the process-server, ***Ismael Mwaura Kamau***, duly served the Petition and its attendant documents upon the second Respondent personally just after 9.00 a.m. on 29th January, 2003. I have to hold, with due respect, that in this important matter in which the Petitioner is seeking to exercise his electoral rights duly recognised for all citizens, the second Respondent has clearly contrived to subject the process-service exercise to a charade the immediate purposes of which must be assumed to be to place procedural obstacles in the way of the petition, and to subject the petition to such a considerable time-loss that by the time it is concluded, if ever it is, the second Respondent would have practically enjoyed a full parliamentary term. This Court is a Court of justice and cannot be used to facilitate such a subterfuge. Indeed it is to be regretted that counsel could have come to adopt the rather questionable fact-scenario laid in the depositions of the second Respondent and his driver, as a basis for making a plurality of time-consuming applications, and for making submissions before the Court. The effect of submissions of such a kind is to mislead the Court; and so the whole enterprise the second Respondent has engaged in, with due respect, is an abuse of the process of he Court and must be halted at once.

With regard to the second Respondent's Notice of Motion dated 30th April 2003 I will make the following Orders:

1. The first prayer, that the process-server, ***Ismael Mwaura Kamau*** be cross-examined on his affidavit sworn on 5th January, 2003 is refused.

2. The second prayer, that the Petition herein dated and filed on 22nd January, 2003 be struck out on the ground that the same was not personally served on the second Respondent/Applicant, is refused.

3. The second Respondent/Applicant shall bear the costs of the Petitioner in this application, in any event.

As regards the second Respondent's Notice of Motion application of 7th April, 2004 I hereby make the following Orders:

(a) The first prayer, that the further affidavit of ***Alfred Njeru Ndambiri*** sworn and filed on 16th February, 2004 be struck out in part and/or in whole, is refused.

(b) The costs of the Petitioner as a Respondent in this application shall be borne by the second Respondent/Applicant.

Having made those Orders in respect of the second Respondent's two applications, I now give the direction that ***counsel shall on Tuesday, 19th of October, 2004 at 9.00 a.m. appear before the Duty Judge for a mention and for taking directions on arrangements for hearing and disposing of the Petition herein, with the greatest possible dispatch***.

DATED and DELIVERED at Nairobi this15th day of October, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the Petitioner/Respondent: Ms. Judy Thongori, instructed by Ms. Judy Thongori & Co. Advocates; Mr. Ndambiri, instructed by Ms. A. N. Ndambiri & Co. Advocates

For the second Respondent/Applicant: Mr. Evans Monari, instructed by M/s. Daly & Figgis Advocates