



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION PETITION 2 OF 2003

ELIAS BARE SHILL.....PETITIONER

AND

ADEN SUGOW AHMED.....1ST RESPONDENT

JAMA HASSAN GINNI

(RETURNING OFFICER FAFI CONSTITUENCY...2ND RESPONDENT

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

RULING

The petitioner herein, Elias Bare Shill, contests the Parliamentary Elections for the Fafi Constituency to Aden Sugow Ahmed. On filing the election petition on the 15th day of January, 2003, his agent filed an affidavit of service dated the 18.2.2003 on the 21.2.2003, stating that he personally served the first defendant on the 22nd day of January 2003. This was a period of seven days after the petition was lodged. The declared of the elected members of parliament was published in the Kenya Gazette on the 3rd January, 2003.

The 1st respondent filed a notice of appointment of advocates **under protest** dated the 5.3.2003 and filed on the 6.3.2003.

(The returning officer is the second respondent herein and the Electoral Commission of Kenya is the third respondent. As at the time this matter was last in court (3.4.03) no advocate was on record representing the 2nd and 3rd respondent. The 3rd respondent had entered appearance through its commissioners).

The 1st respondent then took the opportunity to file an application dated the 10th day of March, 2003 requesting that this election court strike out the petition dated the 15th day of January, 2003 as the petition was not personally served on the 1st respondent within the requisite 28 days.

On the 24th day of March 2003 the 1st respondent filed two applications both dated the 24th day of March, 2003.

i) The first application was to withdraw the application dated 10th day of March 2003 on the grounds that it had typographical errors.

It attached another notice of motion dated the 24th day of March 2003 seeking the same prayers of striking out the petition to be deemed as filed.

ii) The second application sought for prayers of leave to cross-examine the process server who served or is alleged to have served the first defendant.

On the 24th of March 2003 the 1st defendant withdrew his application of 10.3.03, 24.3.03 but retained the second application of 24.3.03 to cross-examine the process server. The following day of 25.3.03 another application was filed seeking to strike out the petition of 15.1.03.

For ease of reference the parties agreed to mark the first application of 24.3.03 "A" the second application of 24.3.03 "B" and the new application of 25.3.03 "C". Another application seeking to cross examine the petitioner on his affidavit dated the 2nd of April 2003 and filed on the same date was marked "D".

The application which is the subject matter of this ruling before me is that dated the 24th day of March 2003 and marked "B" seeking this courts leave to have the process server one Simon Njoroge Kagai cross-examined as to the affidavit of service filed by him or 21.2.03 dated 18.2.03.

Arguments put forward is that the 1st defendant questions the facts deponed to by the process server as being vague. By physically calling the process server to court and subjecting him to cross examination would assist in hearing of the application for striking of the petition. The advocate went further to point out where within the affidavit he would wish to cross-examine the process server as a result of what he deponed.

He relied on rule 18(7) of the National Assembly and Presidential Election Rules Cap. 7 Laws of Kenya. He reads this together with order 18 CPR and the Oath and Statutory Act. He further relied on the case law of:-

Mwai Kibaki v Daniel Torotich Arap Moi

10072/99

Court of Appeal Nairobi

Whereby service was held to be personal.

In this petition the 1st respondent contents the issue of service personally upon him. In questioning the process server on his affidavit salient points as contained in the case law of:-

Assanand & Sons a(U) Ltd

V

E.A. Records Ltd

1959 EA 360

At page 362 no effort to cross-examined the deponent on his affidavit had been made. Thus if the process server is not cross examined on his affidavit the truthfulness of that said affidavit would be taken as deponed.

Mudavadi

V

Kibusi and Another

The rules have not changed that parties must be served personally.

Mr. Wamae for the petitioner had earlier on notified the court that due to the confusion of the many applications filed and withdrawn he was not aware that the application of 24.3.03 marked "B" was still active. Though he did not file his grounds of objection and replying affidavit he did address the court under section 23(1) (d) of the Act.

"The election court shall decide all matters that come before it without undue regard to technicalities"

His arguments against the request was that rule 18(7) of the act provided and catered for witnesses who are deponed to affidavits 48 hours before the hearing date. The process server is not a witness and does not fall under this category. The applications should therefore be dismissed. He did not address me in depth on order 18 r 2 of the Civil Procedure Rules. The gest I presume is that this act is inapplicable to election petition.

Looking at the rules:-

Rule 18(7) of the National Assembly and Presidential Election Act Cap. 7 reads:

"The provision of Order XVIII of the Civil Procedure Rules and the Oath and Statutory declaration Act shall apply to affidavits under this rule".

Rule 18 deals with affidavit of witnesses. Namely the procedure laid down under the act is that "not less than 48 hours before the time fixed by the election court for trial of an election petition, the petitioner shall deliver to the office of the Registrar on affidavit sworn by each witnesses whom the petitioner intends to call at the trial, setting out the substance of his trial."

Thus it is the affidavit of those witnesses which would be subjected to order 18 CRP Cap. 21 Laws of Kenya the Oaths and Statutory Declaration Act Cap. 15 Laws of Kenya.

I would agree with Mr. Wamae that rule 18 was dealing with a different category of group of persons. Nonetheless though the Civil Procedure Rules may not apply in Election Petitions I have noted in past case laws that the principal of service of the petition is laid down in similar terms as those of order 5 CPR dealing with service of summons :-

In the case law of:-

Mwai Kibaki v Daniel Torotich Arap Moi (Supra)

Personal service of the petition had been established as a legal requirements. The court of appeal held and 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 of personal service, then the courts must insist on such service".

"It (parliament) has decreed in section 20 (1) (a) that service of election petition must be personal and whatever problems may arise from that, the courts must enforce that law until parliament should itself be minded to change it".

In this election petition, application brought by the 1st respondent is he disputing personal service upon him. In order to argue his application he wishes to cross-examine the deponent to the affidavit of service that states he was served personally. I believe order 5 r 16 CPR can be used as a guide that reads:-

“On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court touching his proceeding and may make such further inquiry in the matter as it thinks fit and shall either declare that the summons has been duly served or order such service as it thinks fit”.

The applicant relied on order 18 r 2 CPR that states:-

“1) upon any application, evidence may be given by affidavit but the court may at the instance of either party order the attendance for cross examination of the deponent.

2) Such attendance shall be in court, unless the deponent is excepted from personal appearance in court, or the court otherwise directed”.

I believe order 5 r 16 CPR is more relevant to this case.

I would hereby allow the 1st respondent leave to cross-examine the process server, one Simon Njoroge Kagai as to his affidavit of service sworn on 18th February 2003 and filed on 21st February, 2003.

The costs will be in the cause.

Dated this 8th Day of April 2003 at Nairobi.

M.A. ANG'AWA
JUDGE

P.M Wamae & Co. Advocates for the Petitioner

Kilonzo & Co. Advocates for the 1st Respondent

No representation for the 2nd and 3rd Respondents.

Ruling read in the presence of:

P.M. Wamae for the Petitioner

With A. Nyaencha

E. Monari) 1st respondent

Kogeto)

Kilonzo Jnr.-) Absent