



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI(Milimani Law Courts)
ELECTION PETITION 2 OF 2003

BETWEEN

ELIAS BARE SHILL.....PETITIOENR

AND

ADEN SUGOW AHMED.....1ST RESPONDENT

JAMA HASSAN GINNI (RETURNING OFFICER FAFI CONSTIUENCY).....2ND RESPONDENT

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

RULING ON SERVICE

By a Notice of Motion dated the 25th day of March 2003, the applicant, 1st Respondent, Aden Sugow Ahmed prayed for the following orders:-

- “1 That the Petition herein dated and filed on 15th January, 2003 be struck out on the grounds that the same was not personally served on the first Respondent within 28 days after the date of the publication of the result of the Parliamentary Election in the Gazette or at all; and
- 2) That pending the hearing and determination of this application all proceeding hearing be stayed; and
- 3) That the petitioner do pay the costs of the First Respondent in respect of the petitioner as well as costs of this application”.

Before the application was heard, the advocate for the 1st respondent requested that the deponents of various affidavit be cross-examined. By a ruling dated the 8th of April 2003, this Election Court allowed the application to have the deponants cross-examined as to their affidavits.

A brief background of this application is as follows:-

Alias Bare Shill, the petitioner herein contested the Parliamentary Elections for the FAFI Constituency and lost the elections to Aden Sugow Ahmed the 1st Respondent herein. He filled a petition challenging the results of that election on the 15th day of January 2003. This was after a declaration was published in the Kenya Gazette on the 3rd of January, 2003, that the 1st respondent was the elected member of parliament.

A process server named Siemon Njoroge Kagai filled an affidavit of service dated the 18th of February, 2003, on the 21st of February 2003, claiming that he had personally served the first defendant on the 21st day of January 2003 with the said petition.

The 1st Respondent filed a notice of appointment of advocates under protest dated the 5th of march 2003 and filed on the 6th of March 2003. He then filed his first application dated the 10th of March 2003 requesting that this election court strike out the petition dated the 15th of January 2003 on the grounds that the petition was personally served on him, the 1st Respondent, within the requisite 28 days.

This application was withdrawn and two other applications were filed both dated the 24th of March 2003.

The first application marked “A” for ease of reference, sought the same prayers for striking out the petition for lack of personal service.

The second application marked “B” sought for leave to cross examine the process server who served or alleged to have served the 1st respondent.

By a ruling dated the 8th of April 2003 this court allowed application “B” and permitted the process server to be cross-examined on his affidavit of service. The parties thereafter agreed that the 1st respondent be cross-examined as to his affidavit to his application - the subject of this

ruling and the petitioner be cross-examined as to his replying affidavit to the application.

The cross-examination of these three together with the hearing of the application Chamber Summons dated the 25th of March 2003 was set down for hearing on the 14th of May 2003. The issue before the court concerned service only; namely:-

“Was the 1st Respondent personally served with the petition herein?

I shall summarise the findings of the cross-examination and the arguments put forward in the application of 25th March 2003.

A: THE CROSS-EXAMINATION OF DEPONANTS

Siemon Njoroge Kagai, a process server stated that he has been a process server since 1990. Prior to this he was a court clerk at the law courts and other stations in the judicial department. He stated that prior to 1999, no documents was issued except an authority letter to show that he was an authorised process server.

According to his affidavit and the evidence deduced in cross examination, he was instructed by M/s P.M. Wamae and Co. advocates to serve a copy of:-

- i) The petition
- ii) Notice of a presentation of an election petition.
- iii) Notice of acceptance of instruction”
- iv) Receipt by the Registrar High court – Nairobi.

Upon the declared member of Parliament for FAFI Mr. Sugow. At that time, this person was unknown to him. The petitioner together with the petitioner’s driver took him to Eastleigh on the 17.1.03. je stated that the drivers name was one Joshua Wanyama. At Eastleigh along the 1st Eastleigh Avenue and the junction of the 12th Eastleigh Avenue he was taken to an office said to be that of the 1st Respondent. This office carried on a business of transportation of passenger buses known a Gashan. The process server had not known before that the 1st respondent had in fact owned this business. He had gone to the said premises with the driver, J. Wanyama. The petitioner had gone to a nearby lodging.

The two waited for the 1st respondent from 9.00 a.m. to 4.00 p.m. outside those office premises. The two went to the lodging where the petitioner had been waiting. There was information that the 1st Respondent would come to the lodging to see an uncle to the 1st respondent. The lodging was called in Dubat, area, AINU QAMAR.

This two waited for the 1st respondent from 9.00 a.m. to 4.00 p.m. outside those office premises. The two went to the lodging where the petitioner had been waiting. There was information that the 1st Resident would come to the lodging to see an uncle to the 1st respondent. The lodging was called in Dubat, area, AINU QAMAR.

This uncle was called Rabat (at the time the process server was in the witness box, he brought it to the courts attention that the said uncle was seated in court. The advocates to the parties stated they did not require him to be examined by any of them).

Nonetheless the process server and the driver waited till the evening when the process server stated that the law would no allow service be done after 6.00p.m. He abandoned any attempts to wait further for the 1st respondent. He nonetheless received information that the 1st respondent attended the appointment later at 9.00p.m.

The following day, the petitioner came with another person stating that he would be able to show where the 1st Respondent house was in Nairobi West near the Mosque. As they neared the Nairobi West area, near the Mosque in South C the petitioner stated that he in fact knew of the house and that the 1st respondent no longer lived there. The search for the 1st Respondent in that area was abandoned.

On the 20.1.03, they received information that one of the 1st respondent close relative would show them the house but only at night. At about 9.00p.m. of the 20.1.03, the informant, the process server, the driver and the petitioner proceeded to Raira Road and the informant directed them to a house No. 15 Raira Villas. They left that night without entering into the house. There was a motor vehicle, dark green in colour, make Toyota parked outside the house. It was then agreed that the process server spends the night in the City Centre on the following day, that the driver would pick him in the morning of 22.1.2003. The process server did this. On being picked up by the driver, the went and picked up the petitioner. They then went to the Raira Villa’s house No. 15 along Raira Road.

According to the process server and the petitioner there was a main gate that entered into a compound of several houses. There were guards at this gate who enquired where they were going. When they informed them they were let in. it was then that they drove to house No. 15 a young lady and a school going child in uniform emerged from the house. The petitioner asked if the young child’s father was in. the child said yes. The young lady also acknowledge that the wife was in. they went into the house and there found the wife to the 1st respondent seated in the sitting room. She greeted the petitioner by referring him as teacher.

It transpired that the petitioner had indeed taught the 1st respondent’s wife. She then married the 1st respondent. After exchanging pleasantries she was asked whether the husband was in. she called her husband who came after 20 minutes. He had wrapped around his waist a Kikoy. It appeared that he had just woken up. They exchanged pleasantries and then the petitioner introduced the process server to the 1st respondent. The process server admitted that he himself did not introduce himself to the 1st respondent but he did notify him of his business, that of serving the papers pertaining to an election petition on the 1st respondent.

The 1st respondent took his copies but refused to sign the same. He requested that he be given time to read the documents and if the process server would come to parliament at 11.00a.m. where he could sign the same. The process server informed the petitioner that he had in fact served and thus nothing remained to be done. That service at Parliament was not permitted. There was need to go there afterwards.

Not being satisfied, the petitioner came to the High Court and confirmed with the Registrar, Mr. Ouko that this indeed was the correct position, the registrar called another officer to confirm this.

The 1st respondent on being examined stated that he indeed swore an affidavit marked "C" of 25.3.03. he stated in court that he indeed has never seen the process server before until 14.5.03 when he came to court.

He admits that he has two homes. One in South C and another at Riara Villas. That he runs a bus business in Eastleigh together with a lodge business.

He had never heard of any election petition through the media but he became aware of the election petition through the Kenya Gazette Special Notice.

As to the service of the papers on him, he denied any knowledge of this. He informed the court that the petitioner is a relative of his and they came from the same area. He had not seen the petitioner until the time when Parliament was opened.

On the material day in question he would have been in the house at South C and not in Nairobi West. He had two wives. One lived in South C and the other lived in Riara Villas according to his driver's affidavit, he was dropped in Nairobi South "C" and was still there up to 22.1.03. on 23.1.03 the 1st respondent stated that he was indeed still in South C.

On the morning of 22.1.03 the driver one Omar Mutat Ali deposed that he was at Riara Villas and was washing the vehicles. He saw no visitors come that morning to the house.

Apart from the petitioner, 1st respondent and the process server it was only Omar Mutat Ali who deposed to an affidavit in support of this application to strike out the petition. Both parties informed the court they did not wish for him to be called and be examined as to his affidavit.

I am therefore called upon to determine whether the 1st respondent was personally served with the petitioner to this case or not.

The advocate for the 1st respondent pointed out to me the contradictions that came about as a result of the cross-examinations of the process server and parties. These were briefly:-

- i) When they entered the Riara Villas to serve, the process server stood but the petitioner said that they sat down.
- ii) The actual registration number of the 1st respondent's green motor vehicle Toyota was not correct.
- iii) The wife to the 1st respondent is said to have worn a green veil yet the process server was unable to recall the colour of the seats in the house.
- iv) In the affidavit of service, the process server failed to state the person who pointed out the 1st respondent.
- v) No evidence was led to show the 1st respondent was avoiding service.
- vi) The process server failed to introduce himself
- vii) There was an alibi by the driver to the 1st respondent Omar Mutat. Because the driver was not cross examined it means that his affidavit is an admission of the facts.
- viii) The petitioner and or process server should have kept the notes of what transpired including the registration number of the motor vehicle for the 1st respondent
- ix) They both said they deposed to facts they knew were within their knowledge yet the sources relied on are not disclosed.

The advocate went on to address me on the main application.

B) The main application

The basis of the application is found under section 20(1) (a) of the National Assembly and Presidential Elections.

"20 (1) A petition

(a) To question the validity of an election shall be presented and served within 28 days after the date of publication of the result of the election in the Gazettee."

The validity of this election petition is based on whether or not the 1st respondent was served. The case law governing service is that of:-

- i) Mwai Kibaki

v

Daniel Arap Moi

Thus, where a person has been elected and sends to the Registrar of the High Court his address for service then there is no need to comply with the personal service.

If this was not done then personal service is imperative. The advocate touched on the following case laws on this point

ii) Mudavadi v Kibisu & Another

1970 EA 585

The issue was of service. The returning officer was not served. It was held that he must be served.

iii) David Muratha v S.K. Macharia

CA 17/98

The case held service is important and must be personal

iv) E.K. Maitha v Said Hamed Said

C A 292/98

Emphasizing elections laws are strict

v) Mayers & Another v Akira Ranch Ltd.

1974 E A 69

The election courts have authority to struck out affidavit found to be oppressive

vi) Assanads & Sons (Uganda) Ltd. V E A Records Ltd.

(1959) EA 360

One director was not called to be examined by his affidavit. The Court of Appeal relied on the affidavit to the exclusion of all others in allowing the appeal. Thus the failure to call Omar Mutat the 1st respondent.

At page 364 of the authority letter G-H
The affidavit:-

“Did not set out deponents means of knowledge.

Did not distinguish between stated or information and belief and matters desponed to from deponents knowledge”.

vii) Standard Goods Corp v H.Nallin

(9159) 17 EACA 50

It was held that the source and information of a particular fact are specified such information should not be acted on.

Because of the foregoing the affidavit of service being wanting petition should be struck out.

In reply the advocate for the petitioner stated that there is a distinction between challenging an affidavit and not availing oneself to the cross-examination you do not need to challenge what is clearly does not affect your case. As there was no need to challenge the motor vehicle there was no need to cross-examine the witness.

The service upon the 1st respondent was effected. He failed to sign the papers. The petitioner after service had nine days to serve and yet was satisfied with the serve and attempted no further service thereafter. Courts, it was argued, should sparingly strike out election petition.

From the arguments and evidence put forward by both parties I find that the 1st respondent was indeed served with the petition papers in his house at No. 15 at Riara Villas along the Riara Road in the presence of the petitioner.

I now look at arguments that has raised technical points by the advocates for the 2nd and 3rd respondents and who had just come on record.

C. Technicalities

In the cross examination of the process server it transpired that he may not have physically sworn his affidavit before a commissioner of oath. It also transpired that the 1st respondent signed his affidavit but not before a commissioner of oath.

Both the advocates for the 1st respondent and petitioner did not take this point as, according to the petitioners advocate, it would open up a “pandoras box” “silence is golden”.

I believe this point is important. Many years ago Mr. Adere, for the petitioner was summoned to an election court himself to confirm whether the witness who swore an affidavit before him actually did so. I believe that court did not peruse the matter further when the witness was able to identify the advocate.

It is a common practice amongst advocate to take a bunch of affidavits to a commissioner of oaths without the deponents being physically present. The affidavits are then signed. The fact is that it is not true that the affidavit was sworn and signed before the said commissioner of oath. This is not the fault of their client.

I conclude that the arguments put forward by the advocate for the 2nd and 3rd despondent is, if in the first instance the affidavit of the process server and the 1st respondent is technically not an affidavit for lack of not being deponed to, then the said affidavits are of no consequences and should be struck out. The effects of this would be there was no service effected and thus the petitioner should be struck out.

I believe that such arguments should have, in the first instance, have been raised as a preliminary objection and before the cross-examination of the witness whom we have heard.

The issue of affidavits of witnesses under rule 18 (7) of the National Assembly and Presidential Elections should be applied and taken note of.

In this instance as the hearing on the issue of service is complete and this is being brought at this late stage.

I would rely on the
Section 23 (1)(d)

“In exercise by an election court of its jurisdiction - (d) an election court shall decide all matters that come before it without undue regard to the technicalities.”

I would in the circumstances let matters lie save that the commissioner of oaths who signed the documents in the absence of the deponents be referred to the disciplinary committee through the advocates' complaints commission for further action by that body. The names of the concerned advocates are stated separately elsewhere.

As to the application before me I would dismiss the same with costs to the petitioner/respondent.

Dated this 27th day of May 2003 at Nairobi.

M.ANG'AWA
JUDGE