REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

ELECTION PETITION NO 7 OF 2003

ANDREW MBITHIN MUIYA …..……..... PETITIONER

VERSUS

JOSEPH NYAGA

FESTUS KIRAI MUGA

ELECTORAL COMMISSION OF KENYA…..RESPONDENTS

RULING

The 1st respondent's notice of motion dated 2.4.03 is brought under section 20 National Assembly and Presidential Elections Act Cap 7) hereinafter, the Act. The main prayer therein is that the petition dated 21.1.03 be struck out for lack of service within the prescribed time and in a prescribed manner. The other prayer is for costs.

Mr P Nowrojee, assisted by Mr D Maanzo argued this application as per the eleven (11) grounds set out, supported by the 1st respondent's affidavit and with reference to the authorities that both sides put forth. Mr Kilonzo Jr opposed the application while Mr Mbaya for the 2nd and 3rd respondents supported it, even as he filed no papers in that regard.

The Court heard that the results of the parliamentary election held on 27.12.2002 in Gachoka constituency, wherein the 2nd respondent was declared the winner over the petitioner, were published by gazette notice of 3.1.2003. That the petitioner apparently not satisfied with those results filed and presented the petition in question on 22.1.2003. But that even with that, the 1st respondent was never served with that petition within 28 days from the date the results were published. That this was contrary to section 20 (1) of the Act. That the statutory 28 days ended on 31.1.03 and that indeed there had been no service of the subject petition by whatever mode. That on expiry of the 28 days before service, the petition ceased to be of any efficacy and thus became a nullity thereafter.

The Court further heard that the petitioner then came to court and filed a notice of motion on 5.6.2003. That the prayers in that motion were laid under section 20(1) (a) of the Act and rule 14(2) of the Electoral Petition Rules (EPR). The orders were first that the petitioner be heard *ex parte.*

Further that the service of that notice of motion could thus be dispensed with but then the Court would give directions as to hearing *inter partes.*

The other prayers were that the Court do order that the 1st respondent be served by way of substituted

service by advertisement in a newspaper.

And that, by that he would be deemed duly served with the petition. There was an alternative prayer though and that is that the 1st respondent be deemed to have been served by the notice of 31.1.03 regarding filing of the petition. Mr Nowrojee told the Court that the Court gave the petitioner leave to "serve" the petitioner by way of newspaper advertisement and on 8.7.2003, "service" was effected.

The Court further heard that with that 1st respondent was deemed duly served and so the petitioner took no steps to obtain directions as to hearing of his application *inter partes.* It may as well be that the respondents were not served with the notice of motion bearing a date of its hearing. That accordingly, and to this day, the 1st respondent did not reply to that application explaining the facts on which the petitioner relied to obtain *ex parte* orders to effect substituted service. It was however posited that this purported service of 8.7.2003 was invalid because it fell far out of the statutory 28 days. Mr Nowrojee or Mr Mbaya who supported the present application did not seem to challenge the powers of a court other than an election court to give such orders as the petitioner got on 6.2.03. Or indeed whether the Act permitted service of a petition by advertisement in a newspaper as if the election petition was a plaint governed by the Civil Procedure Act and Rules.

As Mr Nowrojee focused more on section 20 of the Act and not so much on the Election Petition Rules, the *Mwai Kibaki v Daniel Arap Moi* CA No 72/1999 feature high in the authorities relied on.

The case of *Re An Application by Gideon Waweru Gathunguri* [1962] EA 520 was cited and stress was laid on the principle of law that rules of court could not defeat the clear provision of section 20 which set the absolute period of limitation of 28 days. And so the move by the petitioner to enlarge time within which the petition would be filed and served, was considered of no avail. In sum the Court was told that personal service was not effected on the 1st respondent at all within 28 days and the mode employed by the petitioner was of no validity. Mr Mbaya concurred with Mr Nowrojee in most of the above, save to add that the petitioner in his affidavit seeking orders for substituted service had admitted that he had not served the petition in the 28 days from the day the election results were gazetted. That enlargement of time beyond 28 days did not thus lie. Mr Kilonzo did not concede all the above. To him the vital question to be answered by this court was: Was this petition served in any manner under the Act? That the answer must be in the affirmative. That since the 1st respondent had not complied with rule 14 EPR the petition could be served through a gazette notice.

That the *Mwai Kibaki* case had mandated that where service could not be effected due to impractical circumstances like where the 1st respondent either hid away or by all means kept out of the way so that he could not be served, the petitioner would "go to the High Court for personal service."

That that is exactly what the petitioner did here and there had been no application by the 1st respondent to set aside the order for substituted service.

That when Kuloba J allowed service by newspaper advertisement because it was not practical to serve this party by any of the modes envisaged under section 20 of the Act and rule 14 (2) EPR. That here petitioner should be seen to have served the petition even by gazette notice (published on or about 31.1.03) where upon it should not be struck out at all. While conceding that where a respondent is not served with a petition it should be dismissed (see *Mudavadi v Kibisu* [1920] EA 585), the Court was told the present case was unique. That the affidavit supporting the application for substituted service spoke of all attempts for personal service of the petition herein which ended in nothing. That that affidavit remained unrebutted and so it stood. But it will be recalled that Mr Nowrojee submitted that the application that gave the *ex parte* orders to the petitioner for substituted service was never set down for hearing *inter partes* by the petitioner whereat the 1st respondent would have challenged it. Mr Kilonzo then referred to the Election Petition Rules of 1868 of the UK whose rule 14 is more or less similar to our rule 14. That law provided that a judge could order a mode of service of a petition. Much as it may sound attractive to cite that UK law, we have our own EPR and they do not have a provision for a judge to order for any mode of service of a petition. Neither does section 20 of the Act. Mr Kilonzo wondered, and perhaps rightly so, as to whether Parliament meant that a petitioner who found himself in the

circumstance like that of his client had no recourse for relief in the law. That the constituents of Gachoka had their constitutional rights at stake. Yet it was being made to appear that where service of a petition was impossible that was the end of road for them. Before Mr Nowrojee responded to Mr Kilonzo's reply, Mr Mbaya rose to press for costs in these proceedings. Mr Kilonzo had posited that since the 2nd and 3rd respondents filed no papers in these proceedings then they were not entitled to costs in the event this application was not successful. Mr Mbaya maintained that in the event of this application being dismissed, still costs must go to his clients because they did not need to file any papers to support the application. Only one desirous of opposing it would be obliged to do so. Mr Nowrojee then rounded up his plea that this application should succeed. That this petition was not unique on the claim that the 1st respondent evaded service. That the Court of Appeal addressed that point in the *Mwai Kibaki* case and found that nothing turned on such as basis and that only

Parliament had the mandate to address situations where a petitioner found it near impossible, if not so, to serve a petition. Having heard all the above and gone over the pleadings, depositions, previous proceedings here plus the authorities presented, this is the court's determination here. It begins with section 20 of the Act which reads in the relevant parts:

"20. (1) 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.

(b) ..... (c) .....

(2) ..... (3) .....

It is not in doubt that this petition questions the validity of the 1st respondent's election as the Gachoka Member of Parliament, on 27.12.02 which was gazetted on 3.1.2003. Many allegations are raised in the petition eg of using undue influence over the voters and corrupting them, hosting and entertaining election officials and colluding with them etc. Accordingly the petitioner prayed this court to find so and nullify the said election. Similarly it was not in dispute that the election results were gazetted on 3.1.03. Both sides accepted that from that day, any petition to question that election result was to be presented and served within 28 days (s 20). And that arithmetically those 28 days were to end and they ended on 31.1.2003. It can be seen that as at 22.1.03 when the petition herein was presented, the petitioner had only 10 days to serve it on the respondents.

That is the law as of now. It is also not in dispute that the petition was not served on the 1st respondent latest by 31.1.03. He claims, and all sides are not at variance on the point that after 31.1.03, the petitioner went to court and on 6.2.2003 got orders to serve the petition on the 1st respondent by publication in a local newspaper and that was done on 8.2.03. So with the strict and absolute provision of s 20 of the Act this was no service at all. If the law allowed service by advertisement, and this we shall consider soon, that service was invalid as being against the law. The law states in no uncertain terms that presentation and service of a petition as the case was is here, must be within 28 days from the date of publication in the gazette of the election result.

On this strictness, this Court has one thing or two to say: Elections are serious matters of a state with its citizens. As elections are held, the outcome announced, the electorate must know their political leader quickly and assuredly. There must be limited or no uncertainty about this. Roles of elected representatives are many and diverse *vis a vis* their electors. To perform the roles well the elected must be sure of his post and the elector of his leader. And the sooner the better to give that certainty. So either the election is accepted at once or if challenged, that challenge must be moved along to the end swiftly enough to restore certainty. And for that, election petitions are governed by this Act with its rules in a very strict manner. Election petition law and the regime in general, is a unique one and only intended for elections. It does not admit to other laws and procedures governing other types of disputes, unless it says to itself. Here it spells out firmly and clearly that a petition must be presented and served within 28 days of the publication of election results. Anything outside that time is invalid and this one here is thus invalid.

The Court was told that after 28 days in fact the petition itself became invalid and therefore a nullity that even serving it by any mode could not breathe life in it. That it could all be a futile exercise. This Court tends to agree that such a petition, as is here which is incompetent, is actually a nullity. It can serve no other purpose but should be struck out.

In the election Civil Appeal No 172/99 (above), the *Mwai Kibaki* case, the petition started in the High Court by way of notices of motion before there judges and the question of service was central. The learned judges were satisfied that no service or valid service was effected on the respondents and is ruled so. The petitioner appealed. Five Judges of Appeal dismissed the appeal (actually it was a consolidated appeal No 172 and 173 of 1999) affirming the High Court decision and making such other findings therein that were necessary to be made. This Court will remark on the applicable ones here and on the others as and when they appear relevant. That election case concerned the 1997 general election whose results were gazetted on 5.1.98.

Let us begin with the fate of a petition whose time has expired before it is served. In the *Mwai Kibaki* case after the result was published on 5.1.98, on 29.1.98, he published a notice, as it were, to serve the respondents with the petition presented to court on 22.1.98. The 1st respondent there, Daniel Arap Moi, then took out a notice of motion praying that the petition be struck out because it was never personally served on him within 28 days of the publication of election result. In the present case we will focus on the course the litigation took around Daniel Moi (the 1st respondent) and the 1st respondent here. While considering section 20 of the Act, the Court of Appeal went over several cases including its decision in *Alicen J R Chelaite v David Manyara Njuki & 2 others* CA No 150/98. Then it delivered itself:

"Then it was contended that the petition was incompetent because though presented within the prescribed period of twenty eight days, yet it was incompetent because it was served outside the prescribed period. This contention was upheld by the High Court and the Court of Appeal and the petition was struck out as in-competent. What would constitute the general principle, the *ratio decidendi*, which would be applied in all subsequent cases is that since section 20(1) (a) of the Act prescribes twenty eight days as the period within which a petition must be served any petition which is served outside that period is incompetent and must be struck out. It is this general principle which would be binding on the courts."

The principle does bind this Court here and the result is that this petition is struck out. This court was not asked to say something about personal service as the basis to strike out the petition but Mr Kilonzo did comment on this in a serious way. That his client tried to serve the 1st respondent but was unsuccessful. That it then went by rule 14 EPR and published a gazette notice otherwise his client's rights and those of the constituents were doomed.

In the *Mwai Kibaki* case, the learned judges, considered both personal service and the fate of rule 14 EPR. Of the latter they said:

"We accordingly agree with the High Court that section 20 (1) (a) of the Act is in direct conflict with rule 14 and that being so rule 14 must give way to the plain words of section 20 (1) (a) of the Act. Indeed under section 20 (1) (a) of the Act, all that one needs to serve is a copy of the petition but we would have no quarrel with it if a party chose to include an unnecessary document like a notice of presentation....."

They continued: What we are saying that election petitions are of such importance to the parties concerned and to the general public that unless Parliament dispensed with the need for personal service, then the courts must insist on such service. We cannot read from section 20 (1) (a) that Parliament intended to dispense with personal service.

Even under rule 14(2) of the rules personal service was not dispensed with. The other modes of service were only alternative modes of service to personal service.

That is why in the various other cases quoted to us personal service was always described as the best form of service."

Then:

In the event we are satisfied the three judges of the High Court were fully justified in holding that as the new law stands only personal service will suffice in respect of election petitions filed under section 20 (1) (a) of the Act ..... It has been decreed in section 20 (1) (a) that service of election petitions 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." Much as this Court may be of the view that the alternative modes of service under rule 14 were not done away with, the petitioner's case is hereby sealed. Anyway his case did not go this far ie regarding the mode of service provided by law. He presented his petition within time but did not accordingly serve it. Assuming that the alternative modes of service under rule 14 are still intact, they do not include substituted service. Again the purported service of the petition, which anyway fell outside the statutory period, would as well have been declared unlawful and invalid.

The other point which is by the way *vis a vis* these proceedings could be something like this: section 20 of the Act as well as rule 14 EPR do not contain any provision by which a court can either enlarge time within which to serve a petition or order other modes of service. Neither are the principles governing general civil litigation permitted to find a place in election petition legal regime.

In the case of *David Mukaru Murathe v Samuel Macharia* CA 171/98

Tunoi JA said:

"Further since election petitions have elaborate procedures of their own relating to filing and serving election petitions the Civil Procedure Rules and any other statutes should not be applied when computing time....."

And because this was not an issue to be determined here, the less said of it the better. But this Court holds a view that except for affidavits of the witnesses (rule 18) where order 18 Civil Procedure Rules and Oaths and Statutory Declarations Act apply the entire Act and rules do not allow applications of any other statute. One should not even dream of amending a petition.

In sum the orders sought are granted. Costs to all the respondents in the petition. This Court is satisfied in the circumstances of this application, that the 2nd and 3rd respondents do not get costs. They supported the 1st respondent in it, yes, but since they did not file their own application to strike out the petition for non-service it is assumed that they were duly served.

Orders accordingly. The petition herein is struck out.

Dated and delivered at Nairobi this 11th day of July, 2003

J.W. MWERA

……..

JUDGE