



**Obwoye & 2 others v Independent Electoral & Boundaries Commission & 4 others; Jubilee Party & 7 others (Interested Parties) (Election Petition Appeal E002 of 2022) [2023] KEHC 1685 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1685 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
ELECTION PETITION APPEAL E002 OF 2022  
GMA DULU, J  
MARCH 14, 2023**

**BETWEEN**

**SAMUEL OBWOGE ..... 1<sup>ST</sup> PETITIONER  
ESTHER MORAA NYABAO ..... 2<sup>ND</sup> PETITIONER  
ALICE MAOBE ..... 3<sup>RD</sup> PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT  
WAFULA WANYONYI CHEBUKATI ..... 2<sup>ND</sup> RESPONDENT  
COUNTY GOVERNMENT OF TAITA TAVETA ..... 3<sup>RD</sup> RESPONDENT  
THE GOVERNOR – TAITA TAVETA COUNTY ..... 4<sup>TH</sup> RESPONDENT  
CLERK OF THE COUNTY ASSEMBLY TAITA TAVETA  
COUNTY ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**JUBILEE PARTY ..... INTERESTED PARTY  
ORANGE DEMOCRATIC MOVEMENT ..... INTERESTED PARTY  
PAMOJA AFRICAN ALLIANCE ..... INTERESTED PARTY  
WIPER DEMOCRATIC MOVEMENT ..... INTERESTED PARTY  
UNITED DEMOCRATIC ALLIANCE ..... INTERESTED PARTY  
TUJIBEBE WAKENYA PARTY ..... INTERESTED PARTY  
PEOPLE’S EMPOWERMENT PARTY ..... INTERESTED PARTY**



JUDGMENT

1. In a Ruling delivered on 31<sup>st</sup> October, 2022 the Principal Magistrate at Voi struck out the election petition filed by the Appellants herein and concluded as follows:-

‘In view of the foregoing considerations, it is my finding that there is no service effected on the Respondents in this matter and within timelines stipulated under the law and thus the issue of service determines this petition. The petition is struck off. There will be no orders as to costs’.

2. Dissatisfied with the Magistrate's court orders striking out of the election petition, the Appellants through Counsel Machora Motuka and Company filed this appeal on 30<sup>th</sup> November, 2022 through a petition dated 4<sup>th</sup> November, 2022. This appeal bears the same number E002 of 2022 relating to the election petition in the Magistrate's Court. The grounds of appeal are as follows:

1. That the learned Magistrate erred in law in holding that lack of physical service and/or through advertisement (in newspaper) of national wide circulation of the main petition upon the Respondents and the Interested Parties within the prescribed timelines, was fatal and grossly incurable in law.
2. The learned Magistrate erred in law by misdirecting herself in failing to understand and appreciate that the trial court had jurisdiction in law to extend the time for service of the election petition upon the Respondents and Interested Parties.
3. The learned Magistrate erred in law in failing to extend time to the Appellants to effect physical service upon the Respondents and Interested Parties.
4. The learned Magistrate erred in law by misdirecting herself on the question of service and just framed general issues that lacked a bearing on the matter at hand and hence causing gross injustice.
5. The learned Magistrate erred in law in dismissing and/or striking out the main petition on account of lack of strict compliance with the rules on service given the circumstance.

3. Relying on the above grounds of appeal, the Appellants have asked this court to set aside the Ruling of the trial court, extend time to them to effect physical service, and for the petition to be heard and determined by a different Magistrate at Taveta.

4. In response to the appeal, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through Counsel Hassan Osman and Associates filed grounds of opposition in the following terms:

- a. Service of an election petition is either direct or by advertisement in a newspaper with national circulation as stipulated under Article 87(3) of the *Constitution* and reflected in Section 77 (2) of the *Election Act*.
- b. Extension of timelines for election petition cannot be done *suo moto* but by a formal application to the concerned parties.



5. The appeal was canvassed through written submissions. In this regard, the Appellants Counsel filed written submissions on 10.2.2023 and the 5<sup>th</sup> Interested Party's Counsel Adrian Kamotho Njenga and Company filed submissions on 5<sup>th</sup> March, 2023.
6. The other parties did not file written submissions in the appeal but the 1<sup>st</sup> and 2<sup>nd</sup> Respondents appear to have relied on the grounds of opposition filed.
7. Having considered the memorandum of appeal, the grounds of opposition of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the submissions filed by the Appellants and the 5<sup>th</sup> Interested Party, in my view the issues for this court's decisions are firstly whether the Petitioners complied with the law in serving the Petition. Secondly, whether the court can extend time to serve the petition. Thirdly, whether the trial court erred in striking out the petition. Lastly, who bears the costs.
8. All parties Counsel appear to agree in their submissions, that election petitions are special proceedings. They are neither criminal nor civil proceedings. Their procedure and processes are specifically governed by the Constitution and the other written election laws, the main one of which being the Elections Act No. 4 of 2011 and regulations made thereunder.
9. The Appellants Counsel has clearly stated that the petition was served through electronic means, and has given reasons such as urgency and lack of information on the addresses of the Respondents and Interested Parties. I note however that the address for service on the Independent Electoral and Boundaries Commission is provided for under statute and statutory regulations, thus it cannot be said that their address for service is uncertain or unknown.
10. Coming back to the first issue whether the admitted mode of electronic service was proper or legal, Article 87(3) of the Constitution provides as follows:

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- (3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.

11. The above constitutional requirement is also captured in the Elections Act and Rules. The Elections Act under Section 76 (1)(a) in particular provides as follows:

76

- (1) A petition
  - a. To question the validity of an election shall be filed within twenty-eight days after the date of declaration of the results of the election and served within fifteen days of presentation.

12. The statutory rules under Rule 10(1)(a) and (b) of the Elections (Parliamentary and County Elections) Petition Rules 2017, provide as follows:

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- (1) Within seven days after filing of a Petition the Petitioner shall serve the petition on the Respondent by:
  - a. Direct service, or
  - b. An advertisement that is published in a newspaper of national circulation.



13. It follows therefore from the above provisions under the Constitution, the Elections Act and the Elections Rules, that the mode of service of an election petition is legally circumvented and different from service of process in other litigations. There are only two modes of service provided by the Constitution and under the Elections Act and Rules. Such service of election petition is either by direct service or advertisement in a newspaper of wide national circulation. There is no other permitted mode of service. Thus other modes of service as recognized under the Civil Procedure Act and other Rules like postal service or electronic service, are not applicable in election petitions.
14. Such other purported mode of service would be at variance with the Constitution and thus unconstitutional as the Constitution itself provides for the mode of service applicable to election petitions.
15. I thus find that the purported electronic service of the election petition herein was not valid service or service of the petition at all, as the Petitioner did not comply with the requirements of the Constitution and the applicable law.
16. I now turn to the issue whether the court had the power to extend the time for service of the election petition.
17. The Petitioners Counsel has argued that though there exists time frames for filing and determination of a petition, the election petition court has residual power in the interest of justice to extend time for compliance including extension of time to serve an election petition.
18. I note that the Petitioner's Counsel has relied on Rule 19 of the Elections (Parliamentary and County Elections) Petition Rules 2017 for his contention that the trial court had power to extend the time within which to serve the petition herein. The said rule provides as follows:
  - 19  
    - (1) Where any act or omission is to be done within such time as may be prescribed in these rules or ordered by the elections court, the election court may for the purpose of ensuring that injustice is not done to any party, extend and limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court has expired.
    - (2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.
19. I note that Rule 10(1) of the election petition rules, provides that election petitions be served within seven (7) days after filing.
20. On the other hand, Section 76 (1)(a) of the Elections Act provides as follows with regard to the period for service of petitions:-

76 (1) A Petition –

  - a. To question the validity of an election shall be filed within twenty-eight days after the date of declaration of the results of the election and served within fifteen days of presentation.
21. Rule (10)1 provides for 7 days to serve the petition, while Section 76(1)(a) of the Elections Act provides for fifteen days to serve.



22. In my view it will follow from the above provisions of the *Elections Act* and *Rules*, that the court can extend the seven (7) days period for service provided under the Rules, but such extension of time cannot exceed the mandatory fifteen days provided under the *Act*. The fifteen days statutory time provided for service of the Petition being governed by the word 'shall' which appears in the same statutory clause with the period for filing the petition, cannot be separated or delineated. The statutory period of fifteen days for service of the election petition is mandatory and cannot be extended by the court.
23. I thus find that the Magistrate's Court had no jurisdiction to extend the time to serve the petition, as the Election Petition was filed on 21.9.2022 and thus the petition was required to be served within a maximum of fifteen days which would go only up to about 6<sup>th</sup> October, 2022.
24. I must mention here that though the Petitioner's Counsel in submissions has attempted to blame the court for delays in giving directions before service of the petition, the court is not to blame as the *Constitution*, the *Elections Act* and *Rules* provide that service of the petition is to be done after presentation of the Petition and not grounded on directions to be issued by the court. Such service of the petition should thus have been done by the Petitioner irrespective of whether the court issued directions. The court cannot thus be blamed for failure by the Petitioner and their Counsel to serve the petition within the fifteen days prescribed statutory time which neither the trial court nor this court has powers to extend.
25. On the issue whether the trial court erred in striking out the petition, in my view, the answer is in the negative. The law is clear on this. An election petition which has not been served within the prescribed time ceases to exist as a legal cause and has no business remaining in the court records as a pending litigation.
26. In my view therefore, the trial court did not err in striking out the petition herein as it had not been served within the mandatory time allowed by the law.
27. The last issue I have to deal with is costs. I note that only Counsel for Appellant and the 5<sup>th</sup> Interested Party filed written submissions. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents however filed grounds of opposition and appeared virtually on 7.2.2023 but did not file written submissions.
28. Costs will follow the events. I will award costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the 5<sup>th</sup> Interest Party, as they participated in this appeal.
29. The appeal herein is thus for dismissal with costs.
30. The final orders of this court are thus as follows:-
  1. The appeal herein is hereby dismissed in its entirety.
  2. I award costs of the appeal to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 5<sup>th</sup> Interested Party to be paid by the Petitioners jointly and severally.
  3. If costs are not agreed, the same will be taxed by the Deputy Registrar of this court.

**DATED, SIGNED AND DELIVERED THIS 14<sup>TH</sup> MARCH, 2023 AT VOI, VIRTUALLY.**

**HON. GEORGE DULU**

**JUDGE**

In the presence of:

Otolo – Court Assistant



Mr. Motuka for Appellants

Ms. Katema for Clerk County Assembly 5<sup>th</sup> Respondent

Ms. Kurgat holding brief for Dr. Kamotho for UDA – 5<sup>th</sup> Interested Party

