



**Okacha v Democratic Action Party-Kenya (Dap-K & 3 others (Election Petition Appeal E008 of 2022) [2023] KEHC 17488 (KLR) (16 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17488 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
ELECTION PETITION APPEAL E008 OF 2022**

**DO OGEMBO, J**

**MAY 16, 2023**

**BETWEEN**

**EVANS OKACHA ..... APPELLANT**

**AND**

**DEMOCRATIC ACTION PARTY-KENYA (DAP-K) ..... 1<sup>ST</sup> RESPONDENT**

**THE CLERK, KAKAMEGA COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup> RESPONDENT**

**JOEL CASTINE OKWAKO ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Ruling of the Hon. Principal Magistrate (Hon. J.R. Ndururi) in Kakamega CM, Election Petition No. E007 of 2022 delivered on 2-12-2022)*

**RULING**

**Ruling On Preliminary Objection**

- 1 The appellant, Evans Okacha, filed an election petition against the 4 Respondents, being Election Petition No. E007 of 2022. The same was filed on September 19, 2022. Before the hearing of the said petition, the 4<sup>th</sup> Respondent filed a Notice of Preliminary Objection to the said petition. The same dated October 31, 2022 was filed in court on the same date. The objection raised the following grounds:-
- i. That the petitioner contravenes the provisions of Article 87 (3) of *the Constitution* of Kenya.
  - ii. That the election petition contravenes the provisions of Section 77 (2) of the *Elections Act*.
  - iii. That the election petition contravenes the provisions of Rule 10 of the *Elections (Parliamentary and County Elections) Petition Rules*.



- iv. That the Petition contravenes the mandatory requirements of service of Election petitions as stipulated under the pertinent laws.
2. The Honourable trial magistrate was obliged to consider the preliminary objection raised ahead of the hearing of the petition. In the ruling of the court delivered on December 2, 2022, and extracted in the decree of the court issued on December 14, 2022, the court decreed as follows:-
    1. That the petitioner did not serve the Respondents as required by the Law.
    2. That the petition cannot stand, and must be struck out.
    3. That the petition is hereby struck out with costs to the Respondents.
    4. That in view of the fact That the petition did not proceed to full hearing, the costs are capped to Kshs 50,000/= for every Respondent.
  3. The petitioner, aggrieved with the above finding of the lower court has now filed an appeal before this court against the findings of the trial court. The rather long Memorandum of Appeal filed by the petitioner on December 16, 2022, lists the following grounds:-
    1. That the learned trial magistrate erred both in law and fact by allowing preliminary objections on the issue of service which was admittedly contested and requiring evidence in defence of precedents set by superior courts which were placed before him, being:
      - a. *Mukisa Biscuits manufacturers Ltd v Westend Distributors Ltd* (1969) EA, 69, in which the court held;
 

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption That all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs, and on occasion, confuse the issues and this improper practice should stop.
      - b. Nairobi High Court constitutional Petition No. E260 of 202 (incomplete), Bonface Akusala and Another - vs- Law Society of Kenya and 12 others;
      - c. *Oraro v Mbaja* (2005) 1 KLR 141.
      - d. *IEBC v Jane Cheperenger and 2 others* (2015) eKLR.
    2. That the learned trial magistrate erred both in fact and law by striking out the petition without an application for striking out.
    3. That the learned trial magistrate misdirected himself in disregarding the applicant's submissions and failing to even attempt to address the issues raised by the Applicant on the content of the Preliminary Objection.
    4. That the learned magistrate erred in law and fact by denying the appellant leave to file supplementary Affidavits is disregard of the Court of Appeal case of *Justus Mungumbu Omiti v Walter Enoch Nyambati Osebe and 2 Others* [2010]eKLR.
    5. That the learned trial magistrate erred in law and fact in holding That evidence could be tendered through cross examination of 1 process server when the petition was served by 3



process servers but only 1 Affidavit of Service had been filed since it had not been anticipated That service could be contested.

6. That the learned trial magistrate erred in law and fact in holding That the mere fact That counsel for the appellant did not oppose the Respondents' filing their responses out of time, it was admission That the petition was never served yet That is a matter of court's discretion. The court did not exercise the same in the same line of reasoning to hold That since the Respondent's filed responses to the petition, then they had been served.
  7. That the learned trial magistrate erred in law and fact in holding That the letter by the political party, DAP-K, Secretary General which was contested was not evidence of service.
  8. That the learned trial magistrate erred in law and fact by rightfully exercising discretion and allowing the Respondents to file responses out of time at the request of the Respondents and responses were indeed filed pursuant to leave of court and at the same time striking out the petition for want of service.
  9. That the learned trial magistrate erred in law and fact by visiting the curable error of counsel failing to file all Affidavits of service on the Appellant and occasioning great injustice.
  10. That the learned trial magistrate erred in law and fact by sacrificing substantive justice at the altar of curable technicalities.
  11. That the learned trial magistrate erred in law and fact by showing bias (lists) several cases of alleged bias).
  12. That the learned trial magistrate erred in striking out the petition when he had a petition and response for determination on merit.
  13. That the learned trial magistrate erred in fact and in law in failing to appreciate the concept of strictness of electoral timelines in the face of substantive justice.
- 3 The appellant has pleaded That the petition be allowed, and be reinstated with costs. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents have objected to the hearing of this petition. The 4<sup>th</sup> Respondent has filed a Notice of Preliminary Objection dated January 31, 2023.
- 3 This court on March 13, 2023, gave directions That the preliminary objection of the 4<sup>th</sup> Respondent be canvassed first before the hearing of the petition. All parties filed submissions.
- 4 From the side of the 4<sup>th</sup> Respondent, Mr. Malalah submitted first, That the appellant filed his Notice of Appeal at the Milimani High Court on December 16, 2022, only to later to irregularly have the same Notice stamped at Kakamega High Court on January 31, 2023. That as at December 16, 2022, has been filed at Kakamega High Court. That if the record of Appeal and the supplementary Record of Appeal were filed on January 31, 2023, then they were filed out of time and without the leave of court. Counsel cited Regulation 34(3) of the [Elections \(Parliamentary and County Elections\) Petition Rules](#) 2017, that;
- The Memorandum of Appeal under sub-rule (1) shall be filed at the nearest High court registry within 30 days from the date of the Judgment.”
- 5 Counsel relied on [Musa Sirma Cherutich v IEBC & 2 Others](#), Petition No. 13 of 2018, in which the Court of Appeal struck out the petitioner's Notice of Appeal on grounds it had been filed in the wrong registry.



- 6 The 4<sup>th</sup> Respondent went on to consider whether or not there was a valid notice of appeal and record of appeal filed herein. That notice of appeal was filed at Milimani on December 16, 2022, only to be altered to show in Kakamega High Court on 31-1-2023. That the said Notice of Appeal is fatally defective as it has 2 rubber stamps. That 31-1-2023 would be out of time and an affidavit to Section 75(4)(a) of the Elections Act, 2011, That an appeal shall be filed within 30 day of the decision of the magistrates court, which was on 2-12-2023. That the appeal ought to have been filed by January 2, 2023.
- 7 On the issue of service, it was the submissions of the 4<sup>th</sup> Respondent That he was never served with the Notice of Appeal and the Memorandum of Appeal contrary to Rule 34(5) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, That provides;
- "The appellant shall within 7 days of filing the Memorandum of appeal in accordance with sub-rule (3) serve the Memorandum of appeal on all parties directly affected by the appeal."
- 8 Counsel relied on the Court of Appeal decision in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others [2013]eKLR, in which the court opined That the oxygen principles under Article 159 of the Constitution are meant to overthrow rules of procedure and to create an anarchical force from all in the administration of justice.
- 9 Other cases referred to on this point were Sbeiku v Sbeikh (1985)KLR 649 M.S.K v S.N.K [2010]eKLR, and Elvis Anyimbo Sichenga v ODM and 4 Others [2018]eKLR , and Rozaab Akinyi Buyu -vs - IEBC & 2 Others [2014]eKLR, where the Court of Appeal held;
- "As we have shown, service upon the Respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the Respondents went to the root of the petition and the petition could stand where there was failure to serve the same."
- 10 The same thread of finding was further illustrated in the findings of the superior courts in Raila Odinga & 5 Others v IEBC & Others, SPCDK Petition No. 3 of 2013, Kitavi Sammy v IEBC & Others [2018]eKLR and Ayub J. Mwakusi v Mwakere Chirau Ali & 2 Others [2008]eKLR.
- 11 The 4<sup>th</sup> Respondent urged That this petition be dismissed with costs to the Respondents. The 2<sup>nd</sup> Respondent has supported the submissions of the 4<sup>th</sup> Respondent.
- 12 Ms. Wanyoni for the Petitioner, on the other hand, submitted That a preliminary objection is on a point of law and fails where it refers to documents. That the issue of dates are typing errors which can be amended orally in court and cannot render the appeal fatally defective.
- 13 That petitions are filed through e-filing and it is the system That gives the number. That there is no way they would have filed the petition in Milimani. That the dates on the stamps are beyond the control of the appellant. Lastly, That the Respondent was served via email. Counsel urged That this Preliminary objection should be dismissed so That the focus be on the main Appeal.
- 14 I have considered the submissions of the 3 learned counsel who have appeared for the parties herein. I have also considered the application, Affidavits filed in favour and in opposing this petition and the preliminary objection raised by the 4<sup>th</sup> Respondent and supported by the 2<sup>nd</sup> Respondent, and the authorities cited.



- 15 From the submissions made by the parties herein, there are 3 issues for determination in this preliminary objection raised by the 4<sup>th</sup> Respondent and supported by the 2<sup>nd</sup> Respondent. The issues are:
- i. Whether the Notice of Appeal was filed in the wrong registry and High court contrary to Rule 34(3) of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017.
  - ii. Whether there is no valid Notice of Appeal and memorandum of Appeal in this court as they were filed out of time and without leave of the court contrary to provisions of Section 75(A) of the *Elections Act*.
  - iii. Whether the appellant served the Notice of Appeal and Memorandum of Appeal upon the 4<sup>th</sup> Respondent within 30 days of the Judgment pursuant to Rule 34(5) of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017.
- 16 I shall deal with the issues in the order in which they have been raised.
- 17 The objection of the 4<sup>th</sup> Respondent is based on Rule 34(3) of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017, which states;
- "The Memorandum of appeal under sub-rule (1) shall be filed at the nearest High Court Registry within 30 days from the date of the Judgment."
- 18 The above provision dictates on 2 main issues. First That the memorandum of appeal shall be filed at the nearest High Court registry. And second, That same must be filed within 30 days from the date of the aggrieved judgment. There is no doubt That the petition of the petitioner was filed and determined at the Chief Magistrate's court at Kakamega, being Election Petition No. E007 of 2022. It therefore follows That the nearest High Court where the Memorandum of Appeal regarding this matter ought to have been filed in High Court in Kakamega within whose jurisdiction the original petition and have been determined.
- 19 In our instant case, there is a record a Notice of Appeal dated 13-12-2022 filed by the petitioner. On its head, the same has 2 date stamps. First is the stamp showing the same was lodged at the High Court of Kenya at Milimani on December 16, 2022. Superimposed on the same is a stamp indicating That the same was lodged at the registry at the High Court, Kakamega on 31-1-2023.
- 20 The Memorandum of appeal filed herein is dated December 13, 2022. The same is headed, "In the High court at variation Milimani High Court." Same however, has a date stamp of the High Court in Kakamega dated December 16, 2022. What can be deduced from this is That the Notice of Appeal must have been first filed at the High Court at Milimani, Nairobi on December 16, 2022 as proved by the date stamp. The appellant then had the same document stamped at the High Court at Kakamega on January 31, 2023. There is even more material confusion on the pleadings filed by the Petitioner as manifested on the supplementary record of appeal filed. The same is dated January 19, 2023, but prominently stamped December 16, 2022, begging the question of how a document drawn and dated January 19, 2023 could have been filed on December 16, 2022. To this extent, I am persuaded by the submissions of learned counsel for the 4<sup>th</sup> Respondent, That these documents (Notice and Record of appeal) were first filed at the High Court at Milimani, Nairobi, before the petitioner embarked on an attempt at rectifying the anomaly by having the same documents stamped at the registry of the High Court at Kakamega to give the false impression That the same had been regularly filed at the registry of the High Court at Kakamega. The petitioner, and in breach of Rule 34(3) of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017, failed to file the notice of appeal and the memorandum of appeal at the nearest High Court registry.



21 A similar position appertained in the case cited by the 4<sup>th</sup> Respondent of *Musa Sirma Cherutich v IEBC and 2 Others*, Petition No. 13 of 2018, in which the Court of Appeal confirmed the finding of the Hon. Justice Muriithi, by holding;

"On the face of the document That was filed at the High Court at Kabarnet, it was the intention of the 3<sup>rd</sup> Respondent to file the document at the High Court in Kabarnet. This is what the document says on its face. The document also shows That it was lodged with the Deputy Registrar at the High Court in Kabarnet. It cannot therefore be said That the 3<sup>rd</sup> Respondent at any time complied with filing a proper notice of appeal as required by the rules of this court regarding election petition appeals where a notice of appeal must be filed at the registry of the court."

22 The above decision of the Court of Appeal binds this court. I accordingly therefore find That the action of the petitioner of filing the Notice of Appeal and the memorandum and record of appeal at the High Court at Milimani, Nairobi, was against the election petition rules and even on its own, renders the appeal of the petitioner lacking in any merit and fatally defective.

23 The second objection of the 4<sup>th</sup> Respondent to this petition is on whether there is a valid notice of appeal and memorandum of appeal before this court. On this score, the court was referred to Section 75 of the *Elections Act*, 2011, which states;

"An appeal under sub-section 1(A) shall lie to the High court on matters of law only and shall be;

(a) filed within 30 days of the decision of the magistrate court."

24 It was the position of the 4<sup>th</sup> Respondent That the decision of the trial court was rendered on December 2, 2022 and That the appeal ought to have been filed on or before January 2, 2023. But this appeal was filed at the registry at Kakamega on January 31, 2023, out of time. Again the documents of appeal filed by the Petitioner do not in anyway aid the case of the petitioner. From the record of appeal filed, the supplementary record of appeal dated 19-1-2023 is stamped as having been filed at the registry on both December 16, 2022 and January 31, 2023. No original record of appeal is on record. A supplementary record of appeal denotes That the petitioner had already filed the record of appeal as envisaged in the above Section 75(4)(a) of the *Elections Act*, 2011.

25 As regards the dates on the face of the supplementary record of appeal, again it is not feasible That a document dated 19-1-2023 would be filed and stamped at the registry on 16-12-2022. And even if one were to go with the other date stamp of 31-1-2023, the appeal would still have been filed out of time which had long lapsed on or about 2-1-2023.

26 The petitioner has not pointed out any appeal filed herein within 30 days from the date of the impugned ruling. And the appeal (record of appeal) with 2 different date stamps does not solve the issue at hand of whether the petitioner ever filed any valid record of appeal on which this court can act. On my part, I do not find or see any such appeal or record of appeal filed by the petitioner at the nearest High Court within 30 days from the date of the ruling of the trial court. It follows therefore That there is no valid appeal or record of appeal placed before this court by the petitioners. I so find.

27 The last issue for determination is whether the Petitioner ever served the Notice of Appeal and the Memorandum of appeal upon the Respondents and the legal effect of the none service of the same.



This objection was based on the provision of Rule 34(5) of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017, That;

“The appellant shall within 7 days of filing of memorandum of appeal in accordance with sub-rule (3) serve the memorandum of appeal on all parties directly affected by the appeal.”

28 Service of processes is at the core of all forms of litigation and the right to fair hearing. Without service, no hearing would ever take place. The *Elections Act*, therefore, has placed the issue of service as a key element in the hearing of Elections Petitions without which no petition can progress to hearing. And the rule above demands That service of the memorandum of appeal shall be served on all parties directly affected by the appeal within 7 days of filing of the memorandum of appeal. The persons to be served are the parties directly affected by the appeal.

29 By their nature, the elections law provides for strict guidelines and timelines within which parties must act. This, I hold is in the interest of justice and fair hearing. These timelines are therefore not merely procedural technicalities as submitted by the Petitioner herein. A petitioner is therefore under a legal duty to effect service of the memorandum of appeal on those affected by the petition (Respondents) within 72 days of filing of the same.

30 The scenario That appears in our case is That the 2<sup>nd</sup> Respondent has todate not been served with the Notice of appeal and the memorandum of appeal. and for the 4<sup>th</sup> Respondent, service of the Notice of Appeal and the memorandum of appeal were never effected on the 4<sup>th</sup> Respondent, but rather on the Advocates who otherwise had not in any manner confirmed to the Petitioner That they had the 4<sup>th</sup> Respondent’s authority to receive the processes. There was therefore no direct service on the 4<sup>th</sup> Respondent as directed by Section 75(4) (a) of the *Elections Act*, 2011.

31 This court was referred to several authorities of the superior courts on the issue of service, which all buttress and confirm the central position That the issue of service occupies in ensuring fair hearings of election petitions. We have captured the ratio decidendi in the said authorities in this ruling and it would not serve much to relay them again. However, in summary, the decisions confirm That the election petition rules must be complied with and That they are not mere procedural technicalities (*Nicholas Kipto Arap Korir Salat v IEBC & 6 Others*; That service on the party affected by the proceedings is crucial so That the party is given the opportunity to be heard (*Sbeik v Sheikh*). That the rules on Elections law are couched in mandatory terms and a party ought not run for refuge in constitutional provisions when the basis required of him have not been complied with (*Elvis Anyimbo Sichenga v ODM and 4 Others*). That failure to serve the petition upon the Respondents went to the root of the petition and the petition could not stand where there was failure to serve the same (*Aluodo Florence Akinyi v IEBC and 3 Others, Rozaah Akinyi Buyu v IEBC and 2 Others*).

32 In all the above, the superior courts dismissed the relevant election petitions on grounds of failure of the petitioners to serve the persons directly affected by the petitions filed. This court aligns itself with the decisions of the superior courts as cited and I do hold That the objection raised by the 4<sup>th</sup> Respondent and supported by the 2<sup>nd</sup> Respondent on lack of service has merit.

33 In view of the above, this court is convinced That all the 3 grounds of objections raised by the 4<sup>th</sup> Respondent and supported by the 2<sup>nd</sup> Respondent are meritorious and go to the root of this petition.

34 I therefore sustain the 3 objections.

35 I accordingly therefore find the Notice of Appeal and the memorandum of Appeal filed by the Petitioner herein incompetent. I struck out both the notice of Appeal and the memorandum of Appeal filed herein by the Petitioner. The Respondents will get costs of this application.



Orders accordingly.

**D. O. OGEMBO**

**JUDGE**

**16<sup>TH</sup> MAY, 2023**

**Court:**

The Ruling read out in Open court in Kakamega in the presence of the Ms. Wanyonyi, for Mr. Sore for the Petitioner, Mr. Malalah for 4<sup>th</sup> Respondent and holding brief for 2<sup>nd</sup> Respondent. Ashioya for 3<sup>rd</sup> Respondent, and Wamalwa Echesa Advocate for 1<sup>st</sup> Respondent are absent.

**D. O. OGEMBO**

**JUDGE**

**16<sup>TH</sup> MAY, 2023**

