



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Election Petition 3 of 1998

**THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT (CAP.7) AND
REGULATIONS THEREUNDER AS AMENDED FROM TIME TO TIME**

AND

**IN THE MATTER OF THE ELECTION FOR THE SHINYALU PARLIAMENTARY
CONSTITUENCY**

BETWEEN

**JAPHETH GALAGATI SHAMALLA..... PETITIONER
AND**

1. PHILIP WEKESA

2. DANIEL LYULA KHAMASI

3. THE ELECTORAL COMMISSION OF KENYA.....RESPONDENTS

RULING

JAPHETH GALAGATI SHAMALLA (hereinafter referred to as "the petitioner) filed this petition in Nairobi (being Nairobi High Court Election Petition Number 14 of 1998) against PHILIP WEKESA as the 1st respondent and DANIEL LYULA KHAMASI as the 2nd Respondent. The petitioner was one of the candidates for the Shinyalu Constituency in the general elections that took place on 29.12.1997 at which the 1st Respondent was the returning officer. The 2nd respondent who also was a candidate at the election was declared the successful candidate and is now the sitting member of parliament for the constituency. In the petition the petitioner seeks orders, inter alia, declaring the election null and void for various reasons. However it is not necessary for the purposes of this application to enumerate them in this ruling.

The official receipt issued by the High Court Registry at Nairobi shows that the petition was filed on 29.1.1998 on which date the necessary deposit for security of costs in the sum of sh.250,000/- was paid in court. The record further shows that on 13.3.1998 the petition file was forwarded to High Court of Kenya at Kakamega where it was received and date stamped on 23.3.1998 it was given the new number and became Kakamega Election Petition No.3 of 1998.

On 15.6.1998 the 2nd Applicant filed this application by way of a Notice of Motion to strike out and dismiss the notice of presentation of the petition and the petition itself upon the following grounds:-

(a) The petition was not filed and served in accordance with the mandatory provisions of sections 20 of the National Assembly and Presidential Elections Act or the Rules made thereunder.

(b) The petition was not served in time.

(c) The petition is not or there is no petition properly before the court.

(d) The Petitioner has not complied with the request for particulars and/or the "particulars" supplied are not in accordance with the order to supply the same and are evasive inadequate and/or are simply no answer to the request for particulars filed and served on 21st April 1998.- 3 -

(e) The petition discloses no reasonable cause of action and is otherwise an abuse of the process of Court.

The application is supported by an affidavit sworn by George Kapten, learned counsel for the 2nd respondent, in which he deposes, inter alias, that:-

" 1. That I am an advocate of the High Court of Kenya having the conduct of this petition on behalf of the 2nd respondent and I have authority to make this affidavit.

2. That this petition was according to the court-stamp filed on 29th January 1998.

3. That I am informed by the 2nd respondent which information I believe to be true that the Notice of Presentation of the petition and the petition were not served on the 2nd respondent as is required by the law.

In response to the application to strike out the petition, the petitioner's learned counsel, Mr. Salim Danji, filed what he refers to as Notice of Objection, the relevant parts of which state, besides other matters, that:-

1. The application is pre mature misconceived and devoid of any merit and should accordingly be struck out.

2. The purported affidavit sworn and filed by George Kaptenis defective and should accordingly be struck out.

3. The petition was presented in time in accordance with time prescribed in the National Assembly and Presidential Elections Act and Rules.

And in a replying affidavit sworn on 20.6.1998, Mr. Salim Dhanji depones that the applicant is correct in stating that the petition was filed in court on 29.1.1998 but incorrect in stating that the notice of presentation of the petition and the petition were not served on the 2nd respondent as is required by the law.

There is yet another affidavit purportedly sworn on 26.2.1998 by one Alex Muganda who describes himself as a process server in which he depones that on 30.1.1998 he received an election petition for the Shinyalu Constituency from the petitioner's advocates with instructions to effect service upon the 1st respondent. That affidavit was not filed in court until 2.7.1998 and there is nothing in it to show that any service was effected by the deponent upon the 2nd respondent.

Before proceeding with consideration of the application I wish to pause here and observe that in summarising the orders sought in the application the grounds and facts on which the application is based on the one part as well as the grounds of opposition including the replying affidavits on the other, have omitted to make any reference to anything relating to the striking out of the paragraphs of the petition as sought in prayer number 2 of the application, because, as pointed out by Mr. Shitsama, that prayer was not canvassed before For that reasons 1 will proceed upon the premises that it was abandoned.

The applicant's main ground for seeking to have the petition and the notice of presentation of the petition struck out is that contained in paragraph (a) of the grounds of the application, namely that "it was not filed and served in accordance with the mandatory provisions of section 20 of the National Assembly and

Presidential Elections Act or the Rules made thereunder. The factual basis of the application is to be found in paragraph 3 of the affidavit sworn on 15.6.1998 by George Kapten which has been quoted in full above.

As observed above, the petitioner's answer to the application was that the petition was presented in time in accordance with the time prescribed in the Act and Rules and that the affidavit sworn by George Kapten in support of the applicant is, in any event, defective and should be struck out.

Regarding the alleged defects in the affidavit in support of the application Mr. Shitsama's contention was that Mr. Kapten was not competent to swear an affidavit on matters which were contested. He did not however specify which alleged contested matters he had in mind. As far as I can see the only relevant matters to which Mr. Kapten swears, as far as this ruling is concerned are

1. That I am an advocate of the High Court of Kenya having the conduct of this petition on behalf of the 2nd respondent and I have authority to make this affidavit.
2. That this petition was according to the court-stamp filed on 29th January 1998.
3. That I am informed by the 2nd respondent which information I believe to be true that the Notice of Presentation of the petition and the petition were

not served on the 2nd respondent as is required by the law.

In the replying affidavit sworn by Mr. Salim Danji on 30.6.1998, no reference is made in paragraphs 1 and 2 of Mr. Kapten's affidavit. Accordingly the two paragraphs stand unchallenged and in those circumstances it is incorrect to say that in matter contained in them is contested. On the contrary, one of the paragraphs namely paragraph 1 is in fact admitted.

With respect to paragraph 3 of Mr. Kapten's affidavit, Mr. Salim Danji depones in paragraph 4 of his affidavit that the said paragraph is incorrect without stating how or what in the paragraph is incorrect. A careful look at the paragraph reveals that it avers that the notice of presentation and the petition were not served on the 2nd respondent as required by law.

One of those legal requirements is that the petition be filed and served within 28 days of its filing. There is no evidence on record to show that this was done and for that reason what is stated in Mr. Salim Danji's affidavit is not only vague and evasive but also devoid of substance. It follows from this that the contents of paragraph 3 of Mr. Kapten's affidavit have not been seriously contested and that Mr. Shitsama's submissions and complaints in that regard have no merit. Further in my view, the matters deponed to by Mr. Kapten are clearly stated to be within his knowledge and where based on information, the source of the information has been disclosed. For those reasons I find that the affidavit is in accordance with the requirements of 0.XVIII of the Civil Procedure Rules and there is no basis for attacking it.

On the issue of filing of the petition and its service upon the respondents Mr. Shitsama argued that the recent amendment to section 20 of the Act had brought a significant change in the law and that under the law as it now stands only the petition has to be served upon the respondent and not the notice of presentation of the petition. He also ventured the view that there was conflict between sec 20 of the Act and Rule 14 of the National Assembly and Presidential Elections (Election Petition) Rules. With regard to the latter submission I must confess that I did not find Mr. Shitsama's argument convincing.

Before its amendment, section 20 (1) of the Act read as follows:-

(I) A petition -

(a) to question the validity of an election, shall be presented within twenty-eight days after the date of publication of the result of the election in the Gazette;

By Act No.10 of 1997 the section was amended by inserting the words "and served" after the word "present". Although the two words "and served" at first glance appear to be innocuous, the amendment they introduced in the law was profound in as much as it reduced the time allowed for filing and serving election petitions to a period which is barely sufficient for such weighty matters. The result, as observed elsewhere, has been the wholesome failure by petitioners in the current spate of elections petitions to satisfy the legal requirements regarding the time for serving election petitions upon respondents.

With regard to service, Rule 14 of the Rules still apply and in that respect I do not agree with Mr. Shitsama's contention that the Rule is in conflict with s.20 (1) of the Act. The section provides for the filing and service of the petition within 28 days of the publication of the election result in the Kenya Gazette while the rule makes further provision as to the mode of service but at the same time requiring that service must be effected within 10 days of filing of the petition meaning that if the petition is filed within time it must also be served within a further 10 days which must be within 28 days of the publication of the election in the Kenya Gazette.

All this is clear and straightforward. There is therefore no conflict between the main Act and the Rules.

Mr. Shitsama also contended that under the law as it now stands, only the petition is required to be served and not the notice of the presentation of the petition. That contention is also in my view incorrect. Rule 14 (2) plainly shows how service is to be effected. It provides:-

(2) Service may be effected either by delivering the notice and copy to the advocate appointed by the respondent under rule 10 or by posting them by a registered letter to the address given under rule 10 so that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address has been given, by a notice published in the Gazette stating that the petition has been presented and that a copy of it may be obtained by the respondent on application at the office of the Registrar.

I concede that there is conflict in the legal opinion as to whether personal service is permissible in election petition as can be demonstrated by various decisions of the High Court. Mr. Orengo for the 2nd Respondent/Applicant together with his colleague Mr. Kapten argued that personal service was not envisaged under the rules while Mr. Shitsama took the view that it was allowed.

-My view of the matter is that personal service is not permissible because rule 14 (2) contains a complete and exhaustive provision with regard to the mode of service. In making the Rules, the Rules Committee in its wisdom deliberately omitted personal service as a mode of serving election petitions. They did not do so in vain. Surely if they intended to include personal service as one of the modes of effecting service of election petitions, they could easily have stated so. By omitting to include personal service in the rule, the Rules Committee clearly intended to indicate that personal service was not proper service. The reasons for this are not difficult to discern, as in a matter as sensitive and as important to the Country as an election petition, the chances of abuse of the process of service are likely to be a major preoccupation of the parties involved particularly where time is of the essence. However, even if I am wrong in my interpretation of Rule 14 (2) with regard to personal service, this petition would still fail. I say so because Rule 14 (1) of the Rules provides that "Notice of the presentation of the petition accompanied by a copy of the petition, shall be served by the petitioner on the respondent. There is no evidence whatsoever that notice of presentation of the petition was at any time served upon the 2nd respondent.

To conclude this matter then my findings are that the result of the election for the Shinyalu Constituency was published in the Kenya Gazette on 6.1.1998. From that date of publication the petitioner had 28 days within which to file and serve the petition upon the 2nd respondent in the manner prescribed by law. The provision with regard to service are mandatory and this court has no powers to extend time - see the following authorities on the point -

1. Devan Nair v. Yong Kuani Terk (1967) 2A. C.31
2. Election Petition No.20 of 1998

Mark Omolo Ageng another v. Mbuo Waganagwa & Another

3. Election Petition No.3 of 1970

Shadrack Namunyu Okova v. Exekiel Nyarangi (Returning Officer) and Brown Tauma.

4. Election Petition No.30 of 1979

Mohamed Mwinyimtwana Jahazi v. Francis Cherogony and Sheriff Nassir Raib.

5. Election Petition No.14 of 1983

James Charles Nakhwanga Osogo v. Nicholas Kipchumba and Peter Habenga Okondo.

6. Election Petition No.21 of 1988

Owino Opar Omach v. Cyrus Gitual and John Henry Okwanyo

7. Mudavadi v. Kibisu and Another (1970) EA. 585

According to my calculations the period of 28 days permitted by the law expired on 3.2.98. Notice of the presentation of the petition was not published in the Kenya Gazette until 6.2.98 well outside that period.

It follows from this that the petition was not served in accordance with the law and is therefore a nullity. Accordingly it must be struck out.

For the above reasons the 2nd Respondents application is allowed and the petition struck out with costs to the 2nd respondent. In view of this decision the petition as against the 1st respondent cannot stand and is also struck out with costs.

Dated at Kakamega this 31st day of August 1998.

TOM MBALUTO
JUDGE