



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT BUSIA
ELECTION PETITION NO. 7 OF 2017

PAUL ODHIAMBO OKELLO.....PETITIONER

=VERSUS=

1. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

2. ROSELYNE A ONYANGO.....2ND RESPONDENT

3. OUMA MOSES PIUS.....3RD RESPONDENT

R U L I N G.

This is a ruling in respect of the Petitioner's Application dated 7th December, 2017 and the 3rd Respondents application dated 13th November, 2017.

The Petitioners application is seeking for the following orders:-

- i. That the petitioner's application be heard together with the 3rd Respondents application seeking for orders for the cross-examination of the petitioners process server Stephen Otagel Ofula.
- ii. That the court do find that the Affidavits dated 26/9/2017 by Owiti C. Ochieng and that of Ouma Moses Pius dated 19/9/2017 be struck out as being evidence of perjury.
- iii. That the two deponents be summoned to court for cross-examination of their contents of their affidavit.
- iv. The court to strike out the Respondents Reply to the Petition and order that the petition proceed uncontested.

The 3rd Respondents Notice of Motion dated 13/11/2017 seeks for orders that;

I. The Petitioner failed to comply with the mandatory provision of section 77(2) of the Elections Act 2011 and Rules 10 and 12 (13) (4) and a of the Election. (Parliamentary and County elections) Petition Rules 2017 as pertain, to form and service of Election Petitions.

II. The Petition in its entirety be striking out on the grounds that service thereof and the form of the Petition is unprocedural, irregular, Incompetent and fatally defective respectively.

III. The costs of this Application and the entire proceedings be awarded to the Respondent.

Both applications are supported by the grounds on the face of the Application and the supporting affidavit of Paul Odhiambo Okello, the petitioner and Ouma Moses Pius the 3rd Respondent respectively.

In response to the 3rd Respondents application the petitioner filed grounds of opposition dated 19th November, 2017 and Replying affidavit dated 20th December, 2017. The 1st and 2nd Respondents also filed a Replying Affidavit to the Petitioners Application and Replying Affidavit dated 20th December, 2017 and a supporting Affidavit dated in respect of the 3rd Respondents application. The third Respondent also filed a Replying Affidavit in response to the Petitioners application.

The parties thereafter filed their submissions. The Petitioners filed his submissions and aver that Section.159 2(d) of the Constitution emphasized that technical issues cannot override the substance of a case and merits thereof and should be heard and that even if the petition is struck out the Amended Petition will still remain on record. They also urge the court to find that the Affidavits of Advocates Owiti counsel for the 1st and 2nd Respondents and the Affidavit of the Respondent are couldn't admission that they were served with the petition and that they also sought leave file their Response. The 1st and 2nd Respondents on their part submit that all the documents served upon them were signed, stamp and dated by the 1st Respondent and that the petitioner was not served and that is why it was never stall signed or dated nor stamped. They admit that they were served with the undated Amended Petition and that the application to cross examine the deponent is – to distract the court and that failure to serve the petitioner is dated. They rely on the – of **AYUB J. MWAKESI VS MAKOMERE CHRITAN AL & 2 OTHERS 2008)EKL.R.**

The 3rd Respondent also put in their submissions and aver that they were never served with the original petition but were served with undated Amended Petition filed on 8th September, 2017 and they have indicated in the opening paragraph of their Response that they were responding to the amended Petition. They also submit that upon perusal of the Affidavit of service and on Cross –examination of the process server, he admitted that the 3rd Respondent accepted documents by signing dated and indicating the time of 2.30 pm but was unable to explain why all documents filed on 6th September, which includes the petitioner does not bear the date signed and time received while those filed on 8th September, 2017 bear their signature, date and time. The Respondent received and that the stamp filed on 0 – 6 includes the petition and the supporting Affidavit by the petitioner and those filed on 8th are served. They urge the court to find that upon failure to serve the original petition the petitioner violated S.77 of the Election Act.

They submitted that on the issue of the undated Amended Petition and the documents herein, they were served without leave of the court and are not properly on record and urge the court to dismiss the petition application and to strike out the petition with costs. They attached herein list of allocate in support of their submissions.

The issue to be determined is whether their petition dated 6th September, 2017 was served upon the Respondents as required by Article 87(a) of the constitution and S.77 (2) of the Election Act and Rules - Having given through evidence of the process server on cross-examination he has not given a satisfactory answers/explanation on why the petition was not signed, stamped and dated by the 1st and 2nd Respondents. There is also no good explanation why the 3rd Respondent did not date, sign and indicate the time they were served it only leads to the conclusion process server and/ or that the petitioner did not serve the Respondents with the petition. It is clear from the Respondents. Reply that they were responding to the Amended Petition and not the Petition. The fact that they Respondents filed their Response does not legalize the fact that they were not served and responded can't stop them from raising the issue and cannot cure it by responding to it.

The petitioner rely on the constitution Article 159 (2) that even if it was it was not served, it was a mere

technicality which should not stop the petitioner to be heard and the case to be heard on and this case to be determined on merits. As stated severally in decided case. i.e re-election petition are special jurisdiction and matters and has specific rules on service and must strictly complied with this rule, S. 77 (i) . Failure to serve is not a procedural technicality which can be cured by that above provisions of the Constitution.

The amended petition is not properly on record as leave was not sought before it was filed as required by the rules.

From the foregoing, I find that the petitioners Application dated 7th December, 2017 has not merit and proceed to dismiss it. I allow the 3rd Respondents application dated 13th November, 2017 by finding that Petitioner did not do serve the Respondents with the petition and is a fatal omission and goes to the root of the petition. The petition dated 6/9/2017 is therefore struck out with costs to the Respondents.

The amended petition filed without leave is also struck out with costs to the Respondents.

WILLIAM K. CHEPSEBA – CM.

23/1/2018.

In the presence of Makokha for 3rd petitioner also holding brief for Owiti for the 1st and 2nd Respondents.

In the presence of Mr. Ashioya advocate for Respondents. Petitioner present in person.

W.K. CHEPSEBA - CM

.23/1/2018.