



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE AT WEBUYE

ELECTION PETITION NO.1 OF 2017

ERIC SOITA PATROBA PETITIONER

VERSUS

SUDUKWA GRACE 1ST RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

RULING

FILING OF PETITION.

1. The Petitioner Eric Soita Patroba filed this election Petition dated 5.9.2017 on 6.9.2017 (see court fees receipt) . In the petition he stated that in an election with seven candidates vying for the elective position of Member for the County Assembly the 1st respondent, one, Sindukwa Grace was returned the winner.

2. The Petition sought for prayers as follows;

1. A scrutiny and recount of votes be done.
2. A declaration that there were electoral malpractices at various polling centres within Sitikho ward.
3. A declaration be made that Sindukwa Grace was not validly elected as member for the county Assembly for Sitikho ward.
4. A declaration be made that Eric Soita Patroba is the validly elected Member of County Assembly for Sitikho ward.
5. Costs of this petition

RESPONSE TO THE PETITION.

3. The 1st respondent Sindukwa Grace had filed her response dated 7.10.2017 to the Petition. She filed her response on 10.10.2017 (see receipt)

APPLICATIONS FILED BY THE PARTIES.

4. The Petitioner filed an application dated 10.11.2017 seeking, inter alia, for an order for scrutiny and recount of votes.
5. The Petitioner filed another application dated 10.11.2017 seeking for an order to be allowed to adduce further evidence.
6. The 1st respondent filed his application dated 13.11.2017 seeking for an order to strike out the Petitioner's petition. This application hereinafter referred to as the instant application in the subject matter of this ruling.
7. The grounds on the face of the instant application were that;
 - a) The petition was filed on 5.9.2017 and its supporting affidavit on 6.9.2017.
 - b) The petition was not served within the statutory period.
 - c) The conduct of the petitioner ran counter to the overriding objectives of Elections (Parliamentary & County Elections) Petitions Rules (hereinafter referred to as the Rules.)
8. The application was brought under Rules 4 (2), 5(1),7,10(1),12(4) and 15(2) of the Rules.
9. The Instant application was supported by an affidavit by the 1st respondent sworn on 13.11.2017 with annexures thereon. The affidavit alleged as follows;-
 - a) The petition was not served within 7 days.
 - b) As at 25.9.2017 the petition had not been served.
 - c) By a letter dated 25.9.2017 to the Chief Magistrate of Milimani Commercial Magistrates court, the 1st respondent's counsel stated that he had not been served requesting to be supplied with a copy of the petition.
 - d) A copy of the petition was received the same day.
 - e) The 1st respondent's counsel drafted an application (which was not filed) to strike out the petition for want of service.
 - f) The 1st respondent was served on 29.9.2017.
 - g) There was no waiver of right to challenge validity of service that was granted by the 1st respondent.

REPLYING AFFIDAVITS.

10. The petitioner filed a replying affidavit sworn on 20.11.2017 to counter the instant application and he alleged as follows;-
 - a) Failure to serve the petition wasn't deliberate. When the petitioner accompanied the process server to the 1st respondent's home on 12.9.2017, She was not there. She was said to have travelled to Kisumu for an induction and was to be available the following day.
 - b) On 13.9.2017 they were not allowed into the 1st respondent's home. They left the petition papers with one of the people at the gate to give to the 1st respondent.
 - c) The Petitioner had accompanied the process server for service on 12th & 13th September 2017.

d) The process server made a third attempt at service on 26.9.2017.

e) The petition was filed on 6.9.2017 not on 5.9.2017

11. The petitioner filed a second replying affidavit through , one, George Winga. The replying affidavit was sworn on 20.11.17. The deponent alleged as follows;

a) He was a process server. On 12.9.2017 accompanied by the Petitioner , they rode to the 1st respondent's home where they found a gateman at the gate who told them that the 1st respondent had travelled to Kisumu.

b) On 13.9.2017 he went back and left petition papers with a watchman at the gate of the 1st respondent's home.

DIRECTIONS.

12. Directions were issued by the court that the instant application was to be canvassed and opposed by way of written submissions. Pursuant thereto the 1st respondent filed her written submissions dated 4.12.17 which was accompanied by following authorities in support thereof, namely,

a) Mombasa H.C.EP NO.4/2008

Masumbuko Mohamed Omar -vs- Gunda Benedict Fondo and 2 others.

b) Kisumu Court of Appeal Civil Appeal No. 40/2013

Rezaah Akinyi Buyu -vs- I.E.B.C and 2 others

c) Eldoret H.C.E.P no.1/2013

Charles Kamuren -vs- Grace Telagat Kipchom -vs- 2 others.

d) Kakamega H.C.E.P No. 9/17

David Wamatsi Omusotsi -vs- The returning officer Mumias East Constituency – vs- 2 others

13. The 2nd respondent filed her written submissions dated 30.11.2017 she relied on the case law of Kitale H.C.E.P No. 5/2017 Robert Wamalwa Ramborah Simiyu -vs- I.E.B.C and 2 others.

14. The petitioner filed his written submissions dated 4.12.2017 relying on the **case of Nairobi H.C.E.P No. 20/17 Macharia Patrick Mwangi -vs- Mark Ndungu Ng'ang'a & 2 others**

15. I have carefully considered the instant application, the 2 replying affidavit filed in opposition to the application and the three written submissions and the authorities relied upon for and against the application to strike out the petition.

16. Issues for determination.

(a) Whether service of the petition was effected on 13.9.2017

(b) If service was effected whether it was proper.

(c) Whether the petition papers were ever served within the statutory period.

(d) Whether the 1st respondent had waived her right to be served.

17. The instant application was filed by the 1st respondent. The petitioner filed two replying affidavits to oppose the application. I will refer to them as the applicant and respondent respectively. The 2nd respondent did not file an affidavit with regard to the application and as such, it was not a party to the application to strike out the suit. I acknowledge that the 2nd respondent in her written submissions supported the applicant's cause.

Summary of the affidavit evidence

18. The applicant in her supporting affidavit posited that;

- She was served with the petition papers on 29.9.2017.
- she received copies of the petition papers from the court at her written request on 25.9.2017.
- she had not waived her right to challenge the validity of service.

The respondent and one, George Winga in their replying affidavits stated that;

- (a) On 12.9.2017 George was escorted by the respondent to the home of the applicant to effect service of the petition papers when they were told at the gate that the applicant was away at Kisumu.
- (b) On 13.9.2017 when they returned for service they were denied entry George left the petitions paper with a person who was at the gate to forward them to the applicant.

The Law on the service of election petition.

19. The service of an election petition is a fundamental step in the EDR process (see the **case of Bazaah Akinyi Biyu -vs- I.E.B.C and 2 others in Kisumu C.A.C.ANo.40/2013**)

20. Article 87 (3) of the Constitution States that in electoral disputes service of petition may be direct or by advertisement in a newspaper with national circulation.

21. S.76 (1)(a) of the Elections Act with regards to the presentation of petitions state that a petition to question the validity of an election shall be filed within 28 days after the date of declaration of the results of the election and served within 15 days of presentation.

22. S.77(2) of the Elections Act on service of petitions states that a petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.

23. Rule 10(1)(a) & (b) of the Rules states that within 15 days after the filing of petition the petitioner shall serve the petition on the respondent by direct service or by an advertisement published in a newspaper of National circulation.

24. From the above it's clear that the Constitution , statute and procedural law regulate with precision and certainty the service of a petition upon a respondent.

Accurate Observations can be made as follows,

25. 1. S.77(2) of the Elections Act was downloaded almost verbatim from Article 87 (3) of the Constitution. The only variation is that whereas Article 87(3) refers to **direct service**, S.77(2) uses the words personal service. We shall find out later whether there is any difference between direct and personal service.

2. Election petitions must be served within 15 days of their presentation in court.

3. R 10(1)(a), & 9b) of the Rules has merged the provisions of Article 87(3) of the Constitution and Ss.76(1)(a) & 77(2) of the Elections Act.

26. Rule.2 the interpretation section of the Rules define direct service to mean personal service or service on a duly authorised agent.

Analysis of the evidence and determination.

27. The applicant in her application alleged that the petition was filed on 5.9.2017 and it's supporting affidavit on 6.9.2017. I have perused the court fee receipt and I confirm that the petition document were filed on 6.9.2017.

28. From the Constitutional, statutory and procedural law provisions, with regard to service, the respondent was firmly bound to comply with the law as follows:-

- Serve the petition on or before 21.9.2017 , the latter date being the 15th day from the filing of the petition. 21st was a Thursday.

- Effect service either;

(a) Personally upon the applicant or

(b) Upon the duly authorised agent of the applicant or

(c) By advertisement in a newspaper of national circulation

29. **Order 5 of Civil Procedure Rules** on Service of summons has not been imported to apply under the Rules.

Order 5 is clear on the contents that an affidavit of service should have .

Although the Civil Procedure Rules is not applicable to election petitions, order 5 on the issue of service provides a basic and common sense guidelines that would aid a court to decide a contestation as to whether there was service or where there was service, whether that service was proper.

30. For instance the Civil Procedure Rules under order 5 sets down the dos and dont's to be observed by a process server effecting service.

In the petition before us George Winga who purports to have served the petition on 13.9.2017 did not file an affidavit of service.

31. When there is a constestation on whether service was done or if done whether it was proper, an affidavit of service is a basic material that assists the court to settle the contestation on the issue of service.

32. It is important that documents commencing an action either by way of a petition or suit be served by a process server such that when affidavit of service is filed pursuant thereto it presents a rebuttable presumption that service was properly.

33. When the applicant in her supporting affidavit stated that she was served with the petition on 29.9.2017 the burden of proof shifted to the respondent to prove otherwise. The respondent should have adopted a higher bar to counter the applicant's allegation of late service. That is to say he should have filed both an affidavit of service and a copy of his licence of practice as a process server.

34. A replying affidavit filed by George Winga in response to the applicant's application was not sufficient response in the absence of his affidavit of service and for want of proof that he was a licensed

process server.

35. A replying affidavit of a process server without an affidavit of service rests on nothing.

An affidavit of service should be specific as to the name of place where service was done, time of service , name of person served, previous aattempts made at service and the mode of service adopted generally.

36. A process server's replying affidavit need not be restricted to the ingredients of an affidavit of service. That is why it would present a practical difficulty to cross examine a process server on the issue of service on an affidavit other than an affidavit of service.

37. Arising from the deficiencies of the purported process server as I highlighted above on the **1st issue** I find it was unproven that service of petition was effected on 13.9.2017 Even if there was service it was upon an unnamed person. The law contemplates personal service or upon an authorised agent of a respondent.

38. There is no evidence that the unnamed person alleged to have been served on 13.9.2017 was an authorised agent of the applicant (see **Rule 10(1)(a) and (b) of the Rules**)

39. On the **2nd Issue** I find that if true that service was effected on 13.9.2017, such service was improper. Respondent failed to prove as required that service was effected upon an authorised agent of the applicant.

40. Even if the process server was cross examined and the court confirmed that he served the petition on 13.9.2017 it would not waive the fact that service was not effected personally upon the applicant and that the person served was not her authorised agent.

41. If the applicant was using dubious tactics to avoid service the respondent ought to have invoked his constitutional and statutory rights under **Article 87 (3) of the Constitution and S.77 (2) of the Elections Act** respectively and also under **Rule.10(1)(a) & (b) of the Rules** for service by having published an advertisement in a newspaper of national circulation.

42. The respondent stated that an attempt was made at service on 26.9.2017 but did not disclose whether that was successful.

43. It is clear from the applicant's affidavit the length gone to by writing to the Chief magistrate , Milimani Magistrate Commercial Court on 25.9.17 requesting for and receiving a copy of the petition.

44. The applicant's counsel asserted from the outset that the applicant was served on 29.9.2017. This is most probably true.

45. Even if the applicant was personally served on 26.9.2017 as the respondent attempted to allege, on the **3rd Issue** I find that she was served outside the statutory period. Applicant ought to have been served latest on 21.9.2017.

46. Failure to serve an election petition in the prescribed manner and within the prescribed time or at all , is a fatal mistake (see the case of **Rizzah Akinyi Buyu (ibid) and case of Eldoret Election Petition No.1/2013 – Charles Kamuren -vs- Grace Jelegat Kipchoim & 2 others.**)

47. Although the regime of service of election petition has been liberalised, the requirement of service was not dispensed with. Service of the petition is still a requirement under the Constitution , the Act and the Rules. Without service , the opposite party is denied the opportunity to defend the case. Service is an integral element of the fundamental right to a fair hearing which is underpinned by well worn rules of natural justice.

48. Mere knowledge of existence of a petition by the respondent can neither cure want of service nor discharge the burden of service imposed on the petitioner by the law. Service of the petition is not a mere procedural requirement that can be dispensed with but is a mandatory step that must be complied with. It is not a mere technicality that can be set aside by application of provisions of Article 159 (2) (d) and the overriding objectives set out in rules 4 & 5 of the Rules. Unless waived by the respondent, service must be effected as it is an essential and mandatory step and an affected party is entitled to apply to the court to strike out the petition for want of service. (see the case of **Patrick Ngeta Kimanzi -vs- Marcus Mutua Muluvi & 2 others – Machakos H.C.E.P No. 8/2013**)

49. In her supporting affidavit the applicant stated that she had not waived her right to be served. I find that his fact was unchallenged. On the **4th Issue** I find that the applicant had not waived her right to be served with her petition . There is no evidence to the contrary.

50. It was argued by the applicant and counsel for IEBC that the petition was defective for want of form for failing to, inter alia, state the results of the election and votes garnered by each of the candidates for the elective post of Member for the County Assembly I will not address the issue. I find that the other determined issues are sufficient to determine the instant application.

51. I have said enough, I think.

52. I find that the applicant's application dated 13.11.2017 has merit.

53. I order as follows;-

1. The petitioner's petition dated 5.9.2017 is hereby struck out.
2. The respondents are awarded the costs of the petition.
3. The 1st respondent is awarded the costs of the application.
4. A certificate of this determination shall issue in accordance with S.86(1) of the Elections Act to the Independent Electoral & Boundaries Commission and Speaker of Bungoma County Assembly.
5. It is so ordered

Delivered at Webuye this 7th November 2017.

T M MWANGI

SPM

Others Present.

Court clerk : Dan

Petitioner: Erick Soita Patroba

Amani advocate holding brief for Isinta for Petitioner/Respondent and Ocharo Kebira advocate for the 1st respondent.

Court: Right of appeal 30 days explained.

T M MWANGI

SPM