REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT KITALE

ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF THE ELECTION ACT, 2011 AND IN THE MATTER OF THE ELECTION LAWS AMENDMENT ACT NO. 36 OF 2016 AND IN THE MATTER OF THE ELECTION LAWS AMENDMENT ACT NO. 1 OF 2017 AND IN THE MATTER OF THE ELECTION OFFENCES ACT AND THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS), PETITION RULES 2017 AND THE ELECTION FOR THE MEMBER OF THE COUNTY ASSEMBLY, KAPLAMAI WARD

BETWEEN

MUTALI SAM BUYERA…….....…….....…PETITIONER

AND

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION OF KENYA……....…1ST RESPONDENT

CHEBII LAZARUS, RETURNING OFFICER……..
…...…….....2ND RESPONDENT

MANJARI ELIKANA KAGUNDA….....…..3RD RESPONDENT

R U L I N G

The 3rd Respondent Manjari Elikana kagunda has filed a notice of motion dated 10th October 2017. The same has been brought under the provisions of Article 87 of the constitution, sections 76 (1) (a) and 77 (2) of the Elections Act and other provisions of the Law.

The same seeks to strike out the petition filed on 6/9/17. The grounds upon which the application has been brought is that the petitioner had not served the petition and its accompanying documents upon the 3rd respondent and hence failed to comply with the statutory timelines mandatorily provided for by the constitution and the Elections Act and hence has no legal force. Further the third respondent claims the issue of service does not constitute a procedural technicality but an issue that goes to the root and content of the petition and the court has no Jurisdiction to extend the statutory period of 15 days for service.

The said notice of motion is further grounded on the supporting affidavit of Manjari Elikana Kagunda, the third respondent herein.

In the annexed affidavit the third respondent claims that on the 10/8/17 he was declared by the 2nd respondent as the validly elected member of the County assembly for Kaplamai ward following the

elections that were held on 8/8/17. He has annexed a copy of the certificate issued to him on 10/8/17.

Later the 2nd respondent Chebii Lazarus who was the returning officer informed him that there was an election petition filed against him but the same was never served upon him.

He then proceeded to obtain a copy of the Petition and supporting affidavit and filed a response and an affdiavit under protest as no service had been effected upon him.

He observes that the peitioner Mutali Sam Buyera was under an obligation to serve him with the petition within 15 days from 6/9/17 and because it was not done, then it has no legal effect, goes to jurisdiction and is not a procedural techicality which makes it for striking out.

There being no jurisdition to extend the statutory timelines by an constitution and Elections Act when the petition must be struck out.

The petitioner has filed a replying affidavit stating that upon filing the petition he effected personal service of the same to 1st and 2nd Respondents through a court process server. His choice of personal service was due to financial constraints as advertisement was quite expensive for him. However he was told that the 3rd respondent was not traced at his residential home after he was informed he had travelled to a political party meeting for the election of the speaker of the county assembly of Trans Nzoia.

He observes that the 3rd respondent having filed his report, he had done so in a manner as though he had been served by way of advertisement. According to him the failure to serve the petition was not deliberate and was excusable since the purpose of service is to make one aware of legal proceedings.

He disputes the declaration of the 3rd respondent as the winner of the election as declared on 10/8/17 because he was allegedly declared using form 35B which he has annexed to the affidavit as oppossed to forms 36B under regulation 83(1) (e) of the elections (general) Regulations 2012 and attached to the affidavit.

Further according to him, form 36B indicates on a separate leaf that it was to be handed over to the National Presidential tallying Centre when they were not handed over except for form 34B. He has annexed a copy of the Waitaluk ward form 36B which indicated the handing over was to be done to the Constitutency Tallying Centre.

He proposes that for the court to determine the issue of declaration of results it could only be determined at a full trial and not by way of affidavit evidence.

His view is that the Jurisprudence on election disputes resolution was to move away from summary determination of election disputes a drastic manner, to weighing the interests and prejudice to all parties in the petition. It is his further claim that the prescibed timelines in the Elections Act were not meant to hinder dispensation of substantive justice but to aid expeditious disposal of electroral disputes.

To him,striking out the petition at this preliminary stage was drastic and adraconian measure which should be resorted to only in extreme circumstances.

He is of the opinion that the court has discretion to extend time under Rule 21 of the Elections (Parliamentary and County elections) peitions Rules 2017 and the 3rd Respondent has so far not demostrated Prejudice that would be suffered should the petition be allowed to proceed on merit which if any case be compensated by costs.

He concludes by stating that the court has both the inherent jurisdiction to promote the overiding objective of the Electoral Laws as provided in the constitution and the election Act and which overiding objective is to remain true to preserve the right of citizens to free, fair credible, verifiable and regular elections based on universal suffrage and the free expression of the will of the electors. The 3rd Respondent shall therefore suffer no prejudice if the application is disallowed.

SUBMISSIONS:

At the hearing of the application the Applicant/3rd Respondent invited the court to address its mind to what was to happen if service was outside the stipulated time and if the court had power to enlarge time and validate late service or even order late service.

The counsel Mr. Kiarie refered to Eldoret Petition No.1 of 2013 Charles Kamuren VS Grace Chelagat Kipchoim and 2 others (2013) eklr. In which service was well after the 15 days had lapsed. An application was made to strike out the petition for late service while the petitioner had filed an application seeking leave to have court consider the Petition duly filed and served. He observed, that the held the court did not have power or jurisdiction to extend time which were couched on mandatory terms. In that case the petition was struck out and the court held that any pleading filed and not served had no legal terms and no lawful order could be drawn from it and it remains to be a petition that never was.

The counsel refered to the court of Appeal decision i.e Civil Appeal No.159 of 2013. Charles Kamuren VS Grace Jelagat Kipchim and 2 others (2013) eklr.

In that case the Honourable Justice of Appeal Nambuye, Musinga and M'inoti JJA upheld the superior courts decision that the high court did not have power to extend time for serving of an election petition for late service. It further held that the Election Act took precedence over the Rules.

The Counsel observed that in the current case the petitioner had not even filed an application seeking extension of time to serve. He noted that once the peition was struck out then it would be impractical to proceed with the petition agaisnt the 1st and 2nd respondents.

Following submissions by the petitioner's counsel Mr. Wanyama, Mr. Kiarie Advocate noted that already the Law under Article 87(3) was a departure from the era of personal service as it provided for service in the newspapers of wide circulation and that section 76 of the Elections Act did not provide for extention of time and the court could not claim to have jurisdiction to do so.

He futher submitted that Article 159 of the constitution did not apply as the issue of service was not a procedural techicality but went to the root of the petition and therefore could not be said to erase the need to serve.

The court of Appeal decision he observed, had also dwelt on the issue at paragraph 34 of the Ruling where the court rejected the counsels plea to consider it a procedural lapse. For as long as the provisions of the elections Act were not yet declared unconstitutional he submitted the need to serve was mandatory.

The 1st and 2nd Respondents associated themselves with arguments by the 3rd Respondent and echoed their prayer to have the petition struck out through Mr. Karani Advocate.

He reiterated that the Law on service as set out in Article 87 and section 76 of the elections Act. He pointed out that the names of the process server were never given and all that was being stated amounted to hearsay.

He cited the lack of Jurisdiction as the reason the court could not provide any relief to the petitioner.

The Petitioner on his part through Mr. Wanyama Advocate submitted that although their was no service which he said was due to financial constraints on the part of the petitioner, the court ought to exercise its descretion under Article 159 of the constitutional and treat the lapse as a procedural technicality.

He refered to the Elections Act section 76 in line with Article 87(1) of the constitution in observing that the Act does not say what happens in case of non service. He termed it as a deliberate omission which could be cured by Article 159 of the constitution.

He urged the court to move away from what he termed as technism and refered to the presidential petition

No.1 of 2017 where the Supreme Court allowed for the documents filed out of time to be considered duly filed and served. He further urged the court to apply substantial justice as the issue of striking out a petition was adraconian measure and noted that no prejudice would be suffered by the 3rd respondent due to lack of or late service of the petition since he is fully aware of the petition and had filed his response.

He observed that it was in the same vein that the provision for advertisement was only a notice and equated to the notice that 3rd respondent had of the petition and went on to obtain the pleadings and respond in the same manner he would have done incase it was advertised in the newspaper.

He cited the cases of Matiba vs Moi and Orengo vs. Moi (1994) where the court struck out the petitions for lack of service by a person with power of Attorney and on the basis of the application of the Law retrospectively.

He urged the court to move away from the two cases and instead protect the individual rights and do subsstantive justice by upholding the petition.

The court has carefully considered the authorities cited by counsel for the 3rd Respondent and submissions by the petitioner as well also the counsel for the 1st and 2nd respondents herein.

ISSUES FOR DETERMINTION

Thee are some issues that appear undisputed and they are as follows:-

1. That the petitioner filed his petition witin the 28 days provided for under the law.

2. That he duly effected service upon the 1st and 2nd respondents who have filed their response to the petition and which is properly on the record.

3. That the 3rd respondent was not served with the petition but came to learn about it from the 2nd respondent upon which he proceeded to peruse the proceedigns and file his response to the petition under protest.

The only issue that is disptued and which is the subject of the 3rd respondents notice of motion dated 10/10/17 is (1) whether the court can declare the 3rd respondent's response duly filed and served. Since he had notice from the 2nd respondent of the exisitence of the petition filed herein.

(2) The other issue which the court must consider is whether the court can enlarge or extend the for time petitioner to serve the 3rd respondent in this case.

Article 87(3) of the Constitution provides for service of a petition which may be either direct or by advertisement in a newspaper with national circulation.

Section 77(2) of the Elections Act No.24 of 2011 similarly provides for personal service as well as by adverisement in a newspaper with national circulation.

The Elections (parliamentary and county elections) petitions Rules, 2017 section 10(1) provides for seven days within which petition should be served after the petition has been filed. However because the Act provides for 15 days then it means it takes precedence.

The purpose of service gives the respondent a reasonable opportunity to know the basis of allegations against them and it provides respondent further an opportunity to be heard. As stated in the case of *Mohammed Odha Mora vs The County returning officer Tana River & Others.* Malindi petition No.15 of 2013 Githua J was held

"**that it gives the respondent a reasonable opportunity to know the basis of the allegations**

against them and provides the Respondent with an opportuninty to be heard and goes to the root of all important tenents of the principle of fair trial and good administration of Justice".

Working from the above premises then this court must determine if knowledge of the petition and filing of a response in protest can be deemed to be proper service and response.

The courts have addressed themselves on this issue time and again and the only reason the petitioner gave in this case is that he had financial constraints and that efforts made by the process server failed.

The court does take note that the Petitioner had 15 days within which to serve the petition. The alleged process server has not sworn any affidavit of non-service to clearly spell our the various attempts he made at service and failed.

The fact that there was provision for service in the newspaper should at some point have alerted the Petitioner to the need to resort to service by Advertisement in the daily Newspapers before the lapse of time.

Looking at the petition before court it is not clear how the Petitioner intended to proceed in the matter with only the 1st and 2nd respondents.

Even assuming the 3rd respondent came to learn of the pettion from the 2nd respondent suppose he failed to peruse and the proceedigns and file his response how would the matter proceeded.

There was no attempt to seek extension as would be in other civil matters in order to serve and that is when the court stops to pause the question why was the petition filed in the first place since the main person it was targeted as was the 3rd respondent who had been declared a winner in the 8th August elections 2017 was never served.

To determine the issue the court has had recourse to the often quoted case by the Honourable Justice D.S. Majanja in Patrick Ngeta Kimanzi -VS- Marcus Mutua Muluvi and 2 others. Election petition Machakos No.8 of 2013, the court explained the importance of service of petitions. At paragraph 30 of the Courts Ruling the Honourable judge held

> "Without service, the opposite party is denied the opportunity to defend the case. Service is an intergral element of the fundamental right to a fair hearing which is underpinned by the well known rules of natural justice. As a component of due process, it is important that a party has reasonable opportuity to present a response".

The Honourable justice Majanja refered to the case of ***Kumbatha Naomi Cidi VS County Returning officer Kilifi and others, Malindi EP No.13 of 2013 (unreported)***. The same was dealt with by the Honourble Justice F. Muchemi. In that case theHonourable Justice Muchemi held that,

> " **Any pleading filed and not served. On the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it. Serving of a pleading accords the opposite party the chance to be heard. It is my considered opinion that this petition is a petition that never was.**"

This case was among the list of authorities relied upon by the 3rd respondent and a full mapping of the case attached to the list of authorities.

The Honourable Justice Majanja in the Patrick Ngela case (supra) went on to find that unless waived, service was mandatory and a requirement under the Constitution and the Rules.

At paragraph 32 of his Ruling the Honourable Judge concured with the positions held by his learned Justices in the Kambatha Naomi Cidi case (Supra) as well as Mohamed Odha Maro case (Supra) and held that:-

"***Service of the Petition is a mandatory requirement and a petition that has not been served cannot proceed for hearing as the respondent is denied the opportunity to contest the facts of the petition"***.

The Petitioner in this case has submitted that the 3rd respondent is aware of the petition by virtue of having filed the response which is similar to what he could have done when served by way of advertisement in the newspaper or notice in the Kenya Gazette.

The Honourable justice Majanja J in his Ruling above stated "***mere knowledge of existence of a petitition by the respondent can neither cure want of service nor discharge the burden of service imposed on the petitioner by Law."***

In his conclusion he found that "***It is service of process that triggers all the other steps in the election petition under the Rules, the duty cast on the Petitioner under Article 87, the Act and the rules to effect service of the petition. The duty cannot be discharged by implication or supposition but by actual service in the manner countemplated or prescribed by the constitituion and the Act".***

As if to answer the counsel for the petitioner in this case the honourable justice Majanja in the Patrick Ngeta Kimanzi case held as follows:-

"***It is not a mere technically, that can be swept aside by applications of the provisions of Article 159(2) (d) and the overriding objectives in rules 4 and 5 of the Rules. Unless waived by the respondent, service must be affected 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***".

In that case the honourable, judge went ahead to strike out the petition after also considering the past decisions. In case of *Nyamweya Vs Oluoch and others and Benard Mwenda Munyasia vs Charity Ngilu and others.*

He quoted the honourable Judge Lenaola 'J' in the latter case. Where he held that "striking out any pleaading is a drastic remedy and this court would be the last to wield that painful knife but the law as understood must be upheld in that regard".

This court in determining the issue of service has looked at, the case of **Aluodho*Florence Akinyi vs IEBC and 2 others (2017). (Siaya election petition No.4 of 2017).***

This is a case delivered by the Honourable Justice Majanja Judge and he held that ,

"**service of the petition upon the respondents was a fundamental step in the electoral process and resolution of disputes arising thereof. Failure to serve the petition upon the respondents went into the root of the Petition and the Petition could not stand when there was failure to serve the same"**.

In coming to the above conclusion the Judge also dismissed the argument that Article 159(2) d of the conclusion which obliges the court to administer Justice without undue regard and technicalities could cure the petitioners situation as failure to effect service was fundamental to the process and a petition that was not served could only suffer the fate of being struck out.

Similar cases have been determined across the republic as well.

In the case of S**hariff Abdulkadir Abderehman VS Abdallah Chikophe and 2 others (2014) eklr.** The honourable justice Meoli was dealing with the issue of service alongside other matters. In the concusion of her ruling she stated that regard to failure to serve the respondent.

"**There is no place for tardness or stealthy conduct by any litigant in the New Electroral regime".**

It is worth noting that the Petitioner has urged urged court to rely on the inherent jurisdiction of the court to cure lapse herein. The inherent authority of the court is a factor that comes to play whenever there is exercise of discretion. Where discretion in the statutes and Rules end, inherent authority actually begins.

In the case of **Rev.Madara Evans Onkanga Pondo VS Housing Finance Company of Kenya. Nakuru Hcc.No.202 of 2005.** The court held that the overiding feature of the inherent jurisdiction of the court is

> " **that part of procedural law both civil and crimnal and not part of the substantive law**."

Hence the same cannot come to the aid of the petitioner in this case. The petition must be struck out.

The other issue the court must deal with is whether the matter can proceed with the 1st and 2nd respondnets after the petition against the 3rd respondent has been struck out.

The 3rd respondent has submitted that it would be impractical to so. The petition is mainly related to the 3rd respondent and his newly elected position that was declared on the 15/8/17.

The Honourable justice Sergon (as he then was) stated as follows in the case of Ayub Juma Mwakesi VS mwakwere Chirau Ali and 2 others ()).

> "**If a petition is not properly served upon all the respondents named in the entire petition, it will be rendered incompeten**t".

The Honourable justice Muchemi in the case of "**Koyi Waluke VS Moses Masike Wetangula and 2 Others** was dealing with the issue of whether the Election peititon can survive without the 1st respondent who was the sitting member of parliament for Sirisia Constituency.

The cour held that

> "i**f the court ruled that the petition proceeds, any orders made are likely to affect the 1st respondent without being heard because he will not be a party to the petition. Such a move would offend the principles of natural justice that no person shalll be condemned unheard**".

A similar situation would apply in the instant case as well if the petition against the 1st and 2nd respondents would proceed in the absence of the the 3rd respondent.

In the case of David Wakairu Murathe -vs- Samuel Kamau Macharia Civl Appeal No. 171 of 1998, the Honurable justice Kwach (as he then was) on appeal against a petition with similar facts said.

> "**The fact that the Electoral Commission was served timeously made no difference at all. The petition was rendered incompetent against all Respondents including those who had been served**".

In the case of **John Michael Njenga Mututho VS Jaynne Njeri Wanjiku Kihara and 2 others Nakuru Civil Appeal No. 102 of 2008.** The court of Appeal stated

> "**Election Petitions are special proceedings, ;they have detailed procedure and by Law they must be determined expeditiously. The legality of a persons election as a peoples representative is at issue. Each minute counts."**

In conclusion therefore the court notes that and reiterates that indeed election petitions have special procedures and must be strictly adhered to failing which consenquences are often fatal to the party that seeks legal redress.

In the instant case the court having been well and properly guided by the above court decisions, finds no room to salvage the situation the petitioner finds himself in. The decisions all have a single line of trend

that appears to seal the fate of the petition regardless of the possible merits and possible chances of success that it may have.

The court therefore finds that since the petition herein was not served upon the 3rd respondent, the same is incompetent. Further the fact that the 3rd respondent came to learn about the petition from the 2nd respondent did not waive the duty and legal obligation on the petitioner to serve the said petition.

The court further finds that it does not have any jurisdiction as well as power to exercise its inherent jurisdiction to extend or enlarge time to serve the 3rd respondent since the provisions of the Law guiding on service are couched in mandatory terms hence leaving no room for the court to intervene in any manner whatsoever.

The court also finds ;that the petition cannot proceed against the 1st and 2nd respondents alone to the exlusion of the 3rd respondents since the only order the court can make is one to strike out the petition for being incompetent for lack of service.

The petition is thus struck out with costs to the respondents.

COSTS:

Sections 84 of the act provides for an election court to award costs of and incidentals to the petition It is also provided that such costs must follow the cause.

The court is at liberty to determine costs as can be interpreted by Rules 36(1) of the Rules.

Particularly on rule 36(1)(a) the court can specify the total amount of costs payable.

The 3rd respondent has have succeeded in their application they shall have costs as well as the 1st and 2nd respondents.

It is however worth noting that the petition has been struck out before the pre-trial conference could be held. It cannot be therefore considered in a similar manner to that case where the petition has been confirmed for trial, heard and determined.

I hereby order that the costs of the 1st and 2nd respondents and the third respondent be copped at Shs.300,000. The other costs and disbursements as well as other incidentals to be assessed if not agreed upon by the parties. The deposit paid as security shall be paid to the parties on a pro-rata basis.

CONCLUSION:

The court will thus make the following final orders:-

1. The petition be and is hereby struck out.

2. The Respondents are awarded costs of the petition and application assessed at.

   (a) Kshs.300,000 as the total instructions fees for the petition and application for the 1st and 2nd respondents.

   (b) Kshs.300,000 as the total instruction fees for the petition and application for the 3rd respondent.

   (c) The other incidental costs may be assessed and certified by the court ifnot agreed upon by the parties.

   (d) The certified costs awarded shall be paid out by the security deposited on a pro-rata

basis.

(e) A certificate of determination in accordence with section 86(1) of the Election Act 2011 shall issue to the independent Electoral and Boundaries Commission and the Speaker of the County Assembly, Trans Nzoia.

DATED and DELIVERED at KITALE this 13TH day of NOVEMBER 2017.

M.I.G. MORANGA

PRINCIPAL MAGISTRATE

13/11/2017

Ms Mengich Holding brief for Mr. Wanyama

instructed by K. Yano and Co.

Advocates for the petitioner.

Ms. Mufutu. Holding brief for

Mr. Karani instructed by Walubengo Waringiro and Co.

Advocates for the 1st and 2nd respondent.

And

Mr. Kiarie instructed by

Kiarie & Co. Advocates for the 3rd Respondent

MS MENGICH: I pray for Leave to Appeal.

MS. MUFUTU - No objection.

COURT - The petitioner has leave to file an appeal against this courts decision within (thirty 30) days as provided for under section 75 4(a) of the Elections Act no. 24 of 2011.

M. I. G. MORANGA

PRINCIPAL MAGISTRATE

13/11/17.