



REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATES COURT AT TAMU

KISUMU ELECTION PETITION NO 4 OF 2017

ELECTION FOR THE MEMBER OF COUNTY ASSEMBLY FOR MASOGO/NYANG’OMA WARD

SAMUEL ONYANGO

ONG’OW.....PETITIONER

VERSUS

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....
1STRESPONDENT**

**ALICE CHERUIYOT CHERONO.....2ND
RESPONDENT**

**NYASUNA HABIL OMONDI.....3RD
RESPONDENT**

RULING

1. The 2nd respondent /applicant has moved this court vide a notice of motion dated 19/10/17 brought under article 87(3) of the Constitution, section 77(2) of the Election Act 2011 and Rule 10(1)(a)(b) of the Elections(Parliamentary and County Elections)Petition Rules 2017 seeking the following orders:

a) That this honorable court be pleased to have this petition struck out for want of service upon the 2nd respondent, ALICE CHERUIYOT CHERONO

b) The costs of this application, together with that of the petition, be borne by the petitioner.

2. That application is also supported by the 3rd respondent. The application to strike out the petition is opposed.Thes on record a replying affidavit sworn by the petitioner and an affidavit of service filed by the process server who allegedly effected service upon the 2nd respondent.

3. Parties agreed to have the application canvassed by way of written submissions. The applicant, submitted that the 2nd respondent was never served with the petition filed on 6th September 2017 .

4. The attention of the court was drawn to Article 87 of the Constitution and section 77 of the Election Act 2011 and the Court of Appeal decision in Rozaah Akinyi Buyu v IEBC & 2 Others. The applicant’s main argument was that failure to serve the petition was not a mere technicality but went to the root of the entire petition.

5. The 3rd respondent supported the application while submitting that the petitioner had not sought to extend time to serve the petition upon the 2nd respondent. The court was urged to strike out the petition.
6. The petitioner on the other hand submitted that the 2nd respondent was duly served .According to the petitioner, failure by the 2nd respondent to sign the principal copy of the petition does not invalidate service. The petitioner further argued that the 2nd respondent had already filed her response to the petition jointly with the 1st respondent. Who instructed the Advocates appearing for the 2nd respondent to do so if it was not herself?
7. On jurisprudence, the Court was urged to consider Pages 63 and 68 of the Bench Book on Electoral Disputes Resolution and the fact that the only purpose of service is to bring proceedings to the attention of an affected party and nothing more. The court was urged to consider the case of Chama Cha Mashinani & 2 others v Beatrice Chebomui where service by whatsapp was considered good service.
8. By consent of all parties, the issue of service was pushed to the hearing of the main petition after an application to cross examine the process server was made at the eleventh hour.
9. The issue of service being a fundamental issue in the electoral litigation process and in view of its preliminary nature, the Court resolved to determine it at this stage.
10. I have considered the arguments in support of the application and the opposition thereto. There are two main issues that arise for determination, firstly is whether the 2nd respondent was served with the petition and if not, the consequences of failure to serve the petition. What is the law on service of election petitions?

SERVICE OF ELECTION PETITIONS

11. The issue of service of the petition is dealt with under Article 87 of the Constitution and reiterated in section 77 of the Election Act as follows:

“ (1) parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes

(2)Petitions concerning an election, other than a presidential election, shall be filed within twenty eight days after the declaration of the election results by the independent Electoral and Boundaries Commission

(3)Service of a petition may be direct or by advertisement in a newspaper with national circulation

Section 77 of the Election Act provides as follows:

“77(1) A petition concerning an election, other than a presidential election shall be filed within twenty eight days after the declaration of the election results by the commission

(2) A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation

Rule 10(1)(a)(b) of the Elections(Parliamentary and County Elections)Petitions Rules 2017 provides as follows:

10(1) Within seven days after the filing of a petition, the petitioner shall serve on the respondent by-

(a) Direct service

(b)An advertisement that is published in a newspaper of national circulation

12. These provisions provide the petitioner with two options to effect service; direct or personal service or service through advertisement in a newspaper with national circulation.

13. In this case, the petitioner elected to effect personal or direct service. The petitioner filed an affidavit of service sworn by the process server on 27/10/17 alleging that the 2nd respondent was served personally.

AN ANALYSIS OF THE AFFIDAVIT OF SERVICE/WHETHER THE 2ND RESPONDENT WAS SERVED

14. In the case of *Dickson Daniel Karaba v John Ngata Kariuki civil appeal 125 of 2003 decided by the Court of Appeal(unreported)* an issue arose as to the truth of whether or not service of the petition was effected upon the respondents. In this unreported decision that was cited with approval by *Majanja J in Machakos High Court Election Petition 8 of 2013 Patrick Kimanzi v Marcus Mutua & 2 others* the Court of Appeal stated the following;

*‘the central issue in this whole matter was to establish the truth about service of the petition filed by the appellant on the 1st respondent. The truth ought to have been established on a balance of probabilities and it lay between stories put forward by the process server and his supporter and by the 1st respondent and his supporter. Indeed the superior court and the parties appreciated the imperative at an early stage of the proceedings and the Court made orders correctly in our view, the process server and the 1st respondent be examined on their affidavits. There was a good reason for that order, traceable on the law on such matters, that there is a presumption that the court process was properly served unless such presumption is rebutted. We alluded to the case of *Karatina Garments limited v Nyanarua(1976)KLR 94**

15. In the Karatina Garments case(supra) the Court of Appeal for East Africa expressed itself thus on the issue of service:

‘we are of the view that in a case like this where the respondent denied having been served with summons, it was proper for the Court to inquire into this aspect of the matter and in the face of the conflicting affidavits filed, it was again proper for the deponents to be examined on oath to try and ascertain the truth. It was then a matter of fact as to which party was to be believed’

16. The process server was summoned to attend Court but despite being given ample opportunity, the court was informed that he could not be traced. He was therefore not cross examined on his averments.

17. In his affidavit of service filed in court on 30/10/17, the process server James Otieno Okudo says that he effected service upon the 2nd respondent in the manner set out therein. For its full effect and import and since it is the center of this ruling, I proceed to set out the 10 paragraphs of the affidavit of service as follows:

(1)That I am an adult of sound mind and the holder of a Kenyan national identity card number 10973160 a copy whereof is attached hereto and marked ‘JOO-1’

(2)That is a duly licenced court process server and holding a current process server’s license a copy whereof is attached hereto and marked ‘JOO-2

(3)That on 7/9/17,I received an Election Petition in duplicate from M/S Onsongo & co Advocates with instructions to serve the same on the Returning officer, independent Electoral and Boundaries Commission IEBC one Mrs Alice Cheruiyot, the returning officer for Muhoroni Constituency in which Masogo Nyangoma ward falls for the election held on 8/8/17

(4)That I had not met the returning officer before and hence did not know her physically but I had her photograph to assist me with identification.

(5)That on 8th September 2017,I went to Awasi IEBC offices within Awasi Town with a view of effecting service of the Election Petition on the returning officer

(6)That upon arrival at the said offices, I found 3 ladies to whom I introduced myself and the purpose of my visit, that I was a process server and wanted to effect service on the Returning officer a Mrs Alice Cheruiyot

(7)That all the ladies said that Alice Cheruiyot Cheroni,the Returning officer, Muhoroni Constituency was on leave and that she was at her place of residence within Kericho town.

(8)That while in Kericho town and while searching for the 2nd respondent's residence, I managed to locate her in town and using the photograph I had, I identified her as Alice Cheruiyot(a copy of the photograph is attached hereto and marked JOO-3)

(9)That I made an inquiry as to her identity and she showed me her national identity card number 5997401 which I handed over to her one copy of the election petition and required her to sign the duplicate copy which I was to return with my affidavit of service but she declined to sign on the same and informed me that she was taking her copy to the IEBC for their further action

(10)That whatever is stated herein is true to the best of my knowledge, information and belief.

18. In a further affidavit filed in Court and sworn on 17/11/17,the 2nd respondent denied all the averments of the process server more particularly the fact that she was a resident of Kericho or how the process server was able to walk around Kericho town with her photograph and where he located her.

19. **Order 5 rule 15 of the civil procedure Rules** provides that the serving officer shall state the time and the manner in which summons were served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.

20. In this case, the process server alleges to have had a photograph that assisted her to identify the 2nd respondent in Kericho town. It does not indicate when he went to Kericho town, what time he allegedly met the 2nd respondent and specifically where he allegedly located the 2nd respondent in Kericho town.

21. The 2nd respondent on the other hand disputes all the details given by the process server. Cross examination of the process server would probably have resolved this conflict but the Court was informed that the process server could not be traced despite the petitioner being given ample time to avail him.

22. I have keenly perused the affidavit of service sworn by the process server. In paragraph 1, he describes himself as a resident of Nyalenda Estate within Kisumu City. The reason given for his nonattendance for cross examination leaves a lot to be desired by this Court. Why would he abscond the process of the Court if he had nothing to hide?

23. From the affidavit of service, and in my humble view, I find it highly impossible that the process server was walking randomly within Kericho town where he was able to trace the 2nd respondent as he wants the court to believe. He does not state when, what time and where he was able to find her.

24. The affidavit of service is general, scanty in details and cannot be said to be a proper affidavit. Nothing would have assisted this situation better than to avail the process server for cross examination.

25. The cross examination of the process server would have gone a long way in clearing these unexplained issues.

26. Failure to arraign a crucial witness fatally weakens a case, when an important witness is not arraigned to testify, the Court is in law entitled to draw an inference that the evidence of that important witness would have been adverse to the party who had an obligation to arraign that particular witness. This position was succinctly laid down in the celebrated case of **Bukenya v Uganda (1972)E.A 549**

27. The process server remained a crucial witness since the main issue revolved around the service that he had allegedly effected. Since he was not arraigned, and his affidavit raised several unanswered questions the 2nd respondent's averments that she had in fact not been served remains uncontroverted.

CONSEQUENCES OF FAILURE TO SERVE THE PETITION

28. This Court is alive to the fact that to deny a person a hearing should be the last resort of the Court, however I am also fully aware that Non service of an election petition is not a mere technicality that can be salvaged under article 159 of the Constitution.

29. In **Mohamed Odha Mao v The county Returning Officer Tana River(2013)Eklr Githua J** held that **“failure to serve a petition is a matter that goes to the very core of the proper and just determination of the Petition and cannot be wished away”**

30. Service of the petition was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the 2nd respondent goes into the root of the petition and the petition could not stand when there was failure to effect service. This position was succinctly laid down by the Court of Appeal in **Rozaah Akinyi Buyu v IEBC & 2 OTHERS(2014)eKLR** and echoed most recently by Majanja J in **Aluodo Florence Akinyi v Independent Electoral and Boundaries Commission & 2 others (2017)eKLR**

31. In **Raila Odinga v IEBC & 3 OTHERS 2013 e KLR** the Supreme Court held that **“the provisions of article 159 (2)(d) of the Constitution were never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from Courts of Law”**

32. Article 87(1) of the Constitution mandated parliament to enact legislation to establish mechanisms for timely settling of electoral disputes hence the Election Act of 2011. Consequently, parties to such disputes must ensure that they comply with the statutory timeframes set by the Election Act and the rules made thereunder. **This position was clearly stated by the Court of Appeal in Charles Kamuren v Grace Kipchoim(2013)eKLR**

33. Filing of a response by a respondent does not waive the petitioner's mandatory duty to serve the respondents as service goes to the root of the Petition.

34. Anyone engaging himself/herself in an election Petition as a petitioner must be prepared to go the full length of what it takes to get an election petition to a stage of full hearing. Such a petitioner must comply with and observe all laws and regulations and rules governing the filing and service of petitions. **Sitati J in Evans Nyambaso & anor v IEBC(2013)eKLR**

35. The court having established that the petition was not served against the 2nd respondent personally or directly, the petition is a nullity and is hereby struck out.

COSTS

36. This Court is under duty by dint of **section 84 of the Election Act** to award costs of and incidental to a petition and such costs shall follow the cause.

37. The Court has a broad jurisdiction to determine costs, **rule 30(1) of the Rules provides as follows:**

30(1)The court may at the conclusion of an election petition make an order specifying

- (a) the total amount of costs payable; and
- (b) the maximum amount of costs payable
- (c) the person by and to whom the costs shall be paid

Under rule 31 of the Rules, if the Court does not determine the costs, the registrar of the Court is required to tax such costs.

38. As the 2nd respondent has succeeded in the application, she shall have the costs of the application and the petition.

39. The final orders are therefore as follows;

a) The petition be and is hereby struck out

i. All the 3 respondents are awarded costs of the petition and the application which together with all other incidental costs shall be taxed in accordance with the Advocates Remuneration Order and the total costs certified by the registrar of this Court

ii. The certified costs awarded shall be paid out of the security deposit on pro rata basis.

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

DATED AND DELIVED IN TAMU COURT THIS 21st November 2017

PK RUGUT, SRM

In the presence of:

.....**Advocate for the Petitioner**

.....**Advocate for the 1st and 2nd respondents**

.....**Advocate for the 3rd respondent**