



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MAUA

ELECTION PETITION NO. 1 OF 2013

IN THE MATTER OF ARTICLES 1, 3, 38, 81,86 & 87 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 75 AND 76 OF THE ELECTIONS ACT

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS 2012 (LEGAL

NOTICE NO. 128 OF 2ND NOVEMBER,2012)

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)

PETITION RULES 2013 (LEGAL NOTICE NO. 44 OF 22ND FEBRUARY 2013)

AND

IN THE MATTER OF GENERAL ELECTIONS HELD ON 4TH MARCH 2013

AND

IN THE MATTER FOR THE COUNTY REPRESENTATIVE OF MUTHARA WARD

BETWEEN:

TURIBU MOSES KINYUA PETITIONER

-VERSUS -

ANDREW KOBIA M'ERINGO1ST RESPONDENT

ABDI SHEIKH MOHAMMED2ND RESPONDENT

THE INDEPENDENT ELECTION AND

BOUNDARIESCOMMIS..... 3RD RESPONDENT

RULING

This Ruling is in respect of 2 applications that were heard together; one by the petitioner dated 8.4.2013

filed together with the petition on 10.4.2013 and the other by the 2nd respondent dated 19th April 2013 filed together with the response. Directions were taken that the 2 applications be heard together starting with the 2nd respondent's application

The application by the 2nd Respondent seeks that the petition herein be struck out with costs for want of any service on the 2nd respondent and costs of the application. The application was based on 2 grounds:

- a. That the petition has never been personally or otherwise served on the 2nd respondent,
- b. That the petitioner has failed to comply with the law relating to service of election petition and rules thereof.

It is supported by an affidavit by Abdi Mohamed Sheikh the 2nd Respondent who deposes in paragraph 2 that he has never been served personally or otherwise with the petition, in paragraph 3 that he should have been served personally or by advertisement in terms of the elections Act, in paragraph 4 that the petitioner never made any attempts to serve him, in paragraph 5, that such failure makes the petition incompetent and untenable in law and in paragraph 6 that the petition should not be allowed to proceed for lack of service and should be struck out.

The 1st Respondent Mr. Andrew Kobia M'Eringo filed an affidavit in support of the 2nd respondent's application. He claims he has never met David Mwenda Kanyamu (the process server) and has never been told that he was looking for him. He avers in paragraph 3 of his affidavit that he left his Muthara home on 11.4.2013 at 10.00am to buy spare parts for his vehicle Reg. KAR 939 N in Nairobi and exhibited a receipt "AKM 2" spent the night there and on 12.4.2013 attended a graduation of a cousin Penina Mbirithi at Igoji Teacher's college up to 4.00pm. He claims to have learnt of the petition from a colleague Julius Kabira Ambau and has never been served. He claims to have obtained a copy of the petition from the court registry.

He deposes in paragraph 8 that the affidavit by the process server is outrageous and in paragraph 9 terms it aas he was in Nairobi on 11.4.2013 at 10.00am when the process server claims to have served him in Muthara at 11.30am.

In reply 3 replying affidavits were filed; one by David Kanyamu Mwenda the process server, another by Turibu Moses Kinyua the petitioner and the other by Eric Nthiga. The process server has deposed that on 11.4.2013 he received copies of the petition herein with supporting affidavit of the petitioner, annexures thereto, and other supporting affidavits, form EP2 applications under certificate of urgency with its supporting affidavit from M/s. Mbogo Muriuki advocates with instructions to serve upon the 1st and 2nd respondent. It is his evidence that on the same day 11.4.2013 at around 11.30am he visited the 1st respondent at his home near Muthara Market and served a copy of the stated documents to him requiring his signature at the back of his return copy. The 1st respondent was identified to him by the petitioner and he accepted service. On the 12th April 2014 he visited the offices of the 2nd and 3rd respondents at Muriri at 11.40am to effect service on the 2nd respondent but he found the offices closed. Upon making enquiries about their whereabouts he got the cell phone of the secretary No. 0714 54 39 14 whom he called. The secretary who introduced herself as Lucy informed him that the 2nd respondent was admitted at Karen Hospital Nairobi and she also gave him his cell phone number being 0721 70 29 72. He then called the 2nd respondent who confirmed being admitted at the hospital. He proceeded to Nairobi and arrived at the hospital at around 5.30pm and at the reception desk requested that the 2nd respondent be called which was done and he served him with the petition documents. He claims to have been with Eric Nthiga.

The petitioner also in a replying affidavit avers that on 11.4.2013 at 5.45pm he was present when the 2nd respondent was personally served with the petition by David Mwenda Kanyamu at the reception area Karen Hospital Nairobi. He deposes to know the 2nd respondent for time and he introduced him to the process server.

The other replying affidavit was by Eric Nthiga. He depones that he is an employee of M/s. Mbogo Muriuki Advocates as clerk cum driver. On 11.4.13 one of the partners of the firm Mr. Muriuki commissioned him to drive Mr. David Mwenda Kanyamu a process server to places he was to effect service of documents in this petition. He started the journey at Maua Law Courts at about 10.00am and got to Kangeta Market at the office of the 3rd respondent arriving at 10.30pm. He and Mr. Turibu Moses Kinyua remained in the car as the process server went to conduct his business. They then proceeded to a home near Muthara Market at the direction of the petitioner where he remained in the vehicle as the petitioner and the process server went about to do their service. After this he was directed to drive to Muriri Market where again the process server and the petitioner went to the offices of the 3rd respondent. They then returned and directed him to drive to Nairobi via Samson Corner Junction. He conferred with Mr. Mbogo Advocate and was instructed to seek Ksh.10,000/- from the petitioner forfeit and his allowances which the petitioner granted. He got to Samson corner where the process server conferred with one Benard Musee. Thereafter he drove to Nairobi Karen Hospital arriving at 5.30pm. He remained in the vehicle as the process server and the petitioner went inside to emerge one hour later. He then dropped the petitioner at Mlango Kubwa Estate Nairobi and drove back to Maua arriving at 2.00am of 12.4.2013.

There is also an affidavit of service by the process server dated 19th April 2013 and filed on 2.5.2012 alongside the replying affidavit. Except for the date it was sworn, it is word for word a copy of the replying affidavit by the process server highlighted above.

The process server was summoned for cross examination. His evidence under cross examination is that he served the 1st respondent on 11.4.2013 and the 2nd respondent on 12.4.2013. He admitted that his replying affidavit as well as affidavit of service puts the date of his visit to the IEBC offices (Before journey to Nairobi) as 12.4.2014 while the petitioner and Nthiga (driver) put the date at 11.4.2013.

Under further cross examination by counsel for 1st respondent he maintained he served the 1st respondent on 11.4.2013 at around 11.30am. He claims to have been shown the around 11.30am. He claims to have been shown the home of the 1st respondent by the petitioner and a motor cyclist who had accompanied them. He denied that on 11.4.2013 he was in any car and a version he used the car on 12.4.2013. Indeed he clarifies further on that he hired a motor cyclist to Karachi Market. He denies that he served the 1st respondent on 12.4.2013. He testified in examination that the date 12.4.2013 is a typographical error and that the events described by the other deponents are for 11.4.2012. He avers that he also visited the home of the 1st respondent on 12.4.2013 to get directions to the 2nd respondent.

Mr. Kerongo for the 2nd and 3rd respondent submitted that service of the petition goes to the root of the petition and that service is mandatory and not a technical issue and that lack of service renders a petition a nullity. He contends that the petitioner had 14 days after filing of the petition on 10.4.2013 to serve the same. He submits that the 3 affidavits filed in support of service do not agree factually at all as they relate to 2 different days and set of circumstances and chronology of events that do not tally at all. He submits that the affidavits cannot be reconciled and the court should conclude there was no service and thus strike out the petition.

Mr. Athiru for the 1st respondent supports the submissions of Mr. Kerongo. He submits that section 77 provides that service on all parties is mandatory as a petition is a serious matter affecting not only the parties but public interest. The 1st respondent was away on 11.4.2013 and on 12.4.2013 he was at Igoji. He asks the court to find the affidavits in support of service contradictory and cooked after the present application was filed. He submits too that the evidence of the process server is at variance with his affidavit failure to serve the 1st respondent, he contends, renders the petition incompetent. He referred the court to **Kagunyi –vs- Gathua & Another [2008] 3 KLR** and **Bett –vs- Electoral Commission of Kenya & 2 others [2008] 2 KLR** for the legal position that personal service in an election petition is a legal requirement and not a technicality. He submits that the 1st respondent was not served and collected the petition as the Respondent indicated.

Mr. Mbogo on his part submitted that the process server has indicated in cross examination how and where he served and how he learnt of the whereabouts of the 2nd respondent, that his evidence was credible, unshakable and vivid because it was true. He would not know why the other deponents give other dates but that the events described happened on 12.4.2013. He further submits that the respondents responded to the petition because they were served. He urges the court to distinguish the 2 authorities from the present case and find that the 1st respondent was served at his home while the 2nd respondent was served at Karen hospital.

Mr. Kerongo responded that the 1st and 2nd respondent has responded does not take away the responsibility of the petitioner to serve every respondent on what was called typographical errors he contends they cannot be typographical errors as they have been put under oath and that parties or counsel cannot amend them. He invites the court to make the finding that the 3 affidavits have created more doubts and the court should find there was no service on the 2nd respondent.

Mr. Athiru in response submitted that it was immaterial that a response had been filed as right service is the issue. He contends that the petitioner should not take credit if the 1st respondent collected the petition in court.

I have considered the evidence of service as contained in the process server's affidavit of service, replying affidavit, the petitioner's replying affidavit and Eric Nthiga the driver's replying affidavit and the 2 supporting affidavits by the 2nd respondent and 1st respondent, the evidence on the cross examination by the process server and the submission by the process server and the submissions by counsel. The process server depones that he served the 1st respondent on 11.4.13 and states on cross examination that he went there by motor bike with the petitioner. The petitioner in his replying affidavit does not state he went there. Mr. Eric Nthiga the driver depones that he drove them to the home! For the service on the 2nd respondent the process server says in his replying affidavit that he served him on 12.4.2014 at Karen Hospital after getting information as to his whereabouts and his contact from a secretary at the offices of the 2nd and 3rd respondent at Muriri Market.

This date of service is repeated in the process server's affidavit of service allegedly prepared earlier but not filed. This evidence is sharply contradicted by the evidence of the petitioner who states that service on the 2nd respondent was on 11.4.2013. It is also sharply contradicted by the driver Eric Nthiga who states that service on both the respondents was on 11.4.2013. Eric Nthiga also contradicts the process server evidence that he went to serve on a motor bike. Eric says he drove him there. I find the date of service on the 2nd respondent in the process server's 2 affidavits an absurdity as we are yet to get to 12.4.14. It is about one year away. I am however surprised that the date of 12.4.2014 in the affidavit of service would be repeated in the replying affidavit which was supposedly prepared later. Is it a question of the process server not being diligent? Nevertheless, the court has been urged by Mr. Mbogo to consider that a typographical error and treat 12.4.2014 as 12.4.2013. Even if I did that, still the date of 12.4.2013 contradicts the date given by the petitioner and the driver Mr. Eric Nthiga who put the date at 11.4.2013. From the affidavit of the driver Mr. Eric Nthiga, service on the 1st respondent at Muthara and the 2nd respondent in Karen took place on the same day which contradicts the process server's evidence that it was on 2 different days, the 11th and 12th of April 2013. These contradictions are not capable of being reconciled. Further the process server states he visited the home of the 1st respondent on the 12th after service on the 11th to get directions from him on the 2nd respondent when he was informed he had gone for a graduation. With respect, I find this incredible and must pose the question whether he was looking for the 1st respondent for service? The 1st respondent has stated in his affidavit that he learnt of the petition from a colleague and went to court for the same and was therefore not served. It is noteworthy also and significant, in my view, that the process server did not file an affidavit of service, immediately he claims to have served but has done so only after the 2nd respondent's application to strike out the petitioner and he court has to wonder what purpose the belated filing services.

As service is denied it is incumbent upon the petitioner to prove service on the respondent. Has he done

so? Mr. Mbogo for the petitioner submitted that he had on a balance of probabilities proved that he served the 2nd respondent. That however is not the standard of proof in electoral disputes.

The standard of proof is higher than the balance of probabilities but lower than the standard of proof in criminal cases where it is beyond a reasonable doubt. Even after removing the absurdity of 12.4.2014 and treating it as a typographical error, the contradictions in the date of service between the process server and petitioner and Nthiga the driver remain unresolved in a matter where service has been denied. The totality of the affidavit of service, the 3 replying affidavits and the affidavits in support of the application casts very serious doubts indeed that there was any personnel service at all. The petitioner has not in my humble view discharged the burden of prove of service of the petition on the 2nd respondent.

The law on service of election petitions is well set out in the constitution of Kenya in article 87 (2) which provides:

“Service of a petition may be direct or by advertisement in a newspaper with national circulation.”

It is also set out in the elections Act 2011 Section 77 (2) which provides:

“A petition may be served personally upon a respondent or by advertisement in a newspaper with National circulator

The election petition rules in Section 13 (1) states:

“An election petition shall be served by the Petitioner on the respondent by-

- a. direct service; or

The other mode of service by advertisement is not in issue here and need not be reproduced. The rules in the interpretation section define a “respondent” in relation to an election petition to mean:

- a. a person whose election is complained of;
- b. the returning officer,
- c. the commission; and
- d. any other person whose conduct is complained of in relation to an election.

There is not a doubt therefore that the present respondents are indeed respondents. The petitioner from the foregoing had under the constitution to serve the respondent either directly or by advertisement, under the elections act to serve personally or by advertisement, under the elections Act to serve personally or by advertisement and under the election petition rules directly or by the alternative mode of advertisement. Service of petitions in our jurisprudence has been personal in the past and our courts placed much trust on personnel service. In **Bett Vs- Electoral commission of Kenya & 2 others** above quoted, it was held thus: that personnel service is a legal requirement and not a technicality in an election petition and that in order to be valid a petition must be personally served upon the respondent within the statutory period....

In the present case, the petitioner had to serve the respondent within 14 days of filing the petition. He filed the petition on 10.4. 2013. He had up to 25.4.2013 to serve by which time he has failed to show that he served. In **Kagunyi –vs- Gathua & Another** also quoted above, the court of appeal emphasized on the primary of personnel service. In a more recent case of **Ayub Juma Wakesi vs Mwakwere Chirau Ali and 2 others [2008]** KLR the requirement of service in the matter prescribed was restated by Judge Serگون who rendered himself thus:

“In my view all the respondents must be served according to the manner prescribed. The fact the Electoral Commission has been served does not matter. The returning officer must equally be served. This will obviously enable the returning officer to participate in the election petition. Thereturning officer is no less a respondent than the electoral commission, he must be served.

If the petition is not properly served upon all the respondents named, then the entire petition will be rendered incompetent.

It becomes clear therefore the present electoral laws and precedent demands of a petitioner direct/personal service or otherwise of a petition on the respondent. Such was wanting respectively in the present case. I do allow the 2nd respondents application to strike out the petition for want of service with costs

The petitioner's application in the way of a notice of motion dated 8.4. 2013 and brought under section 80 of the elections Act 2011 seeks order that:

The 2nd and 3rd respondents be ordered to release to the petitioner/applicant copies of form 34 for all polling stations within Muthara ward forums inspection and/or file copies of the same in court and a specific timeline for compliance be given before the petition is heard.

3. That the Honorable court be pleased to compel the 2nd and 3rd respondents to provide the petitioner with copies of all marked registers for the petitioner to inspect and audit the same and/or order for the said copies of registers to be filed in court and a specific timeline for compliance be given before the petition is heard.
4. That the honorable court be pleased to order a recount of all votes from all the polling stations of Muthara ward before the petition is heard on its merits.
5. That the Honorable court be pleased to order the 2nd and 3rd respondents to furnish the petitioner with a certified copy of the final tabulation table (forms 36) and the results for Muthara ward county representative results.
6. That the honorable court be pleased to order the 2nd and 3rd respondents to furnish the petitioner with each polling station results (form 34) for all the 5 elective posts for all the polling stations within Muthara ward.
7. That the Honourable court be pleased to summon and compel the official election observers; Election observation group (ELOG) and United Nations entity for gender equality and empowerment of Women (UN Women) through their chief officers to produce their reports on the observation of the conduct of Elections within Muthara Ward.
8. That the honourable court be pleased to issue any further or better orders as will meet the ends of justice.
9. That costs of the application be provided for.

It is supported by the petitioners affidavit which contain only paragraph 1,7,8 and 9 which means paragraph 2,3,4,5 & 6 were not filed as the documents in the petition are properly bound with a stapler. The applicant states in paragraph 7 that he seeks a recount to ascertain whether the 2nd and 3rd respondents agents did a proper tally of the votes and in paragraph 8 that there were election observers who documented the shortcomings of the electoral process and hence they should furnish the court with their reports.

The 2nd and 3rd respondents in response filed 5 grounds of oppositions as follows:

1. The application has been overtaken by events as the 2nd and 3rd respondents have already brought before the court the relevant forms 35 and 36 through affidavits.
2. The demand for form 34 is misplaced as the same is only used in declaration of presidential results in irrelevant in the present proceedings
3. That the court cannot order scrutiny of votes and/or the petition is severely limited to one and only one prayer of scrutiny and recount.
4. The Demand for register of votes is without basis and is a fishing expedition for evidence in realization that the petition is without merit
5. The court is only seized of ward representative petition and not only

Other petitions and it not viable for the court to deal with documents relating to other positions of President, Governors, member of parliament/women representative without offending the constitution

and the Elections Act.

The 1st Respondent opposed the application on the following grounds.

1. That the form 34 sought relates to Presidential Elections and has no relevance to the petitions before court.
2. That the demand for all the marked registers is superfluous as elections tallying is not challenged in all polling stations
3. That the court cannot order for recount/scrutiny before the petitioner abandons all other grounds.
4. That application is overtaken by events 2nd and 3rd petitioner's have served the documents in their response.
5. That the petition relates to election of a County Representative for Muthara ward and court cannot grant orders touching on Presidential, Governors, senators, Members of Parliament and women Representative elections
6. That the applicant seeks orders against persons who are not parties to the petition.
7. That application is speculative and omnibus.
8. That the application is totally defective and unlawful and
9. That no ends of justice will be served by the application.

In Prosecuting the application to counsel met went over all the orders he seeks and I need to reproduce them. He relied on the supporting affidavit which unfortunately does not contain several depositions.

Mr Kirongo for the 1st Petitioner agreed that the petitioner ought to have had the information he seeks before coming to court otherwise the application is a fishing application.

He went over the grounds filed and referred the court to ***Raila Odinga vs IEBC in petition no 5/13.***

Similarly Mr Kerongo expounded on his ground and argued that the applicant was a fishing expedition. Forms 35 and 36 have been supplied through affidavits but form 34 is for declaration of presidential wealth, demand for the register is without basis, results have been delivered in the response. The registers cannot be delivered as they are in sealed boxes which would be delivered to court within 48 hours of the trial. It is also submitted that election observers reports do not form part of the official results. He referred the court to Masinde Vrs Bwire (2008) KLR.

I have considered the application, the supporting affidavit and the grounds filed by the respondents as well as arguments by counsel. I find that forms 35 and 36 that the applicant seeks have been supplied in the response and that extent prayers 5 has been overtaken by events. Prayer No 2 for forms 3 is beyond this court as it relates to Presidential elections of which the Supreme court only has jurisdiction.

Regarding prayer No 3 for marked Registers, this prayer is premature as such would be in sealed boxes which would be availed in 48 hours upon commencement of the hearing of the petition.

As for prayer 4 – recount of votes, this is not the only prayer in the petition and so it is also premature. The court is also unable to order that the petitioner be furnished with results of all other 5 elective posts as I have jurisdiction for only County Representative election. I have no jurisdiction over the observed groups who have not been named as parties. Largely as contended by the respondents, the application is a fishing expedition and is disallowed. Costs of the application to be in cause.

J.K Kingori CM

24/5/2013

Court:- Read and delivered in open court this 24th Day of May 2013 in the presence of Mr Mbogo for the Petitioner, Mr Atheru for 1st Respondent and Mr Kerongo for 2nd and 3rd Respondent, in the absence of the petitioner, presence of the 2nd Respondent and in the absence of the 1st Respondent.

J.G Kingori CM

Mr Mbogo:-

I apply for a copy of the proceedings and ruling.

J.G Kingori CM

24/5/13.

Court:- Typed proceedings to be supplied to the counsel and even parties on payment of requisite charges.

J.G KINGORI CM

24/5/2013.