IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, ONYANGO OTIENO & VISRAM, JJ.A)

CIVIL APPLICATION NO. 75 OF 2011

BETWEEN

WALTER ENOCK NYAMBATI OSEBE.....APPELLANT

AND

JUSTUS MONGUMBU OMITI & 2 OTHERS.....RESPONDENT

(Application for leave to adduce additional evidence of the High Court of Kenya at Kisii (Musinga J.) dated 16th September, 2010

in

H.C. EL. PET. NO. 1 OF 2008)
****

RULING OF THE COURT

We have before us a notice of motion dated 25th March 2011 and filed on 28th March 2011 in which the applicant, ***Walter Enock Nyambati Osebe*** is seeking two orders namely:-

"1. That this Honourable Court be pleased to take additional evidence in respect of Civil Appeal No. 260 of 2010 in the form of a letter dated 24th March 2011 from the Process Server s' Committee.

2. That the costs of this application be provided for."

The application is premised on three grounds which are:-

"(i) That the Process Servers Committee has now re-affirmed that John Atieli Angwa was not licensed to effect service.

(ii) That the Process Servers' Committee has confirmed the letter Ref. No. JD/HCCC No./NBI/PS/27 dated 10th April 2008 originated from them.

(iii) That the letter from the Process Servers' Committee could not be placed before the superior court as the authenticity of the letter of 10th April 2008 has never been an issue."

There is an affidavit in support of the application sworn by Jackson Omwenga, who is the advocate on

record for the applicant. That affidavit does not set out the history of the entire saga but narrates the facts in support of the applicant's case from paragraph 4 where he states that he filed Civil Appeal No. 260 of 2010 in this Court and further states in the proceeding paragraphs 5, 6, 7, 8 and 9 as follows:-

"5. That when application No. 222 of 2010 for stay pending appeal came up for hearing on 7th March 2011 an issue arose on the identity of the person who signed the letter dated 10th April 2008 and whether the same originated from the Process Server' Committee. Annexed hereto and marked "JO1" is a copy of the letter dated 10th April 2008.

6. That the authenticity (sic) of the letter dated 10th April 2008 has never been put to question by any of the respondents in the superior court.

7. That the letter of 10th April 2008 was a response to my letter of inquiry that I wrote to the Process Servers' Committee. I personally did not doubt the authenticity (sic) of the letter nor did any party prompt me to seek clarification. Annexed hereto and marked "JO2" is a copy of my letter of inquiry.

8. That pursuant to this Court's sentiments in Civil Application No. 222 of 2010, I wrote a letter to the Process Servers' Committee on 15th March 2011 seeking clarification of the issue raised by the court. Annexed hereto and marked "JO3" is a copy to confirm this.

9. That the Process Servers' Committee replied to my letter on 24th March 2011 clarifying the issue. Annexed hereto and marked "JO4" is a copy of the reply to confirm this."

We have reproduced almost all of the supporting affidavit and certainly the substantive parts of it because of the importance we attach to the history of the entire matter as will be clear later in this ruling.

The application was opposed by the first respondent Justus Omiti. His advocate, Mr. Patrick Kerongo swore an affidavit in reply to the applicant's assertions. That replying affidavit was lengthy but the main issues it raised were that the issue of the identity of the person who signed the letter dated 10th April 2008 had been raised earlier and not for the first time when the stay pending appeal (application) was being heard by this Court differently constituted on 7th March, 2011. The issue was first raised by the respondents' advocate in the proceedings before the Hon. Justice Ibrahim in the superior court prior to the learned Judge's ruling which was the subject of appeal to this court. He then went on to state as follows at paragraphs 8, 9, 10, 11, 12, 13 and 14:-

"8. That the issue was then again raised by the superior court (Mr. Justice Musinga) in his ruling dated 16th September, 2010 (see annexture "B" herein).

9. That then the issue was again raised by this Honourable Court on 7th March 2011 as aforesaid.

10. That the issue has thus been raised in and by the court's and been a live issue for over 3 years now, and the applicant has not during that period made any application for additional evidence to be adduced.

11. That the applicant has not shown any sense of urgency or shown any diligence in bringing the letter now sought to be adduced.

12. That the applicant has been guilty of delay of over there (sic) years, and the said delay is inordinate. The applicant is also guilty of laches to inordinate degree.

13. That the same was being adduced at the last moment two days before the appeal was to be heard on 31st March 2011, at which the applicant again applied for an adjournment.

14. That the application and the letter sought to be adduced as additional evidence do not meet the

conditions set down by the courts for the admissions of fresh evidence, and ought to be dismissed."

Although the entire history narrated in the respondents affidavit was not fully covered by the applicant's supporting affidavit, when Mr. Gatonye, the learned counsel for the applicants addressed us, he found it fit to include it in his submissions before us as those aspects were covered in the list of authorities he filed and having done so in his introductory remarks, he proceeded and urged us to allow the application as the letter sought to be adduced as evidence was important and would affect the outcome of the appeal for if it is to be established that the process server was not licensed to serve process then it would be proved that the applicant was not served with the petition and hence the appeal which was mainly on the issue as to whether the issue of service was *res judicata* would be solved once and for all. Mr. Ongicho, the learned counsel for 2nd and 3rd respondents supported the application. On the other hand, Mr. Nowrojee, the learned counsel for the first respondent maintained that the history of the entire matter demonstrated that the applicant never exercised due diligence and should not be allowed to raise issues that fell under the doctrine of *res judicata* in that they were raised or should have been raised and were decided upon or should have been decided upon. Mr. Gatonye and Mr. Nowrojee addressed us on other matters as well.

We have considered anxiously the rival arguments, the record before us together with those annexed in the lists of authorities supplied to us, the affidavit and the law. The notice of motion is brought under ***rule 29*** of the Court of Appeal Rules. That rule states:-

"29 (1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have power:-

(a) To re-appraise the evidence and to draw inference of fact and

(b)In its discretion, for sufficient reason to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.

(2) …….. Not applicable

(3) ……..Not applicable

(4) ……. Not applicable

In the notice of motion before us, the history of the entire dispute shows that the respondent filed Election Petition No. 1 of 2008 in the High Court at Kisii on 11th January 2008 seeking to unseat the applicant who had been elected as the Member of Parliament for Kitutu Masaba. The applicant filed an application dated 9th July, 2010 in which he sought the striking out of that petition. The main ground for seeking striking out orders was that there was no personal service of the petition upon him. Thus on the very outset, the issue of whether or not the applicant was served with the petition was at the centre of the dispute between the respondent and the applicant together with second and third respondents. It does not need prompting to accept that when the issue of service came up, the mode of service, where the service took place and whether or not the process server was qualified to serve court process were all matters that needed to be gone into and particularly as the applicant is the one that filed that application claiming non service, he had to prepare his evidence including exhibits to demonstrate his claim. It was not enough in our view to take matters for granted on grounds that opposing parties did not raise objection to certain aspects. Thereafter the matter came to this Court on appeal. Again the central issue was service of the petition, whether it was proper or not. Ibrahim J. may not have made a specific finding on whether the process server was licensed or not at the time he served the petition because he thought the service itself was not proper, but on first appeal all those matters were before the court and if the applicant was minded, he could have, with diligence applied at that time to have this evidence claiming the process server was not licensed to be produced before the court for the court was duty bound at that time to revisit the evidence afresh and analyse it. The applicant did not find it fit to do so or it did not occur to him that he needed to do so. Indeed in his judgment in that appeal – Civil Appeal No. 183 of 2008 Waki, JA addressed himself thus:-

"I have considered those submissions, and the various authorities cited by counsel, including the ruling of the superior court E.P. No. 4 of 2008, (supra). The superior court made no findings on the contents of the affidavit of service and it is therefore my duty to evaluate it afresh as this is a first appeal. Having done so, I think the factual dispositions of the process server, which were not challenged in cross-examination, do establish on a balance of probability that the appellant discharged the onus of showing diligence in serving the petition."

That judgment was delivered on 7th May 2010 long after the issue as to whether the process server was licensed had been an issue and efforts to ensure authenticity of the writer of the letter from Process Servers' Committee should have been long made and evidence to that effect availed in that appeal. As if that was not enough, when the petition went back to superior court (Musinga J.), that issue was alive still and was the core issue. No effort was made to get the Process Servers' Committee's letter in time and no effort was made to introduce it as evidence before Musinga J. as an exhibit. Granted on that matter of lack of license having been raised, the learned Judge felt it was *res judicata*, but he may have felt otherwise had a letter similar to the one now sought to be introduced, exhibited before him at that time. Be that as it may, the applicant then came to this Court on an appeal against Musinga J's ruling. He first filed notice of motion under ***rule 5 (2) (b).*** It was Civil Application No. NAI. 222 of 2010. Again the issue of service was at the centre of the application and this Court, differently constituted specifically referred to the ruling of Musinga J. and that of Ibahim J. on the issue of lack of license and to the letter allegedly signed for and on behalf of the Process Servers' Committee and also referred to Waki JA's part of the judgment we have reproduced hereinabove, considered them and came to a conclusion. Before the court heard that application, it was, in our view incumbent upon the applicant, knowing that the authenticity of the letter alleging that the process server was not licensed, was important to his case, to apply for its inclusion as exhibit. He did not do so and now comes at this late hour when we are told the hearing of the petition is almost complete in the superior court, and the appeal is about to be heard, to apply for the letter's inclusion as exhibit in the pending appeal.

In the case of ***Mzee Wanjie and 93 others vs. A.K. Saikwa*** ***(1982-88)*** this Court held inter alia as follows:-

"1. Before the Court of Appeal will permit additional evidence to be adduced under rule 29 it must be shown that it could not have been obtained by reasonable diligence before and during the hearing.

2. It must also be shown that the new evidence would have been likely to have affected the result of the suit."

In our considered view, the applicant has not demonstrated that a similar letter to the one dated 24th March 2011 from Process Servers' Committee could not have been obtained by reasonable diligence before the appeal was filed. In the event and as we have stated above, we think it is too late in the day for the document to be adduced as additional evidence.

In view of the above, we make no comments on the other requirement that the proposed additional evidence would have likely affected the result of the appeal as we have found against the applicant on the first requirement.

In short, the application lacks merit. It is not an appropriate matter for the exercise of our discretion. It is dismissed with costs to the first respondent.

Dated and delivered at Nairobi this 29th day of July, 2011.

E. O. O'KUBASU

.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR