IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 310 OF 2010

BETWEEN

TITUS KIONDO MUYA.....APPELLANT

AND

PETER NJOROGE BAIYA.....1ST RESPONDENT
ROBERT K. MUNGAI.....2ND RESPONDENT
INTERIM INDEPENDENT ELECTORAL COMMISSION.....3RD RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Visram, J.) dated 7th May, 2008

in

H.C.ELECTION PETITION NO. 31 OF 2008)
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JUDGMENT OF THE COURT

The appellant, ***TITUS KIONDO MUYA***, was one of the candidates in the Parliamentary Elections for the National Assembly seat for Githunguri Constituency held on *27th December, 2007* under the ***National Assembly and Presidential Elections Act*** (*Cap 7 Laws of Kenya*), (*hereinafter "the Act*) and the ***Presidential and Parliamentary Elections Regulations*** *(hereinafter"the Regulations")*. The appellant lost the election to the 1st respondent, ***PETER NJOROGE BAIYA***, who was declared the winner by the 3rd respondent, the Electoral Commission of Kenya (ECK).

Being aggrieved by the results declared as stated above, the appellant filed a petition which was presented at the High Court Registry on *28th January, 2008* challenging the election results. The appellant sought the Election Court to declare the election of 1st respondent null and void.

In reaction to that petition, the 1st respondent filed an application dated *21st February, 2008* under ***Sections 20(1)*** and ***23(2)*** of the *National Assembly and Presidential Elections Act*, and ***Rules 14*** and ***34*** of the National Assembly Elections (Election Petition) Rules seeking the following reliefs:-

"(a) That the petition herein dated and filed on 28th January, 2008 be forthwith struck out with costs.

(b) That the costs of this application be borne by the petitioner."

That application by the 1st respondent was based on the following grounds:-

(i) The said petition is wholly and/or fatally incompetent since the same was not served upon the applicant either personally or at all within 28 days after the date of the publication in the Kenya Gazette on 30th December, 2007 of the results of the Parliamentary election hereof.

(ii) The petitioner has never been served with the Notice of presentation of the subject petition as mandatorily required by Rule 14 of the National Assembly Elections (Election Petition) Rules thereby further fundamentally invalidating any purported service (which is denied) of the petition hereof.

(iii) For the avoidance of doubt, the purported service of the petition hereof vide the Kenya Gazette No. 486 published on 29th January, 2008 is fundamentally flawed, irregular and wholly ineffectual."

That application was placed before Visram, J. (*as he then was*) for determination. The learned Judge considered what was urged before him for and against the 1st respondent's application and came to the conclusion that the petition was not served upon the 1st respondent. In the course of his ruling delivered on *7th May, 2008,* the learned Judge stated inter alia:-

I, therefore, find that the 1st Respondent was not served personally with the Election Petition. There is also no evidence before me of "due diligence" required under Section 20(a)(iv) of the Act before that Section could be invoked to serve the Petition in the mode specified therein. Going to the 1st Respondent's law office once, and then "moving around" Kiambu town the same afternoon, can hardly qualify as "due diligence". Due diligence requires some kind of a continual and consistent effort to accomplish the objective. There was no such effort here. It is apparent that the Petition was filed on the last day, and there simply was no time to effect personal service. And in any event, the publication in the Gazette and the two newspapers prescribed by the Act, was completely out of time, and of no effect. I, therefore, conclude that the Petition was not served upon the 1st Respondent within the time prescribed by the law.

The learned Judge considered other matters and concluded his ruling thus:-

"Accordingly, and for all the reasons cited, I find and hold that the Petition was not served upon the 1st Respondent within the period of time prescribed by law, and I strike it out with costs to all the Respondents."

It is the foregoing that triggered this appeal in which the appellant, through his legal advisers, filed a Memorandum of Appeal comprising the following grounds:-

1. The learned Judge erred in law by holding that service by way of/under alternative mode of service as provided under Section 20(1)(c)(iv) of the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya had to be done within twenty-eight (28) days of the gazzettement of Parliamentary Election results in the Kenya Gazette.

2. The learned Judge erred in law and in fact by holding that the efforts made by the Appellant at effecting personal service upon the 1st Respondent did not satisfy the due diligence criteria provided for under Section 20(1)(c)(iv) of the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya.

3. The learned Judge erred in law by holding that the service envisaged in Section 20(1)(a) of the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya, is personal service and means actual physical service.

4. The learned Judge misdirected himself in law by following the decision of the Honourable Justice Ibrahim in the case of Mwita Wilson Marda – versus – K. Machage & Others (High Court Election Petition Number 5 of 2008) and holding that personal service means actual physical service.

5. The learned Judge erred in law in his plain reading of Section 20(1)(a) of the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya in that he completely failed to give effect to alternative service provided for under Section 20(1)(c) of the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya.

6. The learned Judge erred in law and in fact and misapprehended or ignored The Appellant's submissions on provision of Rule 10 of the National Assembly Elections (Election Petition) Rules, 1993.

7. The learned Judge misdirecting (sic) himself in law by holding that he was bound by the observations of the Court of Appeal in Kibaki – versus – Moi (C A 172 of 1999) on Rule 10 of the National Assembly Elections (Elections Petition) Rules, 1993.

8. The learned Judge erred in law by completely disregarding the provisions of Rule 10 of the National Assembly Elections (Election Petition) Rules, 1993.

9. The learned Judge erred in law and in fact by arriving at a decision that was wholly against the weight of the evidence.

10. The learned Judge erred in law by failing to appreciate the purpose and intention of law relating to service of Election Petitions.

11. The learned Judge erred in law by striking out the election petition in Nairobi High Court Election Petition No. 31 of 2008.

12. The learned Judge erred in law by striking out the said Election Petition merely because of an alleged technicality without regards to the substance of the law and the content of the Petition.

13. The learned Judge erred in law by failing to consider and give full or any effect to Section 23(1) (d) of the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya.

14. The learned Judge erred in law by awarding costs to all Respondents."

The appeal came up for hearing before us on *27th September, 2011* when Mr. A.B. Shah with Mr. Macharia, appeared for the appellant, while Mr. Njagi Wanjeru, appeared for the 1st respondent. Mr. K.K. Nyaencha appeared for the 2nd and 3rd respondents.

In his submission, Mr. Shah conceded that the petition was filed on the last day as allowed by the law (Cap. 7) and that they had only half a day left for the purposes of effecting service and that the papers were left with the 1st respondent's secretary. It was Mr. Shah's contention that the secretary of the 1st respondent never said that she was not served. Mr. Shah went on to submit that the 1st respondent was a practicing advocate and hence his secretary was a recognized agent under *Order III* ***rule 3*** of the old rules. He relied on the old Civil Procedure Rules in submitting that the secretary is an agent of the advocate for purposes of accepting service. Finally, Mr. Shah stated that the old days of technicalities are no more.

Mr. Shah took issue with the order for costs made by the learned Judge in that costs should have been made in respect of the 1st respondent only as the other parties did not attend court.

For the foregoing reasons, Mr. Shah asked us to allow the appeal so that the petition proceeds to hearing before the High Court.

On his part, Mr. Wanjeru submitted that the petition was filed on the very last day and hence the petitioner (the appellant herein), was manifestly desperate. Mr. Wanjeru pointed out that the 1st respondent was being served not as an advocate but the winning candidate in the election. It was further argued that the process server said that he looked around Kiambu town and left the documents with the secretary of the 1st respondent. Mr. Wanjeru finally submitted that there was no proper service and that the Kenya Gazette of *29th January, 2008* was published outside the 28 days. He, therefore, asked us to dismiss this appeal.

Mr. Nyaencha associated himself with the submissions of Mr. Wanjeru. On the issue of costs of the petition, Mr. Nyaencha pointed out that the 2nd and 3rd respondents were present and participated in the proceedings before the High Court and so they were entitled to costs. Mr. Nyaencha finally asked us to dismiss this appeal with costs to all the respondents.

In his replying remarks, Mr. Shah conceded that they were facing an uphill task and sought refuge in ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act and ***Article 159*** of the Constitution.

Having set out the foregoing, we may now get down to coming to a decision in this appeal. The issue before the High Court was whether the appellant's petition was served on the 1st respondent in accordance with the law. What is the law?

Section 20(1) (a) (b) and ***(c)*** of the Act provides:-

"20.(I) A petition -

(a) to question the validity of an election, shall be presented and served within twenty-eight days after the date of publication of the result of the election in the Gazette.

(b) to seek a declaration that a seat in the National Assembly has not become vacant, shall be presented and served within twenty-eight days after the date of publication of the notice published under section 18;

(c) to seek a declaration that a seat in the National Assembly has become vacant, may be presented at any time:

Provided that –

(i) a petition questioning a return or an election upon the ground of a corrupt practice and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his election agent may, so far as respects the corrupt practice, be presented at any time within twenty-eight days after the date of the alleged payment or act;

(ii) a petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be presented at any time within twenty-eight days after the date of the alleged payment or act;

(iii) (Repealed by 10 of 1997)

(iv) where after due diligence it is not possible to effect service under paragraphs (a) and (b), the presentation may be effected by its publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest national circulation in each case."

In the present appeal, it is not in dispute that the appellant's petition was filed on the very last day allowed

by the law. Clearly, the appellant and his handlers were manifestly desperate. The process server (Mr. Cosmas Makau) in his affidavit stated that he effected service on the 1st respondent by *"leaving"* a copy of the petition with the latter's secretary at the 1st respondent's law office in Kiambu. In that affidavit, Mr. Makau elaborated that he went to the 1st respondent's law office in Kiambu at 2:30 p.m. on *28th January, 2008* and not finding him there he *"moved around"* Kiambu town *"looking for Mr. Njoroge Baiya"* and when he failed to find him, he went back to the law office at 4:00 p.m. and *"left the documents in his office"*.

Was that a valid service on the 1st respondent? In ***James Nyamweya vs. Cosmos F.C. Oluoch*** – *Election Petition No. 74 of 1993,* this Court dealing with a similar situation made the following observation:-

*"It is thus abundantly clear as our view that service on an agent is invalid service. …….. This were repeated a few days later after the **Emanuel Karisa Maitha** petition, we heard submissions on service in the **Peter Goko Petition**. In this later case we heard that the principal documents were served on a Respondent's personal secretary. We rejected that as an improper and invalid service. …… We conclude with service on the 5th Respondent and we say that service if any at his office (on his personal secretary) was invalid. We have already stated above that service on an agent under the election petition rules is not proper or valid."*

And in ***Kibaki v. Moi*** – **Civil Appeal No. 172 of 1999** this Court sitting as a 5 Judge bench stated:-

"What we are saying, however, is that election petitions are of such importance to the parties concerned and to the general public that unless Parliament has itself specifically dispensed with the need for personal service, then the courts must insist on such service.

We cannot read from Section 20(1)(a) that Parliament intended to dispense with personal service. Even under 14(2) of the Rules personal service was not dispensed with. The other modes of service were only alternative modes of service.

That is why in the various other cases quoted to us personal service was always described as the best form of service.
Section 20(1)(a) of the Act does not prescribe any mode of service and in those circumstances the courts must go for the best form of service which is personal service."

We have set out the undisputed facts as regards filing of the petition and service of the same on the 1st respondent. As already pointed out, the petition was filed on the very last day as provided by the relevant law. The documents of service were not served on the 1st respondent but *"left at the office"*. That was after 4:00 p.m. The Kenya Gazette of *29th January, 2008* was clearly published outside the 28 days allowed by the law.

The facts as set out in this judgment were before the learned Judge of the High Court and the decisions that we have referred to herein were also brought to the attention of the learned Judge. He came to the conclusion that there was no valid service of the petition on the 1st respondent.

We have considered the background to this matter and what emerges therefrom is that the appellant herein found himself in a desperate situation of trying to file a petition on the last day allowed by the law and in that desperate situation tried all he could to effect service on the 1st respondent but unfortunately, time was too short for the process server to locate the 1st respondent and in a last effort to effect service, left the documents at the law office of the 1st respondent. This was not even service on his secretary, which as we have already demonstrated is not proper service of an election petition. The 1st respondent was being served in his capacity as a victorious candidate in a just concluded General Election. He was not being served with the documents as an advocate acting for another party.

Having considered all that has been submitted before us in this appeal, we, like the learned Judge, have

come to the same conclusion that there was no valid service of the petition on the 1st respondent. That being our view of the matter, it follows that this appeal must fail. As regards the submissions of Mr. Shah on the order for costs of the struck out petition, we note that all the respondents had participated in the proceedings before the High Court and hence they were entitled to costs as ordered by the learned Judge.

In view of the foregoing, we are of the opinion that the petition in the High Court was properly struck out and it follows that this appeal has no merit and we order that the same be and is hereby dismissed with costs to the respondents.

Dated and delivered at NAIROBI this 11th day of November, 2011.

E.O. O'KUBASU
.....
JUDGE OF APPEAL

E.M. GITHINJI
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR