



IN THE COURT OF APPEAL  
AT NAIROBI

CIVIL APPEAL NO. 125 OF 2008

DICKSON DANIEL KARABA .....APPELLANT

AND

JOHN NGATA KARIUKI ..... 1<sup>ST</sup> RESPONDENT

JAMES KARIUKI GITAU

*(returning officer for Kirinyaga Central*

*Constituency) ..... 2<sup>ND</sup> RESPONDENT*

ELECTORAL COMMISSION OF KENYA .....3<sup>RD</sup> RESPONDENT

*(An appeal from the ruling and order of the High Court of Kenya at Nyeri (Kasango, J) dated 28<sup>th</sup> May, 2008*

in

**H.C. ELECTION PETITION NO. 1 OF 2008)**

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JUDGMENT OF THE COURT

**Dickson Daniel Karaba** (Karaba) the appellant herein, was one of 18 candidates in Kirinyaga Constituency during the Parliamentary elections held in the Country on 27<sup>th</sup> December, 2007. **John Ngata Kariuki** (Kariuki) the 1<sup>st</sup> respondent herein, was declared as the winner of that election by **James Kariuki Gitau** (Gitau) the 2<sup>nd</sup> respondent, who was the returning officer appointed by the **Electoral Commission of Kenya**, (ECK) (as it then was), the 3<sup>rd</sup> respondent. Karaba believed that

he had won that election and did not come second to Kariuki as announced by the returning officer. He therefore went before the superior court, which is the election court, and filed an election petition on 11<sup>th</sup>

January, 2008 asserting that there was mistaken counting of votes, omission of results from certain poll stations, erroneous tallying and re-tallying. He sought orders for scrutiny and tallying of all votes cast in Kirinyaga constituency.

Before Karaba and his lawyers took further steps to move the petition forward, they were served with two applications: one by Kariuki filed on 27<sup>th</sup> February, 2008, the other by Gitau filed on 3<sup>rd</sup> March, 2008. In both applications Kariuki and Gitau sought an order that the petition be struck out on the ground that each one of them was not served with the petition and, secondly, because no notice of presentation of the petition was served upon them as required by the rules. The applications came before Kasango J. but only Kariuki's application was heard. At the request of Gitau's lawyer, an order was made that the second application would await the result of Kariuki's application. Ultimately, Kariuki's application succeeded and Karaba's petition was struck out on 28<sup>th</sup> May, 2008, thus provoking the appeal before us.

The notice of motion filed by Kariuki on 27<sup>th</sup> February, 2008 invoked **section 20 (1)** of the National Assembly and Presidential Elections Act, Chapter 7 Laws of Kenya ("the Act") and **Rule 14 (1)** of the National Assembly Elections (Election Petition) Rules ("the Rules") seeking the following substantive order:

***"1. The petition herein be struck out on the ground that the same was not personally served upon the 1<sup>st</sup> respondent within 28<sup>th</sup> days after the date of publication of the results of the parliamentary election in Kenya Gazette on 30/12/07 or at all and that the notice of presentation of the petition was not served upon the 1<sup>st</sup> respondent within 10 days of presentation of the petition on 11/01/08."***

There were thus two limbs to that prayer. The first limb hinged on contravention of **section 20 (1)** of the Act and the other on contravention of **Rule 14 (1)** of the Rules. The superior court however considered and rejected the allegation about contravention of Rule 14 (1) and there was no cross appeal against that rejection. We shall say no more about Rule 14 (1).

**"Section. 20(1)** as far as is relevant to this appeal provides as

follows:-

**"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....."**

The provisions and construction of **Sec.20(1)(a)** have had a chequered history both in Parliament and in our court's since the Act came into effect in 1969. We do not, however, propose to explore the entire history in this judgment. Suffice it to observe that the 1992 version of the section did not require "service" of the petition but only provided for the time limit for "presentation" of the Petition. Then, by Act No 10 of 1997 (commencing 7<sup>th</sup> November 1997), Parliament inserted "and served" after the phrase "shall be presented". Parliament however said nothing about how such service was to be effected, and the duty fell on this Court to construe it in various decisions and especially in **Kibaki vs Moi [2000] 1 EA 115**, decided on 10<sup>th</sup> December 1999. A bench of five Judges of this Court held that though **section 20(1)(a)**, did not prescribe any particular mode of service, the best form of service was personal and the Courts were obliged to go for that form of service. That then became the law, but, partly due to some political overtones personified by the parties to that petition, and partly due to dissenting voices from some courts, Parliament sought to undo the requirement of service under **Section 20(1)(a)** and therefore The Statute Law (Miscellaneous Amendments) Bill 2005 was published to, inter alia, "delete the words "and served" wherever they appear in paragraphs (a)....." The stated objective of the Bill was "to remove the requirement for personal service of election petitions on the respondents". Apparently the Bill never saw the light of day before Parliament was prorogued but it was republished in identical terms and objective in The Statute Law (Miscellaneous Amendments) Bill 2007. In the end however, the intended amendment was not effected. Instead, Parliament inserted a new paragraph in the proviso to the section as

follows:-

**“20(1)(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 Swahili local daily Newspaper with the highest national circulation in each case.”**

That was effective from 15<sup>th</sup> October 2007. For its part this Court continued to be faithful to the interpretation of the law made in Kibaki v Moi (supra) and rejected an invitation to overrule itself in Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 Others, Civil Appeal No. 238/2003 (UR) decided on 16<sup>th</sup> September 2005. The majority in that case emphasized:-

**“The truth of the matter is that personal service remains the best form of service in all areas of litigation and to say that members of Parliament are a different breed of people and different rules must apply to them as opposed to those applicable to other Kenyans cannot support the principle of equality before the law.”**

We need only cite one more decision to close this short review on the history of **Section 20 (1) (a)**. That is Mwakwere Chirau Ali v Ayub Juma Mwakesi & 2 Others Civil Appeal No. 80/2008 (UR) in which the majority applied this Court’s decision in M’Mithiaru v Maore & 2 Others (No 2) (2008) 3 KLR (EP) 730, stating:

**“2. Personal service remains the best form of service. However, personal service need not be by actually handing over the papers to the respondent. It can be inferred if the petitioner makes all reasonable efforts to serve the respondent but fails to do so simply because the respondent evades service by hiding, refusing to acknowledge service, causing his agents or servants to restrain in any way the process server from reaching him or by use of any other tactics to avoid service.**

**3. If the petitioner demonstrates to the court’s satisfaction that he made every effort to effect personal service but the same was thwarted by the actions of the respondent, then the court will infer that personal service has been effected upon the respondent.”**

**That decision was delivered on 19<sup>th</sup> October 2007. Immediately after that, section 20 of the National Assembly and Presidential Elections Act, Chapter 7 Laws of Kenya was amended vide Act No. 7 of 2007 adding a fourth provision stating as follows:**

**“(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.””**

**From the above, the law as regards service of election petition and notice of presentation is clear. First, the respondent should be served personally in as far as that is possible i.e. personal service is the best service. Second, where the respondent is clearly evading service either by refusing to acknowledge service or by hiding, causing his agents or servants to restrain in any way the process server from reaching him or by use of any other tactics to avoid service, personal service will be inferred once the petitioner demonstrates that service was effected though not on him in person such as by pinning the document on his door e.t.c. Third mode of service is vide substituted service in the Kenya Gazette and in one English Newspaper and one Swahili paper each with the highest circulation in the country. This mode of service will be accepted only after the Court is satisfied that it was resorted to after due diligence had been made to serve the respondent but it became impossible. In short, substituted service is a last resort which will be used as a mode of service after the petitioner and his process server have demonstrated that they made every effort to serve the respondent personally but it became impossible to do so.**

The M’Thiaru case, as is apparent, was decided on 19<sup>th</sup> October 2007 - 4 days after Legal Notice No 7 of 2007 came into effect on 15<sup>th</sup> October 2007, while the Mwakwere case was decided on 21<sup>st</sup>

November 2008. We agree with the exposition of the law in those decisions. Parliament has in the meantime done nothing to show any displeasure with the construction placed on **section 20 (1) (a)** by the Courts since **Kibaki v Moi** (supra).

On that state of the law, we must now examine the issues raised before us in this appeal.

The publication of the election results for Kirinyaga Constituency was made in the Gazette on 30<sup>th</sup> December, 2007. By dint of **section 20(1)(a)**, any petition to question the validity of that election ought to have been presented and served within 28 days of that publication, that is to say, on or before 29<sup>th</sup> January, 2008. In this case Karaba presented the petition before the superior Court on 11<sup>th</sup> January, 2008. On the same day, his Advocates, M/s Wamae & Company Advocates, instructed a Court Process Server, one John Musyoka, to serve the petition on Kariuki. That afternoon at 2 pm, the process server, accompanied by the advocate's employee and Karaba's agent proceeded to Panafric Hotel along Valley Road, where the offices of Kariuki were but they found he had gone out for official duty. The service was not effected. What the process server did the following day forms the crux of this appeal and we reproduce his affidavit of service sworn on 8<sup>th</sup> February, 2008 *in extenso*:-

“4. THAT on the 12<sup>th</sup> day of January 2008 I proceeded to the said Pan Afric Hotel where Mr. Kariuki's office is situated and at around 6:30 a.m. I was in the said hotel where I took breakfast. That at the same time Mr. Kariuki came with a young man and they sat next to my table and ordered their breakfast too. When taking the breakfast, I introduced myself to the said Mr. Kariuki and the purpose of my visit but he asked me to wait for him to finish his breakfast adding that, thereafter, we could move to his office to tell him there what I wanted.

5. THAT after taking his breakfast the 1<sup>st</sup> Respondent stood up and as he walked away he told me to go to the second floor of the building where I found his Secretary by the name Evelyn.

6. THAT I took a lift to the second floor where I found a door to an office open and I entered to find a lady seated at a desk. I asked her if she was Evelyn and she answered in affirmative whereupon I introduced myself and told her what Mr. Kariuki had told me earlier.

7. THAT Evelyn rang to someone and told that person that Mr. Musyoka was with her (Evelyn) and wished to call on the “MD” (Managing Director), who I understood to refer to Mr. Kariuki, the 1<sup>st</sup> Respondent. Evelyn then told me to go to fourth floor and ask for Rose, the personal secretary to the 1<sup>st</sup> Respondent.

8. THAT I took a lift to the fourth floor where I found a door to an office open and entered. Inside were two ladies and a man seated in front of a computer set placed on large desk. I greeted the three persons and asked who Rose was. One of the two ladies said she was Rose whereupon I introduced myself to her as the person referred to her (Rose) by Evelyn.

9. Rose asked me to follow her across the office she was in to another door which she opened to lead to what appeared like a conference room as it has a number of chairs around a large desk. Rose closed the door and asked me to sit and she sat facing me. Rose had a writing pad and held a pen. Rose asked me whether I knew Mr. Kariuki, the 1<sup>st</sup> Respondent, and whether or not I had an appointment to see him. I answered that I knew the 1<sup>st</sup> Respondent, was with him at the restaurant on the ground floor and that he is the one who had asked me to go to his office. Rose stood up, and left the room asking me to wait, which I did.

10. THAT after a short while, Rose returned and asked me to follow her, which I did. We returned to the office where I had first found Rose and at the other side of that office was another door which she opened and while holding the door asked me to walk in which I did.

11. THAT inside the office I found Mr. Kariuki the 1<sup>st</sup> Respondent seated behind a desk with what

looked to me like a glass top. The newspapers and other documents on the desk. I again introduced myself to Mr. Kariuki, as a court process server whose mission was to serve an election petition upon him whereupon he asked me to sit down.

12. THAT while seated I tendered to the 1<sup>st</sup> Respondent two copies of the election petition with annexures and asked him to retain one copy and acknowledge service by endorsing his signature on the reverse side of the copy. The 1<sup>st</sup> Respondent retorted, "I won the election" adding "umefikisha" (you delivered it). I insisted that he signs my copy but he declined repeating that it had been delivered.

13. THAT I duly effected service of the petition upon the 1<sup>st</sup> Respondent as described in the foregoing paragraph and I return herewith the petition that the 1<sup>st</sup> Respondent declined to sign my notes on the reverse side thereto as duly served.

14. THAT the 1<sup>st</sup> Respondent Mr. John Ngata Kariuki was known to me during the time of service."

In his motion, Kariuki trashed the contents of that affidavit and swore that he was not anywhere near the venue alleged by the process server and never met him. He swore that after the elections in December, 2007, he stayed away from his office for one month until 29<sup>th</sup> January, 2008 when he reported there. The office was at Sarova Hotels Ltd. and not Pan Afric Hotel and on arrival he was given a khaki envelope by a secretary known as Rose together with a leaf of a gummed yellow note on which was written "John Nzive 0723-109213." The envelope contained the petition. There was also a message that Kariuki should call that person at the High Court, but he never called. In specific response to the process servers' Affidavit, Kariuki swore as follows:-

"12. THAT my office is not situated at the Pan Afric Hotel but on the 4<sup>th</sup> Floor of the Sarova Hotels Ltd head office;

13. THAT on the 12<sup>th</sup> January, 2008 at 6:30 a.m. which was on Saturday, I was not in the said Pan Afric Hotel and neither in my office at Sarova Hotels Ltd head offices which I was not attending then, and ordinarily at the said time I am normally at Don Bosco Catholic Church for morning mass;

14. THAT I ordered my breakfast at the said hotel's Flame Tree Restaurant at 8:50 a.m. and I was alone at the said hotel and time; Annexed and marked "JNK 5" is a certified Photostat copy of my hotel bill;

15. THAT I did not meet the said John Musyoka at Pan Afric Hotel or anywhere else, or at all on the said date and the said deponent does not specify whether he met me at the said hotel's Flame Tree Restaurant or Pool Gardens Restaurant;

16. THAT I do not have a secretary called Evelyn in the 2<sup>nd</sup> Floor of Pan Afric Hotel, in which floor of the said hotel there are only guest rooms;

17. THAT in the 2<sup>nd</sup> Floor of the Sarova Hotels Ltd head offices is the Sales offices where I do not work and there is no secretary there called Evelyn;

18. THAT I am not the Managing Director of Pan Afric Hotel Ltd., but am an Executive Director of Sarova Hotels Ltd whose Managing Director is one Mr. Jaideep Vohra;

19. THAT in the 4<sup>th</sup> Floor of Pan Afric Hotel is guest rooms and I have no office there;

20. THAT I do not have a secretary called Rose in the 4<sup>th</sup> Floor of Pan Afric Hotel and the secretary called Rose in the Sarova Hotels head office is not my personal secretary as she serves me amongst other directors and senior officers of the company including the Sarova Hotels Group Human Resources Manager known as Mr. Kariuki whose office is in the same floor as my office;

21. *THAT at the 4<sup>th</sup> Floor of the Sarova Hotels head offices where my office is, the said Rose does not sit at the entrance to the said offices but further inside within the said offices and not in an office of her own but along the corridor of the offices;*
22. *THAT the said Rose does not share a large desk with the other persons she works with as each person has his/her own desk;*
23. *THAT the deponent did not come to my office as he alleged as I do not have a desk with any glass top but a wooden top;*
24. *THAT I have been informed by the said Rose, which information I verily believe to be true, that the person who left the document in an old used envelope which he borrowed from the said Rose, as I was informed by her, did not identify himself but said that the document was mine and left his contacts that I may call him;*
25. *THAT I did not receive any copy of the petition from the deponent as alleged and as such no personal service of this petition has been served upon me to date;*
26. *THAT I was not personally served with a Notice of presentation of the petition but became aware of the same through the Kenya Gazette notice of 25/01/08;”*

Kariuki concluded his affidavit by saying that he was deponing to the “best of his knowledge, information and belief,” but no adverse finding was made on such deposition.

Shortly thereafter a replying affidavit came from the process server reiterating the contents of his earlier affidavit and refuting the averments in Kariuki’s affidavit. He deponed that he had no comprehensive layout of Panafric Hotel Ltd or the Head Offices of Sarova Hotels Ltd., but the two were in the same location behind each other and indeed Panafric Hotel was known as Sarova Panafric. He had no reason to disbelieve the information given to him by the ladies he referred to as “Rose” and “Evelyn” and it was Rose who required him to give his name and telephone number as a condition for admission to Kariuki’s office. It was not him who wrote the name and telephone number “John Nzive – 0723-109213”. The process server also annexed a note which he swore was written by Kariuki giving him his (Kariuki’s) telephone number as 0722769759. The process server’s affidavit was supported by another affidavit sworn by **Peter Mwangi Karanja** (Peter), a car hire businessman who knew both the Process Server and Kariuki. On 12<sup>th</sup> January, 2008, Peter swore that he was at Panafric Hotel shortly before 7 a.m. and found the process server seated at a table in the restaurant. He joined him for tea. He learned from the process server that he had gone there to serve an election petition on Kariuki. Just then Kariuki and another person walked into the restaurant and sat at a table nearby. The process server then stood up holding the petition papers and proceeded to the table where Kariuki was seated. Peter heard the process server greet Kariuki as “Mheshimiwa” and introduced himself. He also heard the process server tell Kariuki that he had come to serve him with an election petition. Kariuki accepted to be served but requested the process server to wait until he finished his breakfast to enable him to formalize acceptance of the service in his office as he did not want to attract unnecessary attention from onlookers and customers in the hotel. After breakfast the two - Kariuki and the process server – left the restaurant and proceeded to Kariuki’s office. Peter had known Kariuki since 1997.

The motion was set down for hearing on 10<sup>th</sup> April, 2008 but in view of the conflicting factual information on both sides, counsel on both sides applied to cross-examine the deponents of the respective affidavits on record and sought leave to file further affidavits. Kasango, J. considered the matter and made the following orders:-

- “(1) The court orders that at the hearing of the applications to strike out the petition that John Ngata Kariuki be availed for cross examination.**
- (2) The 1<sup>st</sup> Respondent is granted leave to file and serve a further affidavit within 14 days from**

today.

**(3) That the paper relating to 1<sup>st</sup> Respondent telephone number be subjected to documents examination by an expert, the 1<sup>st</sup> Respondent do avail himself within 7 days from today to the petitioner's advocate for sample handwriting to be obtained.**

**(4) -----**

**(5) The 1<sup>st</sup> Respondent is granted leave to cross examine John Musyoka at hearing of the application to strike out petition."**

As it turned out at the resumed hearing on 30<sup>th</sup> April, 2008 only Kariuki was cross examined on his affidavit, but his counsel declined to cross examine the process server who had been made available for the purpose. Kariuki also filed a further affidavit in which he denied that he had written his telephone number on a small note as alleged by the process server and he annexed a letter by a handwriting expert whose opinion was that he was not the one who wrote the note. He also annexed an affidavit by **Rose Warigia Wateri** (Rose), the Secretary working at Sarova Hotels head offices, referred to by the Process Server in his affidavit, in which Rose swore that she was the one who wrote down the telephone number. Finally, Kariuki denied ever having met Peter or the process server at the Panafric Hotel or at all. Neither the handwriting expert, nor Rose or Peter was called for cross examination on the depositions and averments made by them.

On the material before her, the learned Judge disbelieved the process server and Peter but found that Kariuki had proved that he was nowhere near the scene of service of process as stated by him. She concluded:

**"Having considered the evidence in totality I find that the evidence of the first respondent has the more convincing force. I am more inclined to believe that the first respondent was not in his office on the 12<sup>th</sup> January 2008 and further that he was not served with a copy of the petition as alleged by the process server. This finding is supported by the short comings and contradicts (sic) found in the petitioner's affidavit. The petitioner did not satisfy the burden of proof laid upon him in respect of service of the petition. I therefore find that the first respondent is entitled to the prayer sought in the notice of motion dated 27<sup>th</sup> February 2008. He has proved on a balance of probability that he was not served with the petition. The case of Kibaki vs Moi provided that the best service of a petition is personal service of the respondent and not through his secretary as in our case here."**

It is that finding which aggrieved Karaba and he sought to challenge it through 16 grounds listed in his memorandum of appeal as follows:

- 1. The learned Judge erred in striking out the petition on the ground that the same was not served on the first respondent within 28 days after the date of publication of the result of Parliamentary Election held on 27<sup>th</sup> December 2007.*
- 2. The learned Judge erred in failing to appreciate that when the process server delivered the petition to the first respondent in the restaurant at Panafric Hotel, that act amounted to personal service of the petition upon the first respondent, which service remained valid and effective despite what might or might not have been said or done thereafter by either the first respondent, the process server or any third parties.*
- 3. The learned Judge erred in admitting the opinion of the hand-writing expert contrary to the law in that it was based on an alleged sample writing of the first respondent made when the proceedings were pending involving a dispute as to who the author was of the figures in a telephone number written in a chit of paper annexed to the second affidavit of the process server, Mr. John Musyoka, and marked "JM1".*

4. *The learned Judge erred in admitting the written opinion of the hand-writing expert which was not convincing and was not tested contrary to the written and case law.*
5. *The learned Judge erred in admitting the affidavit of Rose Warigia Wateri sworn on 21<sup>st</sup> April 2008 which was irregularly introduced into the proceedings as an annexure to the affidavit of the first respondent sworn on 21<sup>st</sup> April 2008.*
6. *The learned Judge erred in giving undue weight to the facts deponed in the aforesaid affidavit of Rose Warigia Wateri without considering factors which militated against such weight including her status as an employee of the first respondent's company and the making of the said affidavit at the instance and request of the first respondent made when the issue as to who was the author of the telephone number in annexure "JM1" aforesaid was pending for argument before court.*
7. *The learned Judge erred in failing to consider evenly and fairly the evidence tendered in support of service and the evidence tendered in opposition thereto.*
8. *The learned Judge erred in subjecting the evidence in support of service to critical analysis and questioning and in failing to do the same with regard to the evidence that denied service.*
9. *The learned Judge overlooked and/or ignored material contradictions in the evidence given to disapprove service particularly that tending to show that the process server could not have found his way to the first respondent's office by the route that he took through the Panafric Hotel as against the evidence given to the effect that the process server did allegedly reach the first respondent's office where he allegedly put the petition papers in a used envelope and went away with a telephone number of the first respondent allegedly written by the said Wateri.*
10. *The learned Judge erred in failing to appreciate that the first respondent's advocate having sought and obtained leave to cross-examine the process server and Mr. Karanja on their respective affidavits and thereafter declining to cross-examine any of them such portions of the process server's affidavits and the said Mr. Karanja a were to otherwise expressly denied were in effect admitted.*
11. *The learned Judge erred in striking out paragraph 11(a) of the affidavit of the process server sworn on 29<sup>th</sup> March 2008 on the ground that it was based on his belief and information the source of which was not disclosed whereas the source of his belief was disclosed elsewhere in his said two affidavits wherein it is stated that the information was given to him by the first respondent, by Evelyn and by the said Rose when each of them in turn directed him to the first respondent's office.*
12. *The learned Judge erred in raising doubt in her judgment as to whether or not the process server knew the first respondent when such knowledge was not an issue in the proceedings and no arguments had been made in respect thereof and despite the unrefuted evidence in the said Mr. Karanja's affidavit to the effect that he had seen Mr. John Musyoka, the process server, serve the first respondent with the petition in the restaurant.*
13. *The learned Judge misdirected herself in considering some irrelevant matters and in making speculation, which factors adversely affected the credibility and weight that she later attached to the evidence in support of service.*
14. *The learned Judge erred in finding that the petitioner did not argue that the notice of presentation of the petition was served on the first respondent contrary to the evidence in the affidavit of service that the said notice formed part of the annexures to the petition, and the petitioner's advocate submissions that it had been decided by this Honourable court that rule 14(1) of the election Petition Rules contradicted section 20(1) of the National Assembly and Presidential Elections Act and that the said rule had to give way, which submissions form, part of the proceedings.*
15. *The learned Judge erred in striking out the petition without considering that the evidence given in support of the application to strike out was given by a party who was interested in the result of the*

*application, the first respondent, and the said Wateri, who might have been acting under undue influence by virtue of her employment status, which said evidence was wanting compared to the evidence given to oppose the said application and in support of service, which was given by persons who were not interested in the result of the said application and in respect of whom the first respondent had testified that he had no cause to think of any reason for any of them to tell lies.*

*16. The learned Judge erred in awarding full costs of the application to strike out the petition to the first respondent which said application was based on two main grounds, to wit, alleged lack of personal service upon the first respondent within the statutory period and the alleged failure to serve notice of presentation of the petition within ten days from the date of the said presentation and that the first respondent had succeeded on the first ground only and his second ground was found to be without any merit in law.”*

Those grounds were argued in fewer tranches by learned counsel for the appellant Mr. Wamae, but they all revolve around one issue: whether Kariuki, the 1<sup>st</sup> respondent, was personally served with the petition in accordance with **section 20(1) (a)** of the Act. That is the issue we shall ultimately answer.

It was Mr. Wamae’s submission that the process server emphatically stated in his affidavit that he met Kariuki on 12<sup>th</sup> January 2008 at around 6.30 am at Panafric Hotel where he introduced himself and stated his mission, and later at Kariuki’s office where he personally served him with the petition. The process server was supported in the contention that he met Kariuki at the hotel and informed him about the petition by Peter in his affidavit. In his submission, if there were any doubts about those depositions, the deponents ought to have been cross examined but the record shows that the respondent applied, and then declined to cross-examine the process server and made no attempt to cross examine Peter. Both were available for verification of their statements on oath. The failure to challenge the affidavits relating to service of process, in Mr. Wamae’s view, amounted to an admission of the facts and there was no basis therefore for ignoring those facts. He also submitted that Kariuki was known not only to the process server but to Peter prior to the date of service contrary to the finding by the superior court. In his view, service of the petition was not only effected at the hotel but also in the office. As for the evidence of Kariuki which was believed, he submitted that there was no basis for the finding that the process server could not and did not access Kariuki’s office; that he was not one and the same “*John Nzive*” alluded to by Rose; that Rose’s affidavit was credible and properly on record; that the untested report given by a document examiner in a letter was probative of the assertion that Kariuki did not give his telephone number to the process server; and that although the alibi put forward by Kariuki was rejected, nevertheless, he was not at his office at the time of process service.

For his part learned Counsel for Kariuki, Mr. Mari, supported the decision of the superior court that the affidavit of the process server and that of Peter were contradictory and therefore unreliable and were properly rejected. In his view, the process server had stated that he did not know Kariuki before and there is no indication as to how he came to identify him. As for the failure to cross-examine the process server, Mr. Mari submitted that there was no obligation to do so especially where there was other evidence to rebut the process server’s averments. No negative inference can therefore be drawn for declining to cross-examine the process server. There was no need, in his view, to test the report of the handwriting expert since there was no other report to the contrary. As for the affidavit of Rose, Mr. Mari contented that it was properly on record, was correctly evaluated, and it displaced the allegations of the process server. The process server, he stated, must have gone to a place he did not know and left documents there which did not accord with the procedure for service of petitions.

Mr. Arusei for ECK simply said he supported Mr. Mari.

We have delved at some length into factual details in this appeal because it is our duty to do as the first appellate court. We are enjoined to revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at our own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties – See **Selle and Another v. Associated Motor Boat Company Ltd. & Others [1968] EA 123.**

We have carefully examined the evidential material placed before the Superior Court and considered the submissions of Counsel and we think, with respect, that the learned Judge fell in error in the manner she evaluated the evidence before her and consequently arrived at the wrong conclusions in fact and in law. The central issue in this whole matter was to establish the truth about service of the petition filed by the appellant, on the 1<sup>st</sup> respondent. The truth ought to have been established on a balance of probabilities and it lay between the stories put forward by the process server and his supporter, and by the 1<sup>st</sup> respondent and his supporters. Indeed the Superior Court and the parties appreciated this imperative at an early stage of the proceedings and the Court made orders, correctly in our view, that the process server and the 1<sup>st</sup> Respondent be cross examined on their affidavits. There was a good reason for that order, traceable to the law on such matters, that there is a presumption that the court process was properly served unless such presumption is rebutted. We allude to the case of **Shadrack arap Baiywo v. Bodi Bach**, Civil Appeal No. 122/86 (UR) cited and applied in **Miruka v. Abok & Another** [1990] KLR 544, where in the former case Platt JA stated:-

***“There is a qualified presumption in favour of the process server recognized in MB Automobile v Kampala Bus Service [1966] EA 480 at p 484 as having been the view taken by the Indian courts in construing similar legislation. On Chitale and Annaji Rao: The Code of Civil Procedure Vol. II p 1670, the learned commentators say:***

***“3. Presumption as to service – There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”***

Also, in **Karatina Garments Ltd. v. Nyanarua** [1976] KLR 94, the predecessor of this Court stated:-

***“Where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter; if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.”***

The process server in this case had categorically sworn that he was in a restaurant at the Panafric Hotel at around 6:30 a.m. on 12<sup>th</sup> January, 2008 when, shortly thereafter, the 1<sup>st</sup> respondent came to the same restaurant. He had the opportunity to, and did talk to the 1<sup>st</sup> respondent and disclosed his mission at the Hotel. He further swore that it was at the request of the 1<sup>st</sup> respondent that he did not formally serve the petition at the hotel but went up to his offices and upon directions given by the 1<sup>st</sup> respondent’s secretary, one Rose, served the 1<sup>st</sup> respondent in his office. He knew the 1<sup>st</sup> respondent before and he gave out his name and telephone number before he was allowed into the offices. The fact that he was at the hotel at the time stated and that he saw and spoke to the 1<sup>st</sup> respondent was supported on oath by Peter who had known both for some time and stated so.

The denials made by the 1<sup>st</sup> respondent were equally categorical. He was nowhere near the hotel or any restaurant within it at 6:30 a.m. or thereabouts on 12<sup>th</sup> January, 2008 and was never in his office, but in Kirinyaga taking a deserved rest from election fatigue between 27<sup>th</sup> December, 2007, when the elections ended, and 29<sup>th</sup> January, 2008, when he made a visit to the office. He denied he worked with Panafric Hotel but Sarova Hotel Ltd. and asserted that the two were different entities. He denied that Rose was his secretary and further denied the physical set up of his office premises as described by the process server. He finally disowned any meeting with the process server or writing of his telephone contact on a piece of paper which he gave to the process server.

In view of those factual statements and in all the circumstances of this case it was desirable that the truth between the two versions be explored through cross examination as stated in the authorities reproduced above. But only one of the deponents was cross examined, the 1<sup>st</sup> respondent, and in the

process he made material admissions which lent credence to the assertions of the process server. We may refer to some of those admissions:-

Even if he was away from his office, as claimed, between 27<sup>th</sup> December 2007 and 29<sup>th</sup> January 2008, the 1<sup>st</sup> respondent was physically placed at a restaurant within the Panafric Hotel on 12<sup>th</sup> January 2008 where he took breakfast. His alibi that he was away in some church and that he took his breakfast late was rejected by the superior court and in all probability therefore he was in the same restaurant where the process server was before 7 a.m. on 12<sup>th</sup> January 2008. He had stood for elections three times and was the Chief Executive of Sarova Hotels for 37 years and was therefore a public figure likely to be known. He did not rule out the possibility that he was known by the process server or Peter or that they were in the same restaurant - the only restaurant operating at the time. Panafric Hotel is partly owned by Sarova Hotels Ltd. Their premises are adjacent to each other on Valley Road, and can easily be mistaken as one building. His office in Sarova Hotels head office is accessible from Panafric Hotel and one can be directed to his office through the hotel. Rose worked in those premises as a secretary on the 4<sup>th</sup> floor where the process server says he went. Rose herself swore that someone who gave his name as "John Nzive" and his cell phone number as "0723109213" went to those offices at a time she does not disclose, on 12<sup>th</sup> January 2008, and left documents which turned out to be the petition the subject matter of these proceedings.

In view of all that evidence, it cannot be doubted that the process server was at the location of the offices of the 1<sup>st</sup> respondent at the time he swore he was, the only issue being whether or not he met the 1<sup>st</sup> respondent there and served him. That issue in our view would have been cleared through cross-examination of the process server who was made available for that purpose but the 1<sup>st</sup> respondent's Advocates declined to cross-examine him. We think in the circumstances of this case they did so at the risk of leaving unchallenged the process server's deposition and there was no firm basis for disbelieving his evidence. In our view, undue premium was given and reliance made on a letter written by a document examiner in response to an enquiry made by the 1<sup>st</sup> respondent's advocates. The order made by the superior court was that the 1<sup>st</sup> respondent should submit his specimen handwriting to the Applicant's Advocates for examination by handwriting experts but there is no evidence that the specimen was submitted and examined by any other expert. The opinion given by the 1<sup>st</sup> respondent's expert therefore remained largely untested and was not subjected to cross-examination.

It is our view therefore that there was no firm basis for rejecting the affidavit of the process server or making the finding that his affidavit and that of Peter who supported him were mutually contradictory. On the contrary they both confirm that it was more probable than not that the 1<sup>st</sup> respondent and the process server met at the time stated by the process server and it was explained to him that a petition would be served on him. If the 1<sup>st</sup> respondent took evasive action thereafter or made it impossible for the process server to complete his mission, that was of no consequence. We further believe the affidavit evidence of the process server which was not challenged in cross-examination that he made his way to the 1<sup>st</sup> respondent's offices and served him in the manner he stated he did. Again, declining or refusing to acknowledge service, was of no consequence.

We have said enough we think, to show that we are inclined to allow this appeal and we now do so, with costs to the appellant only. We set aside the Ruling of the superior court made on 28<sup>th</sup> May, 2008 and substitute therefor an order that the 1<sup>st</sup> respondent's notice of motion dated 27<sup>th</sup> February, 2008, be and is hereby dismissed with costs to the petitioner/respondent in that application.

***Dated and delivered at Nairobi this 19<sup>th</sup> day of March, 2010***

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**D.K. S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**