IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 183 OF 2008

JUSTUS MUNGUMBU OMITI.....APPELLANT

BETWEEN

1. WALTER ENOCK NYAMBATI OSEBE.....1ST RESPONDENT

2. LAWRENCE OLE SEMPELE.....2ND RESPONDENT

3. THE ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

(An appeal from the ruling and order of the Election Court, High Court of Kenya

at Kisii (Ibrahim, J) dated 11th July, 2008

in

KISII ELECTION PETITION NO. 1 OF 2008)

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JUDGMENT OF TUNOI, J.A

I have had the advantage of reading in draft the judgments of my brothers Githinji and Waki, JJA.

I agree with the reasoning of Waki, J.A. that the appeal be allowed on the basis that the affidavit of service was erroneously struck out and that there was due diligence before alternative means of service was adopted by the appellant. I also agree that the order for costs be made as proposed by both Judges of Appeal. It is so ordered.

Dated and delivered at Nairobi this 7th day of May 2010.

P.K. TUNOI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF GITHINJI, J.A.

This appeal is from the ruling and order of the Election Court (Ibrahim, J.) dated 11th day of July, 2008 striking out the Election Petition filed by the appellant herein on the ground that there was no due diligence to effect personal service on the applicant **Walter Enock Nyambati Osebe** (1st respondent) herein before serving him through publication in the Kenya Gazette of 25th January, 2008 and in the Standard Newspaper.

The application involved the interpretation of proviso (iv) to **Section 20 (1)** of the *National Assembly and Presidential Elections Act* (Act).

Section 20 (1) of the Act provides:

"20 (1) 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) …….

Provided:

(i) ……

(ii) …….

(iii) …….

(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 one English and one Kiswahili local daily newspaper with the highest national circulation in each case".

Rule 14 of the *National Assembly Elections (Election Petition) Rules 1993* (Election Petition Rules) which provides for service of the election petition on the respondent is relevant. It provides:

"14. (1) Notice of the presentation of a petition, accompanied by a copy of the petition, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent.

(2) Service may be effected either by delivering the notice and a copy to the advocate appointed by the respondent under Rule 10 or by posting them by registered letter to the address given under Rule 10 so that, in the ordinary course of post, the letter would been delivered within the time

above mentioned, or if no advocate has been appointed, or no such address has been given, by notice published in the Gazette stating that the petition has been presented and that a copy of it may be obtained by the respondent on application at the office of the Registrar".

Rule 10 aforesaid requires a person elected to send or leave at the office of the Registrar of the High Court a notice appointing an advocate to act as his advocate in case there should be a petition against him or stating that he intends to act in person and, in either case, giving an address in Kenya at which notices addressed to him may be left. **Rule 10** further provides that if no such writing is left, all notices and proceedings may be given or served by leaving them at the office of the Registrar.

In **Mwakwere Chirau Ali vs. Ayub Juma Mwakesi & two Others** – *Civil Appeal No. 80 of 2008* I considered **Section 20 (1)** and proviso (iv) thereto in contradistinction to **Rule 14 (2)** of the *Election Petition Rules* and stated in part:

"In conclusion the proviso (iv) of Section 20 (1) (a) and 20 (1) (b) has not on true construction, enacted personal service as the statutory and preferred procedure for service of election petitions.

There is still no statutory provision in the Act or the rules providing for personal service of election petitions. In the absence of such provision, the requirement for personal service of election petitions still remains as *"Judge made law"* **as espoused in** Kibaki vs. Moi **(supra). I have expressed a contrary view in** Abu Chiaba Mohamed **(supra) and in** M'Mithiaru vs. Maore **(supra). The** *"Judge made law"* **requiring personal service of election petitions is in conflict with the statutory procedure for service of election petitions expressly provided in Rule 14 (2). The law is settled that where there is a conflict between a plain statute and a previous decision of the court the statute must prevail. Since I hold the view that the statute law does not provide for personal service of election petitions and that Rule 14 (2) as read with Rule 10 provides the exclusive statutory procedure for service of election petitions in addition, perhaps, to service by publication in two daily newspapers recently introduced by proviso (iv), it is not necessary to investigate and determine whether the 1st respondent had exercised due diligence to effect personal service of the petition on both appellants before resorting to service by publication in the Gazette and in the two dailies".**

In this case, the result of the Parliamentary and Presidential elections were published in the Kenya *Gazette No. 1261 on 30th December, 2007*.

There is ample evidence, and, the 1st respondent admitted that a notice of presentation of the petition was published in the Kenya Gazette on 25th January, 2008 – *Gazette Notice No. 449*. Thus, the 1st respondent was served with the notice of presentation of the petition as stipulated by **Rule 14 (2)** of *Election Petition Rules*. It follows that the application to strike out the petition for non-service had no basis.

I would for those reasons allow the appeal with costs, set aside the ruling of the superior court dated 11th July, 2008 and dismiss the application dated 7th February, 2008 to strike out the petition with costs to the appellant.

Dated and delivered at Nairobi this 7th day of May, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

JUDGMENT OF WAKI, J.A

The appeal before us relates to parliamentary elections which took place in Kitutu Masaba Constituency on 27th December, 2007. The appellant ***Justus Mungumbu Omiti*** was a registered voter in that constituency. The election was conducted by the Electoral Commission of Kenya (as it then was) (3rd respondent) whose returning officer was the 2nd respondent. The 1st respondent was ultimately declared the winner of that election out of 33 candidates. The appellant was however aggrieved by that declaration and on 11th January, 2008, he filed a petition before the High Court of Kenya, in Nairobi which was assigned **E.P. No. 4 of 2008**, but on transfer to the High Court in Kisii, it was re-assigned **E.P. No. 1 of 2008.** The petition listed a catalogue of transgressions committed by the three respondents, jointly and severally, and concluded in the end that the elections in Kitutu Masaba constituency were rigged, unfairly conducted, interfered with, unduly influenced and thereby became undue (sic) elections which ought to be nullified. The petitioner sought orders for scrutiny of votes, recount of ballot papers, and nullification of the purported election.

The petition was not heard despite the gazettment of an election court to hear it. That is because on 7th February, 2008, the 1st respondent sought to strike it out through a notice of motion taken out under ***section 20(1) (a)*** of the **National Assembly and Presidential Elections Act (Cap 7),** Laws of Kenya *("the Act"*). The sole reason given for the application was that the petition has never been served on the 1st respondent, but the prayer has become contentious and I therefore reproduce it verbatim:

"1. THAT the petition presented to court on and filed in court herein be struck out with costs for want of service."

The significance is that there was no date inserted in the prayer relating to the date when the petition was presented and when it was filed in court. I shall revert to this later in this judgment. The 1st respondent swore a short affidavit on 7th February, 2008 in support of the application and stated in part:

"2. THAT I learned about the petition herein through the Kenya Gazette Number 445 of 25th January, 2008 and a publication in the Standard Newspaper. (annexed herewith and marked WN1 is copy).

3. THAT the petitioner has never served me with his petition lodged in court on 22nd January, 2008.

4. THAT I am advised by my advocates on record M/S. Jackson Omwenga Advocates whose advice I verily believe to be true that the petitioner should have served me with the petition in terms of the National Assembly and Presidential Elections Act.

5. THAT I strongly believe that since the petition was filed, the petitioner never made any attempt to serve me with the same.

6. THAT failure to serve me with the petition is a clear indication that the petitioner is not interested to have this petition heard and determined expeditiously.

7. THAT I have been in the country but I do not understand why the petitioner elected not to serve me with the petition.

8. THAT I strongly believe that the petition filed herein should not be allowed to proceed for lack of proper service.

9. THAT I therefore pray that the present petition be struck out for want of service."

Once again paragraph (3) of that affidavit has become contentious since the original date is overwritten by hand to indicate *"22nd"*. I shall revert to this later.

The matter came up for hearing before the election court (Mohamed Ibrahim J) on 11th February, 2008 when the application was set down for hearing on 4th April, 2008. In the meantime, the following orders were made:

"The petitioner, and the 2nd and 3rd Respondent are granted leave to file and serve Replying Affidavit within the next 21 days. The 1st Respondent/applicant is granted leave to file and serve supplementary affidavit within the next 14 days."

Pursuant to that order the 1st respondent filed a further affidavit on 25th April, 2008 introducing a copy of the Gazette Notice of the election results published on 30th December, 2007. For his part, the petitioner's advocate, Mr. Patrick Kerongo, swore an affidavit confirming that upon filing the petition on 11th January, 2008 he instructed a court process server, one ***John Atieli Angwa***, to serve it together with accompanying documents on all the respondents. The process server confirmed to him that he had indeed made several attempts to serve the petition papers on the 1st respondent but in vain. Out of abundant caution, and while the process server continued with his attempts, the advocate proceeded to advertise the petition in one English daily and one Kiswahili daily newspapers and the Kenya Gazette on 17th January, 2008. He also swore that the post-election chaos in the country had created an environment and circumstances which limited movement and created security concerns. The affidavit annexed a copy of the affidavit of service sworn by the process server on 11th February, 2008 but was filed on 28th February, 2008. The process server swore in part as follows: -

"2. THAT on 11th January, 2008 I received the Election Petition documents from the firm of M/S. KERONGO & COMPANY ADVOCATES with instructions to serve the same upon the 1st Respondent, WALTER ENOCK NYAMBATI.

3. THAT on the same day I obtained the 1st Respondent's mobile numbers (0733533889 and 0722724556) and called his numbers which went unanswered.

4. THAT the following day I went to Parliament where the 1st Respondent has been given an office but the security men told me they had not seen him and denied the entry.

5. THAT upon my investigations I learned that the 1st Respondent resides at Mountain View Estate.

6. THAT on the 14th January, 2008 upon gaining entry to the estate and upon inquiry went to House Number 70 (290) upon knocking there was no response at all though there was indication that someone was in the house.

7. THAT on the 15th January, 2008 at the opening of Parliament I tried to gain access to the office of the 1st Respondent and/or Parliament but the nature of security was that all roads leading to Parliament and its surroundings were closed.

8. THAT by the 12th January, 2008 some local radio stations had announced that a petition had been filed against WALTER NYAMBATI by a voter in the constituency.

9. THAT at the time I was attempting service upon the 1st Respondent he knew that a petition had been filed and most likely was avoiding service.

10. THAT I thereafter advised the instructing advocate of the difficult (sic) and requested him to use alternative means of service as I continued with my effort.

11. THAT thereafter I learned that the 1st Respondent as a new member of parliament will be attending an induction meeting at Safari Park Hotel.

12. THAT on the 25th January, 2008 I went to Safari Park with a view of serving him with papers but I failed to locate him and my efforts to venture to the meeting were repulsed by security personnel of the Vice-President and the hotel.

13. THAT my efforts to locate the 1st Respondent in restaurants, offices and to gain access to his residence have proved futile.

14. THAT I was unable to travel to the 1st Respondents rural home because the circumstances and security situations in the country were such that I would endanger my life."

The 1st respondent was unhappy about the contents of the affidavit of service and therefore sought leave of the court to respond to it by a supplementary affidavit, which leave was granted. The petitioner was also given leave to file a further affidavit, if any. On 11th April, 2008 the *"supplementary further affidavit"* was sworn by the 1st applicant stating in part as follows: -

"2. THAT my telephone numbers have been working and they have never failed to work.

3. THAT the Security Personnel at Parliament buildings do not deny entry to members of the public or court officials and it is not true that the process server was denied entry and he never came to the security desk since his name does not appear in the Visitors Book. (Annexed herewith and marked WN1 is copy of the Visitors Book.)

4. THAT the Security Officers always take down the details of the person entering Parliament and in turn issue him with an identification card to enable him enter parliament.

5. THAT I have an office at Continental House in Nairobi but not in Parliament.

6. THAT I stay with more than five (5) members of my family and I am informed by all my members of the family I stay with which information I verily believe to be true that the process server never came to my house as alleged or at all. In fact, at no time my house is without a member of the family.

7. THAT I never learned of the petition through any of the local radio stations and could not have avoided any service.

8. THAT I do not share security details with the Vice-President and or that of Safari Park Hotel and if the process server had introduced himself, I strongly believe that nobody could have denied him entry. But he never came to Safari Park Hotel.

9. THAT the process server is not sincere when he alleges that he failed to serve me with the petition at the restaurants, offices and even in my own house.

10. THAT I am advised by my advocate on record which advise I believe to be true that John Atieli Angwa has not renewed his licence for the year 2008 and that the last time he renewed his licence was in the year 2007.(Annexed herewith and marked WN2 is copy of a letter from the Judiciary, Process Server Committee).

11. THAT I strongly believe that the said John Atieli Angwa was not a proper person to have served if at all he attempted to serve and should appear in court for cross-examination.

12. THAT I am informed by my advocates herein which information I believe to be true that a process server must be licensed to effect service of court documents on annual basis just like advocates. (Annexed herewith and marked WN3 is copy of a sample of certificate.)

13. THAT the Post Election violence should not be used as an excuse for not serving me personally."

True to his intention to cross examine the process server, the 1st respondent filed a notice in court on 23rd April, 2008. A further order was subsequently made by Musinga J in the following words:

"With regard to the notice of intention to cross examine John Atielo Angwa, process server, since it is not agreed upon by the petitioner's counsel, the Judge himself will hear arguments as to whether he should be called or not and give his ruling. However, in view of the fact that the trial Judge is coming all the way from Eldoret for the said application dated 7/2/2008 and in view of the fact that he wishes to dispose of the application expeditiously, he has directed that the said process server should be around the law court so that if it will be ruled that he be cross-examined, he can be reached easily."

The application was fully heard by Ibrahim J on 30th May, 2008 and a ruling thereafter delivered on 11th June, 2008 granting the application for striking out the petition with costs, including the costs of the 2nd and 3rd respondents who had supported the petition. In the course of his ruling, the learned Judge disposed of an objection raised by the petitioner's counsel regarding the competence of the application on the ground that the supporting affidavit made reference to a petition filed on 22nd January, 2008 when in fact the petition in issue was filed on 11th January, 2008. The learned Judge found that indeed the supporting affidavit made reference to the wrong filing date but considered that it was a minor technicality which did not go to the root of the application and which was curable under ***section 23 (1) (d)*** of the Act.

The learned Judge then dealt with another objection raised by the 1st respondent against the *"affidavit of service"* of the process server which is reproduced above. The objection was that the process server did not file the affidavit of service in court as required and the copy of the purported affidavit of service filed as an annexture or exhibit was improperly before the court. In rejecting the affidavit of service, the learned Judge delivered himself thus:

"It is my view that in an Election Petition just like in Civil Proceedings i.e. service of summonses, the Process Server appointed to serve is required to file a return or affidavit of service to prove that the Petitioner and Plaintiff has effected the service of the relevant process. This is my view is almost mandatory in respect of the pleadings that initiate or commence proceedings. It is the instrument which will dictate the way forward or can give the road map whether the proceedings can move further or not. It is therefore the duty of the petitioner's or his advocate in an Election Petition to cause the filing of the Affidavit of Service which has been served personally or not. If there was no personal service, it is one of the documents that will show the reasons for the failure to serve personally and the justification to go for the alternative mode of service.

In the present case the Petitioner, his advocate and/or the Process Server did not cause any affidavit of service to be filed in Court. I have carefully perused the Court file and I find none on record. The so called affidavit of service is annexed to the Replying affidavit and is clearly a reaction to the application to strike out.

It is my view that since it was never filed in this Court then it cannot be admitted as an affidavit of service by the Court's Process Server. It does not and did not exist on the Court records and therefore cannot constitute to (sic) **be an exhibit. It therefore cannot be referred to as a Court document which an affidavit of service of a Court Process Server is supposed to be. A Petition just like a summons and Plaint in civil process is an accountable, returnable and public document. It is entrusted to the Advocate, Process Server or other authorized person by the court and is a public document. It belongs to the Court.**

The so-called affidavit of service was an after-thought and a reaction to the application to strike out.

I do hold that the said purported affidavit of service is not admissible as evidence for the purpose of the application herein. Since the affidavit of service was never filed in Court and is merely an

exhibit then the deponent of the Replying Affidavit Mr. Patrick Kerongo cannot rely on the contents as the same are hearsay evidence which is inadmissible."

With those findings, the affidavit of service was struck out and was not referred to, although it was not expunged from the record as stated by the learned Judge, thus leaving the affidavit of the petitioner's advocate which merely referred to the alternative mode of service and the effects of post election violence. Personal service was thus ruled out and consideration was concentrated on due diligence under ***section 20 (1) (a)*** proviso ***(iv)*** of the Act. The learned Judge held:

"I do hold that a Petitioner cannot in law and fact embark on the process of service under Proviso (iv) until due diligence he (sic) attempted and made all possible efforts in the circumstances to serve the Respondent personally first. It is only after such attempts and/or efforts that he can invoke the provisions of Section 20(1) (a) and proviso (iv).

The Petitioner must demonstrate that he exercised due diligence <u>before</u> invoking proviso (iv) and serving through the alternative mode of service.

Considering the only evidence set out above which is before this Court, it means that the Petitioner filed the Petition on 11th January, 2008. On 17th January, 2008, he went ahead to purport to invoke the provisions of proviso (iv). There is no evidence before the Court of any attempts of personal service before 17th January, 2008.

I also find that there was so much haste on the part of the Petitioner in this case. He filed his Petition fairly early on 11.01.08. I think that he still had more time to carry out the attempts at personal service on 17.01.08 when he invoked proviso (iv). The Petitioner squandered away the evidence he had of the attempts made if any by submitting inadmissible evidence.

I do hold that the Petitioner has not shown that he exercised due diligence and that it was impossible for him to effect personal service as required by Section 20 (1) (a) for him to have been entitled the alternative modes of service of the Election Petition."

The appellant was aggrieved by those findings and has come to us on this first and final appeal. He listed down some thirty five grounds in his memorandum of appeal which are fairly repetitive and prolix and learned senior Counsel, Mr. Nowrojee, who was assisted by Mr. Kerongo in urging the appeal, was well advised to consolidate the grounds and argue them in three tranches. The first tranche covered some 16 grounds addressing the prayer relating to the date of the election petition sought to be struck out. The second tranche covered 12 grounds focusing on the *"affidavit of service"*, while the third and last tranche covered the remaining 7 grounds relating to *"due diligence"*. I shall deal with the three issues in the order in which they were argued.

It was the submission of Mr. Nowrojee that the application before the court did not specify the petition in issue which ought to have been struck out. There was no indication of the date of presentation or filing of the petition in the application itself, and the supporting affidavit swore that it was the one lodged on 22nd January, 2008. According to Mr. Nowrojee, the jurisdiction of the court was limited to the election petition lodged in court on 11th January, 2008 and not any other. Any purported amendment to the supporting affidavit was erroneous in law and it was not open to the court to fill in gaps in the application or to grant prayers which were not sought, since a party can only obtain what they ask for in their pleadings. In his view, the matter of dates went to the root of the application, was determinant of the jurisdiction of the court, and was not, as erroneously held, a mere technicality. The application should therefore have been struck out *in limine*.

In response to those submissions, senior counsel and retired Judge of Appeal, Mr. A.B. Shah who was assisted by Mr. Omwenga submitted that although the prayer made in the application is not elegantly drafted, it was a mere mistake capable of correction as it caused no prejudice. Indeed, he pointed out, it was the appellant's counsel himself who noticed the mistake and corrected it in his replying affidavit

stating that the Election Petition was filed on 11th January, 2008. The learned Judge of the superior court then went ahead and resolved the issue by referring to various publications which all relate to one and the same petition, the one filed on 11th January, 2008. Mr. Shah thought, in those circumstances, a mountain was being made out of a molehill, and submitted that mistakes are even made in affidavits which are not sacrosanct and can be rectified in the interests of justice.

I have considered that limb of the appeal and I think, with respect, that it is not meritorious. As correctly pointed out by Mr. Nowrojee, an affidavit consists of sworn factual evidence and cannot simply be amended by alteration of its contents. Another affidavit would have to be sworn if the need arises to discard any of the contents of that affidavit. In this case, the 1st respondent purported to alter the original date of filing the petition in paragraph three of the affidavit in support of the motion and overwrote *"22nd"* on the date. That alteration was a nullity in law and must therefore be ignored. Clearly, the original typewritten date of the petition was *"11th"* and if it was the wrong date, then a further affidavit ought to have been sworn. Fortunately for the 1st respondent, the original date was the correct date of the petition intended to be struck out and I find no fault in the supporting affidavit as originally drawn. With that finding the omission in the motion itself to state the date of presentation or filing of the petition presents no difficulty as it caused no prejudice to the appellant or any other party. As correctly pointed out by Mr. Shah, it was the appellant's advocate himself who swore that the petition was filed on 11th January, 2008. I agree with the learned Judge in those circumstances that it was a technicality which ought not to hamper the hearing and determination of an election petition which by *dint* of ***section 23 (1) (d)*** of the Act shall be decided "*without undue regard to technicalities*".

I turn now to the tranche of grounds relating to the *"affidavit of service"*. Mr. Nowrojee strongly argued that the learned Judge misdirected himself in holding that it was *"necessary"* and *"almost mandatory"* to file a return or affidavit of service in an election petition. It was erroneous because the electoral code is complete in itself and provides nowhere that an affidavit of service of an election petition be filed and if so, at what point in time. Nor was there any requirement that evidence of due diligence be filed before any application for striking out is filed, and in default, such evidence would be shut out. At any rate, he submitted, the affidavit of the process server was introduced to prove that due diligence was undertaken by the appellant and the fact that it was made an annexure or exhibit in the affidavit in reply to the motion did not deprive it of authenticity or substance. Mr. Nowrojee reminded us that it was the court itself that granted leave to the appellant to file the affidavit in reply to the motion, and also made a further order for cross-examination of the process server on his affidavit. It was therefore erroneous, he submitted, for the same court to turn round and declare, as it did, that the affidavit was an *"afterthought"*, *"inadmissible"* or *"hearsay"*. In his view, it was evidence on record which ought to have been considered together with the rest of the evidence instead of being ignored as it was. In effect, the learned Judge was indulging in technicalities which he himself had stated ought not to torpedo an election petition which is a public process supervised by the court on behalf of a constituency, Mr. Nowrojee concluded.

In response to those submissions Mr. Shah submitted that it was a requirement of law that an affidavit of service of any document must be filed in court in time. On this proposition, Mr. Shah relied on the decision of **Mwakwere Chirau Ali vs. Ayub Juma Mwakesi & 2 others Civil Appeal No. 80/08 (UR),** per Onyango Otieno JA, where the learned Judge of Appeal stated that the Civil Procedure Rules on service of documents were applicable since there were no Election rules of procedure providing for service. He also relied on the decision of Visram J (as he then was) in **Titus Kiondo Muya v Peter Baiya & 2 others EP. No. 31/08 (UR)** where the learned Judge held that the affidavit of service should have been filed immediately after service. Mr. Shah agreed with the learned judge of the superior court that the affidavit of service which had not been filed immediately after service but was made an annexture to a subsequent affidavit was for ignoring since an affidavit filed *ex post facto* could be manipulated. He nevertheless submitted, that even if the affidavit of service had been examined as evidence of due diligence, it was plainly futile. He took us through all the paragraphs of the affidavit to show, *inter alia*, that there was no disclosure of the sources of information relied on by the process server in relation to the 1st respondent's telephone numbers, or residence; that the process server purportedly visited Parliament on a Saturday; that there was no disclosure of the restaurants or offices visited in search of the 1st respondent; that there was no proof that the 1st respondent heard about the petition through local radio

stations; that there was nothing to show that the 1st respondent was avoiding service; and that the purported security situation caused by post election violence was an irrelevant factor in relation to service of the petition. All these deficiencies, Mr. Shah submitted, made the affidavit of service worthless and he cited this Court's decision in **Ephrahim Njeru vs. Justin B. Muturi CA 314/03 (UR)** for support.

As for the submission that the affidavit of service was introduced in the proceedings with leave of the court and that there was an order for cross-examination of the process server, Mr. Shah submitted that the leave granted did not affect the rules on return of service which had been flouted. Furthermore the duty to cross-examine a process servicer lies with the court and not the parties under ***Order V rule 16*** of the Civil Procedure Rules. In his view, it was not obligatory for the 1st respondent to cross-examine the process server although he had filed a notice of intention to do so. There was a choice by the 1st respondent to pursue the cross-examination or not since ***rule 16*** has no relevance to the parties. In those circumstances, he submitted, the grant of leave and failure to cross-examine the process server were of no consequence.

Mr. Nowrojee responded to the attack on the substance of the affidavit of service contending that there was a rebuttable burden which was fully discharged by the appellant through that affidavit but the 1st respondent said nothing of substance to demolish it. Amongst other things, there was no denial that the telephone numbers obtained by the process server were not the 1st respondent's; that there was no security around Parliament and Continental offices, both frequented by the 1st respondent; that the house number disclosed in the affidavit as that of the 1st respondent's residence was not the one; that radios which were in the public domain did not make any announcement and the 1st respondent did not hear the announcement about the petition; and that efforts at tracing the 1st respondent continued even after the publication and gazettement of the petition. At no time did the 1st respondent state where he was during the period the process server was looking for him. Mr. Nowrojee compared the decision of the same learned Judge who, on the same day, dismissed another application filed by a losing candidate against the 1st respondent's election, where the process server's affidavit of service was examined and upheld. That was in **Mose Nyabega v Walter Nyambati Osebe & 2 others**, **EP No. 4 of 2008 (ur)**. The process server in that petition visited almost the same places as the process server in this petition did in tracing the 1st respondent and both of them were not successful. The failure to trace the 1st respondent in that petition was however treated favourably, and the learned Judge in the end stated:

"The respondent does not offer and tell this Court where he was on the said two crucial days."

The security situation in the country was also taken into consideration. In Mr. Nowrojee's view, there was unequal treatment of the two similar situations by the learned Judge and therefore his discretion ought to be interfered with. It was an error of law, he submitted, to treat two people under the same circumstances, differently. Finally Mr. Nowrojee submitted that there was an affidavit of the process server sworn on 11th February, 2008 which the 1st respondent said he would cross-examine on and the learned Judge issued an order to that effect. There was thus ample opportunity for the 1st respondent to test the veracity of that affidavit but he gave up that opportunity. The learned Judge should also, in his view, have expressed some views on the affidavit, even after he had found it inadmissible, but did not.

I have anxiously considered this limb of the grounds of appeal, the facts and circumstances of the case, and the submissions of counsel. In the end I have come to the conclusion that the appellant is on firmer ground here and the complaints raised are meritorious.

The process server's affidavit of service was, as it were, the central pillar holding together the appellant's petition and the rejection of it by striking out and exclusion of its contents, brought the petition tumbling down. It was the very document which would have answered the question as to whether, in terms of ***proviso (iv)*** of ***section 21 (I) (a***), of the Act the appellant exercised due diligence to effect personal service before resorting to alternative means of service on 17th January, 2008. After striking out the affidavit, the learned Judge, stated that "*there was no evidence before the court of any attempts of (sic) personal service before 17th January, 2008.*" He totally ignored it, stating that it had been expunged although it was still on record. Should the affidavit and its contents have been excluded? I

do not think so.

In the first place, the issue raised in the motion before the court was whether the petition had been served on the 1st respondent in accordance with the Act, and leave was granted for affidavits to be filed to assist the court in exploring that issue. That is when the affidavit of service was introduced on record and it cannot, in my view, be said that it was not part of the record. It may well have been desirable to introduce it at an earlier stage of the proceedings but the statute governing election petitions makes no provision for such procedure. The nearest reference is in the Civil Procedure Rules ***order V rule 15*** which relates to service of summons and directs that an affidavit of service be made and filed in a prescribed manner. It is for a good reason that this should be so. The summons to enter appearance served under the Civil Procedure Rules would result in a default judgment if no appearance was entered within a prescribed period and the deputy registrar would rely upon the affidavit of service to enter final or interlocutory judgment as the case may be. Not so in an election petition. There is no requirement for appearance or threat of judgment in default. Indeed, as submitted by Mr. Nowrojee, the petition could have proceeded for hearing, the absence of an affidavit of service notwithstanding. There is no reason, in my view, to anticipate that the service of the petition would be challenged and therefore file the affidavit of service before the motion to strike out. And if there was such challenge, I see no reason why leave of court cannot be granted to deal with it. In this case, leave was indeed sought and granted. There was more; a further order made for cross-examination of the process server in view of the express notice given by the 1st respondent, that he would do so. It was a reasonable order, considering that the role of the court was to discover the truth about the disputed fact of service.

In a recent Election Petition case **Dickson Daniel Karaba v John Ngata Kariuki & 2 others, Civil Appeal No. 125/08 (ur)** this Court examined a similar issue and delivered itself as follows:

"The central issue in this whole matter was to establish the truth about service of the petition filed by the appellant, on the 1st respondent. The truth ought to have been established on a balance of probabilities and it lay between the stories put forward by the process server and his supporter, and by the 1st 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 1st 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 Chitaley 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 affidavit of service was before the court pursuant to its own orders and there was no reason to ignore it. There is no evidence that the process server had not attended court for purposes of cross-examination as indicated in the court order and there was therefore an opportunity for the court and all parties to test the veracity of that affidavit. The court, in my view, fell in error and failed to examine the very evidence that would have assisted the court in establishing the truth of the disputed facts. I agree with Mr. Nowrojee on this score that the affidavit of service should not have been struck out and therefore that ground of appeal succeeds.

Would the affidavit of service have discharged the onus of showing on a balance of probability that the appellant exercised due diligence? That is the final issue in the appeal.

There is no dispute about the application of ***section 21 (i) (a)*** of the Act as to the mode of service of an election petition and the application of ***proviso (iv)*** to that section relating to due diligence before resorting to alternative modes of service. The learned Judge was therefore correct in stating that:

"……..a petitioner cannot in law and fact embark on the process of service under Proviso (iv) until due diligence he attempted and made all possible efforts in the circumstances to serve the Respondent personally first. It is only after such attempts and/or efforts that he can invoke the provisions of Section 20 (1) (a) and proviso (iv).

The Petitioner must demonstrate that he exercised due diligence before invoking proviso (iv) and serving through the alternative mode of service."

The superior court found there was no due diligence simply because there was no evidence of any affidavit of service before the petition was advertised on 17th January, 2008. There was no evidence because, according to the Judge, the affidavit of service which would have established those facts was non-existent.

As stated earlier, Mr. Nowrojee vehemently submitted that the affidavit ought to have been examined and it would have shown more than five attempts having been made by the process server to effect service. Both counsel analysed those attempts as earlier shown. The position taken by Mr. Shah was however that the sequence of events since the filing of the petition on Friday 11th January, 2008 until Thursday 17th January, 2008 when it was advertised through newspapers and in Kenya Gazette, shows that although the appellant had eleven days to serve the petition up to 28th January, 2008, he was in a hurry to advertise it within six days and therefore there was no evidence of due diligence. The petitioner in effect made advertisement as the main mode of service contrary to the law. On these submissions, Mr. Shah was supported by Mr. Orora, learned counsel for the 2nd and 3rd respondents who stated that there was enough time to exercise due diligence before resorting to alternative means.

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 depositions 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. The standard of diligence applied by the superior court was defined in E.P. No. 4 of 2008 (supra) in the ruling delivered by the same Judge on the same day in the following manner:

"In Black's Law Dictionary 8th Edition, "<u>Due diligence</u>" is defined as:

"The diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation."

So what is diligence itself? It is defined as:

"1. A continual effort to accomplish something.

2. Care, caution, the attention and care required from a person in a given situation.

It is my interpretation from the foregoing that the diligence expected when the term "due diligence" is used as the definitions indicate or suggest, is that there must be a committed and serious intention of complying with the legal requirement or discharge a duty. One must show a continual and consistent effort in attempting to achieve the required (sic). **However, the standard is that "reasonably and ordinarily" expected to be exercised by the person who is obliged to satisfy the legal requirement and discharge the obligation.**

It is my view that it is the duty of the election Court to inquire into and determine whether the standard was met or achieved by the petitioner in attempting to serve the petition. It is a matter for investigation, inquiry and determination by the Court. The Court will weigh all facts and circumstances and exercise its discretion in reaching a conclusion/finding. It is my view that the use of the terms "reasonably" and "ordinarily" give the Court the latitude and discretion to consider each case against its special facts and circumstances."

I think that is a fair construction of the standard of proof applicable and in my view it was discharged in the case before us as it was in E.P. No. 4 of 2008. The difference in the dates of filing invite no differential treatment in the two petitions. Having so found I would allow that ground of appeal also.

The upshot is that the appeal is allowed. The decision and orders of the superior court made on 11th July, 2008 are hereby set aside and substituted by an order dismissing the 1st respondent's notice of motion dated 7th February, 2008. The appellant shall have the costs of the appeal and the motion before the superior court to be borne by all three respondents, jointly and severally.

Those are the orders I would make in this appeal.

Dated and delivered at Nairobi this 7th day of May 2010.

P.N. WAKI

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JUDGE OF APPEAL