



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
Civil Appeal 6 of 2004**

**FRANCIS NJARI KAGUNYI.....APPELLANT**

**AND**

**1. DANIEL HENRY GATHUA.....1<sup>ST</sup> RESPONDENT**

**2. JAMES VISCOUNT KIMATHI..... 2<sup>ND</sup> RESPONDENT**

***(Appeal from the ruling of the High Court of Kenya***

***Nairobi (Milimani) (Mwera, J) dated 23<sup>rd</sup> December, 2003 In Election Petition No. 3 of 2003)***

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**JUDGMENT OF THE COURT**

This appeal arises from an Election Petition No. 3 of 2003 in respect of Lari Constituency in which Francis Njari Kagunyi (the appellant herein) was the Petitioner, Daniel Henry Gathua, was the Returning Officer, the 1<sup>st</sup> Respondent and (1<sup>st</sup> respondent in the appeal) and Hon. James Viscount Kimathi the winner in the said election the 2<sup>nd</sup> respondent, who is also the 2<sup>nd</sup> respondent in this appeal.

The appellant filed an Election Petition in the superior court on 21<sup>st</sup> January 2003 challenging the election of the 2<sup>nd</sup> respondent following the General Election that took place in this country on 27<sup>th</sup> December 2002 in which the 2<sup>nd</sup> respondent was declared the winner in Lari Constituency. The 1<sup>st</sup> respondent was the Returning Officer who supervised the exercise in Lari and declared the 2<sup>nd</sup> respondent the winner. The result was published in Kenya Gazette of 3<sup>rd</sup> January, 2003 and as per **section 20** of the National Assembly and Presidential Elections Act (Cap 7 Laws of Kenya) any party wishing to petition that elections' results had 28 days to file and serve the petition. Since the appellant filed his petition on 21<sup>st</sup> January 2003 he was within the period stipulated by the law.

By a Notice of Motion dated 27<sup>th</sup> March, 2003 the 2<sup>nd</sup> respondent sought the striking out of the appellant's petition. The main prayer in that Notice of motion was:-

***“That the petition be struck out on the ground that the same was not personally served on him within 28 days after the date of the publication of the result of the Parliamentary elections in the Kenya Gazette or at all.”***

It is that application that was placed before the superior court (Mwera, J.) for determination. The central question to be answered in that application was whether the 2<sup>nd</sup> respondent was validly served with the petition. That task fell on the shoulders of Mwera J. who after hearing the evidence placed

before him together with legal submissions by learned counsel came to the conclusion that the 2<sup>nd</sup> respondent was not validly served with the petition and hence the learned Judge proceeded to conclude his ruling delivered on 23<sup>rd</sup> December 2003 thus:-

***“In sum this application succeeds with costs payable to the 2<sup>nd</sup> respondent/applicant. The total effect is that the petition herein is struck out with costs. A due return will be made to the speaker of the National Assembly in the usual manner.”***

Being aggrieved by that decision of the superior court the appellant now comes to this Court in which through his lawyers he has filed a memorandum of appeal containing eleven grounds of appeal. The orders that the appellant seeks from this Court are that:

- “(a) The decision and order made by Hon. Justice Mwera on 23<sup>rd</sup> December 2003 be set aside.
- (b) In its place an order be made dismissing the 2<sup>nd</sup> respondent’s notice of motion dated 27<sup>th</sup> March 2003.
- (c) A direction to the superior court that the petition be fixed for full hearing without further delay.
- (d) The appellant be awarded costs of the appeal in this Court and the costs of the said motion in the superior court.

The hearing of the appeal commenced before us on 7<sup>th</sup> June 2007 when Mr. D.M. Mbigi together with Mr Githinji appeared for the appellant while Mr. M. Annan appeared for the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent was represented by Mr M. Kilonzo (S.C.) together with Miss K.D. Kilonzo.

This appeal raises the vexed issue of service of election petitions under the National Assembly and Presidential Elections Act (Cap. 7 Laws of Kenya). What was placed before the superior court was the evidence of a process server known as Anthony Njuguna Kibe. He gave evidence on oath in support of what he had sworn in his affidavit. It was Kibe’s evidence that on 28<sup>th</sup> January 2003 he traced the 2<sup>nd</sup> respondent by a mobile telephone and informed him (2<sup>nd</sup> respondent) that he had the petition papers to serve on him. The second respondent told him that he (2<sup>nd</sup> respondent) would be waiting at Southern Comfort Hotel in a motor vehicle Reg. No KAP 099 E. (The 2<sup>nd</sup> respondent deponed that his motor vehicle was reg. No KAP 099V.) That Kibe proceeded to the scene and on seeing the said motor vehicle, he again called the 2<sup>nd</sup> respondent on the said cell phone. That 2<sup>nd</sup> respondent came out of his car and that Kibe recognized him as the person whose election portrait Kibe was having and whom he had also seen on the T.V. That Kibe handed to the 2<sup>nd</sup> respondent the petition document which the latter perused and did not acknowledge by signing at the back of the papers but instead led Kibe to his (2<sup>nd</sup> respondent’s) lawyers’ offices at Post Bank House. The lawyers were Ngatia & Associates. Apparently, the 2<sup>nd</sup> respondent was having the petition in his hands. That Mr. Ngatia came out of his inner office, took the petition papers from the 2<sup>nd</sup> respondent and went back into the office. That the 2<sup>nd</sup> respondent then left the offices while Kibe sat there and waited for Mr. Ngatia to acknowledge receipt of the document which he did later by signing at the back. Mr Ngatia’s official stamp was placed on the document and the bundle was given to Kibe who then left Mr Ngatia’s Office.

It was Kibe’s evidence before the superior court that with all the foregoing, he was satisfied that proper service of the petition had been effected on the 2<sup>nd</sup> respondent. It is significant to observe that Kibe did not file affidavit of service immediately after leaving Mr. Ngatia’s offices but did so on 17<sup>th</sup> April, 2003. This was of course after the 2<sup>nd</sup> respondent had filed his notice of motion seeking the striking out of the petition.

What was the 2<sup>nd</sup> respondent’s answer to what Kibe stated both in his affidavit and evidence on oath?

In his affidavit in reply, the 2<sup>nd</sup> respondent deponed as follows:-

***“1 THAT I have perused the motion filed herein together with the affidavits purportedly sworn by the Petitioner and the Affidavit of Service sworn by Antony Njuguna Kibe.***

***2 That it is illustrative that the affidavit of service was made on 16<sup>th</sup> April 2003 after my motion had been filed and served upon the Petitioner’s advocates. The affidavit of service was made purposely to mislead and deceive this Honourable Court.***

***3 That Mr. Ngatia’s clerk who dealt with the person who took the documents for purported service has sworn an affidavit and I attach the affidavit hereto marked “JVK-1”***

***4 That Antony Njuguna Kibe did not call me at all. The mobile number he has referred to belongs to one of my drivers who could have quite correctly informed the caller that Mr. Ngatia is my lawyer.***

***5 That I did not at any time talk with Antony Njuguna Kibe or accompany him to Mr Ngatia’s office as falsely alleged. Indeed on the date alleged, I went for exercises at 12 noon and left the gymnasium at 6 o’clock for my residence.***

***6 That I do not own a Toyota Surf Registration Number KAP 099E.***

***7 That it cannot be for the petitioner or his lawyer to decide the lawyer who should represent me. The motion filed herein is callous to the extreme in that:-***

***(a) A lawyer makes legal submissions in court and the fiasco regarding service cannot be such submissions.***

***(b) The process server and Mr Ngatia’s clerk are the only persons who can testify on how service was effected.***

***8 That I recently purchased a motor vehicle registration number KAP 099V, a Toyota Surf. I purchased the vehicle on 13<sup>th</sup> March 2003 and took possession on the same date. I attach hereto a copy of the log-book marked “JVK-2”.***

***9 That since evidence on service was being made purposely to defeat the motion that I filed, the Petitioner and his Lawyer assumed that I had the vehicle in January, 2003.***

***10 That service of the motion and the affidavits were effected upon my advocate on record on Thursday, 17<sup>th</sup> April, 2003. Since the following day was the Easter holiday, I have had insufficient time to fully reply to the false allegations made. Notwithstanding the foregoing, I have carried out inquiries and have ascertained the following:-***

***(a) That the petitioner’s advocates instructed Whitestone Auctioneers to serve the petition upon me.***

***(b) That Whitestone Auctioneers detailed one Kimeli to trace me and effect service. The person was unwilling to effect service upon me at my office or residence and opted to serve my advocate.***

***(c) That Kimeli went to my advocate’s office under the pretext that I had sent him to deliver documents to my advocate.***

***11 That I have managed to get a photograph of the person who took the petition to my advocate and I attach hereto the photograph marked “JVK 3”. The person is employed by Whitestone Auctioneers. I verily believe that the same person effected service upon the 1<sup>st</sup> respondent.***

**Arising from the foregoing, it is abundantly clear that:-**

**(a) The Petitioner's advocates have advanced falsehoods to this Honourable Court.**

**(b) The affidavit of service is false to the knowledge of the deponent.**

**12 That what is deponed herein is true to my knowledge."**

It is to be noted that in his affidavit one Albert Ikunda Muguna a court clerk employed by Ngatia & Associates deponed:-

**"1 That I am a court clerk employed by Ngatia & Associates advocates. I have perused the affidavit of service sworn by Antony Njuguna Kibe and limited to my involvement in the receipt of documents as deponed hereunder.**

**2 That on 28<sup>th</sup> January 2003, at about 5.30pm a male adult came to our chambers. I attended the person since Mr. Ngatia's secretary had left for the day and Mr. Ngatia was inside his office with clients preparing for a hearing that was to commence on 30<sup>th</sup> January 2003.**

**3 That the person informed me that he had "documents" from Mr. Viscount Kimathi and which he required to deliver to Mr. Ngatia. I informed him that Mr. Ngatia was attending to clients and the consultation may continue for a considerable period. He informed me that he was in a hurry and requested me to telephone Mr Ngatia for him to acknowledge receipt of the "documents."**

**4 That during our discussions, the person represented that he had been sent by Mr. Kimathi to bring "documents" for Mr. Ngatia's signature. I therefore concluded that he was Mr. Kibathis's driver.**

**5 That there is an arrangement that documents from Mr. Kibathi be acknowledged by Mr. Ngatia since Mr. Kimathi invariably sends his drivers to deliver important documents to our chambers.**

**6 That I took the documents to Mr Ngatia's office and requested him to acknowledge receipt so that we could release Mr. Kimathi's driver. After about 15 minutes, Mr Ngatia came to the reception, called me and gave me the acknowledged documents. I immediately gave the "documents" to the person who had brought them.**

**7 That I know Antony Njuguna Kibe very well and I am positive that Mr. Kibe did not come to our chambers on 28<sup>th</sup> January 2003. The person who I was dealing with had a Kamba accent.**

**8 That I further positively confirm that Mr. Kimathi did not come to our chambers on the said date and Mr. Ngatia did not at any time attend to the person who brought the documents.**

**9 That on 4<sup>th</sup> March 2003, I found out that the person who I was dealing with is an investigator and/or process sever with Whitestone Auctioneers. I immediately informed Mr. Ngatia that I had been deceived to accept "documents" by the person who had represented to have been sent by Mr. Kimathi. Mr Ngatia informed his secretary in my presence to call Mr. Kimathi urgently."**

The foregoing rival positions were placed before the learned Judge who considered them together with legal submissions by counsel appearing. In the end he came to the conclusion that the 2<sup>nd</sup> respondent was not validly served with the petition documents. In concluding his ruling, the learned Judge said:-

**"Kibe conceded when he was examined on oath that he did not know as at 28<sup>th</sup> January, 2003 whether or not Mr. Ngatia Advocate had been appointed by the 2<sup>nd</sup> respondent to act for him in case a petition was brought against him. Kibe did not check with the registrar about this and it is not shown that by 28<sup>th</sup> January, 2003 the 2<sup>nd</sup> respondent had appointed Mr. Ngatia advocate to act for him in this regard. Consequently, service of the petition documents even though he acknowledged them was of no validity. Mr. Ngatia was not the 2<sup>nd</sup> respondent's advocate appointed at that time to act for him in any petition following the election under review".**

We have now heard the submissions by counsel appearing in this matter. It is Mr Mbigi's stand that the 2<sup>nd</sup> respondent was served with the petition documents on the 28<sup>th</sup> January 2003. Mr. Mutula Kilonzo on his part took the stand that the 2<sup>nd</sup> respondent was not served with the petition documents and he asked us not to disturb the findings of fact by the learned Judge.

The central question to be answered in this appeal is whether Kibe validly served the 2<sup>nd</sup> respondent with the petition on the 28<sup>th</sup> January 2003. That is the question that was before the learned Judge who answered the question in the negative and proceeded to strike out the appellant's petition. The status of personal service and the alternative modes of service were admirably captured in this Court's decision in **Mwai KibaKi v. Daniel Arap Moi & Another** – Civil Appeals Nos. 172, 193/1999 (unreported) thus:-

***“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 rule 14 (2) of the Rules personal service was not dispensed with. The other modes of service were only alternative modes of service to personal service.”***

Bearing in mind the foregoing, can it be said that the 2<sup>nd</sup> respondent was personally served with the petition on 28<sup>th</sup> January, 2003? The superior court considered that question in detail by considering the evidence before it. This being a first appeal it is our duty to reconsider the evidence afresh, analyze the same and make our own conclusions but remembering that we have neither seen nor heard the witnesses - See **PETERS VS. SUDNAY POST LTD. (1958) E.A. 424, SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT K. LTD & OTHERS [1965] E.A 123 and EPHANTUS MWANGI & ANOTHER VS. DUNCAN MWANGI WAMBUGU [1982-85] 1 KAR 278**, In the last case HANCOX, JA (as he then was) put it thus at p. 292:-

***“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”***

We have given this matter very careful consideration and it is our view that the key testimony was that of Kibe the process server. This gentleman's testimony was to the effect that he handed over the documents to the 2<sup>nd</sup> respondent in the street. But if that were to be accepted as true and Kibe being a process server of experience he must have known what follows successful service of process; an affidavit of service should be sworn to that effect. Kibe did not have to accompany the 2<sup>nd</sup> respondent to his lawyers offices at all because as at that time the service on that lawyer (Mr. Ngatia) would not be and was not valid service because the 2<sup>nd</sup> respondent had not appointed Mr. Ngatia as his lawyer in the petition which appointment he had to notify and had not notified to the Registrar as by law provided. Accordingly even the acknowledgment by Mr. Ngatia's office of the service of the petition papers had no validity.

In view of the foregoing, we find no fault in the ruling of the learned Judge as we, like him, are satisfied that there was no valid service on the 2<sup>nd</sup> respondent. Hence the appellant's petition was, in our view, properly rejected on the grounds set out in the Notice of Motion filed by the 2<sup>nd</sup> respondent. Consequently, this appeal is hereby dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of September, 2007.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**