



REPUBLIC OF KENYA
COURT OF APPEAL AT NAIROBI
CIVIL APPEAL NO 6 OF 2004

Kagunyi v Gathua & another (No 3)

Court of Appeal, at Nairobi September 28, 2007

Tunoi, O'Kubasu & Onyango Otieno JJA

Civil Appeal No 6 of 2004

(Appeal from the Ruling of the High Court of Kenya at Nairobi (Mwera J) dated 23rd December 2003 in Election Petition No

Practice and Procedure - service of election petition - service advocate - application to strike out petition on the ground that not been personally served on the respondent within 28 days aft date of the publication of the result of the parliamentary elections Kenya Gazette - appeal against decision of the High Court striking c petition process server stating that he had been led by the respond his advocate upon whom he had served the election petition - Reg of the High Court not having been notified that the advocate serve actually the advocate for the respondent whether the service was the **National Assembly and Presidential Elections Act** (cap 7) section

On 21s' January, 2003 the petitioner filed a petition challenging the el(of the 2^oa respondent as a Member of Parliament for Lari Constiti during the 2002 Presidential and Parliamentary Elections. Later, t respondent filed a motion dated 27" March, 2003 asking the High Cc strike out the petition on the ground that it had not been personally s on him within 28 days after the date of the publication of the results elections in the Kenya Gazette as required by section 20 of the Na Assembly and Presidential Elections Act (cap 7).

In opposing the motion, the appellant called the oral and affidavit evi of his process server to the effect that on 28' January 2003, he had 1 the 2^od respondent to a hotel from where he (the 2^od respondent) N him to the law firm of Ngatia & Associates . While there, the pi server then allegedly effected service of the petition papers on a Mr I' who he (the process server) described in his testimony as the lawy the 2^oa respondent. However, the process server conceded that as time of the service, he did not know whether Mr Ngatia had been for appointed to represent the 2^o respondent in the petition.

The 2^od respondent filed an affidavit sworn by him and another one clerk employed by Ngatia & Associates contradicting certain state of fact in the appellant's evidence. Ultimately, the High Court (Mw)found that as it had not been shown that at the time of the alleged se of the petition papers on him, Mr Ngatia had been appointed by tl respondent to represent him for the purpose of the petition, the se upon him, though acknowledged, was invalid. The 2^od respondent's m was therefore allowed and the appellant's petition was struck out.

The appellant appealed against the decision.

Held:

1. 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 in wrong principles in reaching the findings he did.
2. 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 insist on such service. The other modes of service are only alternatives to personal service.
3. As at the time that the appellant's process server allegedly effected service of the petition on Mr Ngatia, the 2nd respondent had not appointed Mr Ngatia as his lawyer in the petition which appointment he had to notify the Registrar. Accordingly, both the purported service and acknowledgment by Mr Ngatia's office of the service had no effect.

Appeal dismissed with costs to the respondents.

Cases

1. Mwangi v Wambugu [1984] KLR 453; [1982-88] 1 KAR 278
2. Kibaki v Moi & another (2008) 2 KLR (EP) 351; [2000] 1 EA 1
3. Peters v Sunday Post Ltd [1958] EA 424
4. Selle & another v Associated Motor Boat K Ltd & others [1964] 123 Statutes

National Assembly and Presidential Elections Act (cap 7) section 2 Advocates

Mr DM Mbigi and Mr Githinji for the Appellant Mr MAnnan for the 1st Respondent

Mr M Kilonzo and Miss KD Kilonzo for the 2nd Respondent

September 28, 2007, the following Judgment of the Court delivered.

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 1st respondent and (1st respondent in the appeal) and Hon James Viscount Kimathi the winner in the said election the 2nd respondent, who is also the 2nd respondent in this appeal.

The appellant filed an election petition in the Superior Court on 21st January 2003 challenging the election of the 2nd respondent following the General Election that took place in this country on 27th December 2002 in which the 2nd respondent was declared the winner in Lari Constituency. The 1st respondent was the Returning Officer who supervised the exercise in Lari and declared the 2nd respondent the winner. The result was published in Kenya Gazette of 3rd 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 21st January 2003 he was within the period stipulated by the law.

By a Notice of Motion dated 27th March, 2003 the 1st 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 2nd 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 2nd respondent was not validly served with the petition and hence the learned judge proceeded to conclude his ruling delivered on 23rd December 2003 thus:-

"In sum this application succeeds with costs payable to the 2nd 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 23rd December 2003 be set aside.

(b) In its place an order be made dismissing the 2nd respondent's Notice of Motion dated 27th 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 7th June 2007 when Mr DM Mbigi together with Mr Githinji appeared for the appellant while Mr M Annan appeared for the P¹ respondent. The 2nd respondent was represented by Mr M Kilonzo (SC) together with Miss KD 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 28th January 2003 he traced the 2nd respondent by a mobile telephone and informed him (2nd respondent) that he had the petition papers to serve on him. The second respondent told him that he (2nd respondent) would be waiting at Southern Comfort Hotel in a motor vehicle Reg No KAP 099

E. (The 2nd respondent deposed 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 2nd respondent on the said cell phone. That 2nd 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 TV that Kibe handed to the 2nd 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 (2nd respondent's) lawyers' offices at Post Bank House. The lawyers were Ngatia & Associates. Apparently, the 2nd respondent was having the petition in his hands. That Mr Ngatia came out of his inner office, took the petition papers from the 2nd respondent and went back into the office. That the 2nd 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 2nd 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 17th April, 2003. This was of course after the 2nd respondent had filed his Notice Of Motion seeking the striking out of the petition.

What was the 2nd respondent's answer to what Kibe stated both in his affidavit and evidence on oath?

In his affidavit in reply, the 2nd respondent deposed 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 16th 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 13th 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, 17th 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 V 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."

(Tunoi, O'Kubasu & Onyango Otieno JJA)

It is to be noted that in his affidavit one Albert Ikunda Muguna a 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^h 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^h 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 Kimathi's driver.

5 That there is an arrangement that documents from Mr Kimathi 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^h 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 31st March 2003, I found out that the person who I was dealing with is an investigator and/or process server 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 2nd 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 28th January, 2003 whether or not Mr Ngatia advocate had been appointed by the 2nd 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 28th January, 2003 the 2nd 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 2nd 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 Mbugi's stand that the 2nd respondent was served with the petition documents on the 28th January 2003. Mr Mutula Kilonzo on his part

to the stand that the 2nd respondent was not served with the petition document 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 valic served the 2nd respondent with the petition on the 28th 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 we admirably captured in this Court's decision in *Mwai Kibaki v Daniel Ar 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 2nd respondent was personally served with the petition on 28th 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 Sunday Post Ltd* [1958] EA 424, *Selle & another vs Associated Motor Boat K Ltd & others* [1965] EA 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 2nd 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 2nd 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 2nd 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 2nd 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 2nd respondent. Consequently, this appeal is hereby dismissed with costs to the respondents.