



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 314 of 2003

EPHRAIM NJUGU NJERU.....APPELLANT

AND

JUSTIN BEDAN NJOKA MUTURI.....1ST RESPONDENT

T.M. MITHIKA KIOME

(RETURNING OFFICER SIAKAGO CONSTITUENCY).....2ND RESPONDENT

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

(Appeal from the Ruling of the High Court of Kenya at Nairobi (Osiemo, J) dated 12th November, 2003

In

H.C. ELECTION PETITION NO. 13 OF 2003)

JUDGMENT OF THE COURT

Following the National Assembly and Presidential elections in December, 2002, *T.M. Mithika Kiome*, the Returning Officer, Siakago Constituency, (the 2nd respondent), declared *Justin Bedan Njoka Muturi* (1st respondent), as the winner. A part from the 1st respondent, there were other candidates vying for the same parliamentary seat, among them *Ephraim Njugu Njeru*, (the appellant), who was the runner up with 8,670 votes against 8,936 for the 1st respondent. Publication in the Kenya Gazette of these results was made on 3rd January, 2003.

The appellant was dissatisfied with the results, and consequently lodged an election petition, to wit No. 13 of 2003, before the High Court Central Registry, Nairobi, on 24th January, 2003, as he was entitled to do, pursuant to the provisions of **section 44(1)** of the constitution. He cited the 1st and 2nd respondents along with the Electoral Commission of Kenya (3rd respondent) as respondents. The grounds for the petition are not material here.

By dint of the provisions of **Section 20(1) (a)** of the National Assembly and Presidential Elections Act,

Cap 7 Laws of Kenya, the appellant was required to serve the petition upon the named respondents “within twenty-eight days after the date of publication of the result of the election in the Gazette”. The appellant indeed caused the election petition to be published in the Kenya Gazette under Gazette Notice No. 680 of 31st January, 2003.

Any election petition is required to be filed and served within 28 days from the date of publication in the Kenya Gazette of the result of an election held pursuant to the provisions of the National Assembly and Presidential Elections Act. Simon Njoroge Kagai, a process server, was instructed by Messrs P.M. Wamae & Company, a firm of advocates which filed the petition on behalf of the appellant, to serve it on all the respondents. He filed two affidavits of service, the first one on 31st January, 2003, and the second on 21st February, 2003. In the former affidavit Mr. Kagai depones that he was given copies of the petition, among other documents, on 24th January, 2003, and on the same day he learnt that KANU, which was the 1st respondent’s political party, was due to hold a Parliamentary Group meeting at the Mount Kenya Safari Club, in Nanyuki, between 25th and 26th January, 2003. He proceeded there as he believed the 1st respondent would be one of the participants. He intended to personally serve the 1st respondent with the petition.

At the gate into the club compound he met guards who were manning the gate. They could not let him in unless he paid a temporary membership admission fee of Kshs.450. Although he had the money, he could not pay because the time such payment could be made was over. The guards declined a request to call the 1st respondent to the gate on the ground that they had been informed that the meeting was in progress and the participants did not want to be disturbed. He returned to the gate the next day. As the guard on duty was organizing clearance for him, a battery of reporters arrived in a motor vehicle and like him, they were denied entry. They requested that one Mbaria Maina, KANU Executive Officer, be called so that they would presumably seek his permission to cover the meeting. After a short interval the guard reported that no more visitors were to be allowed in until after the conclusion of the meeting. Mr. Kagai’s request to have the 1st respondent called to the gate to facilitate service upon him of the copy of the election petition was met with an answer that the General Manager and the Chief Security Officer had declined to speak to him through the intercom. Later the reporters were cleared by Mr. Mbaria Maina, but the latter refused to let Mr. Kagai in saying that doing so would cause disturbance to Honourable members who were engaged in important deliberations. Mr. Mbaria Maina allegedly told him that the KANU meeting was expected to continue for a further two days, which according to Mr. Kagai was a lie as the meeting ended at noon on the same day, but after he had left.

Mr. Kagai further depones that on 28th January, 2003, he talked to the 1st respondent through his mobile phone number, 0722-529778, but the 1st respondent told him he was away at Nanyuki and promised “to accept service but did not come back to me.” He tried to contact him in his house at Kileleshwa Nairobi but “he seems not to be sleeping in his house”.

The above affidavit was filed in support of a motion for leave to serve the 1st respondent with the petition through the Kenya Gazette and for leave to serve him by substituted service by way of an advertisement in a local radio or television network. That application was filed in court on 31st January, 2003. The motion was placed before Onyancha, J. at 5.45 pm. on the same day. The learned Judge heard the application, ex parte, and granted the following, among other orders:-

“(c) Service of application to be effected on or before 7th February, 2003 by personal service or in default through advertisement in a local widely read newspaper.

(a) In the meantime service of the petition to be effected by substituted service by the mode of advertisement in Kenya Broadcasting Corporation Radio or Citizen Radio or Kenya Broadcasting Corporation Television or Citizen T.V., before 12 midnight”.

That order was to apply to several other election petitions as well.

Mr. Kagai's second affidavit relates to service upon the 2nd and 3rd respondents. No issue arises in this appeal from it.

There is also the affidavit of Paul Matheri Wamae, filed in court on 13th February, 2003. He deposes that he prepared an advertisement which was used to effect service on radio and caused the same to be broadcast on Citizen radio at about 10.30 p.m. on 31st January, 2003, and that he did so when it became difficult to serve the 1st respondent personally.

The purported service of the petition was faulted by the respondents. The 2nd and 3rd respondents moved the superior court under *sections 20, 22 and 23(2)* of the National Assembly and Presidential Elections Act for orders *inter alia*, that the petition be struck out for want of valid service on all respondents. The 2nd respondent swore the affidavit in support of that application, and the relevant part of that affidavit reads thus:-

“5. That I have upon perusal of the election petition noted that Mr. Justin Bedan Njoka Muturi is the 1st respondent and that prayers in the petition cannot be granted in absence of all respondents.

6. That I have from the proceedings of the petition come to discover that the 1st respondent was not personally served and that the petitioner sought service on 31st January, 2003 by way of substituted service.

7. That I have been informed by my advocates that service of an election petition must be served personally on the party as per the election petition Rules and in absence of personal service any other mode of service is invalid and I verily believe that to be so.”

The 1st respondent, too filed a similar application on 10th June, 2003, and denied he was personally served with the petition. In his affidavit in support of that application he denied any person, to his knowledge, made any attempt to serve him, or being aware that any person was looking for him with a view to serving him with any court process.

Both motions were consolidated and heard together by Osiemo, J. After rival submissions by counsel for the parties, he gave his ruling on 12th November, 2003, in which, in pertinent part, he rendered himself thus:

“The twenty-eight days elapsed on 31st January, 2003 at 5 pm since service cannot be effected after 5pm and it follows therefore that the order issued by Onyancha J at 5.45 pm was given after the statutory period had expired.

Where time is of essence like in this elections petition where (sic) the statute provides that the petition shall be presented and served within twenty eight days the court has no jurisdiction to extend the time. It follows therefore, that the service was invalid.

Consequently I do make a finding of both fact and law that, as there was no personal service of the petition upon the 1st respondent within the 28 days statutory period as provided under section 20(1) (a) of the Act.(sic) There is no valid petition before the court. This petition is accordingly struck out with costs to the three respondents.”

It is against that decision that this appeal relates to. There are eleven grounds of appeal, but Mr. Wamae for the appellant when urging the appeal stated from the bar that the only issue he wished to canvas was the issue of service. There was no dispute that by Gazette Notice No. 680 of 31st January, 2003, notice of the filing of the petition against the three respondents was given. Mr. Wamae submitted before us that, efforts to serve the 1st respondent personally did not bear fruit despite all possible human

effort to do so. Hence the request for substituted service. It was his view that the 1st respondent was avoiding service otherwise he would not have commented about the election petition in his affidavit in support of his motion. But with due respect to counsel, in that paragraph the 1st respondent has made reference to Mr. Kagai's affidavit of service. It is not quite clear how the 1st respondent would have challenged Mr. Kagai's affidavit without referring to its contents.

Mr. Wamae cited this Court's decision in **ABU CHIABA MOHAMED V. MOHAMED BWANA BAKARI AND 2 OTHERS** Civil Appeal No. 238 of 2003 in support of the appellant's case. In his view that case and this one are almost on all fours, a fact both Mr. Monari for 1st respondent and Mr. Makau for the 2nd and 3rd respondents denied. Mr. Monari in particular submitted on this, that the **ABU CHIABA MOHAMED** case is distinguishable on the facts. In that case, he said, there was clear evidence that the concerned party was avoiding service and evidence was placed before the court to lead to such an inference. In his view such evidence is lacking here. Besides, Mr. Monari continued, no copy of the petition was left behind as had happened in **ABU CHIABA MOHAMED** case.

There is no dispute that a petition must, by virtue of section 20(1) (a), aforesaid, be served within 28 days of the publication in the Kenya Gazette of the result of an election for it to be regarded as being valid. *Rule 14(2)* of the National Assembly Elections (Election Petition) Rules, 1993 provides:

“14 (2) service may be effected either by delivering the notice and copy to the advocate appointed by the respondent.....or by posting them by registered letter to the address given... so that, in the ordinary course of post, the letter would be delivered within the time abovementioned, or if no advocate has been appointed, or no such address has been given by a 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.”

The appellant it would appear relies both on that rule and the order he obtained from Onyancha J, authorizing him to serve the 1st respondent by substituted service. But when that sub-rule is read with *section 20(1) (a)*, above, there is an apparent conflict. By rules of statutory interpretation *section 20(1)(a)* prevails. This Court in **KIBAKI V. MOI** [2000], E.A. 115, held that in absence of a prescribed mode of service in *section 20(1)(a)*, the courts must go for the best modes of service, namely personal service.

In **ABU CHIABA MOHAMED** this Court re-echoed that principle thus:

“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 agree that the best form of service in all areas of litigation is personal service. It is the only mode of service which would assure the court that the party sued had due notice of the matters complained of against him, and therefore, had ample opportunity and possibly time to respond to those complaints.

In the matter before us the 1st respondent was not personally served. This Mr. Wamae for the appellant conceded. He however contended and submitted that the 1st respondent could not be served because he was avoiding service. No evidence was placed before the superior court to show that the 1st respondent was aware there was a process server looking for him and took steps to avoid him. The process server said he was stopped at the gate when he tried to enter the compound of Mount Kenya Safari Club. He had processes for service not only upon the 1st respondent but also upon the respondents in other election petitions. He did not meet the 1st respondent, nor did he specifically allege that he sent somebody to the 1st respondent but the 1st respondent refused to come to see him. What he depones to in his affidavit sworn on 31st January, 2003, at paragraphs 11 and 12, is that he sent a guard to call him but the guard told him that he had made efforts to speak to the General Manager and the Chief Security Officer, but both of them adamantly refused to speak to Mr. Kagai through the intercom. Mr. Mbaria

Maina, likewise, declined to allow Mr. Kagai entry, arguing that he would not like to disturb the delegates in their deliberations.

With due respect to Mr. Wamae, the foregoing circumstances cannot justify a finding that the 1st respondent did try to avoid service. If anything the evidence shows that third parties frustrated service of the election petition on the 1st respondent.

Then there is the averment that Mr. Kagai contacted the 1st respondent on his cell phone. The 1st respondent allegedly told him he was at Nanyuki. This was not disproved. The process server has not explained in his affidavit what he did when the 1st respondent told him he was at Nanyuki. Mr. Kagai has not said whether or not he checked whether indeed the 1st respondent was at Nanyuki as alleged. The 1st respondent in fact denies that Mr. Kagai contacted him. There is also, an averment that the process server visited the 1st respondent's house at Keleleshwa, but the process server does not state how he was able to find the house. If he was shown the house, who showed him the house? This is a crucial issue as it is possible Mr. Kagai went to a wrong house. The process server has not given a house number, if there was any, the road or the person or persons he found there, if any.

From the foregoing, it is clear to us that, other than the process server's visit to the Mount Kenya Safari Club, no other proper effort was made to locate the 1st respondent. We accept that the Management of the club and to some degree the Executive Officer of KANU, did not allow the process server to enter the club compound. That cannot possibly be held against the 1st respondent unless it could be shown that they acted on his instructions, which was not done. Actions by third parties cannot, properly be held against the 1st respondent unless it can be shown that they acted on his instructions.

The Process Server in the ABU CHIABA MOHAMED case, which Mr. Wamae relied upon, demonstratively showed the court that he made proper efforts to find the concerned respondent in that matter, and that each time that respondent was elusive. Besides, in that case the court process was pinned at the gate and photographs of it taken. There were people at home who saw it being pinned. Clearly the respondent in that case was avoiding service, and was in fact deemed to have been served.

Was the 1st respondent served by any other mode? Mr. Wamae submitted that the 1st respondent was served through a notice in the Kenya Gazette, and also by substituted service. Substituted service is normally ordered where the court is satisfied that there is reason to believe that the person to be served is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way. Service in the ordinary way is generally personal service.

The appellant filed his petition in court on 24th January, 2003, about 20 days after results of the election in Siakago constituency were published in the Kenya Gazette. He did not explain the delay in doing so. When his counsel appeared before Onyancha J, it was on the basis of urgency, and this made the learned Judge remark "The applicant then has come to the court at the latest hour of the day, 5.45 p.m. He is desperate. The time for valid service is drawing nigh – probably at midnight tonight." The learned Judge then concluded that "..... every attempt to serve the respondent by the applicant through the process server have been totally frustrated by the respondent". With due respect to the learned Judge, there was no basis for concluding that the 1st respondent had frustrated service of the petition.

The learned Judge relied on Mr. Kagai's affidavit relating to his attempt to serve the 1st respondent at the Mount Kenya Safari Club, which we discussed earlier. As we stated there is no material in that affidavit to show there was any attempt by the 1st respondent to avoid service.

Generalised statements by a process server regarding service cannot justify resort to substituted service. Substituted service is resorted to after all reasonable and proper efforts have been made to trace the respondent but in vain. The appellant created a situation of urgency by filing his petition late and thus denied himself ample time to effect personal service. Like the election court, we are not satisfied that the 1st respondent was served as required under *section 20(1)(a)* of the National Assembly and Presidential

Elections Act.

In the result we dismiss this appeal with costs.

DATED and DELIVERED at NAIROBI this 8th day of December, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR