



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appeal 215 of 2003

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL

ELECTIONS ACT CAP. 7

AND

THE PARLIAMENTARY AND PRESIDENTIAL REGULATIONS

AND RULES MADE THEREUNDER

AND

THE ELECTION OFFENCES ACT CAP. 66

AND

IN THE MATTER OF THE ELECTION FOR THE BUDALANGI CONSTITUENCY

BETWEEN

PETER LEO AGWELI ONALO APPELLANT

AND

1. ELIAKIM LUDEKI)

2. BITTA SAUTI RAPHAEL WANJALA)

3. ELECTORAL COMMISSION OF KENYA)RESPONDENT

***(Appeal from the ruling of the High Court of Kenya at Nairobi (H.P.G.Waweru, J.)
delivered at Nairobi on 7th August, 2003***

in

H.C.C. ELECTION PETITION NO. 1 OF 2003

JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (Waweru J) delivered at Nairobi on 7th August, 2003 in which the learned Judge struck out the appellant's petition on the ground that there was no personal service of the petition upon the 2nd respondent within the time prescribed by **section 20(1)(a)** of the **National Assembly and Presidential Elections Act (Cap.7 Laws of Kenya)**.

The appellant herein, **Peter Leo Agweli Onalo** as the Petitioner in the Election Petition No. 1 of 2003 lodged his petition in the High Court pursuant to the **National Assembly and Presidential Elections Act** and the **Elections Offences Act (Cap.66 Laws of Kenya)** seeking the nullification of the election of **Bitta Sauti Raphael Wanjala** (2nd respondent) as the Member of Parliament for Budalangi Constituency in the General Elections held on 27th December, 2002. **Eliakim Ludeki**, (1st Respondent) was the Returning Officer for the said Constituency while the Electoral Commission of Kenya (3rd Respondent) was sued as the statutory body empowered to conduct elections and as such appointed the 1st Respondent to conduct the said election on its behalf in the said Constituency.

The election of the 2nd respondent was duly gazetted on 3rd January, 2003 vide Gazette Notice No. 85 of the said date. By dint of **section 20(1)(a)** of the **National Assembly and Presidential Elections Act** any petition to question the validity of the election of the 2nd respondent should have been presented and served within twenty eight days after the 3rd January, 2003. The validity of the election of the 2nd respondent was challenged upon various grounds but this appeal is concerned with the superior court's ruling delivered pursuant to the 2nd respondent's notice of motion which sought the striking out of the appellant's petition. We must add here that the 1st and 3rd respondents had filed their own applications to have the appellant's petition struck out but the applications by these two respondents were dismissed by the learned Judge who in his ruling stated:-

"I am therefore satisfied on balance that the 1st respondent was duly served with the petition within the time prescribed by the law. The application by the 1st and 3rd respondents to strike out the petition is thus without merit. It is hereby dismissed with costs to the petitioner."

Having so disposed of the applications by the 1st and 3rd respondents the learned Judge turned to the issue of service of the petition upon the 2nd respondent. The learned Judge invited the parties to offer oral evidence on the issue of service but both sides declined to do so being content with the affidavit evidence already on record.

There were on record affidavits of service sworn by different persons alleging service of the petition and accompanying documents upon the 2nd respondent on four different occasions. The first affidavit was by one, **Kennedy Kenaza Bw'omote** alleging service on 9th January, 2003. The second was by **Benjamin Musembi Musili** alleging service on 31st January, 2003. The third one was by **Alexander James Ndegwa**, the fourth by **Paul Otieno Ado**. The fifth was by **Phydhelis Owesi Anyona** and the sixth by **Reuben Mangala Echali**.

Having considered affidavit evidence and the submissions of the counsel appearing for the parties, the learned Judge came to the conclusion that the 2nd respondent was not properly served. In his ruling, the learned Judge stated inter alia:-

“In the result therefore I hold that the petition now before court is incurably defective as there was no personal service of the same upon the 2nd respondent within the time prescribed by section 20(1)(a) of the Cap. 7. The petition against the 2nd respondent must therefore be struck out with costs to the 2nd respondent.”

Being aggrieved by that decision, the appellant filed this appeal citing 24 grounds of appeal. When the appeal came up for hearing before us on 10th November, 2005, Mr. Bw’omote, the learned counsel for the appellant, told us that he would demonstrate that there were three different times when the 2nd respondent was served with the petition. These were:- personally on 9th January, 2003 and 31st January, 2003 and in between these two dates there were attempts to get the 2nd respondent but all these attempts were thwarted by the 2nd respondent who made sure that he would not be found.

In our view, the simple issue in this appeal would be whether or not the 2nd respondent was validly served with the petition within the prescribed period. To determine that issue we must go back to the affidavit evidence placed before the learned Judge of the superior court. It was the appellant’s contention that the 2nd respondent was served with the petition documents on 9th January, 2003 at Dambusters Restaurant along Lenana Road. It was argued, on behalf of the appellant, that on the said date the 2nd respondent was identified and as he was being served he drove off in his vehicle (a Pajero) and in so doing hit the gate which led to the vehicle being damaged. The pictures of the said vehicle were produced showing the damage to the vehicle. The 2nd respondent did not deny the ownership of the vehicle but his main defence was that he could not have been at Dambusters Restaurant on the said day and at the said time since that was the day the newly elected Members of Parliament were being sworn in at the National Assembly. The 2nd respondent produced a copy of the Hansard to show that he was indeed in the National Assembly that afternoon.

It must be pointed out that on record were four different affidavits of service sworn by four different persons alleging personal service of the petition and accompanying documents upon the 2nd respondent. In the affidavit of **Kennedy Keriaza Bw’omote**, an advocate of the High Court, he depones on what happened at Dambusters Restaurant on 9th January, 2003. In that affidavit, Mr. Bw’omote depones that he proceeded by a taxi to Dambusters Restaurant where he arrived at 5:45 p.m. He was accompanied by the taxi driver and one, **Phydhelis Owesi Anyona** who pointed out the 2nd respondent. After Bw’omote introduced himself to the 2nd respondent and stating his business, he served him with a copy of the petition and accompanying documents. The 2nd respondent accepted service but asked to be allowed to finish making a call on his mobile phone. After talking on the phone he went inside the restaurant and started pacing in and out and finally got into his car, refused to acknowledge service, and drove off. In the process, he threw the documents back to Mr. Bw’omote. The 2nd respondent hit the gate and in the process damaged both the gate and his vehicle. Mr. Anyona, in his affidavit confirmed what was stated by Mr. Bw’omote but Mr. Anyona’s participation in effecting service upon the 2nd respondent included pointing out the 2nd respondent’s vehicle registration number KAM 250 H. Mr. Bw’omote and Mr. Anyona were accompanied by **Mr. Reuben Mangala Echali**. So that, as regards personal service on the 2nd respondent there were affidavits sworn by Mr. Bw’omote an advocate of the High Court, Mr. Anyona and Mr. Echali.

We would like to deal with this issue of alleged personal service upon the 2nd respondent on 9th January, 2003. As already stated, there were affidavits from three different people all to the effect that the 2nd respondent was personally served with the petition documents on 9th January, 2003 at Dambusters Restaurant at about 5:45 p.m. and that in a bid to wriggle out of a tight situation drove off through the gate and in the process injured Mr. Echali. Mr. Echali reported the matter to the police and was issued with a P3 form. How did the learned Judge deal with this issue of alleged service on 9th January, 2003 at Dambusters Restaurant" In his ruling the learned Judge stated inter alia:-

“The other affidavit is by REUBEN MANGALA ECHALI, already mentioned. He deponed that in the afternoon of 9th January, 2003 he was in the company of advocate Bw’omote and Mr. Anyona at Parliament Buildings, Nairobi. At about 5:45 p.m. they drove to Dambusters Restaurant after “tracing” the 2nd respondent from Parliament Buildings, Mr. Echali does not state that he was the taxi driver. His affidavit is in consonance with that of Mr. Bw’omote regarding service upon the 2nd respondent of the petition and other documents his pacing in and out of the restaurant as he made calls on his mobile phone and his driving off. It is also in consonance with that of Mr. Anyona with regard to him (Echali) getting injured in the process. But he does not explain why he reported the matter to the police three days later on 12th January, 2003 and not that evening or the following morning.”

From the foregoing, it would appear that the learned Judge was prepared to accept the truthfulness of Mr. Echali’s affidavit but faults Mr. Echali for not reporting the incident to the police immediately. It is important to note that there were no contradictions in what the three deponents (Mr. Bw’omote, Mr. Anyona and Mr. Echali) stated in their respective affidavits. But the learned Judge went even further by stating thus:-

“I have given anxious consideration to this alleged service by Mr. Bw’omote, an advocate of this Court. The word of an officer of the court must always be taken seriously unless there is cause to take it otherwise. But I am troubled by a number of matters. Why does the affidavit of Mr. Bw’omote mention the fact that he and his party went to Parliament Buildings found the 2nd respondent’s car there saw him emerge from within and drove off and followed him to Dambusters Restaurant. Why does he not mention Reuben Mangala Echali who was apparently no (sic) the taxi driver” Why does he not mention anybody getting injured by the gate flung open by the 2nd respondent’s car”

With due respect to the learned Judge, we do not accept his reasoning when he faults the affidavit of Mr. Bw’omote merely because he did not mention Mr. Echali and the incident at the gate of Dambusters Restaurant. It is instructive to note that the learned Judge did not declare Mr. Bw’omote a liar.

Towards the conclusion of his judgment the learned Judge said:-

“It is of course possible that the 2nd respondent could have left the chamber at about 5:00 p.m. and gone off to Dambusters Restaurant along Lenana Road which I have been told is somewhere in the vicinity of State House. But given the occasion, is this possible”

The onus is upon the 2nd respondent to prove his alibi though he has put sufficient material before the Court to establish it. Rather, the onus is upon the petitioner to prove on balance that at the material time on 9th January, 2003 the 2nd respondent was at Dambusters Restaurant where he was duly served with the petition herein by Mr. Bw’omote.”

We were asked to review the evidence before the learned Judge. This (review of evidence) is our duty as a first appellate court. We have already set out briefly what was stated by Mr. Bw’omote Mr. Anyona and Mr. Echali in their respective affidavits. The sum total of their evidence was that the 2nd respondent was personally served on 9th January, 2003 at Dambusters Restaurant at about 5:45 p.m. or thereabout. But the 2nd respondent on his part simply sought to rely on the copy of the Hansard showing that the 2nd respondent was in the National Assembly waiting to be sworn as the Member of Parliament for Budalangi Constituency. We have however noted the observation by the learned Judge to the effect that it was quite possible for the 2nd respondent to have left the National Assembly at about 5:00 p.m., and driven to Dambusters Restaurant along Lenana Road. That possibility was not ruled out, and in our

view, the alibi put forward was displaced by the affidavit evidence which we believe.

Let us now consider the alleged service upon the 2nd respondent on 31st January, 2003. The evidence will be found in the affidavit of **Benjamin Musombi Musilli** a Court Process Server. In his affidavit, Mr. Musili deponed that on 31st January, 2003 he went back to the residence of the 2nd respondent and found him. He served him with a copy of the petition and the other documents. The 2nd respondent accepted service but declined to acknowledge service by signature, promising to do so later and telling Mr. Musili to collect the signed petition the following day. What is stated in Mr. Musili's affidavit remained unchallenged. The two watchmen confirmed that the 2nd respondent lived in Flat No. 4 Nairobi West-Gandhi Road. Indeed, the 2nd respondent chose not to comment on the details of Mr. Musili's affidavit. For example, the 2nd respondent did not say that he never lived in Flat No. 4 or that he was elsewhere on 31st January, 2003.

Since service by Gazette Notice was not one of the grounds of appeal we will say nothing about it.

We go back to the issue of personal service. The superior court cited and followed the case of **Mwai Kibaki vs. Daniel Toroitich Arap Moi** – Civil Appeal No. 172 of 1999 (unreported) this Court consisting of a bench of five judges held that following the amendments to **section 20** of the **National Assembly and Presidential Elections Act** which amendments were brought in by Statute **Law (Repeals and Miscellaneous Amendments) Act 1997** i.e. **Act No. 10 of 1997** the best way of serving an election petition was by way of personal service. The basis for that decision was fully set out in the judgment of the Court. We come back to the main issue in this appeal. Was the 2nd respondent personally served with the petition and the accompanying documents" The learned Judge was of the view that the 2nd respondent was not personally served.

This being a first appeal, and as we were reminded by the appellant's counsel, it is our duty to reconsider the evidence, assess it and make appropriate conclusions of our own about it- See **Mwangi v. Wambugu** [1984] KLR 459 at p. 461.

We have already set out the salient points of affidavit evidence that was placed before the learned Judge. We set out to deal with two different occasions when the 2nd respondent is alleged to have been served. The issue of service on 9th January, 2003 related to the scene at Dambusters Restaurant at about 5:45 p.m. Three different people including an advocate of the High Court deponed to the effect that the 2nd respondent was personally served but drove off in the process injuring one, Mr. Echali and destroying the gate of the restaurant. The vehicle which was identified as 2nd respondent's was later photographed and these photographs showed the damage on the said vehicle. The 2nd respondent did not deny the ownership of the vehicle in question. It has been observed by the learned Judge that it was not impossible for the 2nd respondent to leave National Assembly and drive to Dambusters Restaurant and come back. It was argued that the Hansard showed that the 2nd respondent was in the chamber waiting to be sworn as a Member of Parliament. But it was not shown that all those mentioned in the Hansard remained glued to their seats until 6:20 p.m. when Parliament was adjourned. It is our considered view that taking into account the affidavits of the three people who swore that the 2nd respondent was served at Dambusters Restaurant it is our conclusion that the 2nd respondent was personally served on 9th January, 2003 and the learned Judge's conclusion was contrary to the evidence on record.

What about service of 31st January, 2003"

As already indicated elsewhere in this judgment, the affidavit of Mr. Musili as regards service of

31st January, 2003 remained unchallenged. The 2nd respondent made a bare denial without commenting on whether Flat No. 4 Nairobi West Gandhi Road was his residence or not. He never denied having been in that Flat on 31st January, 2003. In **Abu Chiaba Mohammed v. Mohamed Bwana Bakari & 2 Others** - Civil Appeal No. 238 of 2003 (unreported) Omolo JA said:-

In the appeal before us, unlike in the KIBAKI VS. MOI case, the 1st Respondent and his lawyers made strenuous and concerted efforts to personally serve the Appellant; they proved the efforts they had made to personally serve him but they were unable to physically get hold of him and serve him because he was hiding from them. Can the Appellant now be allowed to, in effect tell courts:-

“I knew the 1st Respondent was looking for me to personally serve me. I also knew that as per the decision in KIBAKI VS. MOI he had to personally serve me or his petition would be of no legal consequence. With this knowledge I hid myself from them so that it was impossible for them to find me in order to affect personal service on me. I was successful in hiding from them and they were accordingly unable to serve me. I now ask you (the court) to strike out his petition as being of no legal consequence as it was not personally served on me.”

I know that the law has often been said to be an ass. But I equally know that the law cannot be such an ass that it would even forget its other well-known principle, namely that no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man. Put simply, the Appellant in this case cannot be allowed to rely on his having successfully hidden himself from the attempts of the 1st Respondent to personally serve him to defeat the 1st Respondent's petition challenging the validity of his election as Member of Parliament for Lamu East Constituency. The effort made by the 1st Respondent to personally serve him amounted to personal service on him and the learned trial Judge was right in holding that he had been served. He made it impossible for the 1st Respondent and his agents to physically get hold of him and personally hand over the documents to him, but as I have said, he cannot be allowed to take advantage of his own wrong in hiding from those wanting to serve him and defeat the claim of the 1st Respondent on that basis.”

The appeal before us is slightly different from the above stated in that while in **Abu Chiaba Mohamed case** (supra) efforts were made unsuccessfully to personally serve the respondent in the present appeal, the 2nd respondent was actually personally served with the petition and accompanying documents. This appeal is a classic example of how a sitting Member of Parliament can try to avoid being served with the petition papers challenging his election. Such conduct calls for legislative action, and it is no wonder that a Bill has been published (***The Statute Law (Miscellaneous Amendments) Bill 2005***) to streamline this issue of service of election petitions.

We have said enough, we think, to show that this appeal is for allowing. In view of the foregoing, this appeal is allowed and the ruling of the learned Judge dated 7th August, 2003 set aside and substituted with an order dismissing the respondent's notice of motion seeking the striking out of the appellant's petition. The appellant will have the costs of this appeal and costs in the superior court. The ***Election Petition No. 1 of 2003*** may now be set down for hearing in the superior court. Those shall be our orders.

Dated and delivered at Nairobi this 16th day of December, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

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