



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION NO 11 OF 1998
IN THE MATTER OF**

THE NATIONAL ASSEMBLY & PRESIDENTIAL ELECTIONS

ACT CAP.7

AND REGULATIONS MADE THEREUNDER

AND IN THE MATTER OF

THE ELECTION FOR THE GATANGA PARLIAMENTARY

CONSTITUENCY

BETWEEN

SAMUEL KAMAU MACHARIA.....PETITIONER

AND

THE ELECTORAL COMMISSION OF KENYA.....1ST RESPONDENT

NAPATHALI CHOMBA.....2ND RESPONDENT

SAMMIE MACHARIA ALIAS SAMUEL MACHARIA.....3RD RESPONDENT

DAVID MURATHE.....4TH RESPONDENT

RULING

By an election petition filed on 27th January, 1998 the petitioner Samuel Kamau Macharia has named The Electoral Commission of Kenya as the first respondent, Naphtali Chomba the second Respondent, A. Samuel Macharia Alias Samuel A. Macharia alias Sammie Macharia alias Samuel Macharia the third respondent and David Murathe the fourth respondent.

The petitioner was one of the candidates for the Gatanga constituency in the National Assembly and Presidential elections held on 29th and 30th December, 1998. In the said elections, the fourth respondent David Murathe was declared the winner.

In these proceedings the petitioner is represented by Mr. Githu Muigai Advocate, Mr. Mukele and Mr Kihara Muttu appear for the 1st and 2nd Respondents while Mr A.N. Ngunjiri advocate appears for the 4th respondent. The third respondent has not filed any papers at all.

Both learned counsel for the 1st and 2nd respondents and the 4th respondents respectively have moved the court by way of Notice

of Motion to have the petition dismissed or struck out against the 2nd respondent and 4th respondent.

The order sought on behalf of the 2nd respondent reads as follows:

“THAT the petition be struck out or dismissed for the petitioner having failed to effect any or any valid service of the notice of the presentation of the petition on the second respondent.”

On the other hand the order sought on behalf of the 4th respondent is

“ that the petition herein be dismissed or struck out on the ground that the petition was served upon the 4th respondent outside time provided by section 20(I) of the National Assembly and Presidential Elections Act Cap.7 as amended by Act No. 10 of 1997.”

All learned counsel have made their able submission and cited several authorities. Except for peculiar facts in each case, the principles of law enunciated therein are the same and I do not deem it necessary to set out the holdings in all those cited cases.

The thrust of the 2nd respondent’s case is that, as the Returning Officer he was not served with the petition. However, Mr Mukele, the learned counsel for the 2nd respondent has deponed in his affidavit in support of the Notice of Motion:

“THAT I carefully perused the Gazette Notice and found that the service of the petition was published on the 6th of February, 1998 which publication was out of time for the 28 days provided under the National Assembly and Presidential Elections Act.”

The application by the 4th respondent in reference to the question of service states:

“THAT the petition having been served on the 4th respondent personally on the 5th of February, 1998 and by gazette Notice on the 6th of February, 1998 the service was invalid as it was made outside the mandatory twenty eight(28) days within which service was required to be effected, the publication of the results having been made on the 6th of January, 1998 vide special Issue of Gazette Notice No. 80 of 1998.

” Section 20(1) (a) of the National Assembly and Presidential elections Act Cap.7 Laws of Kenya as amended by act No. 10 of 1997 provides as follows:

“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.

“Rule 14 of the National Assembly Elections (Election Petition) Rules provides as follows:

“14(1) Notice of the presentation of a petition, accompanied by a copy of the petition, shall, within 10 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 copy to the advocate appointed by the respondent under rule 10 or by posting them in a registered letter to the address given under rule 10 so that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address 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.”

When Parliament amended section 20 of Cap.7 aforesaid; Rule 14 sub rule (1) was left in place. However, where there appears to be a conflict between the Principal Act and subsidiary Legislation, the Principal Act shall prevail. Therefore, the Court shall be guided by section 20 of Cap.7 aforesaid

The publication of the result of the election was made on 6th January, 1998. By virtue of the provisions of section 20 of Cap. 7 the twenty eight days started running on 7th January, 1998. This computation of time is fortified by the provisions of section 57 (a) of the Interpretation and General Provisions Act Cap. 2 Laws of Kenya. From 7th January, 1998, the 28 days ended on 3rd February, 1998 within which time the petition ought to have been presented and served. The petition herein was presented in time, that is on 27th January, 1998. However, prima facie, service upon the 2nd and 4th respondents was outside the 28 days prescribed by law.

I shall first address the 2nd respondent's case. No personal service was effected. But under Rule 14(2) of the Rules aforesaid, the publication of the notice in the Gazettee is proper service. The notice was carried in the issue of 6th February, 1998 which was outside the 28 days set by section 20 of Cap 7.

The learned counsel for the petitioner has submitted that as the 2nd respondent was an agent of the 1st respondent, service upon the 1st respondent is sufficient upon the second respondent. However the learned counsel for the 1st and 2nd respondent submitted that the 2nd respondent was not an agent of the 1st respondent and was supposed to be served personally with the petition. Their roles are equally different and the relationship of principal and agent does not arise.

Proper service upon the first respondent has been conceded. The first respondent- The electoral Commission of Kenya is creature of the Constitution of Kenya, section 41 thereof. One of the responsibilities of first respondent is directing and supervising the Presidential, National Assembly and Local Government elections (section 42A (b) of the Constitution).

Section 17A of the National Assembly and Presidential Elections Act Cap.7 aforesaid which was introduced by act NO. 10 of 1997 provides:

“17A The Electoral Commission shall have the overall conduct of elections under this Act and shall give general directions and exercise supervision and control thereof and take the necessary measures to ensure that the elections are transparent free and fair.”

The petitioner has specifically pleaded that the second respondent was the returning officer duly appointed under the provisions of the Parliamentary and Presidential Elections Regulations. In paragraph 8 of the petition the petitioner describes the second defendant as “a servant, employee and agent of the first respondent.”

A returning officer is an appointee of the Electoral Commission. Regulation 3 of the Presidential and Parliamentary Elections Regulations provides that:

“3(1) The Electoral Commission shall appoint a returning officer for each constituency and may appoint such deputy returning officers for the constituencies as it may consider necessary.”

The second respondent as the returning officer is a necessary party in this petition by virtue of Rule 2 of the National Assembly Elections (Election Petition) Rules. That however does not affect his position as the appointee of the first respondent. It will be noted that the title of the returning officer is created by subsidiary legislation. The first respondent therefore remains the principal of the returning officer. Service of the petition upon the first respondent is effectively service upon the second respondent. His actions are the actions of the first respondent. The two are inseparable in law. The first respondent having conceded proper service in time, he disputed service upon the second respondent would be of no consequence.

I had earlier noted that the time for filing and serving the petition expired on 3rd February 1998. It is common ground that the 4th Respondent was served personally on 5th February and by Gazettee notice on 6th February, 1998. Under section 20 of Cap. 7 this was out of time.

The learned counsel for the petitioner has urged the court to invoke the provisions of the Civil Procedure Rules. He cited order 49 Rule 3A which reads as follows:

“3A Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the sixth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act; Provided that this rule shall not apply to any application of a temporary injunction.”

Going by the foregoing provision, it is the learned counsel's submission that the publication of the election results on 6th January, 1998 should be taken to have been made on 7th January, 1998 because 6th January is an excluded day under these Rules. If that be the case then time to present and serve the petition would start running on 8th January, 1998, which is the date after the publication. Therefore, service upon the 4th respondent on 5th February, 1998 was not out of time.

With respect, the submission by learned counsel is quite attractive. However, Civil Procedure Rules are made by the Rules Committee established under section 81 of the Civil procedure Act Cap 21 Laws of Kenya to provide for any matters relating to the procedure of Civil courts. they are subsidiary Legislation.

The presentation and service of petition herein is prescribed a principal act - cap. 7 Laws of Kenya.

In Election Petition No.1 of 1998 in the High Court at Nyeri - Stephen Kimani Gakenia -v- Francis Mwangi Kimani & 2 others: Mwera J. said:-

“This court has remarked that the Civil procedure Rules, or any other law for that matter, cannot be brought in Election Petitions to supplement the Act and the Rules.....From the set up of the election petition legal regime right from the Constitution, to the Act and the Election Petition Rules, this court is of the view that the C.P.A and C.P.R are excluded. The only place where rules of Civil Procedure may apply is on the witness affidavits. Witness give affidavit evidence in election petitions. The process is clearly set out and rule 18(7) provides:

“7. The provision of Order XVIII of the Civil Procedure Rules and the Oaths and Statutory declarations Act shall apply to affidavits under the rule”.

Thus, if there was any intention to have the Civil Procedure Rules apply, express provision would have been made. The learned counsel for the petitioner cited Karanja -v- Magugu where the Court of Appeal is said to have held that Civil Procedure Rules apply. I have not had the advantage to read the judgment of the Court of Appeal in the appeal that arose from Election petition No.20 of 1979 as none was presented. I would not be in the position therefore to say in what context the Court of Appeal addressed the issue.

The foregoing notwithstanding, the National Assembly and Presidential Elections Act Cap.7 provides for its own procedure for filing and serving Election petitions. The Civil Procedure Rules would not apply where the Act provides for time within which an act should be done. I find that those Rules do not apply and cannot aid the petitioner in this case.

There are four respondents in this petition. The bulk of the allegations are against the first and second respondents. The third respondent has not shown any interest in defending the petition. The High Court has held in the past that a party may be struck out from the petition and the petitioner may proceed against the remaining parties. - see Election petition No.1 of 1994 Maj. (RTD) Adrian Shisanya Akweywa -v- Daniel Toroitich Arap Moi & Others.

After considering all matters herein I have come to the following conclusions:

- (a) The application by the second respondent hereby fails and is accordingly dismissed with costs.*
- (b) The application by the fourth respondent hereby succeeds and is therefore allowed with costs. His name shall be struck out from the petition.*
- (c) The petition still remains against the first, second and third respondents.*
- (d) Counsel shall now take hearing dates for the remaining interlocutory matters and/or the main petition.*

Orders accordingly

Dated and delivered at Nairobi this 27th day of July, 1998.

A. MBOGHOLI MSAGHA

JUDGE



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