REPUBLIC OF KENYA

High Court at Malindi

Election Petition 7 of 2013

ELECTION FOR THE SENATOR OF KILIFI COUNTY

BWANA MOHAMED BWANA.....PETITIONER

VERSUS

SILVANO BUKO BONAYA.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

SHAKILA ABDALLA MOHAMED.....3RD RESPONDENT

RULING

The applicants in this notice of motion dated 15th May 2013 are Silvano Buko Bonaya and Independent Electoral and Boundaries Commission (IEBC). The application is brought under **Section 80(1)** of the **Elections Act, Rule 17(1) (d)** and **(2)** of the **Elections (Parliamentary and County Elections) Petition Rules** seeking for orders that the respondents be allowed to serve their response to the petition and affidavits annexed thereto upon the petitioner and the 3rd respondent. The applicants also seek for costs of the application.

The brief background of this application is that the respondents were all served with the petition herein filed by Bwana Mohamed Bwana within the time stipulated by the law. The petition seeks for nullification of the election of the Lamu County Woman Representative Shakila Abdalla Mohamed on several grounds of malpractices and non-compliance with practice and procedure. The 1st and 2nd respondents prepared their responses and filed them on 19th April 2013. However the responses were not served upon the petitioner and the 3rd respondent when this case came up for mention on 13th May 2013, it was the petitioner's counsel who brought it to the attention of the court that he had not been served with the response thus prompting the filing of this application.

The grounds supporting this application are contained on the face of the application and the supporting affidavit of Khaseke Gorgiadis. Mr. Wetangula of Mohamed & Mungai Advocates for the 1st and 2nd respondents argued the application. In his affidavit, the counsel Mr. Khaseke depones that the failure to serve was inadvertent on the part of the respondents advocate. Mr. Wetangula submitted that the mistake of an advocate shall not be revisited on the client. He said that application was filed expeditiously and it is allowed by **Rules 17(2)**. He also argued that allowing service out of time will not prejudice the other party. **Section 80(1)(d)** of the **Elections Act** was cited in that it empowers the court to decide all matters without undue regard to technicalities. The counsel argued that the overriding objective as set out in **Rule 4** calls for just, expeditious, proportionate and affordable determination of the election disputes.

The 3rd respondent did not oppose the application. Mr. Mwangunya holding brief for Mr. Munyithia argued that the evidence of the returning officers of the IEBC is first hand in any petition and should be admitted by allowing this application.

The petitioner opposed the application. Mr. Kilonzo said no sufficient ground has been shown for the court to exercise its discretion. The application has been filed long after the responses were filed which delay has not been explained. He submitted that the application is fatally defective because it does not state in the main prayer that the respondents be allowed to serve the response out of the time allowed by the law. **Rule 20** is not applicable in this situation in regard to extension of time. As for **Section 83**, the counsel argued that it is not applicable in this preliminary stage of the petition.

The duty of the court is to examine the provisions of the law in determining the relevant issues. The **Election Act, 2011** does not consist of any provision relating to service of the response. **Section 77** provides for the filing of the petition and the mode of service. The Act is silent on filing and service of the response to the petition. **Rule 14(1) of the Elections (Parliamentary and county) Petition Rules, 2013** provides:

"Upon being served with an election petition under Rule 13 the respondent may oppose the petition by filing and serving a response within a period of not more than fourteen days."

Rule 14(3) provides for the consequences of failure to file a response by the respondent. Such failure leads to the respondent losing his right to defend the petition.

The facts of this application are that the respondents filed their response within the time allowed by the law but failed to serve the petitioner and the 3rd respondent. For a respondent who files and does not serve the response, the **Act** and the **Rules** are silent on the consequences. It therefore follows that just like the failure to file a response, the applicant who files the document and fails to effect service within the time allowed by the law must show sufficient cause for the court to exercise its discretion.

The applicant relied on **Rule 80(1)(d)** of the **Act** which empowers the court to decide all matters without due regard to technicalities. Also **Rule 17(1)(d)** which provides that during the pre-trial conference, the court shall deal with all interlocutory applications and decide on their expeditious disposal. **Rule 17(2)** prohibits dealing with interlocutory applications after the hearing of the petition starts. This is an accepted position and was meant to ensure expeditious disposal of petitions.

The counsel for the applicants admitted that the failure to serve the response can only be blamed on their office but not on the 1st and 2nd respondents. A client after giving instructions to an advocate, leaves the matter in the good hands of the counsel to do all that pertains to the instructions given. The party may sometimes be ignorant of what the advocate does and how he does it until he gets a feedback. In this matter, there is no indication herein that the 1st and the 2nd respondent were aware of the omission of the advocate on the issue of service of the response.

Rule 20 allows any party who has failed to do anything within the time allowed by the law to apply to court for extension of time. The issue which arises in this application is whether the facts in issue can be dealt with under **Rule 20**. Mr. Kilonzo for the petitioner argued that **Rule 20** is not applicable in this application in that the court has no jurisdiction to extend time limited by the rules. The time to file and serve the response is limited by **Rule 14** to fourteen days. The **Act** is silent on this issue.

In the case of **Dickson Karaba & Hon. John Ngata Kariuki Civil Appeal (Application) 125 of 2008 Court of Appeal Nairobi** the appellant was late to file the notice of appeal. He applied for extension of time to file the notice. The court held that the matter was within the discretion of the court to extend time. The appellant's application was found to be merited and was granted.

In my considered opinion the application to extend time to file a document out of time and to serve a document out of time is within the discretion of the court and the provisions of **Rule 20** are applicable. Has the 1st and 2nd respondent shown sufficient cause? By filing the document in court

within the stipulated time, the 1st and 2nd respondent intended to defend the petition. The failure to serve the already filed response must be treated differently from failure to file and serve a response. It would be a very grave matter had the respondent not filed and served the response for any period exceeding 14 days after service. The filing of the response distinguishes this situation from the latter one.

It was argued by the petitioner that the supporting affidavit did not give details of the inadvertence of the advocates office. To this extent I agree that the deponent of the affidavit was very economical with details. However, it is clear that the advocates office failed to serve the response after filing it in court. When this case came for mention on 15/05/13 the advocate who was holding brief for Mohamed Muigai & Co. Advocates for respondents was not aware that service had not been effected on the petitioner. The respondents' advocate sent the counsel to court assuming that all was well. It was after the mention date that this application was filed. This was after the failure to serve was raised in court. It is established law that a document which has been filed in court cannot be ignored. The court cannot treat such a document like it is non-existent. It remains in the court record and it must work in mitigation for the party who filed it and omitted to serve at a time like this.

In regard to **Section 83** of the **Act**, I agree with Mr. Kilonzo that it is not applicable to this application. The Section relates to the determination of the petition by the court and extends the wings of justice which must not be limited by the law.

The main prayer in the application should have included the words *"out of time"* as argued by the counsel for the petitioner. The applicants' counsel did not find it necessary to amend even after it was brought to his attention. This petition is a serious matter to the respondents and nothing should be left to chance. The counsel argued that the omission was a technicality that does not affect the substance. In regard to the facts of the application it is clear what the issues at hand are. The response was filed but not served on time. The 1st and 2nd respondents have come to court to seek leave to serve the response on the petitioner and the 3rd respondent despite the fact that they were late to do so. The supporting affidavit and the presentation of the application by the applicants' counsel leaves the matter crystal clear that the applicants are seeking leave to serve the response out of time. **Article 159** of the **Constitution** calls for the courts to deliver justice without undue regard to technicalities. **Rule 4** of the **Election (Parliamentary and County) Petition rules, 2013** puts great emphasis on the overriding objective of the rules which is to facilitate just and expeditious justice. In this spirit, I am convinced that the mere omission of the words *"out of time"* is a technicality that should not be allowed to affect the substance of the application.

I am satisfied that the applicants have satisfied this court that the failure to serve the petitioner and the 3rd respondent was not deliberate. The failure to serve cannot be used to deny the applicants the right to defend the petition. If this was to be done, it would defeat the overriding objective of the rules to achieve a just, expedient, proportionate and affordable resolution of this election petition. The doors of justice should not be shut against the respondents given the facts of this application. It is important to note that the mistake was not by the applicants but by their advocates.

I find the application merited and allow it as prayed. The response shall be served on the petitioner's counsel and that of the 3rd respondent within three (3) days.

The applicants advocates shall meet the costs of this application.

F. MUCHEMI
JUDGE

Ruling dated and delivered this **23rd** day of **May 2013** in the presence of Mr. Wetangula for applicants, Mr. Kilonzo for petitioner and Mr. Mwangunya for

Munyithia for the 3rd Respondents.

F. MUCHEMI
JUDGE