

Freetown
August 13,
1962

[SUPREME COURT]

Dobbs J.

THOMAS C. NELSON-WILLIAMS Petitioner
v.
CYRIL B. ROGERS-WRIGHT Respondent

[E.P. 24/62]

Election petition—Service of notice of presentation of petition—Application to strike out petition for failure to file affidavit of service—Indorsement of note on affidavit showing on whose behalf it is filed—Whether affidavit “filed”—Discretion of judge to order cross-examination of deponent.

House of Representatives Election Petition Rules (Vol. VI, Laws of Sierra Leone, 1960, p. 407), r. 19—Supreme Court Rules (Vol. VI, Laws of Sierra Leone, 1960, p. 126), Ord. 27, rr. 1, 4, 10—Courts Act (Cap. 7, Laws of Sierra Leone, 1960), ss. 2, 9—Supreme Court Rules (England), Ord. 38, r. 1.

Petitioner's election petition was filed on June 18, 1962. A notice of presentation of petition was served on respondent by an assistant bailiff. An affidavit of service was sworn by the assistant bailiff before R. A. Woode, Acting Senior Registrar of the Supreme Court. The under-sheriff sent the affidavit to the filing department of the Master's Office, where it was placed in the folder pertaining to the election petition. The affidavit, however, was not placed in the file of proceedings but in a separate part of the folder among miscellaneous documents. It was not entered in the cause book or stamped with any mark to show that it had been filed or presented for filing. No filing fee was paid for it, nor was there any note on it showing on whose behalf it had been “filed.”

Respondent applied for an order that the petition be struck out for failure to comply with rule 19 of the House of Representatives Election Petition Rules, which provides: “The petitioner or his agent shall, immediately after notice of the presentation of a petition shall have been served, file with the master an affidavit of the time and manner of service thereof.”

Held, striking out the petition, (1) that, since there was not indorsed on the affidavit a “note showing on whose behalf it is filed” (Supreme Court Rules, Ord. 27, r. 10), any purported filing of the affidavit was a nullity;

(2) That the word “file” in rule 19 of the House of Representatives Election Petition Rules means “formally file” and not merely placing the document in the folder containing the file of proceedings;

(3) That the affidavit was not “filed” as required by rule 19 of the House of Representatives Election Petition Rules.

Case referred to: *Kanagbo and others v. Bongay*, Sierra Leone Court of Appeal, July 27, 1962, Civil Appeal 14/62.

Berthan Macaulay for the petitioner.

John E. R. Candappa for the respondent.

DOBBS J. This is an application on behalf of the respondent for the petition herein to be struck out on the ground of non-compliance with rule 19 of the House of Representatives Election Petition Rules (hereinafter referred to as “the Petition Rules”).

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Petition Rule 19 is as follows: "The petitioner or his agent shall, immediately after the notice of the presentation of a petition shall have been served, file with the master an affidavit of the time and manner of service thereof."

Messrs. Macaulay & Co. are the petitioner's agents and Mr. J. E. R. Candappa is the respondent's agent.

The evidence of non-compliance with Petition Rule 19 is contained in the affidavit of Mr. Candappa sworn on July 30, 1962, and duly filed on July 31, 1962, the relevant paragraph being No. 2 as follows:

"I did, on July 30, 1962, search the records of proceedings in this matter kept at the Master's Office to ascertain whether any affidavit of the time and manner of service of the notice of the presentation of the above petition has been filed by the above-named petitioner or his agent, and I found that no such affidavit has been filed."

The evidence adduced by the petitioner was as follows: Affidavit of Percy Richmond Davies, Official Administrator, the relevant portions whereof are contained in the paragraphs numbered as follows:

"4. That I know one, Beresford Malcolm Ayodele Sawyerr, and he was, during June 1 and 24, 1962, and still is, a clerk in the filing department aforesaid and was responsible for accepting documents for filing and putting such documents in election petition files which had been opened in any pending petition.

"5. That no clerk in the filing department aforesaid is authorised to accept or take any fee for filing.

"6. That fees for filing documents in election petitions are taken by the Sub-Accountant of the Judicial Sub-Treasury, which is under the Department of the Accountant-General.

"7. That on June 18, 1962, a petition was presented in the filing department bearing the above-named title.

"8. That there is in respect of the petition bearing the above-named title an affidavit of service in the file relating to the petition bearing the above-named title: there is now produced and shown to me a copy of the said affidavit marked 'PRD. 1.'

"9. That it is the practice in the Master's Office that when affidavits of service sworn by process servers and bailiffs in the Under-Sheriff's Office are received from the said Sheriff's Office, they are put in the relevant files in the Master's Office by one or other of the clerks in the filing departments in the Master's Office."

Affidavit of Mohamed Bailoh Jalloh, managing clerk to Macaulay & Company, to the effect that he left certain documents, among them being the notice of the presentation of the petition, with the filing department of the Master's Office to be handed to the under-sheriff for service.

Affidavit of Eric Ola Johnson, under-sheriff, to the effect that he received the documents for service from the Master's Office, that they were handed to one, Alusaine Adams, an assistant bailiff, for service on the respondent, that Alusaine Adams, on June 18, 1962, handed him an affidavit of service a copy of which was exhibited to his (Mr. Johnson's) affidavit. I now quote from Mr. Johnson's affidavit paragraph 4, which is as follows: "That on the same June 18, 1962, I sent the said affidavit of service by way book to the filing department of the Master's Office for filing and the same was delivered therein

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and signed for in the way book; the initials in the said way book are not decipherable by me, but I have the way book in my possession and can produce it in court at any time if required to do so.”

Affidavit of Beresford Malcolm Ayodele Sawyerr, a clerk in the filing department of the Master’s Office, who deposed as follows:

“1. That I am one of the clerks in the filing department in the Master’s Office and was such a clerk between June 1 and 24, 1962, and during this period I was responsible for accepting documents for filing and putting such documents in election petition files which had been opened in any pending petition.

“2. That I am not authorised nor is any clerk in the said filing department authorised to accept or take any fee for filing: that fees for filing are accepted and taken by the Sub-Accountant in the Judicial Sub-Treasury, which is under the Department of the Accountant-General.

“3. That on June 18, 1962, a petition was presented in the filing department of the Master’s Office and a file was opened in respect of the said petition, bearing the above-named title.

“4. That it is the practice in the Master’s Office that when affidavits of service sworn by process servers and bailiffs in the Under-Sheriff’s Office are received, they are put in the relevant files in the Master’s Office by one or other of the clerks, including myself, in the filing department in the Master’s Office.

“5. That on June 18, 1962, I received an affidavit of service in the above matter relating to the above-named petition, which purported to have come from the Under-Sheriff’s Office; that I put the said affidavit in the said file on the same day, that is, June 18, 1962, a copy of the said affidavit of service is now produced and shown to me and marked ‘BMAS 1.’”

On Tuesday, August 7, 1962, counsel argued and made certain submissions to which I shall advert later. Mr. Candappa applied under Order 27, r. 1, of the Supreme Court Rules on behalf of the respondent for the attendance for cross-examination of the persons making the above-mentioned affidavits and hearing was adjourned until the next day for a decision on this application and for the application to proceed. On Wednesday, August 8, 1962, leave was granted to call Eric Ola Johnson, Beresford Malcolm Ayodele Sawyerr and Percy Richmond Davies in that order. This leave was granted despite an objection by Mr. Macaulay that once hearing of the motion has been started such an application cannot be made. I can find no authority for this proposition. According to the notes to the similar rule in the English rules, i.e., Order 38, r. 1, there is a discretion to order cross-examination of a deponent after his affidavit has been used. I cannot see how an affidavit can be said to have been used before the hearing of the motion has started.

I do not propose to set out the evidence of Mr. Johnson in full. The main point was his agreement that by paragraph 4 of his affidavit he did not mean that he sent the affidavit to the Master’s Office specifically for filing but the process for service having been delivered to him by the Master’s Office he merely sent the affidavit to the Master’s Office because that was where the process came from.

Mr. Sawyerr gave evidence on the practice of filing documents of which I quote relevant extracts: “Documents are produced to me in the first instance

for filing. When documents are produced by solicitors they are stamped with the date and payment slips are made out for the purpose of payment to the Sub-Treasury. Slip and document are handed back to the person who brought it. We receive from the Sub-Treasury the document, a duplicate receipt and the payment slip. This procedure relates to all documents including affidavits of service. When the documents are received back we make an entry in the cause book and indorse the back of the document with the date of filing and the page in which the entry has been made."

In regard to the affidavit of service in issue here, Mr. Sawyerr was shown it by the court, and admitted that there was nothing on it to show that it had been filed. In answer to Mr. Macaulay he said that it is not the practice to stamp affidavits of service received from the Sheriff's Office. In reply to further questions by the court he said that in the case of a petition the affidavit of service is handed to the petitioner's solicitor if he asks for it—otherwise it stays on the file.

Percy Richmond Davies was cross-examined only on the status of Mr. R. A. Woode, before whom the affidavit was sworn. He stated that at the relevant time Mr. Woode's appointment was that of Acting Senior Registrar; that Mr. Woode was performing the duties of Assistant Master and Registrar; that the designation Assistant Master and Registrar was changed to that of Senior Registrar during the time of Chief Justice Sir Vahe Bairamian; that since the change of nomenclature made on the recommendation of Sir Vahe Bairamian the Senior Registrar has performed the functions of Assistant Master and Registrar; and that Mr. Woode is not a commissioner for oaths. Mr. Macaulay admitted on behalf of the petitioner that the filing fees for the affidavit had not been paid.

In support of his application Mr. Candappa raised three main points:

1. That the affidavit was a nullity because Mr. Woode had no authority to administer oaths.
2. That the affidavit even if valid had not been filed.
3. That the affidavit does not comply with Order 27, r. 10, of the Supreme Court Rules in that no note was indorsed on it showing on whose behalf it is filed.

I propose to deal with these points in the reverse order. *Point 3.* Order 27, r. 10, is as follows: "Every affidavit used shall be filed in the Master's Office. There shall be indorsed on every affidavit a note showing on whose behalf it is filed and no affidavit shall be filed or used without such note, unless the court shall otherwise direct." The document in question in this application does not bear such a note and the court has made no direction that it should be filed; no application has been made for such a direction. I hold, therefore, that any purported filing of the document is a nullity and rule 19 of the Petition Rules has not been complied with.

Point 2. I should mention first of all that Mr. Sawyerr produced the cause book and that there was no entry of the document in question therein.

The document in question does not bear any mark on it to show that it was filed or even presented for filing.

The file of proceedings in this petition is contained in a folder. Within the folder separate from the file of proceedings appear miscellaneous documents comprising copies of original documents filed in the file of proceedings, duplicate receipts, paying slips, correspondence and affidavits of service of various

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notices. Amongst them is the document in question in this application. None of the affidavits in this part of the folder show any signs of having been filed. Affidavits in what I have termed the file of proceedings all bear the court date stamp and indorsement in accordance with the practice narrated by Mr. Sawyerr. Normally an affidavit does not have to be filed unless it is used in the proceedings. In many cases affidavits of service in the course of Supreme Court proceedings are not used because their use does not become necessary. In the case, therefore, of affidavits of service made by an officer of the court or a bailiff of the Under-Sheriff's Office it is reasonable that such affidavits be returned to the Master's Office and put in the folder of the particular action so that they are easily available for use if needed.

If they are needed for use, as, for example, on signing judgment in default of appearance, then, in my view, they must be formally presented for filing according to the procedure narrated by Mr. Sawyerr and they are in due course placed on the file of the proceedings.

When M. Davies and Mr. Sawyerr state that the document in question was on the file they merely mean put in the folder relating to the petition and they do not mean that the document has been formally filed.

In the case of election petitions, rule 19 of the Petition Rules requires immediate filing so that the question of whether or not the affidavit is used in the proceedings does not arise.

I consider that the word "file" in rule 19 means "formally file" and not merely having the affidavit put in the folder containing the file of proceedings.

The duty of filing the affidavit of service is imposed by rule 19 on the petitioner or his agent. I agree with Mr. Macaulay that he has discharged that duty if he can show that the affidavit has been deposited with the proper officer for filing. In this case, however, I find no evidence that this has been done. No one has come and deposed that he gave Mr. Sawyerr the document in question for it to be filed. There is merely evidence that the document came into his hands as a matter of routine from the Under-Sheriff's Office and that he placed it in the folder relating to the petition. He did not take any of the steps for filing the document, nor do I think he was required to do so.

There is a further significant point. When Mr. Sawyerr deposes that he put the document on the file or, as I say, put it in the folder on June 18, 1962, I do not believe him. I do not say he is deliberately lying, but in the absence of any written memorandum made by him I do not know how he can be certain after such a lapse of time—his affidavit was sworn on August 4, 1962. My view is reinforced by the fact that the document appears amongst the miscellaneous documents that I have mentioned sandwiched between a document dated July 3, 1962, and one dated July 6, 1962. Even if I was to hold that merely placing the document in the folder amounted to valid filing, there would still be the question whether such filing had been done "immediately" after service so as to comply with rule 19. In my view, that would be too long an interval to be called "immediately."

Finally, on the question of non-payment of the filing fees, I am not prepared to say that this would nullify a filing which in all other respects appeared regular. I do think, however, that it is a matter to be taken into consideration in deciding whether filing has taken place or not.

I, therefore, hold that an affidavit of service as required by rule 19 of the Petitions Rules has not been filed.

Point 1. Order 27, r. 4, of the Supreme Court Rules is as follows: "Affidavits sworn in Sierra Leone shall be sworn before a judge, commissioner to administer oaths or officer empowered under these rules to administer oaths." No officer has been so empowered under the rules.

The Courts Act (Cap 7) does, however, make the following provisions: by section 2—"Master" means the Master and Registrar of the Supreme Court and includes the Assistant Master or other person lawfully performing the duties of Master and Registrar. By section 9 of the Act the duties of the Master shall be:—

- (a) to perform all such acts as he may be required by law to do and such acts as he may be required by a judge to do;
- (b) to tax all bills of costs submitted for taxation or referred to him by the Supreme Court or judge thereof;
- (c) subject to rules of court to receive applications for and to seal probate and letters of administration in all cases where the right to such grant is not contested.

In the performance of his duties the Master shall have power to administer oaths and to take solemn affirmations and declarations in lieu of oath.

It has been submitted by Mr. Candappa that Mr. R. A. Woode, before whom the document in question purported to have been sworn, was not authorised to administer the oath, his appointment being that of Acting Senior Registrar and not of Assistant Master.

There are numerous arguments on both sides which come to mind, but in view of my decisions on the other points I do not find it necessary to rule on this point.

I do, however, think the matter could well be clarified by appointment under Order 27, r. 4. This question has not arisen until now, because previous holders of the office of Assistant Master and Registrar and latterly of the office of Senior Registrar have been personally appointed commissioners for oaths.

I hold that, for the reasons given above, rule 19 of the Petitions Rules has not been complied with, and following the decision given by the Sierra Leone Court of Appeal in the *Kamanda Bongay* case, I order that the petition be struck out with costs to the respondent to be taxed.

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