



IN THE SUPREME COURT OF NAURU

COURT OF DISPUTED RETURN  
YAREN

No.69 of 2016

In the matter of an election petition in the  
constituency of Boe District under the  
Election Act 2016

IN THE MATTER OF PETITION BY

DALE CECIL

APPLICANT

BARON DIVESEI WAQA

RESPONDENT

Before: Khan J  
Date of Hearing: 7 September 2016  
Date of Ruling: 12 September 2016

CATCHWORDS:

Elections- General elections in Nauru-Election petition- Whether election petition a nullity if petitioner not complying with requirement to serve the petition and notice of security for costs within prescribed period- Electoral Act 2016 and Election Petition Rules 2016.

APPEARANCES:

For the Applicant: Mr V Clodumar  
Amicus Curiae: Mr J Udit (Solicitor General)

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## RULING

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### **BACKGROUND**

1. A general election was held in Nauru on 9 July 2016 and the respondent was declared to be an elected Member of Parliament for the Boe District Constituency.
2. The applicant was also a candidate in the Boe District Constituency and being an unsuccessful candidate he filed an election petition against the respondent.
3. After the election petition the respondent was elected as the President of the Republic of Nauru.
4. In the petition filed by the petitioner on 5 August 2016 he seeks the following reliefs:
  - a) The unexplained failure of the Electoral Commission to tally the votes counted for Boe brings the results into question.
  - b) The unlawful activities of referred to in paragraphs 2 to 5 were significant breaches of the Act and should have been but was not prevented or stopped on behalf of the Electoral Commissioner and results significant that the Court should hold that they had a material effect upon the election.
  - c) In the alternative the petitioner requested the election of Baron Divesei Waqa declared void and that the Court declare as elected the candidate with the next greatest number of votes.
5. At the time of the filing of the petition and for some considerable time thereafter the respondent was out of the country so personal service could not be effected on him within 7 days as provided for under the Election Petition Rules 2016.
6. On the seventh day the applicant made frantic efforts to serve the respondent but could not do so as he was out of the country. He visited the respondent's residence and met the police guard at the entrance to his residence. He was accompanied by a person by the name of Cyril Cecil. The applicant states in his affidavit that Cyril attempted to hand over the envelope to the police officer which contained the election petition and explained the urgency to deliver the documents and to obtain an acknowledgement of service from anybody at the residence of the respondent.
7. The police officer then approached one Shantelle Kaierua who came over. She had a look at the document and refused to accept it or sign the acknowledgement of service and she suggested that they should see Barina Waqa or Diva Dagiario.
8. The applicant then drove to Diva Dagiario's shop and she also refused to accept service or sign the acknowledgement of service.

## SUMMONS / APPLICATION

9. The applicant filed a Summons/Application on 31 August 2016 seeking the following Orders:-
- a) The Court make an Order for Substituted Service as per Rule 9(2)(b) of the Election Petition Rules 2016.
  - b) The petitioner intends to read and rely on the affidavit of Dale Cecil attached hereto.
  - c) The Court, pursuant to Rule 30 of the Rules expands the time allowed for the petitioner to seek the order for Substituted Service made above. The reason for the delay is finding time to prepare the affidavit of Cyclic Cecil by the agent (Cum legal counsel); lack of awareness of the existence of the Election Rules 2016; and the unavailability of the agent to attend to the required summons due to his unsurmountable cases before the District and the Supreme Courts.

## HEARING OF SUMMONS

10. At the hearing Mr Clodumar submitted that the applicant's application/summons is filed pursuant to Rule 9(2)(b) of the Election Petition Rules (The Rules).
11. Mr Clodumar conceded that under Rule 9(2) the application for substituted service should be made within 3 days when personal service cannot be effected on the respondent. He further conceded that the application is out of time as it was filed on 31 August 2016 and he relies on Rule 30 which he submits gives the Court the discretion to extend the time.
12. Mr Clodumar complained that he had difficulties in obtaining a copy of the Election Petition Rules. He attempted to obtain a copy at the Ronlaw's Website and was unable to do so and then approached the Registrar for a copy and was informed that it was published by the Gazette Notice.
13. The crux of Mr Clodumar's submission is that the application is for an extension of time under Order 30 to enable the petition to be served by way of substituted service.
14. Mr J Udit, the Solicitor General, appearing as Amicus curiae did not make any submissions in this matter and he relied on his submissions which were made in the matter of Dabwido v Aingimea and Kam & Another Case No 70 of 2016 (Dabwido v Aingimea and others). Although Mr Clodumar did not appear as counsel in that matter as he had a conflict of interest, but he prepared all the necessary documents and was present in Court when the matter was argued.
15. I have given a ruling in the matter of Davwido v Aingimea and others in which I discussed in the detail the provisions of the Electoral Act 2016, the Electoral Petition Rules 2016; the position of the Court of Disputed Returns and the case law on the

jurisdiction of the Court of Disputed Returns. I do not wish to canvass those issues again in this matter and I adopt all the matters for the purposes of deciding this case.

16. I just wish to briefly discuss some matters pertaining to the service of documents as provided for in the Rules which are:

a) Rule 8 has the title 'Time For Giving Notice' and reads as follows:

The petition and notice of payment of security of costs must be served on the respondent by the petitioner within 7 days exclusive of the day of the presentation.

b) Rule 9 has the title 'Service of Documents' and it reads as follows:

(1) Service of the petition and notice of security of costs on the respondent, and on the parties in general, must be personal;

(2) Despite sub-rule (1), if the Judge is satisfied on receipt of an application no later than 3 days after filing the petition that all reasonable efforts have been made at service, the Judge may order what has been done constituted substituted service subject to the conditions as he or she thinks reasonable; or make an order for substituted service as authorised by the Supreme Court Rules.

17. So in accordance with the Rules as I have decided in the matter of Dabwido and Aingimea and others, Rule 8 provides that the petition and notice of security for costs must be served within 7 days; Rule 9(1) provides that the service must be personal and Rule 9(2) provides that if personal service cannot be effected within 3 days, then an application has to be filed in the Court.

18. Mr Clodumar is not seeking an extension of time to effect service on the respondent personally but is seeking an extension of time for an Order for Substituted Service which has the same effect, and I must say that I find this proposition to be rather strange.

19. I stated in the matter of Dabwido v Aingimea and others the timeline in the Act and the Rules at [17],[18]and[19] as follows:

What is the position with respect to service?

*"[17] As I mentioned in paragraph 7 above and I reiterate that the Courts of Disputed Returns enjoys a very special jurisdiction which is essentially a parliamentary jurisdiction assigned to the judiciary by the Constitution and legislature. It is mandated to determine the disputes expeditiously so the composition of Parliament can be established and the government can continue with the governance of the country. Its decisions are not subject to appeal which is again a special feature to bring finality to the election disputes. The Act reflects the special jurisdiction of this court. The Rules made by Chief Justice reflects the urgency in the service of the documents so that the petition can be dealt with expeditiously. Rule 8*

*states that the document must be served within 3 days whilst rule 9(1) says that it must be personal. So if a respondent knows that a petition will be filed against him/her or has been filed could easily leave the country to frustrate service of the documents, and, thus delay the entire process. The court process does work not at the whim of a respondent who may decide to depart the country and frustrate service. His absence will not stop the court's proceedings and the proceedings will continue regardless. Under rule 9(2) the petitioner can make an application for substituted service and effect service on the respondent in accordance with the order for substituted service. All that a petitioner has to establish is that reasonable efforts were made to serve the respondent. This applies to a respondent who is within the country and is evading service and also applies to a respondent who is out of the country. However r. 9(2) the petitioner is required to make the application to the court not later than 3 days after the filing of the petition and this in my view reflects the urgency of the matter and the need to have it resolved expeditiously so that the Parliament can continue with its business. In the circumstances I am compelled to conclude the service of the documents under Rules 8 and 9 is mandatory and failure to comply those rules will render the proceeding to be a nullity.*

*[18]In view of the strict nature of Rules 8 and 9 I cannot envisage, as to how Rule 30 could be used by a petitioner to seek enlargement of time. Mr Nimes submitted that the Act is a new piece of legislation for this jurisdiction and urged upon me show some compassion, as the practitioners are unfamiliar with the legislation and the rules and he submits that itself is a 'good reason' as stipulated in Order30. I am afraid I unable to assist as compliance with rules 8 and 9 is mandatory and petitioner's failure has rendered the proceeding to be a nullity and Order 30 cannot revive the proceedings.*

### **CONCLUSION**

*[19]In light of the matters discussed above I find that the provisions of R.8 and 9 are mandatory and the failure of the petitioner to comply with the timelines laid therein rendered the proceeding a nullity and the petition is struck out".*

### **CONCLUSION**

20. For the sake of clarity I find that the respondent was not served within the time prescribed in Rules 8 and 9 and no application was made to the Court within 3 days with the result that the proceedings has been rendered to be a nullity and the petition is struck out.

DATED this 12 day of September 2016



Mohammed Shafiullah Khan

Judge

