

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APLA

MISC. 20155

IN THE MATTER of the Electoral Act 1963 and its amendments

A N D

IN THE MATTER concerning the election of a Member of Parliament for
the Territorial Constituency of Aana Alofi No.1

BETWEEN: TOLRAFOA FAAPILSI of Fasitoouta, a candidate for election
Petitioner

A N D: SUAPDA LAUTASI of Faleasiu, a candidate for election
First Respondent

A N D: TUAIFAIVA TANAFILI BEIULI of Fasitoouta and American Samoa, a
candidate for election
Second Respondent

A N D: MAIAVA NAFATALI of Faleasiu, a candidate for election
Third Respondent

A N D: AIONO LEULUNOEGA SOFARA of Fasitoouta, a candidate for
election
Fourth Respondent

A N D: LBAUPEPE TALA FABANI of Fasitoouta, a candidate for election
Fifth Respondent

A N D: AIONO SIA of Fasitoouta, a candidate for election
Sixth Respondent

A N D: NATATUNUA MAIMOAGA of Faleasiu, a candidate for election
Seventh Respondent

A N D: AIONO FANAIFI of Fasitoouta, a candidate for election
Eighth Respondent

Counsel: R S Toailoa for applicant

Hearing: 29 May 1996

Decision: 31 May 1996

DECISION OF SAPOLU, CJ

On 14 May 1996 the Chief Electoral Officer declared the result of the general election of Members of Parliament held on Friday, 26 April 1996 by giving public notice thereof in terms of the relevant provisions of the Electoral Act 1963. The declaration of the poll result for the territorial constituency of Aana Alofi No.1 showed the number of votes polled by each candidate as follows :

| | |
|----------------------------|------------|
| Aiono Fanaafi | 100 |
| Aiono Leulumoega Sofara | 298 |
| Aiono Sia | 234 |
| Fesolai Moemoe | 62 |
| Leaupepe Tala Farani | 241 |
| Maiava Nafatali | 376 |
| Matatumua Maimoaga | 125 |
| Suafoa Lautasi | 478 |
| Toleafoa Faafisi | 851 |
| Tuaifaiva Tamafili Seiuli | <u>476</u> |
| Total number of valid vote | 3,241 |
| Number of informal votes | 7 |

Suafoa Lautasi and Toleafoa Faafisi were accordingly declared by the Chief Electoral Officer as the elected Members of Parliament for Aana Alofi No.1 territorial constituency.

Following the declaration of the poll the applicant Toleafoa Faafisi filed two election petitions, one against the candidate Tuaifaiva Tamafili Seiuli and the Chief Electoral Officer and the other against eight of the candidates who contested the election with him. A third election petition in relation to the same territorial constituency was filed by the unsuccessful candidate *Tuaifaiva Tamafili Seiuli against the two successful candidates which include the present applicant. The only election petition we are concerned with here is the one by the applicant against eight of the candidates who contested the election with him. That petition according to the Court file was presented on 21 May 1996 which was within the time period allowed under section 106 of the Electoral Act 1963 for the filing or presentation of an election petition.

Even though the petition in question was filed on 21 May, it had not been served on any of the eight respondents. The reason for this, as it appeared from what counsel for the applicant told the Court, is that there had been efforts made to resolve this matter in accordance with Samoan custom and traditions. However it appeared those efforts were unsuccessful when the candidate

Tuaifaiva Tamafili Seiuli appeared in Court on 29 May 1996 and stated that he was still proceeding with his petition against the two successful candidates which includes the present applicant.

It appears to the Court that the efforts to resolve this matter in accordance with Samoan custom and tradition must be related to the unsuccessful candidate Tuaifaiva's petition against the applicant rather than the applicant's two petitions. If it was the applicant's petitions that they were trying to settle in accordance with custom and tradition then it was still open up to 29 May for the applicant to withdraw his petitions and settle the matter in the customary manner. But the Court was told that Tuaifaiva was still proceeding with his petition which clearly suggests that it was in respect of Tuaifaiva's petition that efforts had been made to settle in accordance with Samoan custom.

Coming now to the issues raised in the present application, it was first submitted that it was still not too late to effect personal service of the applicant's petition on all the respondents. This submission was based on rule 53 of the Electoral Petition Rules 1964 which provide :

"All days set apart or declared to be holidays of the Court under the rules of that Court in its ordinary jurisdiction shall be deemed to be holidays for the purposes of these rules".

It was then suggested that the Court's holidays include weekends or at least Sundays so that those 'holidays' should not be counted when computing the time for which personal service of the petition should be effected.

However it appears to me that the Court holidays referred to in rule 53 of the Electoral Petition Rules 1964 are the holidays set apart or declared by the rules of Court. And rule 7 of the Supreme Court (Civil Procedure) Rules 1980 provides :

"The days for the time being appointed to be observed as "holidays in the Public Service should be holidays on which "the office of the Court shall be closed".

In other words the Public Service holidays would also be Court holidays in terms of rule 7 of the Supreme Court (Civil Procedure) Rules 1980. But the material period of time required for effecting personal service in this case did not include any Public Service holidays. So the seven days period required by rule 19 of the Electoral Petition Rules 1964 to effect service of the petition did not include any Court holiday in terms of rule 7 of the Supreme Court (Civil Procedure) Rules 1980.

Coming now to the main part of the application which is to extend time to effect personal service of the petition on the respondents. I turn first to the relevant rules of the

Electoral Petition Rules 1964. Rule 19 provides :

"The petition shall be served not later than 7 days after
"the date of filing".

Rule 20 then provides :

"The petition shall be served personally on every respondent".

As already pointed the applicant's petition was filed on 21 May 1996. So the 7 days period required for service, which should be personal service, expired on 28 May. Personal service, however, may be waived or excused under the circumstances provided in rules 21, 22 and 23, but none of these circumstances apply here.

In interpreting the provisions of rule 19 which appear to be expressed in mandatory terms I turn first to the decision of the Privy Council in *Nair v Teik* [1967] 2 All E R 34 which dealt with an election appeal from Malaysia. In that case the election Judge struck out an election petition on the ground that it had not been served within the time required by rule 15 of the Malaysian Election Petition Rules 1954. Rule 15 provided :

"Notice of the presentation of a petition accompanied by a
"copy thereof, shall, within ten days of the presentation of
"the petition, be served by the petitioner on the respondent.
"Such service may be effected either by delivering the notice

"and copy aforesaid to the solicitor appointed by the respondent under r.10 of these rules by posting the same in a registered letter to the address given under r.10 of these rules at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no solicitor has been appointed, or no such address given, by a notice published in the Gazette stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the registrar".

The election petition in that case was filed on 29 June 1964 within the required time. In terms of rule 15 the petition should then have been served within ten days of filing in any of the manner provided in rule 15. That means the petition should have been served in any of the manner provided by 9 July. However the petition was only served on 23 July. So the election Judge struck out the election petition as it was not served within the required ten days period. On appeal to the Privy Council it was held that the provisions of rule 15 of the Malaya Election Petition Rules 1954 were mandatory and non-compliance with the time period for service provided in rule 15 rendered the proceedings a nullity. The appeal was accordingly dismissed. In delivering the judgment of the Privy Council Lord Upjohn made certain remarks which should be quoted here. His Lordship said at p.36 :

"Constitutionally decisions on questions of contested elections are vested in the assembly for which the contested election has been held, but in the course of the nineteenth century many countries, including this country and many of Her Majesty's possessions overseas, adopted the view that as

"the deliberations of the assembly itself were apt to be governed rather by political considerations than the justice of the case, it was right and proper that such questions should be entrusted to the Courts. This required legislation in every case, and in many cases the right of appeal after the hearing of an election petition by an election tribunal to which those hearings was entrusted was severely limited, clearly for the reason that it was essential that such matters should be determined as quickly as possible, so that the assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment".

And at p.40 His Lordship went on to say :

"The need in an election petition for a speedy determination of the controversy, a matter already emphasised by their Lordships. The interest of the public in election petitions was rightly stressed in the Federal Court, but it is very much in the interests of the public that the matter should be speedily determined".

This public interest consideration of speedy determination of an election is also reflected in the successive amendments which have been made to the provisions of the Electoral Act 1963 in respect of the time for presentation and trial of an election petition. Initially section 106 of the Act provided that an election petition shall be presented within 28 days after the day on which the Chief Electoral Officer has publicly notified the result of the poll. By section 16 of the Electoral Amendment Act 1984 that time period of 28 days was reduced to 14 days and by section 30(1) of the Electoral Amendment Act 1990 that time period

was further reduced to 7 days.

Section 111(1) which initially provided that notice of the time and place of the trial of an election petition shall be given not less than 14 days before the day of trial was by amended in 1990 so that the said period of 14 days is now reduced to 7 days. Section 30(2) of the Electoral Amendment Act 1990 further amended section 111 of the principal Act by adding thereto a new subsection as follows :

"(3) In allocating a time for hearing an electoral petition the Court shall give priority to that petition over all matters before the Court which are not electoral petition".

So the message that comes through very clearly in the provisions of the Electoral Act 1963 and its subsequent amendments I have referred to is the public interest in the speedy determination of an election petition.

The Election Petition Rules 1964 also contemplate that every reasonable effort should be made to serve an election petition within the prescribed time period of 7 days; and where such efforts have been unsuccessful then application may be made to the Court for an order for sufficient service : rule 22. But where there is evidence of evasion of service, then application may be made to the Court for substituted service : rule 23.

In this case there is no evidence of any effort being made to effect service of the election petition in question on any of the respondents within the required 7 days' period provided in rule 19. The reason is that the applicant was trying to settle out of Court the petition filed by Tuaeifaiva against him and the other successful candidate Suafoa Lautasi in accordance with custom and tradition. The efforts to settle that petition in accordance with custom and tradition have been unsuccessful as the petitioner Tuaeifaiva Tamafili Seiuli is still proceeding with that petition. However, service of the applicant's petition against Tuaeifaiva and seven other respondents is now out time.

I have given due consideration to the provisions of rule 15 of the Malaysian Election Petition Rules 1954 as to service of an election petition which were in issue in *Nair v Teik* [1967] 2 All E R 34 and I am of the view that in material respects those provisions are no different from the provisions of rule 19 of our Election Petition Rules 1964. As already pointed out, the Privy Council in that case held that non-compliance with the service requirements of rule 15 of the Malaysia Election Petition Rules 1954 which were mandatory rendered the petition a nullity and it was therefore dismissed. It follows that on the authority of *Nair v Teik* [1967] 2 All E R 34 non-compliance in this case with the requirements of rules 19 and 20 as to the time for effecting personal service of the petition on any of the respondents renders

the petition a nullity - the provisions of rules 21, 22 and 23 being not applicable in this case.

I have not overlooked the decision of the Full Supreme Court of New Zealand in *Re Wellington Central Election Petition, Shand v Comber* [1973] 2 NZLR 47 which dealt with the distinction between a nullity and an irregularity with regard to an election petition. However the facts of that case and the issues it dealt with are quite different from the facts and issues of the present case and *Nair v Teik*. And even if for the sake of argument what has happened in this case is regarded as an irregularity which the Court has discretionary power to cure if the justice of the case so requires, what happened here is that the applicant made no attempt to serve his present petition within time. Perhaps in the circumstances he saw some advantage to him in taking that course, but then he should also accept any disadvantage which may follow from it if the course he decided to take turned out to be unsuccessful. I also draw the inference, from the absence of any evidence on the point, that the applicant was not under any bona fide mistake as to the time requirements for effecting personal service of his present petition as his other petition which is against the unsuccessful candidate Tuaifaiva Tamafili was served within the prescribed time. There are also the considerations mentioned in *Nair v Teik* [1967] 2 All E R 34 particularly the public interest in the speedy determination of an election petition

which the Court must bear in mind in the exercise of its discretion : see *Re Wellington Central Election Petition, Shand v Comber* [1973] 2 NZLR 470 at 477-478 per Cooke J. With all those considerations in mind, I am of the view that even if what has happened in this case was for argument's sake to be regarded as an irregularity and not a nullity, I would still have exercised my discretion against the indulgence of extending the time for service of his election petition sought by the applicant.

In all then, the application for extending the time for service of the applicant's election petition is denied and that petition is therefore dismissed.

There will be no order as to costs.

TFM Sapolu
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CHIEF JUSTICE