**Kibaki v Moi**

[2000] 1 EA 115 (CAK)

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 10 December 1999

**Case Number:** 172 and 173/99

**Before:** Chunga CJ, Omolo, Shah, Lakha And Owuor JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Elections – Presidential elections – Service of petition – Time of service – Mode of service – Whether*

*both presentation and service of petition had to be effected within 28 days – Whether personal service of*

*petition on Respondent required – Sections 41, 42A and 44 – Constitution – Section 20 – National*

*Assembly and Presidential Elections Act – Rules 10 and 14 – National Assembly and Presidential*

*Elections (Election Petition) Rules.*

*[2] Judgment –* Stare decisis *– Precedent – Judicial decision as authority –* Obiter dicta *– High Court*

*bound by decisions of Court of Appeal – Whether the High Court had acted in breach of the doctrine of*

*precedent.*

**Editor’s Summary**

Following the December 1997 Kenyan general election, the First Respondent was declared the winner of

the presidential elections with the Appellant coming in second. The results of the elections were

published in the Kenya *Gazette*

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number 79 of 1998 dated 5 January 1998. On 22 January, the Appellant filed a petition in the High Court

challenging the validity of the First Respondent’s election as president of Kenya. As well as the First

Respondent, the electoral commission of Kenya and its chairman, were named in the petition as

additional Respondents. Notice regarding the filing of the petition against the three Respondents was

purportedly served through the publication in the Kenya *Gazette* of 29 January 1998 by the Appellant’s

advocates of notice number 395 dated 22 January 1998. The said notice further directed the three

Respondents to obtain copies of the petitions from the deputy registrar of the High Court’s office. The

Respondents thereafter appointed advocates to act on their behalf and to obtain copies of the petition

from the court registry. On 25 January 1999, the First Respondent applied for the petition against him to

be struck out on the ground that he had not been served within 28 days of the publication of the election

results as required by section 20 of the National Assembly and Presidential Elections Act. The following

day, the Second and Third Respondents filed a similar notice of motion seeking identical orders to those

sought by the First Respondent. As well as relying on section 20 of the National Assembly and

Presidential Elections Act, the Second and Third Respondents also sought to rely on the provisions of

Rule 14 of the National Assembly (Election Petition) Rules to support their application that the petition

be struck out. Section 20 provided that a petition had to be presented and served within 28 days after the

date of publication of the election results in the *Gazette* whereas Rule 14 of the National Assembly

(Election Petiton) Rules provided that notice of the petition together with a copy thereof were to be

served within ten days of the presentation of the petition. Rule 14(2) further provided that where no

address was given for service under Rule 10, notice could be published in the *Gazette* stating that a

petition had been presented and that the Respondent could obtain a copy from the registry. The two

motions were heard together by a bench of three judges of the High Court, which allowed the

applications and struck out the petition. The Appellant appealed against both rulings primarily on the

grounds that the High Court had refused to follow various principles set out in previous Court of Appeal

decisions, that those principles would have worked in his favour and that, by its refusal, he had been

deprived of his established rights. The two appeals were consolidated by consent of all the parties.

**Held** – The High Court had no power to overrule the Court of Appeal and was bound by the principles of

precedent and *stare decisis*. Though it had the right and the duty to critically examine the decisions of the

Court of Appeal, it was obliged to follow those decisions unless they could be distinguished from the

case under review on some other principle such as *obiter dictum*; *Cassel and Co Ltd v Broome* [1972] 1

All ER 801 and *Dodhia v National and Grindlays Bank Ltd* [1970] EA 195 approved.

In order to rule on the disputes before them in *Chelaite v Njuki* and *Murathe v Macharia*, it was not

necessary for the Court of Appeal to determine the issue as to whether section 20 and Rule 14 were in

conflict. Any pronouncements by the court on this issue in those judgments therefore amounted to

judicial dicta and were not binding on the High Court. Thus, the issue of whether section 20(1)(*a*) was in

conflict with Rule 14(1) was still open to the High Court to discuss in this petition. There was no reason

to differ with the High Court’s conclusion that Rule 14 was in direct conflict with section 20(1)(*a*) and,

accordingly, did not apply to petitions concerning that section.

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The National Assembly and Presidential Elections Act (Chapter 7) and the rules made thereunder

formed a complete regime with regard to election petitions and no other legislation or rules could apply

unless made applicable by the Act or Rules. Though section 20(1)(*a*) did not prescribe any particular

mode of service, the best form of service was personal and the courts were obliged to go for that form of

service. Though the Appellant had contended before the High Court that the massive security

surrounding the First Respondent precluded personal service, no effort to serve him had been made and

repelled. Moreover that was a reason that could not have been offered for the failure to serve the Second

and Third Respondents. The Appellant had therefore failed to comply with section 20(1)(*a*) and the

appeals would be dismissed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Chelaite v Njuki and others* [1998] LLR 2184 (CAK)

*Mudavadi v Kibisu and another* [1970] EA 85

*Maitha v Said and another* [1998] LLR 854 (CAK)

*Murathe v Macharia* [1998] LLR 2233 (CAK)

*Wamukota v Donati* [1986] LLR 2306 (CAK)

*Young v Bristol Aeroplane Co Ltd*

***Canada***

*Bahner v Marwest Hotel Co Ltd* (1969) 6 DLR (3rd) 322, 69 WWR 462

*Fraser v Wilson (1969)* 6 DLR (3rd) 531

*McElroy v Cowper-Smith and Woodman* (1967) 62 DLR (2nd) 65

*McKinnon v FW Woolworth Co Ltd and Johnson* (1968) 70 DLR (2nd) 280

***New Zealand***

*Fogg v Mcknight* [1968] NZLR 330

***United Kingdom***

*Australian Consolidated Press v Uren* [1967] 3 All ER 523

*Broadway Approvals Ltd v Odhams Press Ltd* [1964] 2 All ER 904

*Broome v Cassel and Co Ltd* [1971] 2 All ER 187

*Cassel and Co Ltd v Broome and another* [1972] 1 All ER 801 – **APP**

*Dodhia v National and Grindlay’s Bank Ltd and another* [1970] EA 195 – **APP**

*Fielding v Variety Incorporated* [1967] 2 All ER 497

*Hulton v Jones* [1908–10] All ER 29

*Jones v Secretary of State for Social Services* [1970] 1 All ER 97

*Ley v Hamilton* (1934) 151 LT 360

*Mafo v Adams* [1969] 3 All ER 1404

*Mason v Associated Newspapers Ltd*

*McCarey v Associated Newspapers Ltd* [1964] 2 All ER 335

*Minister of Social Security v Amalgamated Engineering Union* [1966] 1 All ER 705

*Rookes v Barnard* [1964] 1 All ER 367; [1964] AC 1129

*Uren v John Carfax and Sons Pty Ltd* [1967] ALR 25

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