**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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**Judgment**

**CHUNGA CJ, OMOLO, SHAH, LAKHA AND OWUOR JJA:** These two appeals, apart from the

undeniable fact that they involve persons of no mean status in our county, raise issues very crucial to the

jurisprudence of our legal system as we have hitherto understood it to be. The Appellant in both appeals

is Mwai Kibaki who is the leader of the official opposition in Parliament. The Respondent in civil appeal

number 172 of 1999 is Daniel Toroitich Arap Moi, the president and commander-in-chief of the armed

forces of the Republic. We shall hereinafter refer to him as the First Respondent. There are two other

Respondents in civil appeal number 173 of 1999. They are S M Kivuitu and the Electoral Commission of

Kenya; we shall hereinafter refer to these latter two as the Second and Third Respondents respectively.

The Second Respondent is the chairman of the Third Respondent. The Third Respondent is a body

created by section 41 of the country’s Constitution and by virtue of section 42A of the Constitution the

Third Respondent’s functions are tabulated to be:

“(*a*) the registration of voters and the maintenance and revision of the register of voters;

(*b*) directing and supervising the presidential National Assembly and local government elections;

(*c*) promoting free and fair elections;

(*d*) promoting voter education in Kenya; and

(*e*) such other functions as may be prescribed by law”.

It is clear from this tabulation that the Third Respondent and its chairman the Second Respondent are

crucial to the democratic system of governance that Kenya, like all other emerging democracies is

struggling to put in place. We said from the outset that the parties involved in the two appeals are persons

of no mean status in our Republic. That must be apparent from the short description we have so far given

to each one of them. We only need to add that the two appeals were consolidated by the consent of all

parties.

The Republic of Kenya held its last general elections on 29 and 30 December 1997. At those elections

the Appellant and the First Respondent were among the candidates who contested for the office of the

president. The result of the presidential elections was published in the Kenya *Gazette* number 79 of 1998

and dated 5 January 1998. The First Respondent was declared the winner with 2 445 801 votes. The

Appellant was the runner-up with 1 895 527 votes.

Pursuant to section 44 of the Constitution, the Appellant, on 22 January 1998, filed in the High Court

election petition number 1 of 1998 to challenge the validity of the First Respondent’s election as the

president of Kenya. On 29 January 1998 the Appellant had published in the Kenya *Gazette* notice

number 395 the following and we quote:

“The Constitution of Kenya:

The National Assembly and Presidential Elections Act (Chapter 7)

and

Election Offences Act (Chapter 66)

In The High Court of Kenya at Nairobi

Election Petition Number 1 of 1998

Between

Mwai Kibaki (petitioner)

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versus

Daniel Toroitich Arap Moi

S. M. Kivuitu

Electoral Commission of Kenya (Respondents)

Notice

To:

Daniel Toroitich Arap Moi

S. M. Kivuitu

Electoral Commission of Kenya

Take notice that an election petition has been presented and filed in the High Court of Kenya at Nairobi, by

Mwai Kibaki, relating to the election of Daniel Toroitich Arap Moi, as the president of the Republic of Kenya

in the presidential elections that took place on the 29 and 30 December 1997. And further take notice that a

true copy of the petition may be obtained by you on application at the office of the registrar/the deputy

registrar, High Court of Kenya, law courts, P.O. Box 30014, Nairobi.

Dated the 22 January 1998.

Pheroze Nowrojee

Advocate for the petitioner”

We have found it necessary to set out this notice in full because it was agreed on all sides that this was

the only mode adopted by lodged in the High Court on 22 January 1998.

The First Respondent, in turn appointed Messrs Kilonzo and Company Advocates as his advocates on

2 February 1998. The Second and Third Respondent also appointed their advocates on 3 February 1998.

We assume that before the appointment of Messrs Kilonzo and Company Advocates by the First

Respondent on 2 February 1998, the First Respondent had not pursuant to Rule 10 of the National

Assembly Elections (Election Petition) Rules (“the Rules” hereinafter), left at the office of the registrar a

writing signed by him or on his behalf, appointing an advocate to advocate in case there should be

petition against him or that he intends to act for himself, and in either case, giving an address in Kenya at

which notices addressed to him may be left where such writing is left with the registrar by an elected

person, all notices and proceedings may be given or served by leaving them at the office of the registrar.

The relevance of these observations will in due course become apparent. We have already said that all

the Respondents were served with the petition through the *Gazette* Notice of 29 January 1998 and which

notice we have set out in full. On 25 January 1999, one year after the presentation of the petition, the

First Respondent took out a notice of motion which was said to be under section 20 of the National

Assembly and Presidential Elections Act Chapter 7 (“the Act” hereinafter) and in his motion, the First

Respondent asked for three basic orders, namely:

“(1) That the petition be struck out an the ground that the same was not served on the First Respondent

within 28 days after the date of the publication of the result of the presidential election in the gazette or

at all; and

(2) That pending the hearing and determination of this application, all proceedings herein be stayed; and

(3) That the petitioner do pay the cost of the First Respondent in respect of the petition as well as of this

application”.

The motion was supported by the affidavit, the First Respondent’s averments were to this effect:

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“2. That a notice of the result of the 1997 presidential election, whereby I was declared to be elected as

president, was published in the gazette on 5 January 1998. I learnt of this fact from the local

newspapers.

3. T hat I have not been served personally with the petition in this case, either within 28 days after the

date of said publication as required by section 20(1) of the National Assembly and Presidential

Elections Act (Chapter 7) or at all.

4. T hat on 2 February 1998, I instructed Messrs Kilonzo and Company Advocates of Nairobi to act for

me in this matter and to obtain a copy of the petition from the court registry.

5. T hat what is stated above is true to my knowledge”.

It is thus clear from the notice of motion and the supporting affidavit that the question of service under

section 20(1) of the Act was directly put in issue.

The Second and Third Respondents also joined in the fray and on the 26 January 1999, they also filed

a second notice of motion seeking similar orders as those sought in the motion by the First Respondent.

But the motion by the Second and Third Respondents was stated to have been brought not only under

section 20 of the Act but also pursuant to Rule 14 of the Rules.

Needless to say the two motions were vigorously opposed by the Appellant who in turn filed grounds

of objection and also replying affidavits. The two motions were heard together by O’kubasu,

Mbogholi-Msagha and Ole Keiwua JJ and by their ruling delivered on the 22 July 1999, the Learned

Judges acceded to the motions by the Respondents and struck out the Appellant’s petition. It is that order

striking out the Appellant’s petition which the provoked the appeal before us.

We started this judgment by remarking that the two appeals before us raise issues very crucial to the

jurisprudence of our legal system as we have hitherto understood it to be. We can now show the

relevance of that remark. In civil appeal number 172 of 1999, the first ten grounds of appeal are as

follows:

“1. The High Court overruled the Court of Appeal.

2. T he High Court erred in flouting the first principles of precedent and the doctrine of *stare decisis*.

3. T he High Court has no power or status to determine whether the decision, reasoning or words of the

Court of Appeal judgments are or are not, ‘rather wide’.

4. T he High Court accordingly erred in denying on that basis the Appellant of his lawful orders, and dues

in the High Court.

5. T he High Court cannot deny a party a decision in accordance with the Court of Appeal’s existing

judgments or conclusions on the basis that it disagrees with those conclusions or judgments.

6. T he High Court was bound by the numerous Court of Appeal judgments and decisions cited and

refusal to follow them has damaged our legal system and has brought it into disrepute.

7. T he High Court was bound by each of the said Court of Appeal judgments and decisions and erred in

allowing the Respondent’s application to strike out the Election Petition in the face of those judgments

and decisions.

8. I n the High Court the Respondent submitted that the Court of Appeal was wrong in several parts of

several of its said judgments and decisions and the High Court erred and was unprofessional in

entertaining and eventually upholding such flawed and unprofessional submissions.

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9. T he High Court had no jurisdiction so to do.

10. The High Court has acted without and/or in excess of its jurisdiction and powers”.

The basic substance to be gleaned from these ten grounds is that there are several decisions of this Court

establishing certain principles of law, that those principles were all in favour of the Appellant, that the

High Court was bound by those principles on the basic of the doctrine of *stare decisis*, but that in

contumacious violation of that doctrine, namely the doctrine of *stare decisis* aforesaid, the High Court set

at nought the principles of law previously established by the Court of Appeal and thus deprived the

Appellant of what was his established right or entitlement at law. If we were to be satisfied that the High

Court did all or any of these things that would constitute a very serious indictment of our judicial system’

We would join the Appellant and Mr *Nowrojee* in asserting and we assert together with them.

(i) That the High Court has no power to overrule the Court of Appeal;

( ii) The High Court has no jurisdiction to flout the first principles of precedent and stare decisis; and

(iii) That the High Court, while it has the right and indeed the duty to critically examine the decisions

of this Court must in the end follow those decisions unless they can be distinguished from the case

under review on some other principle such as that of *obiter dictum* if applicable.

The principles of precedent and *stare decisis* are so well established in the Commonwealth jurisdictions

that even the ever-crusading Lord Denning was hardly able to make any appreciable dent in them. In

*Broome v Cassel and Co Ltd* [1971] 2 All ER 187, Lord Denning took on the House of Lords in these

words:

“Yet, when the House of Lords came to deliver their speeches, Lord Devlin threw over all that we ever knew

about exemplary damages. He knocked down the common law as it had existed for centuries. He laid down a

new doctrine about exemplary damages. He said that they could only be awarded in two very limited

categories, but in no other category; and all the other Lords agreed with him.

This new doctrine has up till now been assumed in this Court as a doctrine to be applied: see *McCarey v*

*Associated Newspapers Ltd*; *Broadway Approvals Ltd v Odhams Press Ltd*; *Fielding v Variety Incorporated*;

and *Mafo v Adams*. It was applied by Widgery J in *Mason v Associated Newspapers Ltd.* But it has not been

accepted in the countries of the Commonwealth. The High Court of Australia has subjected this new doctrine

to devastating criticism and has refused to follow it: see *Uren v John Fairfax and Sons Pty Ltd*. The Privy

Council has supported the High Court of Australia in a judgment which marshals with convincing force the

arguments against the new doctrine: see *Australian Consolidated Press Ltd v Uren*. The Supreme Court of

Canada, together with the Courts of Alberta, Ontario, British Columbia and Manitoba, have repudiated the

new doctrine: see *McElroy v Cowper-Smith and Woodman; McKinnon v F W Woolworth Co Ltd and*

*Johnson*; *Bahner v Marwest Hotel Co Ltd and Fraser v Wilson*. The Courts of New Zealand also declined to

follow it: see *Fogg v McKnight*. The Courts of the United States of America know nothing of this new

doctrine. They go by the settled doctrine of the common law as to punitive damages and would not dream of

changing it. It is well stated in the *Re-statement of the Law of Torts*.

This wholesale condemnation justifies us, I think, in examining this new doctrine for ourselves; and I make

so bold as to say that it should not be followed any longer in this country. I say this primarily because the

common law of England on this subject was so well settled before 1964 – and on such sound and secure

foundations – that it

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was not open to the House of Lords to overthrow it. It could only be done by the legislature. We say it also

because the counsel who argued *Rookes v Barnard* accepted the common law as it had been understood for

centuries and did not suggest any alteration of it. Yet the House, without argument, laid down this new

doctrine. If the House were going to lay down this new doctrine – so as to be binding on all our courts – it

ought at least to have required it to be argued. They might then have been told of the difficulties which it

might bring in its wake, particularly when there are two Defendants, as in this case. Next, I say that there were

two previous cases in which the House of Lords clearly approved the award of exemplary damages in

accordance with the settled doctrine of common law. They were *Hulton v Jones* and *Ley v Hamilton*. It was

not open to the House in 1964 to go against those decisions. Lord Devlin must have overlooked them or

misunderstood them, for he said that: ‘There is not any decision of this House approving an award of

exemplary damages’; and yet there were those two. Finally, I say that the new doctrine is hopelessly illogical

and inconsistent”.

Here was Lord Denning at his intellectual best. Not only criticising but refusing to follow the case of

*Rookes v Barnard* [1964] 1 All ER 367; [1964] AC 1129 which was a decision of the House of Lords, a

court superior to the Court of Appeal of England where Lord Denning, as the Master of the Rolls,

presided, Lord Denning went further to advise other courts below the Court of Appeal not to follow

*Rookes v Barnard*. Not surprisingly, there was an appeal to the House of Lords from the decision of the

Court of Appeal. Delivering his speech in the House of Lords, Lord Hailsham of St Marylebone LC, had

this to say, and we quote him:

“The fact is, and I hope it will never be necessary to say so again, that, in the hierarchial system of courts

which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept

loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol*

*Aeroplane Co Ltd* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to

question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken

freedom to review its own decisions, will do so cautiously. That this is so is apparent from the terms of the

declaration of 1966 itself where Lord Gardiner LC said:

‘Their Lordships regard the use of precedent as an indispensable foundation upon which to decide

what is the law and its application to individual cases. It provides at least some degree of certainty

upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly

development of legal rules. Their lordships nevertheless recognise that too rigid adherence to

precedent may lead to injustice in a particular case and also unduly restrict the proper development to

the law. They propose therefore to modify their present practice and, while treating former decisions of

this house as normally binding, to depart from a previous decision when it appears right to do so. In

this connexion they will bear in mind the danger of disturbing retrospectively the basis on which

contracts, settlements of property and fiscal arrangements have been entered into and also the especial

need for certainty as to the criminal law. This announcement is not intended to affect the use of

precedent elsewhere than in this house.’

It is also apparent from the recent case of *Jones v Secretary of State For Social Services*, where the decision

in *Minister of Social Security v Amalgamated Engineering Union* came up for review under the 1966

declaration, that the house will act sparingly and cautiously in the use made of the freedom assumed by this

declaration. In addition, the last sentence of the declaration as quoted above clearly affirms the continued

adherence of this house to the doctrine of precedent as it has been hitherto applied to and in the Court of

Appeal – see Lord Hailsham, LC in *Cassel and Co Ltd v Broome and another*, [1972] 1 All ER 801 at 809g

to j and 810a to c”.

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We have found it necessary to extensively quote from these cases in England because they illustrate very

well the kind of problems we are called upon to decide, particularly as regards grounds one to ten in the

memorandum of appeal which we have set out elsewhere in the judgment. It is also worth remarking here

that the 1966 declaration by the House of Lords was adopted by the Court of Appeal from East Africa,

the predecessor of this Court, in the case of *Dodhia v National and Grindlay’s Bank Ltd and another*

[1970] EA 195, where it was held that: “The Court of Appeal while it would normally regard a previous

decision of its own binding, should feel free in both civil and criminal cases to depart from such

decisions when it appears right to do so”.

The Kenya Court of Appeal has steadfastly reminded loyal to this principle and the consequence of

that is that the courts of this country has continued to adhere to the principles of precedent and stare

decisis and that is why we have joined the Appellant and his counsel in asserting the continued adherence

to the principles. We can then now turn to an examination of whether the High Court by its decision

appealed from is guilty of all or any of the grounds listed as one to ten in the memorandum of appeal.

The question that was argued before the High Court was whether section 20(1)(*a*) of the Act was in an

irreconcilable conflict with Rule 14 of the Rules. Section 20(1) after its amendment by Act 10 of 1997

now reads:

“20(1) A petition:

( *a*) t o question the validity of an election shall be presented and served within 28 days after the

date of publication of the result of the election in the Gazette;

( *b*) t o seek a declaration that a seat in the National Assembly has not become vacant, shall be

presented and served with 28 days after the date of publication of the notice published under

section 18;

( *c*) t o seek a declaration that a seat in the National Assembly has become vacant, may be presented

at any time.

( *c*) t o seek a declaration that a seat in the National Assembly has become vacant, may be presented

at any time.

Provided that

(i) . . .

(ii) . . .”.

Before the amendment of 1997, section 20(1)(*a*) merely provided that a petition was to be presented

within 28 days but the 1997 amendment introduced another requirement, namely that not only must a

petition be presented within 28 days but that it must also be served within the same 28 days. The issue of

service of the amendment. Rule 14, however, has not been amended and remains as it was in 1997. The

Rule provides:

“14(1) Notice of presentation of a petition, accompanied by a copy of the petition, shall within ten days of the

presentation of the petition, be served by the petitioner on the Respondent.

(2) Service may be effected either by delivering the notice and copy to the advocate appointed by the

Respondent under Rule 10 or by posting them by a registered letter to the address given under Rule 10

so that in the ordinary course of post, the letter would be delivered within the time above mentioned,

or if no advocate has been appointed, or no such address has been given, by a notice published in the

Gazette stating that the petition has been presented and that a copy of it may be obtained by the

Respondent on application at the office of the Registrar”.

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We have, elsewhere, set out in full the notice published by the Appellant in the *Gazette*. We also pointed

out that it is likely the First Respondent in particular did not leave with the registrar a writing signed by

him showing who his advocates were and their address in Kenya or that he was to act for himself and

where he could be served. So the Appellant chose to serve all the Respondents through the *Gazette* notice

and they contended they were entitled to do so under in accordance with Rule 14. The motion by each

Respondent seeking to strike out the petition was predicated on the contention that since the amendment

of section 20(1)(*a*) of the Act, Rule 14 has become irrelevant as it is in conflict with the section. The

conflict which the Respondents asserted was that section 20(1)(*a*) requires that the petition be filed and

served within 28 days while Rule 14 provides that it can be served within 10 days after the date of

presentation so that if a party filed his petition say on the 28th day after the publication of the result in

the *Gazette*, such a party would still have another 10 days from the 28th day to serve the Respondent.

That would be good service under Rule 14, but it would clearly be bad service under the Act.

The Appellant, on the other hand, contended that there was not such irreconcilable conflict between

section 20(1)(*a*) of the Act and Rule 14. Both in the High Court and before us, Mr *Nowrojee*, for the

Appellant, relied on the passage of Gicheru JA in the case of *Maitha v Said and another* [1998] LLR 854

(CAK), where in dealing with the issue of conflict between a statute and rule made thereunder that

Learned Judge says this:

“At 302 of the 9 Edition of the Construction of Deeds and Statutes by Sir Charles Odgers, it is stipulated as

follows in connection with interpretation of delegated legislation and in particular the Rules made under an

Act of Parliament:

‘Rules must be read together with their relevant Act; they cannot repeal or contradict the express

provisions in the Act from which their authority’.

If the Act is plain, the Rules must be interpreted so as to be reconciled with it or, if it cannot be reconciled,

the Rule must give way to the plain terms of the Act. Where an Act passed subsequently to the making of the

Rules, is inconsistent with them (*sic*) unless it was clearly passed with a different object and then the two will

stand together”.

The issue in the *Maitha* case in which these observation were made was whether there was a conflict

between section 23(4) of the Act which provides that: “subject to subsection (5) an appeal shall lie to the

Court of Appeal from any decision of an election court whether the decision be interlocutory or final,

within 30 days of the decision” and the Rules of the Court of Appeal under which a notice of appeal is to

be lodged within 14 days from the date of the decision and the appeal itself being lodgeable within a

further 60 days from the date of lodging the notice of appeal. Maitha had filed a notice of appeal within

14 days and then lodged his appeal well before the expiry of the 60 days allowed by the Rules of the

Court of Appeal but outside the 30 days prescribed under section 23(5) of the Act. The majority of the

Court, which included Gicheru JA, had no difficulty in holding that the appeal was incompetent as it had

been lodged outside the period allowed by the Rules. The Rules had to give way to the plain provisions

of the statute and that is what is set out in the passage from the ruling of Gicheru JA which we have

quoted.

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The Appellant’s contention, however, was that the Court of Appeal itself had decided in at least two

cases that there was in fact no conflict between section 20(1)(*a*) of the Act and Rule 14. These cases are

*Chelaite v Njuki and others* [1998] LLR 2184 (CAK) and *Murathe v Macharia* [1998] LLR 2233 (CAK).

In *Chelaite*’s case, Kwach JA, is recorded as saying:

“Assuming for the purposes of argument only that Rule 14(1) is in conflict with section 20(1)(*a*) of the Act

then under the ordinary canons of statutory interpretation, the provisions of the Act must prevail. I am

satisfied that Parliament has properly exercised the powers given to it by section 44 of the Constitution and

that there is no conflict between that section of the Constitution and section 20(1)(*a*) of the Act. I am equally

satisfied that in dealing with the issue of service under section 20(1)(*a*) of the Act rather than leaving it to the

rules committee, Parliament acted within its legislative authority and did not unsurp the power of the rules

Committee. As a matter of construction Rules 14(1) can still be reconciled with section 20(1)(*a*) of the Act

and there is really no conflict between the two provisions”.

Earlier on, the Learned Judge of Appeal had said and we once again quote him:

“All that section 20(1)(*a*) of the Act says is that a petitioner must present and serve his petition within 28 days

from the date of publication of the result of the election in the gazette. In fixing the date of presentation of the

petition the petitioner must make sure not only that service is effected on the Respondent within ten days as

required by Rule 14(1) of the Rules, but also that this is done within twenty eight days, from the date of

publication of the result of the election in the gazette. So in effect presentation is governed by publication of

the result while service is governed by presentation and both these steps must be taken within twenty eight

days”.

The late Pall JA was the second member of the court in *Chelaite*’s case and for his part he had this to say:

“I do not find any conflict in section 20(1)(*a*) of the Act and Rule 14 of the Rules and in case there be any

conflict then section 20(1)(*a*) of the Act, being an Act of Parliament must prevail over Rule 14 which is a

subsidiary legislation. Similarly I do not find any conflict in section 44(4) of the Constitution and section

23(3) of the Act and in case of any conflict section 44 of the Constitution will supersede section 23(3) of the

Act by virtue of section 3 of the Constitution”.

The third member of the court, Owuor JA, originally had reservations of her own, but in the end, she

agreed with the other members of the court and concluded:

“In the course of argument, I was inclined to think that there was indeed a conflict between section 20(1)(*a*)

of the National Assembly and Presidential Elections Act Chapter 7 and Rule 14(1) of the National Assembly

Elections (Election Petition) Rules, but on reflections and having read my brothers’ judgments, I am satisfied

that there is none. The efficacy of Rule 14(1) has not been affected by the amendment of section 20(1)(*a*) of

the Act introduced by Act number 10 of 1997”.

So the Appellant is fully justified in saying that in the *Chelaite* case, the Court of Appeal had held that

there was in fact no irreconcilable conflict or any other conflict between section 20(1)(*a*) of the Act and

Rule 14(1) of the Rules. That now brings us to the case of *Murathe v Macharia ante*, and the members of

the court once again included Kwach and Pall JJA, the new member being Tunoi JA. This time round

Kwach JA said:

“The result of the election was published in a special issue of the Kenya Gazette dated 6 January 1998 and for

the purposes of section 20(1)(*a*) of the Act twenty eight days allowed for presentation and service of petitions

started to run on 7 January 1998. So anyone who wished to present a petition had to do so, and also have it

served on or before 3 February 1998, subject to compliance with Rule 14(1) of the National Assembly

Elections (Election Petition) Rules . . .”.

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The Learned Judge of Appeal still made it clear that not only had a petitioner to comply with section

20(1)(*a*) of the Act but also with Rule 14. And Pall JA repeats:

“But to me there seems to be no conflict. As the electorate of the constituency in particular and Kenya in

general are entitled to know as soon as possible as to who has been validly elected from that particular

constituency, Parliament in its wisdom has cut down the period of 38 days previously allowed for the

presentation and service of petition to 28 days. The two provisions can easily be reconciled. The period of 28

days now is the over-all period within which a petition must not only presented but also served and, not going

beyond this period of 28 days Rule 14(1) says the petition must be served within 10 days of the presentation”.

The Learned Judge of Appeal was clearly still of the view that there was no conflict between the Act and

the Rule.

Tunoi JA, the new member in the decision, was obviously not happy with this view, but he did not

dissent from it. He says in his judgment:

“In my view it is a fallacious contention to aver that only the Act was amended but the Rules remained intact,

for if it were so that legislative intent would have been devoid of concept of purpose and would have reduced

the amendment to futility. Further, since election petitions have elaborate procedures of their own relating to

filing and serving election petitions the Civil Procedure Rules and or any other statutes should not be applied

when computing time . . .”.

Like Owuor JA in the *Chelaite* case, Tunoi JA also had his doubts on the issue but the relevant fact is

that none of them dissented. So once again the Appellant is right in contending that the Court of Appeal

had held in this case too that there is in fact no conflict between section 20(1)(*a*) of the Act and Rule

14(1) of the Rules.

How then, did the High Court deal with these cases which were expressly cited to them? We think we

can only turn to their ruling to find out what they said about the cases. We quote them:

“We see the core issue to be decided in the *Chelaite v Njuki* case as being whether service of the petition was

good given the fact that it was effected outside the twenty eight days period provided under section 20(1)(*a*)

of the Act but within the ten days provided under Rule 14 of the Election Petition Rules. The other matters

were *obiter dicta* which do no bind this Court”.

It is apparent from this passage that the Judges of the High Court who decided the matter at the very least

know that they are bound by the decisions of the Court of Appeal. But it is also apparent that they equally

know that if the Court of Appeal purports to decide a matter which does not fall for consideration in a

particular case, that is, a matter which it is not necessary to decide in order to arrive at a decision

disposing of the particular case, then they are not bound by such a side decision. That is why they are

saying that the other remarks made by the Court of Appeal in the *Chelaite* case were not binding on them

because those remarks constituted what the lawyers designate as *obiter dicta* (plural) or *obiter dictum*

(singular). In *Chelaite*’s case the High Court was asked to strike out the petition on the ground that it was

served outiside the 28 days prescribed by section 20(1)(*a*) of the Act. In the view of the High Court, to

decide that issue it was not necessary to decide the question of whether section 20(1)(*a*) was in conflict

with Rule 14. It was agreed in both the *Chelaite* case and the *Murathe* case that service of the relevant

documents upon the Respondents in those cases had been effected outside the 28-day period prescribed

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under the Act. The question of whether the Act was in conflict with the Rules did not, accordingly, arise

and was irrelevant to the decision. Aluoch J who decided the *Chelaite* case in the High Court did not at

all purport to consider the issue of whether or not there was a conflict between the two provisions. Nor

did Mr Ochieng Odhiambo who represented Chelaite throughout the whole case ever purport to contend

that there was in fact a conflict. Mr Odhiambo’s contention both in the High Court and in the Court of

Appeal was to the effect that section 44 of the Constitution only gave Parliament the power to make

provisions dealing with the circumstances and manner in which, the time within which, and the

conditions upon which a petition may be filed in the High Court and also the powers, practice and

procedure of the High Court in relation to petitions. Mr Odhiambo had argued from these provisions that

Parliament was not entitled to prescribe the period within which a petition had to be served and that in

prescribing the period of 28 days for service in section 20(1)(*a*) Parliament was exceeding the authority

conferred on it by the Constitution. That argument was obviously for rejection and was rightly rejected

by both courts. But the point we are making is that the question of whether section 20(1)(*a*) of the Act

was in conflict with Rule 14 was never raised in the High Court. It was also not raised in the High Court

in the *Murathe* case, but even if it had been raised, it would have really been unnecessary to decide it

since it was irrelevant to the issue of the petitions being incompetent for having been filed outside the 28

days prescribed by section 20(1)(*a*). That is why the three Learned Judges of the High Court who decided

this petition thought they were not bound by the holdings in the *Chelaite* and *Murathe* cases – they said

the holdings were *obiter*. We were referred to *Halsbury’s Laws of England* (4 ed) Volume 26 paragraph

573 which deals with the question of the *ratio decidendi* in a decided case. It is therein stated:

“The enunciation of the reason of principle upon which a question before a court has been decided is alone

binding as a precedent. This underlying principle is called the *ratio decidendi*, namely the general reasons

given for the decision or the general grounds upon which it is based, detached or abstracted from the specific

peculiarities of the particular case which gives rise to the decision. What constitutes the binding precedent is

the *ratio decidendi* and this is almost always to be ascertained by analysis of the material facts of the case, for

judicial decision is often reached by a process of reasoning involving a major premise consisting of a

pre-existing Rule of law, either statutory or Judge-made, and a minor premise consisting of the material facts

of the case under immediate consideration”.

Our understanding of this passage is this. In the case of *Chelaite*, for example, the major premise was

section 20(1)(*a*) which lays down that a petition must be filed and served within 28 days from the

publication of the election result in the *Gazette*. Chelaite filed her petition within the 28 days but she

served it outside that period. That was the minor premise existing of facts. Then it was contended that the

petition was incompetent because though presented within the prescribed period of 28 days, it was

incompetent because it was served outside the prescribed period. This contention was upheld by the High

Court and the Court of Appeal and the petition was struck out as incompetent. What would constitute the

general principle, the *ratio decidendi*, which would be applied in all subsequent cases, is that since

section 20(1)(*a*) of the Act prescribes 28 days as the period within which a petition must be served, a

petition which is served outside that period is incompetent and must be struck out. It is this general

principle, which would be binding on the courts. There will of course be other

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conclusions within the main decision, such as whether section 20(1)(*a*) is in conflict with Rule 14 and so

on but these are what are designated as *obiter dicta* and these are not binding. *Halsbury* puts it like this at

paragraph 574:

“Dicta: Statements which are not necessary to the decision, which go beyond the occasion and lay down that

it is unnecessary for the purpose in hand are generally termed ‘dicta’. They have no binding authority on

another court, although they may have some persuasive efficacy. Mere passing remarks of a Judge are known

as enunciations of the Judges’ opinion on a point not arising for decision, and so not part of the ratio

decidendi, have been termed ‘judicial dicta’ . . .”.

Like the three Judges of the High Court, we also agree that in deciding the question of whether the

petitions in *Chelaite*’s and *Murathe*’s cases were incompetent or not, it was not necessary to decide the

issue of whether or not section 20(1)(*a*) of the Act was in conflict with Rule 14. We agree that the

pronouncements made in the two cases to the effect that section 20(1)(*a*) is not in conflict with Rule 14

amounted to no more than “judicial dicta” and were not binding on the High Court.

We were also referred, on the same point, to the second case of *Murathe,* namely *Murathe v Macharia*

civil appeal number 25 of 1999 (unreported) which was presided over by Gicheru, Tunoi and Shah JJA,

but that appeal involved a petition which had been filed pursuant to section 20(1)(*c*) of the Act for a

declaration that a seat in the National Assembly had become vacant. Such a petition can be filed at any

time and section 20(1)(*c*) was not affected by the amendments brought in by Act 10 of 1997. Rule 14

would still be applicable to that section. The Judges of the High Court were only considering whether, in

view of the amendment to section 20(1)(*a*), Rule 14 could still apply to that section. The second *Murathe*

case is, with respect, irrelevant to the issue at hand. Shah JA, in the second *Murathe* appeal, correctly

distinguished the difference between section 20(1)(*a*) and 20(1)(*c*) insofar as service of the petition is

concerned.

We are ourselves satisfied that the issue of whether or not section 20(1)(*a*) was in conflict with Rule

14(1) was as it were, still “*terra rosa’* and therefore, still open to the High Court to discuss. We so find

and hold and in view of that, grounds one to ten in the memorandum of appeal number 172 of 1999 must

accordingly fail.

The High Court considered the issue of whether or not section 20(1)(*a*) of the Act was in conflict with

Rule 14(1) of the Rules and the Learned Judges came to the conclusion that the two provisions were in an

irreconcilable conflict with each other. That conclusion is questioned in both appeals and we must deal

with it. Section 20(1)(*a*) lays it down that a petition must be presented and served within 28 days after

publication of the result of an election in the *Gazette*. It is agreed on all sides that presentation and

service under the section must be within 28 days and any service done outside that period is invalid and

the petition itself is rendered incurably defective. That is the *ratio decidendi* in the cases of *Chelaite* and

*Murathe*. Rule 14(1), however, says expressly that service of the notice of presentation of a petition

accompanied by a copy of the petition “shall, within ten days of the presentation of petition, be served by

the petitioner on the Respondent”.

If the two provisions are not in conflict with each other, then our understanding of the position is that

each of them must be given its full application. The Rule binds a petitioner to lodge and serve the petition

within ten days

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from the date of lodging the petition. If this Rule is to be given its full application then it would mean

that a petitioner who lodges a petition on the 20th day, for example, would still be entitled, under the

Rule, to ten days from that date which would carry the matter to the 30th day. The Rule can only be

reconciled to the Act by deducting some days from the ten days given by it (the Rule) or by making sure

that the petition is filed within an earlier period as would allow a period of 10 days to run. As the

Learned Judges of the High Court correctly point out, if the provisions of the Rule were to be given their

full application, then the cases of *Chelaite* and *Murathe* ought not to have been struck out because

service of the petitions in those cases fully complied with Rule 14(1) of the Rules. That is why the Judges

say that decisions such as those of *Chelaite* are examples of the conflict between the two provisions. To

reconcile the two decisions, one has to modify the application of Rule 14(1) and we do not know that a

court is entitled to modify the provisions of a written enactment, whether it be a statute or subsidiary

legislation. We once again quote Gicheru JA in *Maitha v Hemed ante*:

“Rules must be read together with their relevant Act; they cannot repeal or contradict express provisions in

the Act from which they derive their authority. If the Act is plain the Rule must be interpreted so as to be

reconciled with it, or if it cannot be reconciled with it, or if it cannot be reconciled, the Rule must give way to

the plain terms of the Act. Where an Act passed subsequently to the making of the Rules is inconsistent with

them, the Act must prevail unless it was clearly passed with a different unless it was clearly passed with a

different object and then the two will stand together”.

As we pointed out earlier, the conflict being considered in the case above was between section 23(3) of

the Act which provides that an appeal to the Court of Appeal must be lodged within 30 days from the

decision against which the appeal is brought, and the Rules of the Court of Appeal. Rule 74(1) of the

Court of Appeal Rules provides for the giving of the notice of appeal within 14 days from the date of the

decision while Rule 81(1) provides that the appeal itself is to be lodged within 60 days from the date of

lodging the notice of appeal. The appeal by Maitha, as we pointed out earlier, was lodged outside the 30

days prescribed under section 23(3) of the Act but within the 60 days. The majority of the Court –

Gicheru and Omolo JJA – had no difficulty in holding that the appeal was incompetent and there was no

question of attempting to reconcile the provisions of section 23(4) of the Act with those of the Court of

Appeal Rules. The Court of Appeal Rules were in conflict with the provisions of the statute and they (the

Rules) had to give way to the plain words of section 23(4). We see no difference between the position in

the *Maitha* case *ante*, and the one now under consideration. We accordingly agree with the High Court

that section 20(1)(*a*) of the Act is in direct conflict with Rule 14 and that being so Rule 14 must give way

to the plain words of section 20(1)(*a*) of the Act. Accordingly, Rule 14 of the Rules can no longer apply

to petitions which concern section 20(1)(*a*) of the Act. Indeed, under section 20(1)(*a*) of the Act, all that

one needs to serve is a copy of the petition but we would have no quarrel with it if a party chose to

include an unnecessary document like a notice of presentation, which, for the purposes of section

20(1)(*a*) of the Act is really irrelevant.

We can now discuss the mode in which an election petition is to be served. We agree with Mr

*Norwojee* and Mr *Orengo* that the Act and the Rules both form a complete regime and other legislation or

Rules can only be applicable to

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election petitions if they are made applicable by the Act itself or the Rules. We also agree that the

purpose of the regime is to have election petitions dealt with in as quick a manner as is reasonably

possible and the reason for this is not difficult to understand. The voters in a particular constituency and

also the general voters in Kenya are interested in knowing who their legitimate representative in

Parliament is. We are in entire agreement with the principles set out in the ancient case of *County of*

*Tipperary* which was decided way back in 1875 and we agree that the principles enunciated in that case

are embodied in our Rules. Those principles, however, cannot answer for us the question of how service

of a petition is to be effected.

Section 20(1)(*a*) which we have extensively dealt with merely says that a petition shall be presented

and served within 28 days. We have held that Rule 14 can no longer apply to petitions file pursuant to

section 20(1)(*a*) of the Act. Mr *Orengo* pointed out to us, rightly in our view, that section 20(1)(*a*) does

not say who is to be served and how service is to be effected. On the issue of who is to be served, we

very much doubt if a party who has taken a great deal of trouble to draw up a petition would be ignorant

as to the person or persons against whom he is complaining and the reliefs he seeks from that persons

against whom petitions are brought are the correct parties is, of course, a wholly different issue.

Section 20(1)(*a*) sets out what is to be served – a petition. It (the section) also says when the petition

is to be filed – within 28 days from the date of publication of an election result. The period within which

it is to be served is also the same period. Parliament, however, has not stated in the section how the

service is to be effected. Under Rule 10 of the Rules:

“A person elected may at any time after he is elected send or leave at the office of the Registrar a notice in

writing signed by him or on his behalf appointing an advocate to act as his advocate in case there should be a

petition against him or stating that he intends to act for himself, and in either case giving an address in Kenya

at which notices addressed to him may be left or if not such writing is left all notices and proceedings may be

given or served by leaving them at the office of the registrar”.

It is obvious from this Rule that it is not mandatory for a person elected to do any of the things set out in

the Rule. The expression is that “A person elected may” not that “A person elected shall”. So that we

have a situation in which the only provision in section 20(1)(*a*) is that a petition is to be presented and

served within 28 days from a certain event. Rule 10 does not compel an elected person to leave his

address or that of his advocate with the registrar. If he was compelled to do so, then one would be

entitled to assume that service can be effected on him at the address left with the registrar and if no

address is left, they by leaving the documents with the registrar. We think we should state at this stage

that if the amendments of 1997 had not intervened the question of the mode of service was well settled

and even in the other cases brought in after the amendments, the issue of any conflict between section

20(1)(*a*) of the Act and Rule 14 of the Rules had not been raised. We have already dealt with this aspect

of the matter and we need not repeat ourselves. Where Parliament simply says that a party is to be

“served” without specifying how the service is to be effected, what does it (Parliament) mean or intend?

In ordinary language, to serve a person with a document is to deliver that document to that person. For

example, Order 5 of the Civil Procedure Rules deals with service of summons in ordinary civil case. Rule

7 deals with mode of

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service and is to the effect that: “Service of the summons shall be made by delivering or tendering a

duplicate thereof signed by the Judge, or such officer as he appoints in this behalf, and sealed with the

seal of the court”.

Rule 9 and (2) of Order 5 of the Civil Procedure Rules deal specifically with service on a party or his

agent. The general tenor of service under this Order is that unless there is an appointed agent or unless a

Defendant cannot be found service is normally personal. Exceptions only come when personal service is

not practicable.

We would add this with regard to service of petitions upon an elected person. Service by way of

publication in the Kenya *Gazette*, in view of section 20(1)(*a*) of the Act, cannot be proper service. The

publication in the *Gazette*, as in this case, directs a respondent to obtain a copy of the petition from the

office of the registrar/deputy registrar of the High Court of Kenya. In view of the fact that section

20(1)(*a*) requires presentation and service of the petition asking a respondent to collect a copy thereof

from the High Court registry cannot be proper service. This is yet another aspect which shows that Rule

14(1) is in conflict with section 20(1)(*a*) of the Act.

Mr *Nowrojee* also cited and made available to us the Parliamentary Election Petition Rules of 1868 of

England. Rule 14 of those Rules was to the effect that:

“Where the Respondent has named an agent or given an address, the service of an election petition may be by

delivery of it to the agent, or by posting it in a registered letter to the address given at such time that, in the

ordinary course of post, it would be delivered within the prescribed time”.

This Rule is similar to our Rule 10, so that if an address of the advocate or the Respondent himself is left

with the registrar then service may be effected on the advocate or at the address given. But of more

interest is the commentary found immediately under the English Rule 14 which we have set out:

“In other cases, service must be personal on the Respondent, unless a Judge, on an application made to him

not later than five days after the petition is presented on affidavit showing what has been done, shall be

affidavit showing what has been done, shall be satisfied all reasonable effort has been made to effect personal

service and cause the matter to come to the knowledge of the Respondent, including when practicable, service

upon an agent for election expenses, in which case, the Judge may order that what has been done shall be

considered sufficient service, subject to such conditions as he may think reasonable”.

It is agreed on all sides that election petitions are not ordinary civil suits; as Mr *Nowrojee* submitted

before us, an election petition is a dispute *in rem*, though of course it must, of necessity, be fought out

between or amongst certain named parties. They are disputes of great importance to the public but some

specified person or persons still have to answer to certain alleged defaults. How is it then, that in

ordinary civil litigation the parties concerned have to be served in person unless it is impossible to find

them when other modes of service may be adopted?

The question arose that if only personal service would suffice, the Respondents would seek to evade

service by, for example, travelling out of the country or just staying out of sight until after the expiry of

the prescribed 28 days. That fear may be genuine but it must also be remembered that election petitions

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generally involve Kenyans who very much prize their title of “Honourable” and we do not contemplate

that those involved in petitions will wilfully take cover in order to avoid the process of the law.

What we are saying, however, is that election petitions are of such importance to the parties

concerned and to the general public that unless Parliament has itself specifically dispensed with the need

for personal service, then the courts must insist on such service. We cannot read from section 20(1)(*a*)

that Parliament intended to dispense with personal service. Even under Rule 14(2) of the Rules personal

services was not dispensed with. The other modes of service were only alternative modes of service to

personal service. That is why in the various other cases quoted to us personal service was always

described as the best form of service. Section 20(1)(*a*) of the Act does not prescribed any mode of service

and in those circumstances, the courts must go for the best form of service which is personal service.

Before this Court, the Appellant did not offer any reason why he did not go for personal service though

in the High Court, it had been contended that the First Respondent in his capacity as the president, is

surrounded by a massive ring of security which it is not possible to penetrate. But as the Judges of the

High Court correctly pointed out, no effort to serve First Respondent was made and repelled. In any case

that reason could not be offered in respect of the Second and Third Respondents. The Second and Third

Respondents are themselves not elected persons in terms of Rule 10 of the Rules though they are truly

Respondents within the Rules and the long-standing decision of the court in *Mudavadi v Kibisu and*

*another* [1970] EA 85. But though the Second and Third Respondents are Respondents they cannot take

advantage of Rule 10 of the Rules because that Rule is only available to elected persons, so that the

Second and Third Respondents could not have provided the registrar with their or their advocates’

addresses in Kenya. That being so, the Appellant had to serve them in accordance with section 20(1)(*a*)

of the Act and as we have said, that had to be personal service.

In the event, we are satisfied the three Learned Judges of the High Court were fully justified in

holding that as the law now stands only personal service will suffice in respect of election petitions filed

under section 20(1)(*a*) of the Act. It may be unjust, but so is section 6 of the Land Control Act Cap 302

which once made Apaloo JA (as he then was) lament in the following words:

“ ‘A’ sold agricultural land to ‘B’. The former was unco-operative in getting ‘B’ to obtain the consent of the

land control board. ‘A’ however obtained full payment of he purchase price and duly put ‘B’ into possession.

On the faith of this sale, ‘B’ spent a large sum of money in developing and improving the land. Ten years

afterwards, ‘A’ motivated by the prospect of obtaining higher price for the land sells the self-same land to ‘C’

then with ‘A’ ’s active co-operation, hurriedly obtained consent (this in one day) and thereafter registered his

title. ‘C’ then proceeds to ask ‘B’ ’s eviction from the land. Without the aid of section 6(2) of the Act, ‘C’ will

be held entitled to evict ‘B’. Indeed ‘A’would be entitled to say to ‘B’: ‘Yes I accept that I sold the land to

you, obtained full payment of the consideration money and put you in possession for 10 years and you may

well have developed the land. But I say that an Act of Parliament entitles me to resell to “C” and you must be

content with the return of the purchase price you paid me ten years ago’. To think such a thing could be

possible offends against one’s idea of propriety and fairness”.

See *Wamukota v Donati* [1986] LLR 2306 (CAK) in Court of Appeal judgments civil appeals 1986

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Mr Justice Apaloo was appalled that the kind of thing he set out could happen, but it did happen in the

case in which he spoke and it still continues to

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happen to this day. As Kwach JA says in *Chelaite*, Parliament in its wisdom, and it is forever wise, can

and often does decree certain things which may not seem wise to persons unschooled in its way of doing

things. But the courts must accept the wisdom of Parliament, unless, of course, they are contrary to the

provisions of the Constitution. It has decreed in section 20(1)(*a*) that service of election petitions must be

personal and whatever problems may arise from that, the courts must enforce that law until Parliament

should itself be minded to change it.

We shall conclude this judgment by briefly touching on Mr *Nowrojee’*s complaint that in applying to

the High Court to strike out the Appellant’s petition, the Second and Third Respondents were abusing the

process of the Court. The Second and Third Respondents, it was contended, had, in two previous cases,

one at Nakuru and another one at Mombasa, taken a position diametrically opposed to the position they

took in this petition. The Second and Third Respondents are by law required to be impartial and they

ought not to be perceived as taking a particular position in support of a particular candidate. We agree

with Mr *Nowrojee* that Second and Third Respondents must always remain impartial. We said at the

beginning of this judgment that the Second and Third Respondents are crucial to the democratic process

Kenya is evolving. The High Court did not itself say anything about this aspect of the Second and Third

Respondents abusing the process of the court. For out part, we would say this. The Second and Third

Respondents must remain impartial in matters of elections. The law binds them to be impartial. But when

they are sued and allegations of impropriety or wrong-doing are made against them, then they must

somehow challenge those allegations. If they are sued, then they become parties to the suit in which they

are sued, and as parties surely they must be partisan in the defence of their interest. They are, in the

position of parties, entitled to make whatever submissions to a presiding Judge or Judges. That is how the

adversarial system of justice operates. We would, however, state that once a party has, in a previous case,

taken a particular stand on an issue of law, then good practice would demand that if the position

previously taken is being changed, the party ought to disclose that a contrary view had been previously

taken and argued, but that there had been a change and the reason or reasons for the change stated. Mr

*Kapila*, in the High Court merely termed the submissions of Mr *Nowrojee* as being harsh while not

offering any reason why the change was necessary. However, the High Court did not find it necessary to

decide the issue, and Mr *Kapila* cannot be blamed for that. Had the High Court been unaware of the

previous position taken by the Second and Third Respondents and it was only discovered later, then in

those circumstances the Second and Third Respondents could be legitimately accused of misleading the

court. But as it is, we do not think it would be right to hold that the Second and Third Respondents’

failure to put forward a defence to their conduct during the hearing of the application amounted to an

abuse of the judicial process.

We have said enough, we think, to show that all the grounds listed in the two appeals do not convince

us that we should allow the appeals. Although there were in total in the two appeals, 173 grounds argued

before us in groups, we are satisfied that in our judgment we have dealt with all of them. To have

considered each and every ground separately would have made this judgment much longer than it is. We

think each of the grounds has found its place in the judgment.

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Before we leave the matter, we must commend the advocates for the very able manner in which they

advanced arguments for their respective clients before us. Their learned and very detailed submissions

have made our task in writing the judgment that much easier. We are greatly indebted to them.

In the event, our final order in civil appeal number 172 of 1999 is and shall be that the appeal is

dismissed with costs certified for two counsel.

As regards civil appeal number 173 of 1999, while we dismiss the same, we are not inclined to award

any costs to the Second and Third Respondents. They have taken inconsistent stands on the matters

falling for consideration and neither here nor in the superior court did they offer any valid reason for

changing their position. The order which accordingly commends itself to us is that civil appeal number

173 of 1999 be dismissed but with no order as to the costs thereof. We would further order that the order

for costs awarded to the Second and Third Respondents in the High Court is also set aside and the result

of that is that there will be no costs to the Second and Third Respondents both here and in the High

Court.

Those shall be our orders in the two appeals.

For the Appellant:

*P E Nowrojee* instructed by *P Nowrojee Adv*

*J A B Orengo* instructed by *J Orengo Adv*

For the First Respondent:

*I T Inamdar* instructed b*y Inamdar and Inamdar*

*M Kilonzo* instructed by *Kilonzo and Co*

For the Second Respondent:

*O Kapila* instructed by *D V Kapila and Co*

For the Third Respondent:

*H P Makhecha* insrtucted by *Makhecha and C*