**Mohamed v Bakari and others**

[2005] 2 EA 213 (CAK)

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

**Date of judgment:** 16 September 2005

**Case Number:** 238/03

**Case Number:** 238/03

**Before:** Omolo, Tunoi, O’kubasu, Githinji, Waki, Onyango-Otieno and

Deverell JJA

**Sourced by:** Lawafrica

*[1] Election petition – Service of election petitions – Whether service of elections must be personal –*

*Section 20(1)(a) – National Assembly and Presidential Elections Act – Rule 14(2) – Election Petition*

*Rules.*

Page 214 of [2005] 2 EA 213 (CAK)

*[2] Judicature – Hierarchy of courts – Doctrine of precedent – Whether High Court can hold differently*

*from Court of Appeal.*

**Editor’s Summary**

Following the general elections in Kenya on 27 December 2002, the Electoral Commission of Kenya

declared the appellant as the duly elected member of Parliament for Lamu East Constituency. The date of

the declaration was 3 January 2003. The first respondent filed Election cause number 3 of 2003 at the

Mombasa High Court Registry on 27 January 2003, challenging the election of the appellant as the

member of Parliament for Lamu East Constituency. The appellant, on 18 March 2003 took out a motion

on notice under section 20(1)(*a*) of the National Assembly and Presidential Elections Act seeking,

principally, that the petition be struck out on the ground that the same was not personally served on him

within 28 days after the date of the publication of the result of the Parliamentary elections in the Kenya

Gazette, on 3 January 2003 or at all. The first respondent adduced evidence that his lawyers had made all

efforts conceivable to personally serve the appellant with the election petition but that the appellant went

into hiding in order to evade service. The trial judge dismissed the notice of motion and further

distinguished an earlier ruling by the Court of Appeal in the case of *Mwai Kibaki v Daniel Arap Moi*

[2000] 1 EA 115 on the ground that the decision in this case was reached *per incuriam* the provisions of

rule 14(2) of the National Assembly and Presidential (Election petition) rules when it held that only

personal service was recognised under the National Assembly and Presidential Elections Act on appeal:

**Held** – The decision of the Court of Appeal in *Kibaki v Moi (ibid*) that following the amendments to

section 20 of the National Assembly and Presidential Elections Act the only way of serving an election

petition was by way of personal service, was based on the specific facts of that case.

A High Court judge, under the doctrine of precedent, is bound by the decisions of the Court of Appeal

even if he may not approve of a particular decision.

On the material placed before the trial judge, any reasonable tribunal would be fully justified in

concluding that the appellant had gone underground with the sole purpose of evading personal service.

The decision in *Kibaki v Moi* (*supra*) recognised that if personal service which is the best form of

service in all areas of litigation, is not possible, other forms may be resorted to.

There is nothing unconstitutional in striking out an incompetent election petition.

(*Per Githingi JA*) – The purpose of the Constitution of a statute is to find out the intention of the

Legislature (*sic*). If the words of the statute are clear and unambiguous effect must be given to them. It is

not permissible in the construction of statutes to imply a provision in the statute which is inconsistent

with the words expressly used.

Page 215 of [2005] 2 EA 213 (CAK)

(*Per Githinji JA*) The Court of Appeal is bound by the principle of *stare decisis* to follow its own

decisions except where, *inter alia*, the decision was given *per incurrence* and a decision is given *per*

incuriam if it is given in ignorance or forgetfulness of some inconsistent statutory provision or authority

binding on it.

(*Githinji JA dissenting*) – Section 20(1)(*a*) of the National Assembly and Presidential Elections Act

did not decree, as the court in *Kibaki v Moi* erroneously said that service of election petitions must be

personal.

(*Githinji JA dissenting*) – The Court of Appeal in *Kibaki v Moi* ignored the provisions of rule 14(2) of

the National Assembly and Presidential (election petition) rules which was the only provision prescribing

the mode of service and imported into the Act the requirement of personal service of Election petition is

disregard of the cannons of the construction of statutes. The decision was, therefore, given *per incuriam*.

**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* Civil appeal number 150 of 1998

*Dodhia v Nat and Grindlays Bank Ltd* [1970] EA 195

*Income Tax v T* [1974] EA 546

*Kibaki v Moi* [2000] 1 EA 115

*Kiriri Cotton Company v Devani* [1958] EA 159

*Murathe v Macharia* Civil appeal number 171 of 1998

***United Kingdom***

*Ferrell v Alexander* [1976] 1 All ER 129

*Young v Bristol Aero Plane Company Ltd* [1944] 1 KB 718