



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Election Petition 35 of 2008**

IBRAHIM AHMED.....PETITIONER

AND

SIMON MBUGUA.....1<sup>ST</sup> RESPONDENT

PRISCYLLAR A. WAWIRU

(RETURNING OFFICER KAMUKUNJI CONSTITUENCY).....2<sup>ND</sup> RESPONDENT

THE ELECTORAL COMMISSION OF KENYA..3<sup>RD</sup> RESPONDENT

**RULING**

The Notice of Motion dated 12<sup>th</sup> February, 2010 premised under Sections 20 and 23 (2) of the National Assembly and Presidential Elections Act and Rules 14 and 15 of the National Assembly Elections (Election Petition) Rules, 1993 was filed by the 1<sup>st</sup> Respondent (hereinafter referred to as the 'Election Act' and 'Election Rules' respectively).

This application is filed after the request for particulars filed by the 1<sup>st</sup> Respondent was responded to by the Petitioner.

The application seeks the prayer that the Petitioner (sic) dated and filed on 28<sup>th</sup> August, 2009 (sic) be struck out with costs.

It is supported by following grounds as well as supporting affidavit sworn by the 1<sup>st</sup> Respondent on 12<sup>th</sup> February, 2010.

The grounds upon which the application is filed are:

- (a) ***There is no proper and valid Petition before the Honourable Court.***
- (b) ***The petitioner has not served his Petition on the 1<sup>st</sup> Respondent within twenty eight days after the publication of the result of the election in the Gazette.***
- (c) ***The petition and/or the notice of the presentation of the Petition has not been served in accordance with Sec. 20(1) and the proviso (IV) of Sec. 20 (1) of the National Assembly and Presidential Elections Act and Rule 14 of the National Assembly Elections Petition Rules.***
- (d) ***The 1<sup>st</sup> Respondent/Applicant has not been served with the Petition either personally or at all and no attempts to do so were made at all by the Petitioner.***
- (e) ***The purported service of the Petition herein vide Gazette Notice No. 8413 published in the Kenya Gazette of 5<sup>th</sup> September, 2008 is fundamentally misconceived, flawed and wholly ineffectual.***
- (f) ***In view of the foregoing the Honourable Court lacks jurisdiction to hear and determine the Petition herein.***
- (g) ***Other grounds and reasons to be adduced during the hearing of this application***

In his supporting affidavit, the 1<sup>st</sup> Respondent avers *inter alia* that after the tallying exercise for Kamukunji constituency was undertaken under the court order, he was announced the winner on 11<sup>th</sup> August, 2008 and the same was published in a special issue of Kenya

Gazette of the same date.

He also averred that he was informed around October 2008 by his lawyer Mr. Kibe that Notice of Presentation vide Gazette Notice No. 8413 had been published by M/s S. O. Owino and Associates and that it was only on 6<sup>th</sup> July, 2009, at the first appearance by way of Mention that his lawyer Mr. Kibe was supplied with publication of Kenya Gazette but till the date of filing the present application, none of them has seen the advertisement in Daily News Paper.

In paragraph 8 of his supporting affidavit, he avers:

**8. THAT upon being advised by my advocate, which advice I verily believe is sound, I believe that the Petitioner was enjoined by law to serve the Petition upon me in person. I hereby confirm that whereas I was in Nairobi conducting my normal business and political work between 11<sup>th</sup> August, 2009 (sic) and 8<sup>th</sup> September, 2009 (sic) – when the Petitioner was obliged to serve me with the Petition – he did not do so and I believe no attempts to serve me were made. Accordingly, it is my earnest belief that the Petition herein is incompetent for want of lawful or proper service.**

I have quoted the above paragraph as its averments have been subject of contentions raised before the court. Then in paragraph 9 of the supporting affidavit, he avers *inter alia* that “**he was obliged by law to personally serve me with the Notice of Presentation of Petition dated 28<sup>th</sup> August, 2009 (sic) within seven (7) days of its publication in Kenya Gazette of 5<sup>th</sup> September, 2008. I confirm that between 5<sup>th</sup> and 12<sup>th</sup> September, 2008 the Petitioner did not serve me with the said notice**”.

I may just note that it was not only in the provisions mentioned under which the Notice of Motion is premised, but the 1<sup>st</sup> Respondent also relied on the provisions of Rule 14 of the Election Rules in his affidavit as per the advice of his lawyer.

The 1<sup>st</sup> Respondent also filed a further affidavit sworn on 17<sup>th</sup> February, 2010, in response to the replying affidavit sworn by the Petitioner on 15<sup>th</sup> February 2010 which enclosed the Affidavit of Service of the process server, Willis Aganyi sworn on 10<sup>th</sup> September, 2008 and filed on 15<sup>th</sup> February, 2010. The further affidavit has 36 paragraphs. It mainly criticizes the Affidavit of Service of the aforesaid process server. He avers therein that the attempts made by the process server were all futile and not genuine with an intention to serve him personally and that either the process server did not know the 1<sup>st</sup> Respondent properly or was completely inefficient as a process server. It is alleged that his affidavit is fraught with lies, misrepresentations and contradictions and thus lacks credibility. He however, agreed that his earlier deposition to the effect that he was continuously in Nairobi from 11<sup>th</sup> August, 2008 was not completely true and then narrated full details of his whereabouts at Mombasa and stressed that if the process server knew him, he would have seen him seated amongst front rows at the presidential function.

He also responded in detail to the efforts of service on places which are of no concern to him, to wit, Langata Road Motors, City Hall Shop, Aero Court Apartments Blocks, his mother’s residence being California Block D4 No. 20 and not No. 22.

As regards the efforts of service at Continental House, he stated thus:

**“Furthermore, the alleged orderlies have not been named and explanation given why the deponent assumed that they knew me because by then I had not even been sworn in as an M.P. Noticing Willis does not state that he ever visited my office at Continental House where he could certainly have found me or my staff John Onyango and Billy Okecho Otunga**”. See paragraph 28 of the further affidavit of 1<sup>st</sup> Respondent.

The application is opposed by the Petitioner and he has filed his replying affidavit sworn on 15<sup>th</sup> February, 2010 which has, as earlier stated, annexed the Affidavit of Service by Willis Agoyi who has also sworn and filed a further affidavit on 19<sup>th</sup> February, 2010.

Upon application and as per the ruling delivered on 22<sup>nd</sup> February, 2010, the process server was closely cross-examined by Mr. Kibe.

I may refer to the evidence under oath by the process server in this ruling but it may suffice to state that he was cross examined at length and suggestions were made that he did not know the 1<sup>st</sup> Respondent physically and that he did not diligently carried out his duty to serve the 1<sup>st</sup> Respondent personally at the places where he has averred he went to serve him. The process server denied these suggestions and stated that he followed the information he obtained from the record of criminal case, from the Petitioner and from several persons who were shown to be associated with the 1<sup>st</sup> Respondent.

The petitioner, though given leave to cross-examine the 1<sup>st</sup> Respondent on his two affidavits, chose not to do so.

On conclusion of the evidence under oath, the Petitioner and the 1<sup>st</sup> Respondent filed their skeleton submissions and thereafter highlighted the same by oral submissions.

I shall deal with the issues of publication of Notice of Presentation and diligent efforts for personal services separately.

***Whether the publication of the Notice of Presentation was properly.***

The court granted quite a latitude on the oral submissions even though the points to support the issues had been reiterated severally and points of facts revisited.

Be that as it may, Mr. Kibe, the learned counsel for the 1<sup>st</sup> Respondent, started by submitting that the Court of Appeal in the case of ***Kibaki vs. Moi – Appeal Case No. 172 and 173 of 10000 (2000)*** I E.A, 115 (CAK) found that Rule 14 (1) of the Election Rules is inconsistent with Sec. 20 (1) (a) of the Election Act. I may only point out that it is not in dispute that Kibaki's case as well as the Appeal case of ***Abu Chiaba Mohammed AND Mohammed Bwana Bakari CCA No. 238 of 2003*** (UR) were determined before the amendment to Sec. 20 (1) (a) was enacted by Act No. 7/07 by adding proviso IV to the said section.

With the entry of the proviso IV in Sec. 20 (1) (a) of the Election Act, the aforesaid two decisions are of limited value so far as the interpretation of the said proviso IV is concerned. I observe so, as it can easily be seen that the court in ***Kibaki and Abu Chubai's*** cases (supra) had to undertake painstaking exercise to arrive at the principle of law of service of the Election Petition.

Coming back to the submissions, Mr. Kibe added that Rule 14 of the Election Rules does not apply to this proceedings and no reference shall be made of the said provisions. However, I may state here that the application on hand itself makes mention of that provision as well as ground no. (c) of the application takes support in Rule 14 of the Election Rules by stating that the Notice of Presentation of the petition has not been served as per Sec. 20 (1) proviso IV of the Act and Rule 14 of the Election Rules.

It was further submitted that Rule 14 does not refer to the Advertisement in the newspapers, however, the provision was complied if the Rule applies, by way of publication in Kenya Gazette. Obviously in stating that the reference was made to Rule 14 (2) of the Election Rules.

Mr. Kibe also posed an interesting question as regards the format of publication in the Gazette and in the Newspaper. The publication in the newspaper were made on 5<sup>th</sup> and 6<sup>th</sup> September, 2008 and that of Kenya Gazette was on 5<sup>th</sup> September 2008. But in all these three publications, Notice of Presentation of Petition of 28<sup>th</sup> August, 2008 was published which according to him cannot be envisaged as a good service as per Sec. 20 (1) (a), proviso IV.

Why is it so? Mr. Kibe submitted that the Notice of Presentation of the petition was already filed in the court along with a copy of the petition. According to him, proviso IV is in place of a substituted service which comes into operation when after due diligence the personal service could not be effected. Thus the format of the Notice as per proviso IV should be different and not the publication of the Notice of Presentation. When the court, posed the question, i.e. by which format as per law the same could be published, no sufficient answer

was given apart from the indication of the method of substituted service in civil matters.

Thus the court was urged to hold that the service is not effected as per the Sec. 20 (1) (a) proviso IV of the Election Act as Rule 14 of the Election Rules is inconsistent with the Act and as per Sec. 31 (b) of the Interpretation and General Provisions Act (Cap 2), the provisions of the Act should prevail.

Mr. Owino agreed on the contention that Rule 14 of the Election Rules is inconsistent with Sec. 20 (1) (a) of the Election Act and hence he referred to some passages from *Kibaki and Abu Chiaba's* cases (supra).

On page 128 of *Kibaki's case* – between letters (*f and g*), the Court of Appeal did hold:-

***“We are ourselves satisfied that the issue of whether or not sec. 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”.***

After the court held as aforesaid, some grounds of Appeal were found to have been failed. However, the court agreed that it did not have any reason to differ with the High Court decision that Rule 14 was in conflict with Sec. 20 (1) (a). I may point out that the issue before the court in the said cause was the two different period of service prescribed in two provisions, namely Sec. 20 (1) (a) which provides 28 days and Rule 14 (1) which provides 10 days.

I say so because in *Abu Chiaba's* case (supra) on page 15, Hon. Omolo J.A. (who was a member of Bench in Kibaki's case), has observed namely:-

***“I must confess that I have found it difficult to appreciate from the Judgment the relevance of the issue of conflict of two provisions relating to time of service (as opposed to mode of service) of a petition in Kibaki vs. Moi to the application which was before the court because it was not there contended that service was outside the 10 days after the presentation of the petition”.***

Then the Hon. Judge observed that the effect of the conflict was at least to render rule 14 (1) inoperative and to leave provision dealing with the service of petition.

Thus in my humble view, the court found the reason for inconsistency between sec. 20 (1) (a) and Rule 14 (1) but in effect, the provision of sec. 14 (2) was held to be inoperative, instead of taking the provisions of Rule 14(2) of the Election Rules as a substituted or alternative mode of service despite the reference of provisions of order V of Civil Procedure Rules was made by the Court of Appeal in both the cases

Be that as it may, that is now the water under the bridge by way of enactment of proviso IV to sec. 20 (1) (a), which stipulated:

***“(IV) where after due diligence it is not possible to effect service under paragraphs (a) and (b), the presentation may be effected by its publication in the gazette and in one English and one Kiswahili local daily newspaper with the highest national circulation in each case.” (emphasis mine)***

In the premises, aforesaid, I shall limit my observation on the publication in gazette and two daily local newspapers in terms of the aforesaid provision.

Mr. Owino contended that the petition was filed on 28<sup>th</sup> August, 2008 after the election results of Kamukunji constituency was gazetted on 11<sup>th</sup> August, 2008. The petitioner had more or less 10 days to serve the petition to the Respondents.

As per proviso IV, in failure of personal services on the 1<sup>st</sup> Respondent, the Petitioner was supposed to effect service of the presentation as prescribed. The petitioner published Notice of presentation of the Petition in all the three places as stipulated and that is what

is envisaged in absence of any other format of '**presentation**' prescribed either by the Act or the Rules.

The Petitioner also published in two daily local newspapers although on different dates and he was quick to contend that there is no requirement that both publications must be on the same date and that all the three publications are made before the expiry of 28 days as stipulated in Sec. 20 (1) (a) of the Election Act.

I do tend to agree with the aforesaid submissions that the publications in Kenya Gazette, the Standard and Taifa Leo are as provided in Sec. 20 (1) (a) proviso IV of the Election Act.

The proviso IV simply states that the presentation may be affected by its publication. In ***Kibaki and Abu Chiaba's*** cases (supra), although the Court of Appeal has specifically stated that National Assembly and Presidential Election Act (Chapter 7) and The Rules made thereunder formed a complete regime with regard to election petition and ***no other legislation or rules*** could apply unless made applicable by the Act or the Rules and although it still went ahead to refer to order V of Civil Procedure Rules to look into how the service by the process server was made, but categorically once again refused to accept any other mode of service as stipulated in Order V of Civil Procedure Rules.

I can only mention Rule 18 (7) of the Election Rules wherein provision of Order XVIII of Civil Procedure Rules and the Oaths and Statutory Declaration Act are explicitly made applicable to the election proceedings, no other law or rules are made applicable as such.

If I just compare proviso IV and Form 23 of Appendix A of the Civil Procedure Rules (under Order V, Rules 17 and 26), the similarity between the said Form and the Notice of presentation is stark.

With the above observation, I do find that the publication of Notice of Presentation of Election Petition in Kenya Gazette and two daily local newspapers are in conformity with the proviso IV of Sec. 20 (1) (a) of the Act. In the circumstances, I also ignore the contradictions in the pleadings and submissions made on behalf of the 1<sup>st</sup> Respondent.

That brings me to the second issue, namely, ***whether the said publications were made after exercise of due diligence to serve the Respondent as per Sec. 20 (1) (a) of the Act and consequently whether the petition was properly served upon the 1<sup>st</sup> Respondent.***

The court allowed Mr. Adere to submit only on the issue of law after hearing objections from Mr. Kibe.

Mr. Adere reiterated that the Highest Court of the land has found that the electoral laws are the complete code and thus introduction of other laws or rules while deciding matter under the Act and Rules cannot be allowed. He emphasized that the Court of Appeal in ***Kibaki's case*** did not apply the law of service as per the Civil Procedure Rules (as I have found herein before) and also did not make finding that Rule 14 was overruled. He compared the wordings of Sec. 3 of the constitution and those of Sec. 31 of the Interpretation and General provisions Act (Cap 2) and reiterated that Rule 14 is still in operation when applicable.

I do appreciate Mr. Adere's contributions and do hope that in my observations in this ruling, I would have covered those points.

Mr. Kibe took a strong view on the averments made by the Petitioner that the 1<sup>st</sup> Respondent had gone into hiding to avoid service and that the contention is contradicted by affidavit of service by the process server depicting his efforts to serve the 1<sup>st</sup> Respondent at Mombasa, at the presidential function and several places at Nairobi.

As regards the averments of effort to serve the 1<sup>st</sup> Respondent at the Continental House, he stressed that there was no diligent effort to serve as he never went through the gate of Continental House building and knocked on the door and if he had done so ***“he could certainly have found me or my staff John Barasa Ongong and Billy Arocho Otunga”***. (Paragraph 28 of the further affidavit).

The above contention is made after paragraph 18 of his further affidavit wherein a letter dated 27<sup>th</sup> August, 2008 addressed to the Sergeant at Arms, Continental House has been annexed to show that the above referred two persons were introduced as working with him at his constituency office. The above contentions contradict his averment that the parliament was in recess and that he was not sworn in as an

M.P. In my opinion, one thing clearly emerges from the aforesaid letter that the Sergeant at Arms at the Continental House was a person in charge thereof and no one can enter the same without authority.

It was also contended, relying on the detailed grounds of non-diligence in the skeleton submissions, that the home of the 1<sup>st</sup> Respondent has been allegedly found only on 4<sup>th</sup> September, 2008 after payment of publication as well as the Notices in daily newspapers, that there was no reasonable belief that 1<sup>st</sup> Respondent lived at Aero Court Apartments when the 1<sup>st</sup> Respondent was living with his wife and family at plot L.R.209/3213 House C2-Kileleshwa, and that he could not have believed statement by one Mr. Bernard Maina that the petitioner and his wife had not been at home for last one month.

He relied on the provisions of Order V Rule 17 of Civil Procedure Rules to substantiate his submissions that before the option of the substituted service can be taken one needs to establish the threshold of reasonable and diligent efforts.

The stress was placed on the page 47 of the Standard where the notice was published which is a place for "classifieds for sale: private" and it was submitted that no reasonable person would look for service in such pages and moreover The Standard is not the paper with highest national circulation. I would frankly hesitate to take this later submissions on board without further substantiation and find the same as mischievous. He further contended that the notice on Taifa Leo is on Saturday which is prohibited under the provisions of Order XLIX Rule 8 of Civil Procedure Rules. I do note however, that Rule 8 (2) thereof states that the service shall **normally** be effected on weekdays other than Saturday. I also note in the same page, there are other legal process advertised.

Mr. Kibe made reference to Order V Rule 12 and 13 of Civil Procedure Rules to contend that all the efforts to serve the 1<sup>st</sup> Respondent was made in contravention of the process of service and specifically when the Petition was left with the caretaker/guard at Aero Court Apartments where his brother lived. It was suggested that he could have affixed the copies on his mother's house or at Continental House.

In further submissions, it was stated that no further investigation was made to establish the residence or business places of the 1<sup>st</sup> Respondent like Nairobi Stalls and no connection to Idow Trading is established with the 1<sup>st</sup> Respondent.

It was pointed out further that the petition was filed after 17 days of the gazettelement of results of election and that half-hearted and haphazard attempts to serve personally the 1<sup>st</sup> Respondent establish the fact that the Petitioner never had an intention to serve the 1<sup>st</sup> Respondent personally. All the efforts were simply token efforts.

The following cases were relied to show that the efforts to serve were not diligent and thus it was urged that the Petition be struck out:-

- (1) ***Francis Mwanzia Nyenze vs. Charles Mutisya Nyami & 2 Others (2008) e KLR***
- (2) ***Titus Kiondo Muya vs. Peter Njoroge Baiya & Others (2008) e KLR***
- (3) ***Nasin Mohammed Dolal vs. Duale Aden Bace (2008) e. (2008) e KLR***
- (4) ***Stanley Livingo Livondo vs. Raila Amolo Odinga & 2 Others (Election Petition No. 27 of 2008) unreported.***

In the first case, after making observations on the feeble attempts to serve on the eleventh hour, the court found that the Notice in the Kenya Gazette was not within the time prescribed by Sec. 20(1) (a). I also note that the petition was filed a day prior to the expiry of 28 days.

In the second case also the petition having been filed on the last moment the process of service was left in the office and thus the court did find that the service was not proper.

In the third case, the service was made by dropping off court process at the gate of the 1<sup>st</sup> Respondent's brother's home.

Similar are the facts of the fourth case.

Mr. Kibe summed up his case by submitting that no consistent and diligent effort is made to serve the 1<sup>st</sup> Respondent personally and in view of the submissions made on the validity of publications, the court should allow the application by striking out the petition.

Mr. Owino submitted as under on the issues of facts by emphasizing that the averments made by the 1<sup>st</sup> Respondent are full of lies which tantamount to perjury.

Firstly Mr. Owino attacked the veracity of the 1<sup>st</sup> Respondent's supporting affidavit wherein he has averred that he was in Nairobi between 11<sup>th</sup> August, 2008 and 8<sup>th</sup> September, 2008, conceding that the mention therein of the year as 2009 was typographical error. Because of that concession, I may not say anything further on the propriety of any amendment to the affidavit other than by way of a further affidavit.

He then took the court through the replying affidavit of the Petitioner (paragraph 9 thereof). It is stated that as per the court record of the Criminal Cause No. 1195/08, the 1<sup>st</sup> Respondent was supposed to be in Mombasa to attend a seminar on 29<sup>th</sup> August, 2008 and thus the mention of the case was brought back to 28<sup>th</sup> August, 2008. It was only after this fact was disclosed, in the replying affidavit the 1<sup>st</sup> Respondent gave fullest possible details of his stay at Mombasa. Mr. Owino mused whether it was a memory lapse or a deliberate lie at first instance and then at the second instance giving elaborate details? Mr. Kibe responded that the incident occurred in 2008 and that was the reason of the oversight.

2<sup>nd</sup> instant of the untrue averments was as regards the 1<sup>st</sup> Respondent's averred connection with Mandhari Communication Ltd. The 1<sup>st</sup> Respondent has produced documents of incorporation of the said company to show that he or his wife is neither a shareholder nor a director thereof. But it was stressed by the Petitioner that the 1<sup>st</sup> Respondent always carried on business behind a façade of another person and to support the same, in the further affidavit of the process server it was shown that one Hashim Kamau who is appointed by the 1<sup>st</sup> Respondent as the Chairman of his Constituency Development Fund is a shareholder of Mandhari Communication Ltd.

I was also asked to compare the signature of the 1<sup>st</sup> Respondent in his affidavit to that of signature purportedly made by one Peter Waihenya for a shop at the City Hall Building basement. The letter is from Idow Trading Co. Ltd. This I am asked to do as per Sec. 76 of the Evidence Act (Cap 80).

Sec. 76 (1) of the said Act stipulates:

***“76. (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the court to have been written or made by the person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.”***

Mr. Kibe, in opposition to these two averments of facts, submitted that no connection with Idow Trading is produced and that the 1<sup>st</sup> Respondent has accepted his connection with City Hall Shop and stressed that the document now sought to be looked at by the court is not produced by the 1<sup>st</sup> Respondent.

As regards Mr. Hashim and 1<sup>st</sup> Respondent's connection with Mandhari, he suggested that the connection is not properly proved and that the 1<sup>st</sup> Respondent was not allowed to give any response to those averments of facts.

I pause here and observe that the above fact connecting the 1<sup>st</sup> Respondent with Mr. Hashim vis a vis Mandhari was produced in response to his own denial of any connection with Mandhari Communication in any way. This court cannot endlessly go on allowing jumble up of several affidavits as and when chosen by a litigant.

I had compared the purported signature of Peter Waihenya and those of the 1<sup>st</sup> Respondent on the record and cannot but see very striking similarity. I also see several remarks on the said letter of Idow Trading Ltd from the officers of the City Council. Thus the letter cannot be held as a figment of imagination or manipulation of the Petitioner as has been suggested by Mr. Kibe.

The third fact which has been averred by the 1<sup>st</sup> Respondent and questioned by Mr. Owino is paragraph 21 of his further affidavit, wherein he denied that he had anything to do with the business known as Muranga Road Motors after December, 2003 and that one Evanson Ndungu was the person in charge of the said business in August – September, 2008. 1<sup>st</sup> Respondent has annexed a tenancy agreement in respect of the said business dated 29<sup>th</sup> September, 2006. (Annexure No. 6 (pages 37 to 41 of the further affidavit). On page 41 thereof it is shown to have been signed by one Stephen Kamau who is his brother. In the column of contact person, the name of the 1<sup>st</sup> Respondent is given and it has been stated that his place of work was Langata Road Motors and his relation is shown as brother of the lessee/tenant.

In the said tenancy agreement the column of signature for the lessor/landlord is not properly filled in and has some scribbling only. This fact is noted by the Court and I must place the same on record. I may further add that any person who peruses the said document shall believe the facts given thereon.

Lastly, it was submitted that the 1<sup>st</sup> Respondent lied when he averred that two mobile nos. given by the process server are not his. In support of his contention, he only gave one number which according to him was his. However, the second number namely 0721 336 656 is shown on his own letterhead. (Annexure SNM 3, letter dated 27<sup>th</sup> August, 2008 addressed to the Sergeant at Arms). He pointed out that the said denial is half true and half lie.

It is also pointed out that no proper evidence is before the court to prove the residence of the 1<sup>st</sup> Defendant as only sale agreement is produced whereas the best proof of ownership is a title deed which is not produced.

It was urged thus that considering the above glaring untrue averments, the two affidavits sworn by the 1<sup>st</sup> Respondent should not be relied upon and be struck out as being scandalous under Order XVIII Rule 6 of Civil Procedure Rules.

On the issue of diligence, Mr. Owino submitted that after the petition was filed, the Petitioner and the process server have made several attempts to serve the 1<sup>st</sup> Respondent personally and there has been consistent and reasonable attempts to do so as outlined in the affidavits of the process server as could be undertaken within the practical time available to the petitioner as per law.

The 1<sup>st</sup> Respondent, despite the fact that his results were challenged by the way of a Judicial Review application and were ordered to be retailed; did not leave his address in the court for the purposes of Rule 10 of the Election Rules. The sincerity of the Petitioner to serve the 1<sup>st</sup> Respondent personally can be gathered also from his attempts even after the Notice in Gazette was paid for on 3<sup>rd</sup> September, 2008.

Moreover, he contended that each case has to be considered on its peculiar circumstances and cited a case of Election Petition No. 3 of 2008; *Manson Onyango Nyamweya vs. James Omingo Magara & 3 Others* (UR) wherein simple averments of the process server of futile attempts to serve the Respondents were held to be adequate.

Mr. Kibe reiterated that due diligence is totally lacking and the court-process server should have gone to House No. 20 and should have not attempted at No. 22 and lastly he reiterated that he could have pasted the process on the door of the said house which belongs to his mother..

I may pause here and observe that in view of clear provision of Sec. 20 (1) (a) as well as proviso IV of the Act, from where Mr.

Kibe could import the notice of affixing the process by way of substituted service?

It may be opportune now to clearly state the law as to the process of service in Election Petition as it is in existence presently.

Under Sec. 20 (1) (a) of the Act, the service of the Petition is through personal service, as has been held in **Kibaki and Abu Chubia's** cases (supra).

In **Abu Chubia's** case the Court of Appeal painfully struggled with the obvious injustice to the Petitioner when the Respondent avoided the personal service and tried to see the light at the end of the tunnel with the proposed amendment of Sec. 20 (1) of the Act. This light came in the garb of proviso (IV) of Sec. 20 (1) of the Election Act.

The Court of Appeal in several Election Petitions' cases have consistently pronounced that the Election laws are the complete regime and thus any attempts to introduce any other process in disguise of any process of law or rules should be discouraged at the threshold and I do hereby find so.

In view of the observations made hereinbefore, the only issue now remains to be determined is whether the attempts by the Petitioner through the process server were diligent. It will be unnecessary to recap the facts and the submissions against and in favour of this issue. I do like to believe that I have captured the same adequately hereinwithbefore.

It is also trite law that all cases should be determined as per the applicable laws under the circumstances of each case and I do not intend to differ from the said proposition of law.

This petition has the past which is an application of judicial review. The results were tallied and the same was announced on 11<sup>th</sup> August, 2008. Yes, the Petitioner took some time to file this Petition on 28<sup>th</sup> August, 2008. But this cannot be said as last minute efforts. Not a single day is wasted after the presentation of the Petition. From the affidavits filed and oral evidence of the process-server, I cannot say that he was embarking on a futile and heartless efforts to serve the 1<sup>st</sup> Respondent. The documents of the 1<sup>st</sup> Respondent have been confronted against his averments of facts. I have sufficiently noted those submissions.

With the introduction of proviso IV of Sec. 20 (1), the court has to satisfy itself whether due diligence is exercised to serve the Respondent personally. That does not tantamount to successful attempt, otherwise, it shall defeat the mischief intended to be addressed. It just includes the efforts which genuinely were believed to result in personal service.

I shall quote the observation made by the court in ruling of **Manson Omingo's** case (supra) namely:-

***“What amounts to due diligence in a matter of this nature is dependent upon the efforts that are evidently shown to have been made by the Petitioner or through a process server to effect personal service”***

In my considered view, the process-server made diligent and consistent efforts to serve the 1<sup>st</sup> Respondent personally but failed to do so and hence the publication in Kenya Gazette and Newspapers.

The upshot of all the above is that I dismiss the application dated 12<sup>th</sup> February, 2010 with costs to the Petitioner as well as 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

Dated, Signed and Delivered at Nairobi this 5<sup>th</sup> day of March 2010.

**K.H. RAWAL**

**JUDGE**

**5.03.2010**