REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

ELECTION PETITION NO 3 OF 2003

BAKARI …….....……. PETITIONER

VERSUS

ABU CHIABA MOHAMED & 2 OTHERS…….. RESPONDENTS

RULING

There is before the Court an interlocutory application in this petition. The application by Notice of Motion is brought under section 20 (1) (a) of National Assembly and Presidential Elections Act chapter 7 Laws of Kenya.

The orders sought by the first respondent, Abu Chiaba Mohamed , the successful candidate in the General Elections held on 27/12/2002 in the Lamu East Constituency, are follows;

1. That the petition herein be struck out on the ground that the same was not personally served on the first respondent within 28 days after the date of publication of the result of Parliamentary Election in the Gazette on 3/ 1/2003 or at all and

2. That pending the hearing of this application all proceedings be stayed.

And

3. That the petitioner do pay the costs of the first respondent in Respect of the Petition as well as of this application.

The motion is supported by the affidavit of the first respondent (hereinafter referred to as "Chiaba") in which he swears to the fact that he was not served personally or at all. However he states that on 5/3/2003 he instructed his present lawyers to act for him and to obtain a copy of the Petition at the High Court Registry. He does not disclose when he learnt of the existence of the petition or how he became aware that there was a petition concerning him at the High Court Registry. However it is sworn by the petitioner / respondent's process server that a copy petition, copies of the relevant documents was on 30/1/2003 pasted upon the gate to Chiaba's residence at Mombasa where Chiaba was said to be in residence. It is also sworn by the respondent that a copy of Notice of presentation of Election Petition was published in the Kenya Gazette Volume CV – No 10 dated 31/1/2003 being Notice Number 687 which is exhibited in an affidavit of Moses Gitau filed in this matter. It is suprising therefore that the supporting affidavit says nothing of having seen these documents. It is absolutely silent. It is also silent as to whether the gate upon which the documents were pasted were to his residence or not. Nevertheless his contention is that he was not served personally as he says. The law invoked section 20 (1) (a) of the National Assembly and

Presidential Elections Act cap 7 (hereafter called the Act) states and I quote:

“20 (1) petition

(a) to question the validity of an election shall be presented and served within twenty eight days after the date of publication of the result of the election in the Gazette”.

It is not disputed that the petition herein was presented within 28 days after publication of the election result. It is not disputed that it was served within the time limited. The dispute is that the service was not personal service upon the respondent. Now the issue is, does the law regarding election petition requires personal service? This issue has occupied our election courts on several occasions. The applicant, in support of his motion has listed several election petitions already decided both in the High

Court and the Court of Appeal such as *Mwai Kibaki vs Arap Moi* Civil Appeal No 172 of 1999 in Court of Appeal (hereafter referred to as *Kibaki – Moi* Case), David W Murathe vs Samuel Macharia Court of Appeal decision in Civil Appeal No 171 of 1998. *Emmanuel Karisa Maitha vs Said Hemed Said* Court of Appeal decision and Appeal 292/98 *Mark Omolo Ageng and Isaac Okomba vs Mbuo Waganagwa* HCC No 20/1988. *James Nyamweye vs Cosmos Dluoch & Others* HCC NO Election Petition 74/93. Benjamin K Bett v Electoral Commission of Kenya & Others HCC EP No 1 of 2003. *Andrew Mbithi Muywawa Joseph Nyaga & Others* HCC EP NO 7 of 2003.

However in his submissions counsel for the applicant relied heavily on the Kibaki – Moi decision of the Court of Appeal delivered on 10/12/ 1999 where the question of service under section 20(1) (a) was directly put in issue.

As it will be seen the provisions of section 20(1) (a) does not specify the manner in which the service of the petition will be effected. It provides simply that the petition will be presented and served within 28 days. However the Act provides for the making of the rules of court by Rules Committee regulating the practice and procedure concerning petitions. section 23 thereof has the marginal note reading thus:

“Procedure of election court” and subsection (3) thereof states:

“Rules Committee may make rules of court regulating the practice and procedure concerning petitions”.

This is in accordance with the provisions of the Constitution section 44 (4) which provides:

“The Parliament may make provision with respect to-

(a) The circumstances and manner in which the time within which and the condition upon which an application may be made to the High Court for the determination of a question under this section and

(b) The powers, practice and procedure of High Court in relation to the application .

It is in pursuance to these provisions that the Act under section 23 delegated its powers to make rules of court as aforesaid. The rules of court existing under the Act were made under section 27 of the Act. This section was repealed under section 10 of Act No 8 of 1974 but the rules made there under were not repealed. These rules are the ones followed by courts as election petition rules to date.

By virtue of the provisions of section 24 of the Interpretation and General

Provisions Act cap 2, the rules were saved. The section provides:

“24 where an Act or part of an Act is repealed,

legistlation under subsidiary legislation under or made by virtue thereof shall unless contrary intention appears remain in force, so far as it is not inconsistent with the repealed Act, until it has been revoked or

repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made there under."

Therefore the rules made under the Act are authorised by the Constitution Seciton 44 (4) and published under the Act and contain provisions titled as the National Assembly Elections (Election Petition) Rules 1993). Such provisions as to contents and form of election petition, appointment of advocate by petitioner and respondent, service on the respondent, time and place of trial, postponment of trial, adjournment and continuation of the trial, withdrawal of petition and such other matters as are stated under the rules.

A relevant rule for the purpose of this Motion is rule 10 which states as follows:

"10. 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 the 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 no such writing is left all notices and proceedings may be given or served by leaving them at the office of the Registrar."

There is no dispute here that the said Chiaba never complied with the above provisions. He had not left any notice as contemplated under rule 10 above.

The other rule which is of great importance in this Motion is rule 14. This rule has two limbs: 14 (1) provides for the time within which the petition will be served upon the respondent after the same has been presented. It reads thus:

"14 (1) – Notice of the presentation of a petition, accompanied by a copy of the petition shall within 10 days of presentation of the petition, be served by the petitioner on the respondent".

The other limb 14 (2) provides the manner in which service is to be effected. It is provided as follows:

"14 (2) service may be effected either by delivering the notice and a copy to the advocate appointed by the respondent under rule 10 or by posting them by 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. In the present case the petitioner through his own affidavit and that of this advocate Moses Gitau it is shown that such a notice appeared in the Gazette No 687 V C10 of 31/1/2003.

This was within the time expressly prescribed under section 20 1(a) of the Act. As if to make double sure that Chiaba saw the notice the petitioner caused the notice and copy of petition to be pasted on his gate of his residence and in addition caused it to be posted to his known postal address in Nairobi and in Mombasa.

There is no denial that these documents did come to the knowledge of Chiaba within the prescribed time. It can now be said there is reason to believe that the service was effected as prescribed by law. However it still remains to investigate whether the provisions of law required personal service.

On a reading of section 20 (1) a and rule 14 (2) as quoted above it is clear no-where has these provisions required personal service. Indeed by rule 10 above it is clear personal service was and is not required. The rules (rule 10) must have been designed to remove the stress, so to speak, that may be occasioned to the successful respondent by avoiding direct confrontation that would be occasioned by personal service such as must have been occasioned by the scene at the lobby of International House when the process server attempted to serve those documents to the respondent as he entered the lift. This was in the EP HCC NO 1 of 2003 which involved the Hon Kosgey. The Court had this to say "throwing a bundle of court documents to a party to be served with them does not constitute proper service of court process. It would be ridiculous to extend the rule to that limit".

Rule 10 aforesaid stipulated that an elected member of parliament should find it convenient to receive the petition from his own advocate or through some designated address for the purpose. However it has to be pointed out that the rule is not mandatory. Furthermore the rule (14)2 provides that where rule 10 is not complied with service may be effected by publication of the Notice in the Gazette. The rule 14 (2) does not require personal service, for comparison only as to where the law requires personal service, it is to be seen that the provisions of Civil Procedure Rule order V rule 9 provides

"Wherever it is practicable, service shall be made onthe defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient". The mandatory provision as to requirement of personal service is clearly indicated.

This cannot be said to be so under rule 14 (2) of the Act. As I have said above this rule goes a long way to avoid personal service. It contemplates that personal service may not be practicable. In spite of what is stated above nevertheless there is a dispute as to whether the mode of service specified under section 14 (2) is valid.

In the case of *Kibaki vs Moi* – above mentioned the Court of Appeal discussed the issue of the validity of rule 14 in view of the amended section 20 (1) (a) of the Act under which this application is brought.

After a full and comprehensive review and consideration a bench of 5 (five) Judges of the Court of Appeal ruled that rule 14 is inconsistent with section 20(1)(a) of the Act and therefore the rule has to give way to the provisions of the Act. The Court proceeded to find that because of that inconsistency there is no provision under the Act as to the method of service of the petition upon the respondent and that therefore the best service is personal service.

This court should find itself bound by this decision of the Court of Appeal.

However counsel for the petitioner senior counsel Lee Muthoga who argued the petitioner's objection to this motion urged this court very strongly not to feel bound by the judgment of the Judges of Appeal on the *Kibaki Moi case* on the issue of personal service of an election petition or that the provisions as to service set out under rule 14 (2) are invalid. The grounds he has put forward for that proposition were that the Court was not a constitutional court to decide on the validity of statute and subsidiary legislation and that the decision of the Court in this matter was per incuriam and therefore it is not binding on this court and thirdly that rule 14 (2) is not inconsistent with section 20(1) (a) of the Act and therefore not invalid.

An examination of the decisions of the Court reviewed in the cases relevant to this issue it will be observed the following points. The case of *Emmanuel Maitha Karisa vs Said Hemed* was concerned with the provision of the Act section 23 (4) where Notice of appeal was filed within 14 days under Court of Appeal rules and the appeal lodged with 60 days prescribed in the Court of Appeal rules but outside 30 days prescribed under the Act.

The court said that:

"the provision of the rules of the Court of Appeal must give way to the provisions of statute (cap 7)". The judges also reviewed the case of election petition of *Alice JR Chelaite vs David Manyara Njuki and 2 others* Appeal No 150 of 1998 and the case of *David Kiru Murathe vs Samuel Kamau Macharia* Civil Appeal No 171 of 1998.

In the *Chelaite* case Kwach JA is recorded as saying

"as a matter of construction rule 14(1) can still be reconciled with section 20(1) (a) of the Act and there is no conflict between the two provisions".

In the case of *Chelaite and Murathe* it appears that service of the relevant documents was effected outside the 28 days period prescribed under section 20(1) (a). In these two cases there was no reason for the High

Court to consider whether there was any conflict between the Act and rule 14 (1). The High Court did not consider the question. The opinions therefore expressed in the appeals in these two cases were *obiter*.

In the *Kibaki – Moi case* the appeal Judges stated:

"We agree that the pronouncements made in the two cases by the Court of Appeal judges 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 Judges".

It must be remembered here that the rule 14 mentioned above is rule 14(1) limiting the time the petition must be served. The Honourable Judges proceeded to say:

"We ourselves are satisfied that the issue of whether or not section 20 (1) (a) was in conflict with rule 14 (1) was, as it were, still *terrarosa* and therefore still open to the High Court to discuss".

In considering the operations of section 20(1) (a) and rule 14 (1) the Court was of the view that to reconcile the two one has to modify the application of rule 14 (1) (so as to bring the total time of presentation and service within the 28 day statute limitation) and they said:

"We do not know that a court is entitled to modify the provisions of a written enactment, whether it be a statute or subsidiary regulation".

This is the true position in law.

However notwithstanding that the Court was dealing with the period within which the petition must be served the Court proceeded to declare 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 claim 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)".

With greatest respect the Court failed to comment on the second limb of the rule that is rule 14 (2) which deals with the mode of service. This rule simply provides the manner of service and is not in conflict with section 20(1) (a) of the Act. Its provisions are to be read together with rule 10 referred to therein which rule provides for address for service in case there should be a petition against the respondent, granted the rule is not mandatory. However rule 14 (2) indicates that where a party has failed to comply with rule 10 service may be effected by advertisement in the Gazette.

On the issue of the interpretation of the effect of the rules a court is bound to consider the provisions of section 33 of cap 2 – Interpretation and

General Provisions Act which provides:

"33 An act shall be deemed to be done under an Act or by virtue of the powers conferred by an Act or in pursuance or execution of the powers of or under the authority of an act, if it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act".

This provision clearly shows that the rules here have the sanctity of the law.

The Court of Appeal did not consider this provision. The rules are made by Parliament in pursuance of section 44 of the Constitution. Although the rules existing were made under a section now repealed rule 14 (2) is not inconsistent with any part of the provisions of the Act as shown above.

The rule has force of law under section 33 of cap 2 above stated. In *Halsbury Laws of England* 4th Edition Volume 1 Paragraph 26 is stated the general rule to be applied when considering the invalidity of rules thus:

"Unless the invalid part is inextricably interconnected with the valid a court is entitled to set aside or disregard the invalid part leaving the rest intact". It was therefore possible to make declaration on the inconsistent rule (14) (1) and retain rule 14(2) as applicable.

In my view the issue of the manner of service in the authorities of *Chelaite* and *Murathe* were not in issue. The issue was whether the service was within the time limited by Act (20) (1) (a). And it was not.

In the *Kibaki – Moi* case the respondent stated on oath that he was not personally served with the Notice of Petition either within 28 days after the date of publication of the result of Petitions as required by section 20(1)(a) of the Act or at all. However it was shown that the petition was served through the Gazette Notice as provided under rule 14(2). The facts are different in that case made no effort to personally serve the respondent.

In this case alternative methods were made to bring the notice to of the petition of the respondent knowledge but personally service proved impossible.

That may be why the Court gave so much consideration to the situation under the provisions of rule 14 (1) which limits the time for service. It is not the time limited that is in issue here. It is the manner of service which is disputed. The Court had no grounds to find that rule14(2) was inconsistent with the provisions of the Act. As the Court found the section 20(1) (a) did not provide the method of service and the validity of rules made under repealed section (27) not being disputed the only manner of service provided by the rules (14)(2) is that set out under rule 14(2). It is clear that the Act did not rule out personal service. But then the statute left the matter of practice and procedure to be formulated by the Rules Committee. The rules formulated under the National Assembly Eletions (Election Petition) Rules 1993 are the only rules existing in force to date. It is for the Court therefore to examine these rules for the manner the petition may be served upon respondent. The Honourable Judges of Appeal did discuss the manner service should be effected. This was after they declared rule 14 (both sub Rule 1 and 2) invalid for being inconsistent with section 20 (1) (a). They came to the conclusion that that section did not provide for the manner of service and therefore declared that the best manner of service is personal service. They observed that the Act did not expressly dispense with personal service, saying:

"What we are saying, however is that election petitions are of such importance to the parties 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 service was not dispensed with.

The other modes of service (provided) therein were only alternative modes of service to personal service".

The Honourable Judges of Appeal also discussed the result arising by failure of section 20(1) (a) of the Act to provide a manner of service and said:

"Where Parliament simply says that a party is to be served, without specifying how the service is to be effected what does 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 Civil Procedure Rules dealing with service of summons in ordinary cases dealing with mode of service directs rule 7. Service shall be made by delivery or tendering a duplicate"

I have already remarked on the mandatory requirement under this order, Civil Procedure rule 9 of personal service elsewhere above. "Wherever it is practicable service shall be made upon the defendant in person".

In case of Election Petitions Parliament has not expressly required only personal service. If it intended to do so Parliament should have easily provided so. Instead provisions were made for alternative methods avoiding personal service. It is clear therefore that although the Court of

Appeal found that the best method of service is the personal service this is not what Parliament said or intended. The Parliament had provided other methods of service and all these methods including advertising in the Gazette were authorized by law.

Counsel for the applicant had also made reference to a *Concise Law Dictionary* .. 5th Edition where service of process is explained in relation to order 10 rule 1 (of England) where the order requires personal service.

It states personal service means serving the defendant with a copy of the writ showing him the original if he demands.

In the notice advertised the respondent could have collected a copy from Registrar of Court and could have been shown the original which was already therein deposited in court if he so wished.

Therefore there is nothing inconsistent with the service by advertisement. Counsel also referred to *English Law Dictionary* by DH Collin where personal service is described as delivery of a document to someone in person or to his solicitor. It has to be pointed out that there is no dispute as to the way personal service is to be effected. We are concerned as to whether personal service as described above is the only method that is permitted in the manner of serving election petition upon a respondent.

The purpose of service of process is to let the other party involved in the litigation upon whom orders are sought to know that the dispute is before the Court and that way he has a right to take action he may deem right to defend his rights or take any position he deems necessary. This is a fundamental requirement in keeping with the principles of rules of natural justice and the practice of rule of law. The maxim "*Audi Alteram Partem* – No man shall be condemned unheard" is the basis of administration of justice. It is therefore the reason that any decisions made against a party in circumstances which advocates call *ex parte* are liable to be set aside and in such cases the matter is heard again correctly. So the rule is concerned with decisions that effect the rights of a party without the party having been heard.

In this motion the court is asked to strike off the petition for alleged failure of personal service. There is evidence that before the petition is set down for hearing the respondent is asking for the petition to be struck off. At this stage no decision has been made by election court, on this petition that is binding against the respondent. It is therefore not open to seek such an order to strike out the petition before it is heard and determined and is contrary to the provisions of the Kenya Constitution which has set down the manner in which questions as to membership of National Assembly shall be determined. section 44 grant to the High Court jurisdiction to hear and determine any question raised as to whether a person has been validly elected as a member of the National Assembly.

The Constitution has authorized the Parliament to make provision with respect to

"(a) the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of the question under this section, and

(b) the powers, practice and procedure of the High Court in relation to the application."

The Constitution has given the right to question and challenge any election result declared in respect of a general election in any constituency Parliament cannot make any law that would take away that right as will be seen in section 3 of the Constitution which provides that the provisions of the Constitution shall prevail over any other law. A reading of National Assembly and Presidential Elections Act, chapter 7 Laws of Kenya will not show any provisions that purports to deny the right to question the election neither has section 20(1) (a) rule 14 (2) given the court power to strike out a petition. Such provision would be void and contrary to the provisions of the Constitution. Therefore to make a finding that the election should be struck off and terminated because it has not been served within time is to misinterpret the law. The Constitution requires that the question be determined by judicial systems. The merits of the petition are not challenged at this stage. The purpose of service as said above is only to allow the respondent to know what is said against him so that he can arrange for his defence. To strike out a petition

for non service would be a drastic penalty to be paid by a petitioner who has failed to fulfil a matter that can easily be rectified. It is to be pointed out that it is not only the petitioner who has an interest in the outcome of the petition but also members of the constituency concerned.

As of this moment before the trial date is fixed the respondent is well aware of the petition and the allegations made against him. He is not restrained in any manner from participating in the hearing and giving his views of the matter before determination by election court. No steps have been taken against him. I find no prejudice is suffered by him to enable the Court to strike off the petition.

I now consider the submission made that this court should not feel bound by the decision of the Court of Appeal on the grounds that it was per incuriam.

The submissions by counsel for the petitioner are that the service upon the respondent, Chiaba was effected in accordance with the law contrary to the service in *Kibaki – Moi case*. The provisions rule 14 (2) has force of law by virtue of section 24 of Interpretation and General Provisions Act. He submitted that the Court acted in ignorance or forgetfulness of statutory provision namely section 33 of the aforesaid Act (Cap 2) which has been quoted elsewhere above. Section 33 shows that rules 14 (2) and all other rules of National Assembly Elections (Election Petition) Rules have the sanctity of law. The court could not therefore change and rewrite the law to prescribe that personal service is the only mode of effecting service in an election petition. He submitted further that decision displays an error on the face of the record. In support of his submissions he cited the authority of the author FAR Benson – *A Code of Statutory Interpretation* 2nd Edition in which overruling decisions arrived at *per incuriam* is discussed at page 97 and 98 thus:

"a court decision as to the legal meaning of an enactment which is arrived at *per incuriam* is not a binding precedent". An example is given in the case of *Rakhit v Carty* [1990[2 All ER 202 in which case is shown that although the court appreciated and emphasized the importance of the doctrine of stare decisis (precedent) the Court declined to follow a decision reached *per incuriam*, saying that it was an exception to the doctrine of *stare decisis*. Another authority is the case of *Henry J Garnet & Co v Ewing* [1991] 4 All ER 891. In that case the Court of Appeal was urged to find that a previous decision of a differently constituted division of the court in *A.G vs Jones* [1990] 2 All ER 636 as regards the construction of section 42 of the Supreme Court Act 1981 was given *per incuriam* as the decision was given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court as per Lord Donaldson MR at page 894-895. The doctrine of *stare decisis* was discussed at length in the *Kibaki – Moi* decision. The Judges of

Appeal went to great lengths to examine the relevant authorities and I totally agree with their conclusion on that issue. However in this case in considering the legal effect of the Act and the rules and particularly sections 14 (1) (a) and 14 (2) the provisions of the Interpretation and General Provisions Act (cap 2) set out namely section 24 and section 33 were not considered. The authorities referred to me indicated that in the circumstances the court acted in "ignorance or forgetfulness" of these provisions and therefore the decision is *per incuriam*.

In addition the *Kibaki – Moi* decision can be distinguished with the present case. The facts shown indicate that in the *Kibaki – Moi* case no attempts were made to effect personal service. In the present case several attempts were made, visiting the residences of the respondent, Chiaba, as demonstrated in the affidavits of service sworn by Moses Gitau advocate and Alexander Kalu Thirabi and the service in that case was outside the period prescribed.

It would have been purposeless to seek leave of court of an order for substituted service since the personal service could have proved impracticable.

I must not omit to comment on the submissions of the applicant Chiaba, on the issue he raised regarding the affidavit of service. On the adequacy of the service, there were some photographs which were taken but not presented by the person who took them. I take these to be inconsequential side shows. His main submissions were not affected and I would apply the provisions of order 18 rule 7 CPA and dismiss the

objections as mere technicalities. On the part of other respondents Mr Lumatete addressed the Court and submitted that in his view the Court of Appeal overstepped their powers in *Kibaki – Moi* case and the High Court is being overzealous in the following decision. He urged this Court to study the matter in minutest detail. The state counsel also submitted as *amicus curia* and the effect of his submissions are that the court should decide. After considering the whole issue raised in the present Notice of motion and the orders sought I now summarize my observations as follows:

The provisions of law do not require that only personal service may be applied in effecting service upon the respondent / applicant. Other practical methods are provided under the rules rule 14(2) made under the Act which rules have the force of law.

The facts of this case show that service was effected according to the rules 14(2) under the Act and I so find.

I agree that this Court is bound by decisions of the Court of Appeal except where there is strong argument against the application of the doctrine of stare decisis. I am convinced however that the expression of the decision of the Court of Appeal in the *Kibaki – Moi* case are as to the validity of rule 14(2) was made *per incuriam*. The facts at issue were not similar and the Court was not informed of the provisions of Interpretation and General Provisions Act Cap 2 which gave the force of law to the rules. I therefore find that the provisions of the rules and particularly rule 14 (2) are not invalid and that they have been saved under section 24 of cap 2 and given the force of law under section 33 of the same Act. I therefore do not find that I am bound by that decision. Having found that the rule 14(2) as to service is valid in my view in any case that whether service was valid or invalid it was not the intention of Parliament to terminate the petition before the question of the validity of the result of election has been determined. This would be to deprive the voters the right given by the Constitution to question the result of the elections. It would be contrary to the provisions of the Constitution and the Parliament would not intend such a result. It is also for public interest that the question be determined in a judicial system. section 23 (d) of the Act states that the election court shall decide all matters that come before it without undue regard to technicalities.

I also note that the Act and the rules do not provide for the consequences arising for the non compliance with the provisions and therefore there is no right to have the petition struck out.

Regarding the prayers in the Motion prayer 3 is the main one which requires attention. I find that the provisions of section 20 (1) (a) together with rule 14(2) do not require personal service. I also find that on the facts of this case that personal service was impracticable. I also find that the applicant was served in accordance with provisions of law within the period prescribed under section 20(1) (a) of the Act.

I also find that there was no prejudice suffered by the applicant in the circumstances. And I find no grounds at all to strike out the petition as prayed.

The application is therefore rejected and is hereby dismissed with costs.

The other 2nd and 3rd respondents did not file any application but supported the respondent / petitioner. Mr Lumatete is recorded as saying that the Court should examine the matter in great detail. These parties are entitled to costs. The state counsel also contributed to the arguments and being a friend of the Court submitted that in his view there was a lacuna in the law and left the matter to court. He cited authorities on interpretation. He should have costs.

The upshot is that the application is dismissed with costs to the petitioner and the two respondents' 2nd and 3rd and also state counsel.

Orders accordingly.

Dated and delivered at Mombasa this 19th day of August, 2003

J.N. KHAMINWA

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JUDGE