REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

ELECTION PETITION NO 1 OF 1993

EMMANUEL KARISA MAITHA ……..... PETITIONER

VERSUS

JOHN D YAA

RASHID MZEE ……. RESPONDENT

RULING

The petition of Emmanuel Karisa Maitha, hereafter the petitioner was filed in this Court on 15.1.93 against the 2 respondents herein. The 1st respondent John D Yaa, the returning officer appointed by the Electoral Commission of Kenya and duly gazetted for Kisauni constituency in Mombasa district, and the 2nd respondent is one Rashid Mzee who polled the highest number of votes in the said constituency and was declared elected Member of Parliament after the general election of December 29, 1992. There were five parliamentary aspirants in that election. After all the counting the 2nd respondent was declared to have won the seat in Kisauni by 10,627 votes against the petitioner's 10,557. The latter was not satisfied with this result hence the filing of this petition containing several grounds on which the Kisauni election should be declared null and void with the 2nd respondent election being nullified also, among other prayers.

The notice of presentation of this petition and its receipt was dated the same day 15.1.93.

By his notice of motion dated 17.2.93 which was later withdrawn the petitioner sought this Court's orders to keep the ballot papers, boxes registers etc at a safe place until the hearing of the petition. But as noted above the motion was withdrawn on 22.3.9 when a notice of motion by the 2nd respondent, also dated 17.2.93 came up for hearing.

The 2nd respondent's motion was filed by Mr James Orengo, his advocate, who also swore an affidavit in support thereof. It was brought under rules 14 (1) and (2) of the Natioanl Assembly Election Petition Rules 1993 (to put it correctly) herein – after called the new Rules and the National Assembly and Presidential Election Act (Cap 7) the Act. The main prayer was one:

> 1. That the petition be dismissed or struck out the petitioner having failed to effect any or any valid service of notice of presentation of the petition and the petition on the 2nd respondent and / or the 1st respondent.

In this affidavit in support of the motion it was deponed to that besides the court registry formalities, the notice of presentation of this petition was published in the Kenya Gazette of Friday 29th January, 1993. It

was stated that this gazette notice was not within the 10days stipulated by the rule 14 (1) & (2) and thus the service was bad and / or of no effect at all. It was therein added that any other mode of service other than that stipulated in the rule in issue was equally invalid. Accordingly the petition should be dismissed / struck out on this ground. At this juncture it need be said that under this rule 14 (1) & (2), to be reproduced below, it is clear that the gazette notice appeared 14 days after the presentation of the petition to this Court.

The rule in question states this:

Rule 14(1). Notice of the 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.

> (a) 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.

Reference has been made to rule 10. This rule says the following"

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

The rules referred to above were published in the official gazette dated 29th January 1993 and they were cited as the National Assembly Elections (Election Petition) Rules, 1993. By this notice the earlier National Assembly Elections (Election Petition) Rules were revoked.

These revoked Rules will be referred to as and when appreciating some of the cases cited to us but which were governed by them. The rule governing service this time was rule 15 (1) (2). Its wording is similar to the new rule. But prior to this set there was another regime of Rules but its wording was different as it shall be seen below.

So come the hearing day of the 2nd respondent's motion, and the Court has before it an affidavit of service by one Mr Venant Mwakio Irina sworn on 25.1.93. In substance Mr Mwakio deponed to the fact that on 22.1.93 he, in company of the petioner's representative one Shida, served the 2nd respondent personally with a notice of presentation of the petition and a copy of the petition. He accepted service and signed on the reverse of the documents. It was further deponed to that on 23.1.93 Mr Irina personally served the 1st respondent with the same documents. He acknowledged receipt again by signing on the reverse thereof. Later on, the said Mr Shida and petitioner had their respective affidavits filed in Court on this service. If this personal service be considered valid, then it falls within 10 days limit imposed by rule 14b (1) and (2). When the hearing of this notice of motion, Mr Orengo lead the team for the 2nd respondent / applicant. Mr Ogeto with his team was for the petitioner, Mr Dhanji was for the 1st respondent while Mrs Onyango came in for the AG. It was not in dispute that the gazette notice was well out of the 10 days' bar. It was also not in dispute that the respondents were personally served 7 – 8 days from the date of presentation of the petition. What was in dispute was that such personal service was not contemplated in the relevant rule 14 (1) and (2) and that it was invalid. What was contemplated in the rule was either service within 10 days on the respondent's appointed advocate if his name had been left with the Registrar, or through his own address if it had been similarly left with the Registrar or by publishing in the gazette. This was the only mode of service and no other so Mr Orengo argued. Mrs Onyango seemed to support this view on service while Mr Dahnji in essence pointed out various aspects relevant to

the matter and was rather comfortable to leave the Court to determine the issue. Mr Ogeto for the petitioner had an opposite view on the construction rule 14 (1) and (2). Unlike Mr Orengo who argued that this rule was to be seen to say what was to be served in an election petition (sub r 1) the mode of service was spelt out in subrule 2 and this did not include personal service, Mr Ogeto told us that without looking far there was personal service contemplated and so stated in subrule 1. Subrule 2 only went on to say other modes of service in case, personal service was not easy. Several cases, legal treatises and authorities were cited to us. Meanings of words used in the rule 14, (1) and (2) were also brought to the fore in the battle of semantics.

To begin with the first and more or less oft-quoted case in such interlocutory matters touching on service is the case of *Devan Nair vs Yong Kuan Tek* [1967] 2AC 31. In this case an election was conducted in some constituency in Malaysia. It was contended in an election petition that the appellant was not qualified to stand in the election because he was not a citizen of Malaysia. The appellant had neither appointed an advocate nor left an address with the Registrar as per their rule 10 (similarly worded with our rule 10). The respondent however left a copy of the petition with the Registrar within the 10 day – limit. He caused a gazette notice to be published after the 10 days stated under their rule 15 (more or less an equivalent of our rule 14 (1) (2). The judge struck out the petition on the ground that the petition had not been served in accordance with the Rules. The Privy Council agreed with the decision of the Malaysian judge. The learned Lord Justices said *inter alia* that although the lodgement of the petition on the Registrar was a literal compliance with the rule 10. There was in respect of service of petitions, an inconsistency between rules 10 and 15 in view of the explicit provisions of rule 15, service in accordance with rule 10 was insufficient and a petition must be served in accordance with terms of rule 15 which were mandatory and not merely directory.

The Malaysian relevant rule 15 reads as follows:

> "15 Notice of presentation of a petition accompanied by a copy thereof, shall within ten days of the presentation of the petition be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the solicitor appointed by the respondent under rule 10 of these rules or by posting the same in a registered letter to the address given under rule 10 of these Rules at such time that in ordinary course of post, the letter would be delivered within the time above mentioned, or if no solicitor has been appointed or no such address given, by a notice published in the gazette stating that such petition has been presented and that a copy of the same may be obtained by the respondent on application at the office of the Registrar."

As it can be seen the Malaysian rule 15 although it is substantially the same as our rule 14, (*supra*) it is one rule while our rule is broken up into-subrule (1) and (2) and we do not have the word "such".English language being what it is, it cannot be easily said that these two distinguishing features have no substance at all. But be that as it may for now. Some other aspect of this case need be pointed out here. It is clear that the gazette notice in this *Devan Nair's* case was long after the 10 days limit. The appellant had neither appointed an advocate nor given his address - both pieces of information being left with the Registrar under their (and our rule 10). So whichever way one looks at it the petitioner had not served the two important and basic documents – the notice of presentation of the petition with a copy of the petition validly on the respondent at all. He had left the documents at the office of the Registrar within 10 days, yes, but there was neither the detail regarding the respondent's appointed advocate nor the respondent's address of service with the Registrar all. Thus the lodgement on the Registrar was ineffective and similarly publishing a gazette notice of the presentation of the petition after the 10 days was invalid and the petition was consequently struck out.

The Court hearing this *Devan Nair* case did however state as follows also:

> "Rule 15 was not complied with strictly for there was no personal service and no notice in the gazette within 10 days of the presentation of the petition" (pp 44 – E)

Be it remembered that in our instant case we are invited to determine whether personal service on the

respondents was valid service or not. In the *Devan Nair* case, the Court was considering, it can be said, generally whether or not proper service had been effected under rule 15. Yet reference was made on the absence of personal service. Although dealing with service under rule 15, the Court was emphatic that there being no personal service and the advertisement in the gazette being out of time, the proceedings were a nullity.

On our own scene the case of *Mudavadi v Kibisu & another* [1970] E A 585 came before the Court of Appeal sitting at Nairobi. An election petition filed by the appellant challenged the conduct of the returning officer, among others, at polling stations. The returning officer's name was not included in the heading of the petition. He was also not served with the petition within the time allowed by the Election Petition Rules 1961. There rule 15, in structure and wording, is similar to rule 15 in the *Devan Nair* case (*supra*). It is not broken up into two and the word "such" is used when referring to service.

The Court held, *inter alia*,

> "We are therefore of the view that the judges of the election Court were correct in finding that the returning officer had not been served as he should have been in accordance with rule 15. The effect of this is that the returning officer was not properly brought before the election Court …" (pp 588 – 1).

The case of *Devan Nair* was quoted in this case. But again it should be seen that an important respondent had not been served with the petition as per rule 15. He was considered thus not to be properly before the Court and it was ordered that complaints in the petition would continue against the stated and served respondents and none against the returning officer. The mode of service was not in issue here at all.

The next important case cited and referred to by all parties is *James Osogo vs Nicholas Mberia & anr* EP 14 of 1983. A notice of motion was filed for the striking out of a petition on the ground that the notice of presentation of the petition was not served on the respondent by the petitioner within 10 days of such presentation as required under rule 15 of National Assembly Elections (Election Petition)Rules. This rule as it was in 1983 read as much in every word as in the *Devan Nair* case, (*supra*), but it was broken into 2 ie rule 15 (1) and (2). It also referred to "such service …." In subrule 2. The 2nd respondent had neither appointed an advocate nor left his own address of service. Presentation of the petition was on 28.10.83 and the publication in the gazette followed 14 days later – ie beyond the 10 days limit. It was therefore out of time. But there had been an attempt to serve the 2nd respondent by leaving a copy of the petition with the Registrar. This too was seen to be futile since no details of the 2nd respondent's appointed advocate or his address had been left there. The Court while entertaining some sympathy with the petitioner whose service through the Gazette was a mere 4 days out of time said:

> "It can, we think, be assumed that on November 2, they (the petitioners team) realized that they would be out of time hence their attempt to serve by leaving a copy of the notice with the Registrar. They do not claim to have made an attempt to effect personal service or even to inform the respondents that a copy of the notice had been left with the Registrar……." (pp 191)

Be it noted here again that while the learned judges in this case were considering service under rule 15 and concluding that service by gazette notice appearing 4 days out of the time limit of 10 days was fatal to the petition, they made the above remarks on personal service. There was no attempt at that. It is no fault to conclude that their Lordships would have considered such service in favour of the petition if it had been effected and followed by ……..… "an excuse." Looking at this remark from the other side seems to mean that if personal service was effected and the rule 15 was the legal basis of the notice of motion before the Court, arguments thereon could have seen to a ruling or a finding being specifically made. The petition was however struck out on the basis above stated. But we do not desire to leave this case before noting that Court's approach and appreciation of the *Devan Nair* case:

> "The question whether a provision such as rule 15 is mandatory or directory was considered by the Privy Council in *Devan Nair vs Yong Kuan Teik* (*supra*). Lord Upjohn said (at p 44)

> ‘So the whole question is whether the provisions of rule 15 are ‘mandatory’ in the sense in which that word is used in the law ie that a failure to comply strictly with the times laid down renders the proceedings a nullity; or ‘directory’ ie that the literal compliance with the time may be waived or excused or enlarged by a judge’

“He continued:

> “The circumstances weigh heavily … in favour of a mandatory construction are:
>
> (1) The need in an election petition for a speedy determination of the controversy, a matter already emphasized…. The interest of the public in election petitions was rightly stressed…..but it is very much in the interest of the public that the matter should be speedily determined.
>
> (2) In contrast, for example….. in this country, the Rules vest no general power in the election judge to extend the time on the ground of irregularity. Their Lordships think this omission was a matter of deliberate design. In cases where it was intended that the judge should have power to amend proceedings or post-pone the inquiry it was conferred upon him: see, for example rules 7,8 and 19.
>
> (3) If there was more than one election petition relating to the same election, election petition or return, they are to be dealt with as one (rule 6). It would be manifestly inconvenient and against public interest if by later service in one case and subsequent delay in those proceedings the hearing of other petitions could be held up.
>
> (4) Respondents may deliver recriminatory cases (rule 8) and speed of service, in order that the respondent may know the case against him, is obviously desirable so that he may collect his evidence as soon as possible.
>
> On the whole matter, their Lordships have reached a conclusion that the provisions of rule 15, are mandatory and the petitioner’s failure to observe the time of service thereby prescribed rendered the proceedings a nullity.” (pp 189-190)

The foregoing lengthy quotation here from the *Devan Nair* case in this *Osogo* case is not without good reason. We do not intend to go back to the *Devan Nair* case when dealing with the very purpose for the mandatory compliance with service under the rule in issue – r 14(1) and (2). The quotation from the *Devan Nair* case in this *Osogo* case was petinent in the latter’s conclusion – namely upholding the principle that a failure to comply strictly with the time laid down in rule 15 (our current rule 14(1) and (2) renders the proceedings a nullity. The operative phrase is “…….failure to comply strictly with the times laid down ....” The emphasis is not so much on the mode of service as on the times laid down in this Rule. The essence of time is seen in the speedy determination of the controversy of election petitions and how the public is interested in their speedy disposals; the position that an election Court was, by the design of the legislation, not given general powers to extend time on the ground of an irregularity for this would delay proceedings; further that timeous service should be observed strictly as per the Rules so that where there are 2 or more petitions regarding one election (or return) they should be dealt with as one without letting late service in one hold up the others and lastly that respondents need to go in a given time frame knowing what cases are against them so that they collect their evidence – all in rediness for a speedy trial. And those are the reasons behind mandatory compliance with the times (not modes of service) set out in rule 15 which was applicable during the times of the *Osogo* case. More on this matter will follow presently. Now *Mark Omolo Ageng vs Mbuo Waganagwa & Arc Ondiek* EP 20 of 1988.

A petition had been filed on 21.4.88. A copy of the petition only was served personally on the 2nd respondent. On 29.4.88 a gazette notice was published to the effect that the petition had been presented on 21.4.88. A notice of motion by the 2nd respondent was brought to strike out the petition or have it summarily rejected in that there had been no valid service on him as required by rule 15 of the Election Petition Rules. This rule is worded similarly to the current rule 14 (1) and (2). Prior to filing of the petition the 2nd respondent had left in writing the name of his appointed advocate at the office of the

Registrar.

While restating the mandatory requirements of rule 15 and going through the various local cases that had quoted the *Devan Nair* case with approval, the Court remarked:

> "No express provision is made for personal service and it would seem to us having regard to the purpose of rules 11 and 15 that this was by design. If it was intended that personal service could be one of the modes of service, this would have been provided for instead of being left to inference. This issue is not without difficulties and even though Mr Ishan Kapila… has in his submissions to us conceded that personal service is not contemplated under the National Assembly and Presidential Elections Act and the National Assembly Elections (Election Petition) Rules, the matter was not fully ventilated before us. We should therefore, prefer not to found our decision in this application on this." (pp 3)

From the foregoing their Lordships started off by saying that personal service was not contemplated in rule 15. They were minded that that omission was by design on the part of the Legistlature which should otherwise have explicity said so of personal service. The Court nonetheless saw some difficulty in that issue which had not been fully ventilated by argument before it. In that regard the Court decided or preferred not to take that as a basis of a decision in the matter before them. In essence their observation, although apparently weighty, remained largely *obiter dictum*.

More of difficulties facing their Lordships on that issue of personal service came later in their judgment.

> "And so even if personal service is permissible, the fact that the 2nd respondent was not served with the principal document namely the notice of the presentation of the petition and was only served with a copy of the petition, makes that service imcompetent and a nullity and it is on this analysis that we would hold that the alleged personal service on the 2nd respondent on 27.4.88 was no service"(pp 4)

Thus the Court not being sure about personal service under the rule 15 alluded to it adding in essence that indeed had the petitioner served the two principal documents – the notice of presentation of the petition and a copy of the same, instead of serving only the latter, probably the position could not have been so bad as to have the petition struck off. It had to be struck off again on the ground that the 2nd respondent had left in writing the detail of his appointed advocate at the office of the Registrar. The only mode of service open to the petitioner was to serve that advocate. And out went the petition, at that interlocutory stage.

Let us turn to the case of the *Owino Omach vs Cyrus Gituai & John Okwanyo* EP 21 of 1988.

In this case a petition was presented on 21.4.88. The 1st respondent was served with the due documents on 13.5.88 while the 2nd respondent had been served a day earlier on 12.5.88. Clearly this service was effected way outside the 10 days limit under the then applicable rule 15 (similar in wording to the present rule 14 (1) and (2). The learned judges went through the motions of citing all the cases quoted above and more and rested with the statement of law that the provisions of rule 15 were mandatory and the Court had no jurisdiction to extend the time for the service of the petition. Accordingly the petition was summarily dismissed under s 22 of the Act. Apparently here there was no gazette notice. But their Lordships did not finish their job here until they had touched an the issue of personal service, and they did so in such a language:

> "On the petitioner's own showing based on the two returns of service already referred to, and filed on his behalf by his advocates, and even assuming that service could under the given circumstances be validly effected personally on the respondents, service of the petition by the petitioner was clearly beyond the stipulated ten days allowed for service under rule 15 which ten days we have no jurisdiction to extend. This means that the petition has not been served and cannot be heard" (pp 5)

Again in this case the problem facing the Court on personal service is noted. Yet again like in the *Mark Ageng* case this issue had not been ventilated fully before the Court.

After citing all the foregoing cases and noting the wording of the applicable law, the various salient and distinguishing landmarks etc it cannot be disputed that the issue of personal service has never been fully considered as an issue and ruled upon since the *Devan Nair* case. It has indeed been referred to one way or another, and more to the effect that personal service is competent service. The various remarks referred to above point in this direction and we would now like to tackle the issue here.

In support of this motion Mr Orengo streneuously argued before us, that reading the law as it is and in the light of the past authorities no other mode of service is valid other than service as per rule 14 (2) ie, on the appointed advocate, to the respondent's address in Kenya and by gazette notice. There is nothing of personal service as effected by the petitioner. Mr Ogeto stoutly resisted this argument. To him personal service is clearly stated in rule 14(1). It is couched in the language.

"……shall within ten days of presentation of the petition be served by the petitioner on the respondent" The language, he continued, is strong and mandatory as seen against that in rule 14(2) which says "service may be effected either …" and goes on to enumerate who to serve but all within the 10 days limit. To him this service is secondly to the personal service and is allowed to be used in case personal service is not easy or feasible. Arguments went back and forth but all boiling down to the opposing stands that personal service is or is not valid. We were indeed invited not to interprete the law here in any way than it is or so as not to bring out an absurd meaning. It was further argued that an interpretation and application of this rule other than that that has gone before could open a flood – gate of every type of service being used in election petitions and that is undesirable. Fair enough.

On our part we are not in doubt that an election Court as this one operates under a special jurisdiction to hear a rather special kind of cases and under a legal regime specifically meet to dispose of the matters relating to elections. Such legal regime is made of the Act, the Rules and the cited cases, for instance. Indeed we ought to point out as regards the Rules on service as set out under rule 14(1) (2) that it is complete in itself and there is no validity in looking at service under other enacted laws and Rules eg under the Civil Procedure Act and Rules. This rule is mandatory in its application. It is however our view that while reading it conjunctively rather than disjunctively it makes provision for personal as well as other modes of service. Our reasons are these:

Rule 14 (1) states

> "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."

The subrule sets out the 2 principal documents to be served the notice of presentation of the petition and a copy of the petition. Not one of them should be served on the respondent and another left. They must be served together and on the respondent. They must be served within 10 days and no more. Even this Court cannot extend that time in case of an omission or irregularity. Failure to serve within the stipulated 10 days renders any consequential proceedings a nullity. In our view the subrule is complete and positively states what to be done by who, on who and in which time span. It is no matter that the provision does not specifically incorporate the words "… served personally…." It is to us enough to say as it says "be served……on the respondent." The respondent is the primary party against whom a specific complaint is raised in the petition. Barring all others who may be served on his behalf he is rightly and naturally the primary or basic party to be served. He must be served with the processes against him, and personal service is the best at all times. After being served he can on appreciating the contents of the service papers consider to consult counsel or begin lining up what material he has in defence. Personal service on the respondent in any proceedings is superior and should be the mode of service most valued. But where it is not easily feasible for instance where the respondent is out of the country or on hearing of the probability of a petition against him he goes into hiding, yet the 10, days limit is running out then the petitioner has the other modes envisaged in subrule (2).The petitioner effecting service under this provision needs to give reasons why he did not utilize the personal service mode. Indeed assuming for once that the

Legislature had only enacted subrule 1 (*supra*) under rule 14, it can be affirmatively said that the subrule could still be complete in all the requirements because it sets out as said earlier what to be served, by who, on who and within what time.

So in subrule (2) it is complete again by stating what to serve, by/on who But still within 10 days. It affords a chance for the petitioner who cannot find his respondent. It is permissible permissive, and possible to serve under subrule (2) but only on the respondent who has in writing left at the Registrar's office the name of his appointed advocate and / or his address for service in Kenya. But if such circumstances do not obtain, then the petitioner eager to stay within the stipulated 10 day limit has the facility of putting up a gazette notice. This subrule as worded says that service "may" be effected "either" and goes on to say the appointed advocate "or post to the address and where none of those are available, by gazette notice. We were not invited to say whether or not the petitioner ought to use the avenues envisaged under subrule 2 as he chooses or try one after another. It is quite probable that the petitioner may need to try either way in turn. Indeed there is another hurdle we did not address as it was not argued before us regarding the gazette notice. This notice should also be published within 10 days of the presentation of the petition. In this country the gazette is published once every week – on Fridays but it is the Government Printer's sole areas of operation to decide when to gazette whatever is submitted to him for publication. A petitioner desiring to have a gazette notice published may not necessarily have it published within the 10 days limit. He may indeed have presented the notice on time having made due payments. Probably this issue will await another opportunity but for our case here, the rule 14(1) (2) about service allows personal service and alternative modes to. The two subrules are complementary in seeing to effective service by the petition but all within 10 days.

In any case even arguing for once as the 2nd respondent's side wished us to do, that personal service should not be read in the law, that is if it was not there, what would the Legistlature be intending to achieve by leaving out personal service in such situations? Obsolutely nothing. No reason whatsoever and no justification. Anyway we are of the view that personal service is contained in rule 14(1) and it is valid service if properly executed.

It was then argued before us that construing as we do that personal service is valid service under rule 14(1) and (2) It would open floodgates of applications for all manner of service. We do not agree. As stated above served under rule 14(1) and (2) on respondent is given a complete provision for this purpose. It is complete in that it sets out what to be served, by who, how and within what time. We do not envisage that it would be a valid application response to say that service on the respondent's wife, adult child etc or agent is valid service. We also do not think that a party should import substituted service in a newspaper as valid or by any other mode outside that provided for in rule 14 as valid at all. Accordingly, the fear of opening flood-gates, may be laid to rest, at least as far as we see it.

A further argument was to the effect that precedent must be respected. We absolutely agree, especially where the Court enunciating what becomes the precedent is superior to us. But that is not the case here. Firstly, and this is being repeated, none of the cases cited to us on the import of service on the respondent did address and make a specific finding on the status of personal service. Indeed and secondly there were troubled stands here and there on this issue but the general trend was inclined to accepting personal service. We on our part here are clearly of the view that personal service is in rule 14. Thirdly let us address the statement in law that the provisions and application of rule 14 are mandatory and not directory.

While considering the *Osogo* case (*supra*) there was a long quotation from the *Devan Nair* case. Now we proceed to say what is mandatory in strictly applying the provisions of rule 14. It is the compliance with service within a time frame. It is mandatory because:

> "a failure to comply strictly with the times laid down renders the proceedings a nullity….."

That is the core part, and 4 reasons also repeated above were set out as to why time is of essence. Proper service within the laid down time regime ensures speedy settlement of election petitions – a matter of great public interest and matters the public is interested in as much as the parties; there should be no

postponement of the inquiry in case the election Court was allowed to extend the time to serve and there should be no delay where two or more petitions are consolidated. Indeed the respondent served within time embarks on a process to collect his evidence as soon as possible for the petition to proceed quickly. All these reasons are based on time – hence the 10 day bar. It is not said anywhere that the mandatory requirement is about service and its mode *per se*. To us it is time that is the central point. It is for the petitioner to ensure that he serves the 2 principal documents in accordance with the Rules.

Finally we wish to reaffirm the statement of law that striking out a pleading is a very drastic measure particularly at an interlocutory stage. An election petition is a very serious matter. Besides the parties disputing the public has an interest in it – be it the general public or that section of the public living in a given constituency. One ought to be certain about one's representative in the National Assembly and no wonder when an election petition is filed much excitement abounds. So it may be noted that much caution is called for when a motion to strike out a petition is filed. A facility for striking out a petition needs be most sparingly used and in the most clear and proper cases. Parties to petitions need, on their part, to be extremely careful so that their cases are not struck out on one technical aspect or another. It is important that justice be done in their cases by prepairing them with such care that full trials proceed.

All in all we are of the opinion and we find that personal service on the 1st and 2nd respondents was valid and effective service under rule 14.

Accordingly, the notice of motion filed to strike out this petition is dismissed with no orders as to costs.

Dated at Nairobi this 29th day of April, 1993

E.O. O'KUBASU

……..…….

JUDGE

G.P. MBITO

…….…….

JUDGE

J.W. MWERA

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JUDGE