REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 272 of 2003

NTOITHA M'MITHIARU ……...…… APPELLANT

AND

RICHARD MAOKA MAORE ……..……. 1ST RESPONDENT

BISHOP JOSEPH KYAVOA - RETURNING

OFFICER NTONYIRI CONSTITUENCY..... 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA ……... 3RD RESPONDENT

(Appeal from a ruling and order of the High Court of Kenya at Meru (Mulwa, J) dated 23rd September, 2003

in

H.C.E.P. No. 1 of 2003)

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JUDGMENT OF OMOLO, J.A

I had the advantage of reading in draft form the judgment prepared by Onyango Otieno, JA and I gratefully accept his summary of the facts underlying the litigation before us. There is, accordingly, no occasion for me to repeat those facts in this brief judgment, except to the extent where the judgment would be intelligible without a reharsh of the facts.

Section 44 of the Constitution of Kenya which is the supreme law in the country provides as follows: -

"***44 (1) The High Court shall have jurisdiction to hear and determine any question whether-***

(a) a person has been validly elected as a member of the National Assembly; or

(b) the seat in the National Assembly of a member thereof has become vacant.

44 (2) An application to the High Court for the determination of a question under subsection (1)(a) may be made by any person who was entitled to vote in the election to which the application relates, or by the Attorney General.

44 (3) An application to the High Court for the determination of a question under subsection (1) (b) may be made-

(a) where the Speaker has declared that the seat in the National Assembly of a member has by reason of a provision of this Constitution become vacant, by that member; or

(b) in any other case, by a person who is registered as a voter in elections of elected members of the Assembly, or by the Attorney-General.

44 (4) Parliament may make provisions with respect to –

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

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

These provisions are clear and unambiguous. They set out which court has jurisdiction to hear and determine the matters set out therein, namely the High Court; it is the High Court as a collective, not a judge of the High Court designated by the Chief Justice. All judges of the High Court have the constitutional jurisdiction to hear and determine an application made pursuant to the provisions of ***section 44*** of the Constitution. The section does not even use the words "Election Petition". It simply employs the term "*application"*.

But pursuant to the provisions of ***section 44 (4)*** Parliament has enacted the National Assembly & Presidential elections Act, ***Chapter 7*** of the Laws of Kenya and that Act, in accordance with the provisions in ***section 44 (4)*** of the Constitution, sets out: -

"***.....the circumstances and manner in which, the time within which, and the conditions upon which an application may be made to the High Court,"***

and

"***.... the powers, practice and procedure of the High Court in relation to the application."***

The Act then defines an election court as meaning: -

"***the High Court in the exercise of the jurisdiction conferred upon it by section 44(1) of the Constitution."***

As far as I am able to tell from the provisions of the Constitution, the Act and the Rules made under the Act, there is no particular provision that only judges of the High Court designated by the Chief Justice have jurisdiction to hear and determine election petitions. ***Section 19*** which is found in PART VI of the Act specifically provides that:-

"***19 (1) An application to the High Court under the Constitution to hear and determine a question whether:-***

(a) a person has been validly elected as President; or

(b) a person has been validly elected as a member of the National Assembly; or

(c) the seat in the National Assembly of a member thereof has become vacant, shall be made by way of petition."

Even under that section the application is to be made:-

"***------ to the High Court,"***

not to a judge of the High Court designated by the Chief Justice. Only section 23(2) of the Act provides that:-

"***Unless otherwise ordered by the Chief Justice, all interlocutory maters in connexion with a petition may be dealt with and decided by any judge."***

Does that provision mean that Judges of the High Court who are not designated by the Chief justice to be "Election Court Judges" only have jurisdiction to hear interlocutory matters with regard to election petitions but cannot hear and determine an election petition unless designated to as "election court judge" by the Chief Justice?

With respect, I would myself summarily reject such a proposition. The jurisdiction to hear and determine election petitions is given to each and every judge of the High Court by the Constitution itself and even the Act does not purport to limit that jurisdiction. That is clear from the provisions of ***section 19*** of the Act. If the Act purported to limit the jurisdiction only to judges designated by the Chief Justice, such limitation would clearly be contrary to the provisions of ***section 44*** of the Constitution and by virtue of ***section 3*** of the Constitution, would be void to the extent of the inconsistency. But I have no doubt myself that no provision of the Act with regard to the jurisdiction of all the judges of the High Court to hear and determine petitions is inconsistent with the provisions of the Constitution. The designation by the Chief Justice of judges to hear and determine what or which election petition is a matter for administrative convenience to facilitate the operations of the High Court; it is not based on the issue of jurisdiction or lack of it.

How do these considerations apply to this appeal?

The appellant herein clearly filed his petition very late in the day. He had to serve it on the respondents by 31st January, 2003 and he filed it on 29th January, 2003. For one reason or the other the appellant was unable to serve the first respondent Maoke Maore with the documents required to be served, and so on 31st January, 2003 the appellant filed a motion before Onyancha J, seeking alternative modes of service. On the same day Onyancha J, made certain orders amongst which was an order granting to the appellant leave to serve the petition in certain stated ways. On that aspect of the matter, I agree with the conclusions of my brother Githinji, JA as to the efficacy of the mode of service granted by Onyancha, J.

What is of interest to me, however, is that after the appellant had complied with the orders given by Onyancha, J. the first respondent then made an application to the High Court seeking an order that the petition be struck out because it was not served on him according to law. That motion was eventually heard and determined by Mulwa, J. by then a Judge of the High Court with equal and concurrent jurisdiction with Onyancha J, In disposing of that motion, Mulwa, J stated, among other things:-

"***In the circumstances, I find that there was no service on the applicant herein or any of the other respondents in the petition AS THE SUBSTITUTED SERVICE ORDERED WAS AND STILL IS UNLAWFUL AND UNACCEPTABLE. FOR THESE REASONS THE PETITION HEREIN MUST FAIL."***

The "*unlawful and unacceptable mode of service*" had been ordered by Onyancha, J and in all respects, the two Judges had the same and equal jurisdiction. Mulwa, J was here declaring as unlawful and unacceptable orders which had been made by Onyancha, J. In our jurisprudence and with the greatest respect to Mulwa, J he himself had absolutely no jurisdiction to declare unlawful and unacceptable the orders made by a brother Judge of equal and concurrent jurisdiction. If this kind of thing was to be allowed to take root, there will, in my view, be total chaos and confusion in the High Court and there would even be no need for the appeal process. The position would have been different if the High Court had been asked to review the orders made by Onyancha, J who himself was not available to review his orders and the Chief Justice had given Mulwa, J permission to review the orders. But here, Mulwa, J was, in effect, being asked to simply declare the orders of Onyancha, J unlawful and unacceptable and he

did exactly that. As I have said he had no jurisdiction to do so.

Nevertheless, I agree with Onyango Otieno, J.A that this appeal, on the facts, must be dismissed. Githinji, J.A also agrees and the order of the Court shall be that the appeal be and is hereby dismissed with the costs thereof to the 1st respondent.

Dated & delivered at Nairobi this 19th day of October, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

JUDGMENT OF GITHINJI, J.A.

The relevant facts in this dispute have been comprehensively stated in the judgment of Onyango Otieno, JA. which I have had the advantage of reading in draft. It is not necessary to restate them in detail.

The result of election of ***RICHARD MAOKA MAORE*** (1st Respondent) as a member for Parliament for Ntonyiri Constituency was published in the Kenya Gazette on 3rd January, 2003. By ***Section 20 (1)*** of *National Assembly and Presidential Elections Act (Cap 7)* (the Act) a 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***

On 29th January, 2003 ***NTOITHA M'MITHIARU***, the appellant who was the unsuccessful candidate, filed an election petition in the superior court seeking the nullification of the election of the 1st Respondent. On 31st January, 2003, the appellant filed a Notice of Motion seeking, orders *inter alia*, that:

"***(a) ……***

(b) ……

(c) ……

(d) In the special circumstances of this petition, service through the Kenya Gazette be deemed proper service.

(e) Leave be granted to serve the 1st Respondent Richard Maoke Maore, by way of advertisement in a local radio or television netword".

The application was supported by the affidavit of Mathias Mboya Maithya who deposed, among other things, that on 30th January, 2003 he could not trace the 1st respondent in his office or at his rural residence in Mutuati or at the 1st respondents residence in Nairobi for service of the petition.

The superior court (Onyancha J) granted an order on 31st January, 2003 that the:

"***Service of the petition be affected by substituted service by mode of advertisement on Kenya Broadcasting Corporation or citizen radio or Kenya Broadcasting Corporation Television or Citizen Television on or before 12.00 midnight".***

On 13th February, 2003 Paul Matheri Wamae, learned Senior Counsel for the Petitioner (appellant) filed an affidavit of service deposing, among other things, that the 1st respondent was served with the petition by radio advertisement. A document from "Citizen and Television Network" was filed showing that a Notice of filing of six petitions including the one relating to the 1st respondent was announced on Citizen Radio on 31st January, 2003 between 10.20 p.m. and 11.45 p.m.

On 7th April, 2003, the 1st Respondent filed a Notice of motion under ***section 20 (1) (a)*** of the Act for the order that the petition be struck out on the ground that it was not *personally served* on the first respondent within 28 days after the date of the publication of the result of the election in the Gazettee (emphasis mine). The application was supported by three grounds, namely, that:

"***(1) The petition and Notice of Presentation of the Petition were not served as provided by the law.***

(2) Any purported order by substituted service or to extend the statutory period was and is still null and void.

(3) There is no evidence of any service whatsoever".

At the hearing of the application before Kasanga Mulwa, J. Mr. Monari, learned counsel for the 1st respondent contended, among other things, that there was no personal service of the petition and that the High Court had no power to order substituted service. He relied on the decision of this Court in ***Mwai Kibaki vs. Daniel Toroitich A. Moi***, (Kibaki vs. Moi) [2000] 1 EA 115 as authority for the proposition that an election petition must be personally served on the respondent.

On his part, Mr. Wamae, submitted that the High Court had power to order substituted service and that in this case the petition was served by substituted service within 28 days as ordered by the High Court.

The superior court considered the provisions of ***Rule 10*** and ***14 (2)*** of the National Assembly Elections (Election Petition) Rules 1993, (1993 election petition rules) and concluded that the decision of the Court of Appeal in ***Kibaki v Moi*** (supra) that only personal service will suffice in respect of election petitions was reached per *in curiam* saying in part:

"***I believe the rules committee had in mind the mischief that could be brought about by personal service when it consciously excluded requirement of personal service under rule 14 (2). Rule 14 (2) equally does not provide for the service by substituted service. The Rules committee would have made express provisions for these modes of service if it intended to make the same available to petitioners".***

The superior court, nevertheless held that no service was effected in terms of ***Rule 14 (2)*** of the rules; that the order for substituted service was unlawful and unacceptable and struck out the petition for want of service.

It is not necessary to refer to all the 17 grounds of appeal as in my view, grounds 1, 4, 7 and 11 which I reproduce below adequately encompasses the appellant's grievances.

They state, that:

"***1. The learned Judge erred in holding that service had not been effected on any of the respondents.***

2. ……

3. ……

4. Having held that service of an election petition by any mode of service prescribed in Rule 14 (2) of the Election Petition rules could be proper, the learned Judge erred in holding that no service had been effected upon any of the respondents contrary to the evidence on record.

5. ……

6. ……

7. The learned Judge erred in invoking the rules of Civil Procedure in holding erroneously that service by substituted service as ordered was effected out of time.

8. ……

9. ……

10. ……

11. The learned Judge erred in holding that the substituted service was unlawful and unacceptable".

The application in the superior court to strike out the petition was based on the ground that the 1st respondent had not been personally served with the election petition in accordance with the decision in ***Kibaki v Moi*** (supra). The 1st respondent's counsel contended that the purported substituted service by radio announcement was null and void. The superior court considered ***Rule 10*** and ***14*** of the 1993 election petition rules which relate to the service of notices and election petitions and made findings *inter alia*, that ***Rule 14 (2)*** in particular neither provided for personal service nor substituted service. The superior court struck out the petition not because there was no personal service but specifically for two reasons. First, that no service was effected in terms of ***Rule 14 (2)*** of the 1993 election petition rules and secondly, because the order for substituted service was unlawful and unacceptable.

Rule 14 and ***10*** of the 1993 election petition rules which the superior court construed respectively provides:

"***14. (1) Notices 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.***

(2) Service may be effected either by delivering the notice and copy to the advocate appointed by the respondent under rule 10 or by posting them by a registered letter to the address given under rule 10 so that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address has been given, by a notice published in the Gazette stating that the petition has been presented and that a copy of it may be obtained by the respondent on application at the office of the Registrar".

And ***Rule 10*** provides:

"***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 decision in ***Kibaki vs. Moi*** was considered recently by a powerful bench of this Court in ***Abu***

Chiaba vs. Mohammed Bwana Bakari & 2 Others, Civil Appeal No. 238 of 2003 (unreported). The Court in ***Abu Chiaba's*** case was urged to overrule ***Kibaki vs. Moi*** on the ground that it was reached *per incuriam* but the Court, by majority declined to overrule the decision and instead distinguished the ***Abu Chiaba's*** case from ***Kibaki vs. Moi***.

In my dissenting judgment in ***Abu Chiaba's*** case, I made a finding that ***Kibaki vs. Moi*** was decided *per incuriam* and said in part:

"***The law is the same as it was when Kibaki vs. Moi was decided. Section 20 (1) (a) of the Act does not decree as the court in Kibaki vs. Moi erroneously, in my view, said that service of Election petitions must be personal. The section does not indeed deal with mode of service. It merely prescribes the time of service. The court of Appeal did not in Kibaki vs. Moi construe rule 14 (2) which is a subsidiary legislation having the same status as an Act of Parliament. That rule prescribes three statutory mode of service of election petitions which do not include personal service".***

The construction of ***rule 14 (2)*** by Kasanga Mulwa J conforms with my view in ***Abu Chiaba's*** case. I still adhere to that construction. Indeed, I venture to say that both personal service and substituted service as known in ***Order V*** – *Civil Procedure Rules* are excluded by 1993 election petition rules. In my view, the principle of construction of legislation – *Expressio unius est exclusio alterius* (to express one thing is (by implication) to exclude the other) applies to the construction of *rule 14 (2).*

There was no evidence that the petition was served on the 1st respondent as stipulated by *Rule 14 (2)*. Although the appellant had in the Notice of Motion asked the court to deem service through Kenya Gazette as proper service there was no evidence to show that the appellant had served the 1st respondent through publication in the Gazette and the court did not grant the order. Indeed, the appellant did not file an affidavit nor produce a copy of the Gazette to verify the publication. Had he done so, then the copy of the Gazette should have been *prima facie* evidence of the due making and tenor of the notice (see ***section 69*** of ***The Interpretation and General Provisions Act***). Thus, I would dismiss the appeal on the ground that the 1st respondent was not served with the Election Petition in accordance with *rule 14 (2)*.

Moreover, the substituted service through radio announcement that the appellant relies on is not sanctioned by the law as lawful means of serving election petitions. In my view, in ordering service through electronic media; Onyancha J acted without jurisdiction. It is doubtful that, that service through a radio announcement would be effectual as there is no guarantee that the person intended to be served would hear the announcement. It is even more doubtful in this case that the 1st respondent heard the broadcast as it was made late at night between 10.20 p.m. and 12.45 p.m. Indeed, there was no evidence that the 1st respondent ordinarily listens to Citizen radio at that hour or that he was not asleep at that moment in time or that he did infact hear the announcement.

The 1993 election petition rules do not prescribe the time of the day that Election petitions should be served. In the absence of any such provision, the superior court applied ***Order XLIX rule 8 (2)*** of *Civil procedure Rules,* which provides, in respect of service of pleadings, notices, summons, orders, rules and other proceedings, that:

"***Service shall normally be effected on a weekday other than Saturday and before the hour of five in the afternoon".***

Section 57 of ***The Interpretation and General Provisions Act***, like ***Order XLIX*** *Civil Procedure Rules* excludes Sundays and Public Holidays in reckoning time for doing anything authorized by law. Any civilized system of law cannot reasonably allow the service of legal processes at night when people are supposed to be asleep.

In my view, it would be against public policy and perhaps a breach of constitutional right to privacy to serve election petitions outside the official hours and times specified for service of other court processes. The superior court holding that the 1st respondent should have been served before the hour of five in the

afternoon was in my view undoubtedly correct.

Even assuming that service through the radio announcement was lawful, it is clear that the announcement merely gave a notice of the filing of the Petition and required the 1st respondent to obtain a copy of the petition from the High Court Registry, Nairobi. ***Section 20 (1) (a)*** requires that the petition be presented and served within 28 days after the date of publication of the result of the Election in the Gazette.

It is conceded that the 28 days expired on 31st January, 2003 at midnight. By the time the 28 days limitation expired, the 1st respondent indisputably had not been served with the petition itself. Thus, the petition was not served within the time stipulated by the law.

For those reasons, I would dismiss the appeal with costs to the respondent.

Dated and delivered at Nairobi this 19th day of October, 2007.

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF ONYANGO OTIENO, J.A:

Presidential, Parliamentary and Civic Elections were held in Kenya on 27th December 2002. The appellant in this appeal, **Ntoitha M'Mithiaru** (appellant), the first respondent, **Richard Maoka Maore** and four others were candidates for the parliamentary elections contesting Ntonyiri Constituency seat. The second respondent, **Bishop Joseph Kyavoa,** was the returning officer while the third respondent, **The Electoral Commission of Kenya,** was conducting and supervising the entire elections. On the same day after the close of balloting and counting of the votes, the second respondent announced the results of the elections and the results showed that the first respondent had worn the parliamentary seat having got **10,934** votes. The appellant was second with **6,808** votes. There were other candidates who scored fewer votes than each of the two. The official results were gazetted in the Kenya Gazette of 3rd January 2003. The appellant was not satisfied with the results. On 29th January 2003, he petitioned superior court against the results by way of Election Petition No. 20 of 2003 and sought:

"**(a) That it be determined that the said Richard Maoka Maore was not duly elected.**

(b) That the election in Ntonyiri Constituency be declared void and that a certificate to that effect be issued to the Speaker of National Assembly.

(c) That the Respondents jointly and severally be condemned to pay your petition's (sic) costs of this petition and matters incidental thereto.

(d) That such further or alternative orders and/or reliefs be made as this Honourable Court may deem just."

That petition was required to be served upon all parties within twenty eight (28) days from the date of the publication of the election results in the official gazette as is the legal requirement according to the provisions of ***section 20(1) (a)*** of the National Assembly and Presidential Elections Act, Chapter 7 Laws of Kenya. As the petition was filed on 29th January 2003, the applicant had to serve it upon all parties latest by 31st January 2003. The appellant annexed an affidavit sworn by a process server, Mr. Mathias Mboya Maithya on 31st January 2003 which states as follows on the service of that petition:

"**2. That I am a process server of this Honourable Court duly authorized to serve processes issued.**

3. That on 30th January 2003 I received in duplicate election petition No. 20 of 2003 to effect service upon the respondent.

4. That on the same day, 30th January 2003, the petitioner and I proceeded to Continental House Nairobi at the 1st Respondent's office to effect service upon him but the guards at the entrance advised me that the 1st respondent was not in office.

5. That on 30th January 2003, I proceeded to Mutuati, Ntonyiri Constituency accompanied by the Petitioner but efforts to trace the 1st respondent within proved futile.

6. That on 30th January, 2003 in company of the petitioner we visited the 1st respondent's residence along Waiyaki Way where the 1st respondent's personal assistant one Patrick advised me that the 1st respondent was not in his home.

7. That on 31st January 2003, at 7.30 a.m. the second visit at the home, the 1st respondent's guards denied me access to the home.

8. That I therefore sought assistance from the local District Officer Westlands who accorded me two Administration Police namely Mr. Kisunza and Morris but upon arrival of (sic) 1st respondent's home the guards at the gate refused us access to the 1st respondent.

9. That efforts to locate 1st respondent in most restaurants where the 1st respondent occasionally visits within Nairobi proved futile ….."

Having failed to trace the first respondent and serve him with the election petition as deponed by the appellant's process server, the appellant filed an application by way of a notice of motion dated 31st January 2003 in the superior court in which he sought mainly four orders which were that:

"**(c) This application be heard ex-parte;**

(e) In special circumstances of this petition, service through the Kenya Gazette be deemed proper service;

(f) Leave be granted to serve the first respondent Richard Maoka Maore by way of advertisement in local radio or television network.

(g) Time for service of this petition be extended by fourteen days or such other duration as this Honourable Court may deem fit to grant."

That application was filed on grounds, among others, that the first respondent could not be served in person as required under **section 20(1) (a)** of the National Assembly and Presidential Election Act as he was deliberately avoiding service; that all efforts had been made to effect service in person upon the first respondent by visiting his home, office and all other places he was considered likely to go to or visit but the first respondent could not be traced as he had gone into hiding or was on the run; that service of the petition had to be effected on or before 31st January, 2003, being the 28th day after the date of publication of the results in the Kenya Gazette on 3rd January 2003 and that no other mode of substituted serve was possible other than advertisement through the electronic media within the remainder of the statutory period of service unless time was extended for service of the petition. That application was placed before the superior court (Onyancha J.) in the afternoon of 31st January 2003. After an ex-parte hearing, the learned Judge certified it urgent, heard it partly and made orders, *inter-alia,* as follows:

"**(c) Service of the application to be effected on or before 7th February 2003 by personal service or in default through advertisement in a local widely read newspaper;**

(d) Service of the petition be effected by substituted service by the mode of advertisement on Kenya Broadcasting Corporation Radio or Citizen Radio or Kenya Broadcasting Television or Citizen Television on or before 12.00 midnight."

I must point out that apparently, on that day and at that time, the learned Judge heard other applications and the above orders were made in respect of all of them including the application. The record shows that the orders of the superior court were complied with and the election petition was purportedly served through the KBC radio and television and Citizen Radio and Television. As to whether that was legally proper service and whether the superior court had the jurisdiction to make the orders that were made are matters I will refer to later in this judgment.

On 7th April 2003, the first respondent filed a notice of motion dated 4th April 2003 in the superior court on which he sought three orders as follows:

"**1. That the petition dated and filed on 29th January 2003 be struck out on the ground that the same was not personally served on the first respondent within 28 days after the date of the publication of the results of the Parliamentary Election in the Gazette or at all.**

2. That pending the hearing and determination of the application, all proceedings herein be stayed.

3. That petitioner do pay the costs of the first respondent in respect of the petition as well as costs of this application."

That application cited non service of the petition and notice of presentation of petition as first of the grounds for seeking striking out of the petition. The second ground was that the purported order for substituted service or extending the statutory period was null and void. Lastly, the first respondent also maintained as its ground for seeking the striking out of the petition that there was no evidence of any service of the petition upon him. That application was supported by an affidavit sworn by the first respondent which stated in pertinent part as follows:

"**2. On 3rd March 2003, I instructed M/S E.N. Monari, Esq, Advocate to act on my behalf in this petition. I further instructed them to peruse the court file as I was not served with the petition personally.**

3. Upon perusal of the court file, my Advocates of record, inform me, which information I verily believe to be true and correct, that they found an affidavit sworn by one Mathias Mboya

Maithya and filed on 31st January 2003.

4. I am further advised by my Advocates of record (sic), which advice I verily believe as true and correct, that the affidavit purported that I had left the country a fact the deponent knew or ought to have known as untrue, incorrect and misleading.

5. I have now perused the affidavit aforesaid.

6. What is deponed is true to the best of my knowledge save as to information and belief, sources and grounds thereof I have disclosed."

That application was opposed by the appellant who, in his ground of opposition filed on 5th May, 2003, stated as follows:

"**That the petition filed on 29th January 2003 was served to (sic) the respondents by the way of substituted service as per the order made on 31st January 2003 by Hon. Mr. Justice Onyancha."**

The affidavit in support of the grounds of opposition was filed by the appellant. He deponed that he accompanied a court process server to Ntonyiri Constituency to serve the petition upon the first respondent but the respondent was "*nowhere to be found in the constituency*" and he also accompanied the court process server to the residence of the 1st respondent in Nairobi but guards stationed at the gate denied them entry to the house of the first respondent. Thus, whereas he mentioned only two attempts to serve the respondent, the process server mentioned three attempts. Be that as it may, that application by the respondent seeking to strike out the petition came up for hearing before the superior court (Kasanga Mulwa J.) who, after full hearing found that the order for substituted service upon which the appellant relied to support his allegation that the petition was properly served, was not available in law. Having made that finding, the learned Judge proceeded to strike out the petition stating, *inter alia*, as follows:

"**In the circumstances, I find that there was no service on the applicant herein or on any of the other respondents in the petition as the substituted service ordered was and still is unlawful and unacceptable. For these reasons, the petition herein must fail.**

The result of these is that this application succeeds. The petition herein dated and filed on 29th January 2003 is consequently struck (sic) for want of service. The applicant and the other 2 respondents in the petition will have their costs in respect of the petition."

The appellant felt aggrieved by that ruling hence this appeal before us which is premised on seventeen (17) grounds all of which, in a summary, are that the learned Judge erred in striking out the petition on grounds that it was not served upon the respondents whereas the respondents were served with the petition either through proper substituted service or through normal service upon the 2nd and 3rd respondent and in the case of the first respondent, through attempts to serve him which he evaded knowingly by going underground, hiding or by making it impossible through his guards to access him.

Before us, Mr. Wamae, the learned counsel for the appellant, submitted at length what I may, in a nutshell, state that the second and third respondents were properly served and that he brought that fact to the attention of the superior court. He referred us to page 73 of the record where he had addressed the superior court on 28th July 2003 and told that court that the 2nd and 3rd respondents were served and stated further that only the first respondent could argue about the service and the court responded then by making an order that the 3rd respondent would only be confined to matters of law only. He thus confined his arguments before us to the issue of service upon the first respondent only as in his submission, the 2nd and 3rd respondents were properly served with the petition and the superior court's finding that they were also not served was misplaced.

On service upon the first respondent, Mr. Wamae's contention was that the trial Judge having made a

finding that ***rule 14(2)*** of the Election Petition Rules was applicable as it was not in conflict with ***section 20(1)*** **(a)** of the National Assembly and Presidential Election Act (Cap 7) Laws of Kenya and as that rule provides for service other than personal service, the Judge should have accepted that the service of the petition that was affected upon the first respondent was proper service. For that proposal, he referred us to the recent case of **Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 Others – Civil Appeal No. 272 of 2003** and argued that like in that case, in this case, the appellant made several attempts to serve the first respondent with the petition but the first respondent did hide himself with the sole purpose of avoiding personal service. That being the case, Mr. Wamae urged us to accept that the attempts made to serve the first respondent which did not end in physical personal service of the petition upon the first respondent amounted to a proper service upon the first respondent under the provision of ***rule 14(2)*** of the National Assembly and Presidential Elections Rules as well as under **section 20(1) (a)** of the National Assembly and Presidential Elections Act Chapter 7 and should be construed to amount to personal service. He raised other matters such as that the learned Judge of the superior court erred in law in finding that the Honourable Mr. Justice Onyancha should not have heard the interlocutory application that was seeking extension of time to serve the petition and order for substituted service and that as far as the superior court was concerned, the orders granted by Onyancha J. were conclusive and no other superior court Judge had the jurisdiction to overturn those orders; that the learned Judge erred in applying the Civil Procedure Rules and thus finding that service of the petition could not be done after 5.00 p.m. which was, in his view, a wrong finding in law as Civil Procedure Rules do not apply to election petitions. He thus urged us to allow the appeal. Mr. Monari, the learned counsel for the first respondent, in opposing the appeal contended that Onyancha J. had no jurisdiction to hear the application seeking orders for substituted service as he had not been appointed as an election court. He however agreed that one Judge of the superior court could not overrule the other but maintained that sitting as an election court as Mulwa J. was, he could overrule another Judge of the superior court. He submitted further that as what was to be served was an election petition and documents connected to the same petition, announcement through the radio and through the television did not and could not be treated as service of the petition. They were mere notice of the fact that an election petition had been filed but could not constitute the service of the petition. In his view, the affidavits purported to be in support of service upon or attempts to serve the first respondent only ended up in confirming that the first respondent was not served. There was no evidence whatsoever that the first respondent was avoiding service and he submitted that the facts in the case of **Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 others** (supra) were clearly distinguishable from the present case as the attempts made in this case fell far short of what was required before a court of law could conclude that service was effected upon the first respondent.

Lastly, Mr. Monari referred to the case of **David Wakairu Murathe vs. Samuel Kamau Macharia – C.A No. 171 of 1998** and argued that all parties to an election petition must be served unlike in this case where some parties were not served.

Mr. Mukuria, the learned counsel for the 2nd and 3rd respondents, on his part submitted that the two respondents were not personally served as required by law but as the matter that was before Mulwa J. was the application by the first respondent, the 2nd and 3rd respondents did not raise the question of non-service upon them before Mulwa J.

I have anxiously considered the above rival points raised by the parties. This is a first and last appeal. I am enjoined to revisit the evidence that was before the superior court afresh, analyse it, evaluate it and come to my own conclusion but always putting in mind that the superior court Judge had the advantage of seeing and hearing the parties and thus giving allowance for that – see the case of **Selle vs. Associated Motor Boat Co. Ltd. (1968) EA 123**. The starting point is the provisions of ***section 20(1) (a)*** of the National Assembly and Presidential Elections Act Chapter 7 Laws of Kenya. It states:

"**20(1) A 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 Gazettee."

The petition filed by the appellant was questioning the validity of the parliamentary election held in

respect of Ntonyiri Constituency in December 2002. The results, as I have stated above, were gazetted in the Kenya Gazette of 3rd January 2003 according to ***section 20(1) (a)*** above. That ***section 20(1) (a)*** does not however present any mode of service. All it says is that it must be served upon the other parties within 28 days of the gazettement of the results. ***Rule 14(2)*** of the National Assembly **Election (Petition Rules), 1993** provides as follows:

"**(2) Service may be effected either by delivering the notice and copy to the advocate appointed by the respondent under rule 10 or by posting them by a registered letter to the address given under rule 10 so that, in the ordinary course of post the letter would be delivered within the time above mentioned or if no advocate has been appointed, or no such address has been given by a notice published in the gazette stating that the petition has been presented and that copy of it may be obtained by the respondent on application at the office of the Registrar."**

That provision clearly gives alternative modes of service of election petition. In my humble opinion, those other modes of service are available as and when the respondent cannot be served in person, in other words, they are alternative to personal service. I think that is why the word "***may***" is used in that provision. What I am saying is that personal service remains the best mode of service, but other alternative ways such as provided under ***rule 14(2)*** I have reproduced above are available and cannot be ruled out. This Court, constituted of five Judges, considered in details, among others, the provision of ***section 20(1) (a)*** of the National Assembly and Presidential Election Act Chapter 7 Laws of Kenya and ***rule 14(1) and 14(2)*** of the rules made thereunder and concluded that service by way of publication in the Kenya Gazette, in view of ***section 20(1) (a)*** of the Act could not be proper service. However, later in the same judgment it stated:

"**But the Courts must accept the wisdom of the Parliament unless, of course, they are contrary to the provisions of the constitution. It was decreed in section 20(1) (a) that service of election petitions must be personal and whatever problems may arise from that, the courts must enforce the law until parliament should itself be minded to change it."**

In my mind, ***section 20(1) (a),*** as I have stated above, only provides for the time within which the election petition should be served, which it specifically states is **28 days**. It does not provide for the mode of service i.e. it does not state how the service is to be done. That is clearly covered by ***rule 14(2)*** of the National Assembly and Presidential Elections Rules. Thus in my view, ***section 20(1) (a)*** is not in any way in conflict with ***rule 14(2)***. I do agree it is in conflict with ***rule 14(1)*** which also provides for time within which an election petition is to be served. I also agree that ***rule 14(1)*** must, in such circumstances in law, give way to ***section 20(1) (a)***. However, having said that much, one thing still stands out, and that is that in the case of **Kibaki vs. Moi (2000) IEA 115**, no attempt was made to personally serve the respondent with the election petition. That, in effect meant that the petitioner in that case preferred the alternative mode of service namely through gazzette notice before attempting personal service. Omolo, J.A in the case of **Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 others** (supra) explained what personal service would embrace. He stated, *inter alia*, as follows:

"**Perhaps this is now an appropriate place for me to set out the issue of personal service of an election petition which the appellant made the basis for his motion to strike out the 1st respondent's petition."**

Then he gave narrative factual actions taken by the appellant to serve the first respondent with the petition in that case and having done so, he proceeded and addressed himself thus:

"**I think that on the material placed before the trial Judge, any reasonable tribunal would be fully justified in concluding, as those who wanted to effect service upon the appellant did, that the appellant had gone underground with the sole purpose of evading personal service and that was why he could not be found in his two houses in Nairobi and Mombasa. Put simply, he was hiding from those who intended to effect personal service upon him.**

Did KIBAKI vs. MOI establish any proposition that even where it be proved that a party was

hiding with the sole purpose of avoiding personal service, yet such a party must still be personally served? The decision established nothing of the kind. At page 37 of the judgment in KIBAKI vs. MOI the Court stated: -

" ……. ***section 20(1) (a) of the Act does not prescribe any mode of service and in those circumstances, the courts must go for the best form of service which is personal service. Before this Court, the appellant did not offer any reason why he did not go for personal service though in the High Court, it had been contended that the 1st Respondent in his capacity as the President, is surrounded by a massive ring of security which it is not possible to penetrate. But as the Judges of the High Court correctly pointed out no effort to serve the 1st respondent was made and repelled……."***

The decision clearly recognised that if personal service which is the best form of service in all areas of litigation, is not possible, other forms may be resorted to. Otherwise why would the court have expected to be given reason or reasons why personal service was not effected? Why would the High Court and this Court have expected that some attempt at personal service be tried on the President and be shown to have been repelled?"

Thus in the case of **Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 others** (supra) this Court established that personal service is the best form of service, and that personal service need not be by actually handing over the papers to the respondent. It can be inferred if the petitioner makes all reasonable efforts to serve the respondent but fails to do so simply because the respondent evades service by hiding, refusing to acknowledge service, causing his agents or servants to restrain in any way the process server from reaching him or by use of any other tactics to avoid service.

Omolo, J.A further stated:

" **Put simply, the Appellant in this case cannot be allowed to rely on his having successfully hidden himself from the attempts of the 1st Respondent to personally serve him to defeat the 1st Respondent's petition challenging the validity of his election as Member of Parliament for Lamu East Constituency. The effort made by the 1st Respondent to personally serve him amounted to personal service on him and the learned trial Judge was right in holding that he had been served. He made it impossible for the 1st Respondent and his agents to physically get hold of him and personally hand over the documents to him, but as I have said, he cannot be allowed to take advantage of his own wrong in hiding from those wanting to serve him and defeat the claim of the 1st respondent on that basis."**

The above is the law. If the petitioner demonstrates to the court's satisfaction that he made every effort to effect personal service but the same was thwarted by action of the respondent, then the court will infer personal service upon the respondent in the same way it would infer service in civil matters. Mr. Wamae urges us to accept that in the case before us, personal service should be inferred as the appellant made several efforts to physically serve the fourth respondent with the petition but at all times the fourth respondent avoided service. He thus says the court's decision in the **Abu Chiaba Mohammed vs. Mohammed Bwana Bakari & 2 others** (supra) would apply in this case.

I have considered the facts in this case and the facts in the case of **Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 others** (supra). With respect, I do not agree. In this case the affidavit sworn by the process server**,** Matheas Mboya Maithya on 30th January, 2003, most of which I have reproduced above states that the process server went to the 1st respondent's office at Continental House on 30th January, 2003 for purposes of serving the 1st respondent with the election petition but the guards advised him that the 1st respondent was not in the office. The process server himself did not state that he believed the 1st respondent was in the offices. He did not state at what time he went to the 1st respondent's office. He does not state whether the guards who advised him that the 1st respondent was not in the office were the respondent's employees or guards generally employed to guard the entire building. In short, there is nothing to make me conclude that the first respondent was hiding in the office for purposes of avoiding

service of the petition. The guards might have been telling the truth that the first respondent was indeed not in the office. The second effort was made on that same day 30th January, 2003. The process server proceeded to Mutuati, Ntonyiri Constituency in an effort to trace the first respondent but again that effort proved futile. It is not stated why they had to go to Mutuati to trace the first respondent. Who had told the process server the first respondent was there? The affidavit is silent on that. Where in particular at Mutuati did they go to? It is not stated whether Mutuati was the first respondent's home or where his constituency office was and whether the process server had been told the first respondent was there. I cannot be satisfied that the first respondent was hiding there or that his agents were deliberately misleading the process server as to the first respondent's whereabouts with a view of avoiding being served. On the same day, the process server visited the first respondent's residence along Waiyaki Way and the first respondent's Personal Assistant, one Patrick, advised them that the first respondent was not at his home. The process server did not state that he believed the first respondent was at home contrary to what Patrick said.

On his second visit on 31st January, 2003, at 7.30 a.m. the process server said the respondent's guard denied him access to the home and he sought assistance of the Local District Officer who gave him two Administration Police Officers to accompany him to the first respondent's home but the guards refused him access to the first respondent. Two questions come to mind when considering the process server's allegations on the visit to the first respondent's home on all the three occasions. First is, was the first respondent in the house on all or any of those occasions? If so, why did the process server not say so? The second question is if the process server believed that the first respondent was avoiding service, why did he not paste or pin the election petition and the notice of presentation of the petition at the gate of the first respondent's home? The process server knew very well that if he visited the first respondent's home on more than one occasion and did not get him to serve him with the petition, on the third visit he would paste or pin the petition on the gate. He knew that other than his words, there was need for evidence of what he did when he felt the first respondent was deliberately avoiding personal service. In contrast, in the case of **Abu Chiaba Mohamed vs. Mohamed Bwana Bakari and 2 others** (supra), the petitioner there set out how he knew the respondent; who said he was residing in House No. 12 Ole Shapara Avenue in Nairobi; the efforts to serve him at that place; the misleading information from the respondent's relatives that the respondent was in Saudi Arabia; that an advocate in Mombasa in company of another process server went to the respondent's residence in Mombasa to personally serve him. The process server was denied entry into the premises and then the advocate and the process server were told that the respondent was in Nairobi. When attempts to serve the respondent in Nairobi failed, the petitioner sent documents to the respondent by registered post to his last known address. When the respondent's residence in Nairobi was visited again on 29th January, 2003, a watchman told the process server that the respondent was in Mombasa and on 30th January, 2003, the petitioner again accompanied an advocate and another process server to the respondent's residence in Mombasa. On arrival they met a lady who was identified by a watchman as the respondent's wife. That lady drove off from the premises without acknowledging the process server's attempts to explain the purpose of their visit. The process server then pinned the petition and other documents intended to be served on the respondent on the gate to the respondent's premises and photographs showing that were attached to the replying affidavit. Also the gazette notice of the filing of the petition was availed. That was after attempts to physically serve the respondent personally failed.

It is certain that the attempts that were made in **Abu Chiaba's** case (supra) could leave no court with any other conclusion but that the respondent in that case was avoiding service. Further, the petitioner in that case demonstrated beyond *per adventure* that he had done all he could in affecting personal service including pinning the petition and the other documents at the respondent's gate. In the case before us, there is no reason for any court to conclude that the first respondent was hiding or in any other way avoiding service upon him of the election petition.

I do therefore find and hold that no satisfactory attempts were made to serve the first respondent within 28 days as is required by ***section 20(1) (a)*** of the National Assembly and Presidential Elections Act Chapter 7 Laws of Kenya. I further hold that the action allegedly taken by the appellant to serve the first respondent in this case could not lead to an inference that the first respondent was indeed served with the election petition and notice of presentation of the petition. I may also add that this was perhaps because

the election petition was filed too late in time and so the appellant had no time available to effect the service as required by law.

In the result, I would dismiss this appeal on grounds that the appellant failed to comply with ***section 20(1)(a)*** aforesaid. I have read in draft the judgment of Omolo, J.A on the legal position as to whether the learned Judge of the superior court was right in overruling a fellow Judge of the same Court and I agree with his explanation of the law. I have nothing useful to add on that point. I have also read in draft the judgment of Githinji, J.A on whether the service by media after 5.00 p.m. was proper. I do agree with him fully on his view on the law and I do not need to add anything on to his judgment.

In view of the foregoing, I would dismiss this appeal with costs to the first respondent.

Dated and delivered at Nairobi this 19th day of October, 2007.

J.W. ONYANGO OTIENO

…….**…….**

JUDGE OF APPEAL