



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: OMOLO, TUNOI, O’KUBASU, GITHINJI, WAKI,

ONYANGO OTIENO & DEVERELL, J.J.A)

CIVIL APPEAL NO. 238 OF 2003

BETWEEN

ABU CHIABA MOHAMED ..... APPELLANT

AND

MOHAMED BWANA BAKARI ..... 1ST RESPONDENT

AHMED H.S. MRAJA ..... 2ND RESPONDENT

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

(An Appeal from Ruling and Order of the High Court of Kenya at

Mombasa (Khaminwa, J) dated 19

th

August, 2003

in

H.C. Election Petition Number 3 of 2003)

\*\*\*\*\*

JUDGMENT OF OMOLO, J.A.

Following the last general elections held in Kenya on 27th December, 2002, The Electoral Commission of Kenya, the 3rd Respondent herein, vide Gazette Notice dated 3rd January, 2003, declared Abu Chiaba Mohamed, the Appellant herein, as the duly elected Member of Parliament for Lamu East Constituency in the Coast Province. The date of the declaration, namely 3rd January, 2003 is vital in the dispute before us because section 20 (1) (a) of the *National Assembly and Presidential Elections Act Chapter 7* of the Laws of Kenya, “**the Act**” hereinafter provides and I quote: -

“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 Gazette .....*”

According to Election Cause No. 3 of 2003 filed by Mohamed Bwana Bakari on 27th January, 2003 at the Mombasa High Court Registry, Mohamed Bwana Bakari, the 1st Respondent herein, stated that he was a person who voted in a parliamentary election under the Act and having stated so, he went on to enumerate various election malpractices which he alleged took place before and during the election and as a result of the alleged malpractices, the 1st Respondent asked the High Court to declare the election in Lamu East Constituency to be null and void and to penalize the Appellant with the costs of the petition. Faced with the challenge to the validity of his election as the Member of Parliament for Lamu East Constituency the Appellant, on 18th March, 2003, took out a notice on motion under section 20 (1) (a) of the Act, and the prayers sought in the motion were: -

***“1. THAT the petition herein be struck out on the ground that the same was not personally served on the 1st Respondent {i.e. the Appellant} within 28 days after the date of the publication of the result of the Parliamentary Election in the Kenya Gazette on 3rd January, 2003 or at all; and***

***2. THAT pending the hearing and determination of this application all proceedings herein be stayed; and***

***3. THAT the petitioner [i.e. the 1st Respondent] do pay the costs of the 1st Respondent [i.e. the Appellant] in respect of the petition as well as of this Application”***

The notice of motion was supported by a short affidavit comprising of six paragraphs and sworn by the Appellant and in that affidavit, the Appellant stated as follows, and I set out the whole affidavit:-

***“I, ABU CHIABA MOHAMED of Post Office Box 59839, Nairobi, make OATH AND STATE AS FOLLOWS:-***

***1. THAT I am the First Respondent herein.***

***2. THAT a notice of the result of the 2002 Parliamentary Election, whereby I was declared to be duly elected as Member of Parliament for Lamu East Constituency, was published in the Gazette on 3rd January, 2003. I learnt of this fact from the local newspapers.***

***3. THAT I have not been personally served with the petition in this case, either within 28 days after the date of the said publication as required by section 20 (1) (a) of the National Assembly and Presidential Elections Act (Cap 7) or at all.***

***4. THAT on 5th March, 2003, I instructed Messrs Kilonzo & Company, Advocates of Nairobi to act for me in this matter and to obtain a copy of the petition at the High Court Registry.***

***5. THAT I am advised by my Advocates on Record, Messrs Kilonzo & Company Advocates, which advice I verily accept to be true and correct that the petition herein should be struck out with costs on the GROUNDS THAT:-***

***(a) The petition herein, the Notice of Presentation and all other accompanying notice and documents were not served on me personally or at all within the statutory (28) days after the gazettelement of the Election in the Kenya Gazette on 3rd January, 2003;***

***(b) Without service of the petition as above the same is of no legal consequence or at all (sic) and should be struck out with costs.***

***6. THAT what I have deponed herein is true to the best of my knowledge save as to information and believe (sic) sources whereof I have disclosed.”***

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 Respondents petition. In

the case of **MWAI KIBAKI VS. DANIEL TOROITICH ARAP MOI**, Civil Appeal No. 172 of 1999, (unreported) this Court consisting of a bench of five Judges held that following the amendments to section 20 of the Act, which amendments were brought in by the Statute Law (Repeals and Miscellaneous Amendments) Act, 1997, i.e. **Act No. 10 of 1997**, the only way of serving an election petition was by way of personal service. The basis for that decision was fully set out in the judgment and I need not repeat them. In the present appeal, we were asked to over-rule the decision in **KIBAKI VS. MOI**, supra. I will answer that contention in due course.

Faced with the motion to strike out his petition, the 1st Respondent swore a replying affidavit of some twenty two paragraphs and in that affidavit he set out in detail, the efforts his lawyers had made in order to serve the Appellant personally. Right from paragraph 5 of the 1st Respondents replying affidavit, he sets out how he knew that the Appellant was residing in House No. 12 along Ole Shapara Avenue in Nairobi , South 'C' Area and that he passed that information to his legal advisers to enable them serve the Appellant personally, obviously in order to comply with the decision of the Court in **KIBAKI VS. MOI**. That his legal advisers sent a process server Mwangi Kabaria to serve the Appellant at that known residence, how Mwangi Kabaria visited House No. 12 on 28th January, 2003, how a grandson of the Appellant named Jamal Domilla and a watchman known as Mohamed Omar Ali Rotich were found there and told the process server that the Appellant had gone to Saudi Arabia. It was then suspected that the Appellant was hiding in order to evade service (paragraph 8) and that it was thought prudent to go and look for him at his Mombasa residence; that an Advocate called William Mogaka of Mombasa in the company of another process server Alexander Kaluve Musembi went to the Appellant's residence in Mombasa to personally serve him. This was still on 28th January, 2003. The process server was denied entry into the premises in Mombasa and when enquiries were made as to the whereabouts of the Appellant the advocate and the process server were told that the Appellant was away in Nairobi. Attempts were then made to determine the whereabouts of the Appellant and the 1st Respondent learned that the Appellant was in Nairobi and that he had not travelled to Saudi Arabia. The information was passed to the 1st Respondent's lawyers and on the same day, the lawyers sent documents by registered post to the Appellant's last known postal address. On 29th January, 2003, Joseph Mwangi Kabaria again visited the Appellant's South 'C' residence; once again the watchman informed Kabaria that the Appellant was in Mombasa. On 30th January, 2003 the 1st Respondent again accompanied William Mogaka and Alexander Kaluve Musembi went to the Appellant's residence in Mombasa and on arrival they met a lady who was identified by a watchman as the Appellant's wife and who drove off from the premises without acknowledging Musembi's attempts to explain the purpose of the visit. Musembi then pinned the documents intended to be served on the Appellant on the gate to the Appellant's premises and photographs showing this happening were attached to the replying affidavit. Mr. Moses Gitau, who argued the 1st Respondent's appeal before us, also had published in the Gazette the filing of the petition. This was after the attempts to personally serve the Appellant had failed. There were also affidavits of service by Mr. Moses Gitau and Alexander Kaluve Musembi. All these affidavits were served upon the Appellant's advocates and had the Appellant been minded to contest the veracity of their contents, he could have done so. The Appellant did nothing of the kind. All that Mr. Mutula Kilonzo Junior did on his behalf was to contend before us that all the allegations made in the affidavits show that the Appellant was not personally served and that, therefore, the trial Judge was wrong to hold that he had been properly served according to law. Because the Appellant thought the Judge was wrong in holding that he had been properly served and thus dismissing his motion to strike out the petition, he now appeals to this Court.

Now, the 1st Respondent brought before the trial Judge the efforts that he and his legal advisers had made in an attempt to personally serve the Appellant and thus comply with the law as laid down in **KIBAKI VS. MOI**. Of course the learned Judge of the High Court would have no jurisdiction to over-rule a decision of this Court even if she disagrees with the decision and the comments in her judgment must be ignored as having been made without jurisdiction and in violation of the well-known doctrine of precedent. I would respectfully point out to the learned Judge that like all other Judges in her position, under the doctrine of precedent, she is bound by the decisions of this Court even if she may not approve of a particular decision and any attempts to over-rule or side-step the Court's decisions can only result in unnecessary costs to the parties involved in the litigation. I go back to the facts as presented before the trial court.

The 1st Respondent mentioned two places where he knew the Appellant to be residing. He mentioned House No. 12 in Nairobi South 'C'. He also mentioned the names of two people, the grandson Jamal Domilla and the watchman Mohamed Omar Ali Rotich; those two are stated to have told the process server that the Appellant was in Saudi Arabia. The Appellant, as we have seen, chose not to say anything on those matters. He, for example, did not say that he did not own House No. 12 along Ole Shapara Road, Nairobi South 'C'; he did not say that he has no grandson known as Jamal Domilla or a watchman called Mohamed Omar Ali Rotich. These people told the process server that the Appellant was in Saudi Arabia. Those intending to serve the Appellant have sworn that they suspected the Appellant was hiding from them in order to avoid being personally served. That led to the party intending to personally serve him to move to Mombasa. The Appellant, if it was true that he was in Saudi Arabia, could have proved that fact by producing a copy of his passport. He did nothing of the kind. Then the search moved to Mombasa and once again, the Appellant did not say he had no house in Mombasa and that he knew nothing about the gate on which the documents to be served on him were pasted. A woman identified as his wife was found there and refused to talk to the party intending to effect service. The Appellant chose to say absolutely nothing about these matters. On the contrary, he swears that he had instructed his lawyers on 5th March, 2003 without disclosing how he learned about the existence of the petition filed against his election.

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 recognized 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? Lady Justice Khaminwa clearly recognized this aspect of the decision for she stated in her judgment at page 135 of the record of appeal:-

***“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 the petitions (sic) as required by section 20 (1) (a) of the Act 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 (sic) made no effort to personally serve the Respondent. In this case alternative methods were made to bring the notice to (sic) of the petition (sic) of the respondent knowledge but personal service proved impossible.”***

The truth of the matter is that personal service remains the best form of service in all areas of litigation and to say that Members of Parliament are a different breed of people and different rules must apply to them as opposed to those applicable to other Kenyans cannot support the principle of equality before the law. In the appeal before us, unlike in the **KIBAKI VS. MOI** case, the 1st Respondent and his lawyers made strenuous and concerted efforts to personally serve the Appellant; they proved the efforts they had

made to personally serve him but they were unable to physically get hold of him and serve him because he was hiding from them. Can the Appellant now be allowed to, in effect tell courts:-

***“I knew the 1st Respondent was looking for me to personally serve me. I also knew that as per the decision in KIBAKI VS. MOI he had to personally serve me or his petition would be of no legal consequence. With this knowledge I hid myself from them so that it was impossible for them to find me in order to effect personal service on me. I was successful in hiding from them and they were accordingly unable to serve me. I now ask you (the court) to strike out his petition as being of no legal consequence as it was not personally served on me.”***

I know that the law has often been said to be an ass. But I equally know that the law cannot be such an ass that it would even forget its other well-known principle, namely that no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man. 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.

Should the decision in **KIBAKI VS. MOI** be over-ruled? I think there is no occasion for me to do so in this appeal even if I were minded to do so. I would myself decline to over-rule the decision for several reasons. First, as I have said, **KIBAKI VS. MOI** did not establish any principle that even where it is proved that the party to be served evaded service by hiding himself, or used physical force to prevent personal service or took refuge in a place where service of documents is not permissible, such as the House of Parliament, or used such other subterfuge to avoid being personally served, such a party must still be served or else the petition would be struck out. The law will not and cannot permit such a party to rely on his own wrong to defeat an otherwise valid petition. Secondly, I have held as a fact, and the learned trial Judge did recognize that fact, that the Appellant was served through alternative means after he had made it impossible for the 1st Respondent and his agents to physically hand the documents to him in person. Having found as a fact that the Appellant was personally served as required by the decision in **KIBAKI VS. MOI**, anything else I say on the case would merely be treated as obiter. Thirdly, Parliament appears to have taken the matter in its own hand and will be dealing with it in due course. The published ***“The Statute Law (Miscellaneous Amendments) Bill, 2005***, proposes in the 1st Schedule thereof, the amendment of section 20 (1) (a) of the Act by deleting the words ***“and served”*** whenever they appear in paragraphs (a) and (b) of the section. If the proposed amendment goes through, we shall revert to the old position which obtained before the passing of Act No. 10 of 1997 to which I have already referred. It was the introduction of the words ***“and served”*** in the section which precipitated the decision in **KIBAKI VS. MOI** and if those words are removed there will be no further problem. For these reasons, I see no necessity to consider the issue of whether or not to over-rule the decision and I would myself decline the invitation to do so.

The only other issue I wish to touch on briefly is the learned Judge’s holding that it would be unconstitutional to strike out an election petition without hearing it on merit. The provisions of section 44 of the Constitution provide for the court where elections petitions are to be lodged, i.e. the High Court, the person or persons, who may lodge a petition, and in section 44 (4) it is specifically provided:-

“Parliament may 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 a question under this section; and***

***(b) the power, practice and procedure of the High court in relation to the application.”***

The Act, i.e. the ***National Assembly and Presidential Elections Act***, is obviously made pursuant to **section 44 (4)** of the Constitution. The Act provides that an election petition shall be filed and served within 28 days. Surely the learned Judge cannot be saying that the High Court would be acting unconstitutionally if it were to strike out a petition filed some three months from the date of publication of an election result in the Kenya Gazette . With respect to the learned Judge there is nothing unconstitutional in striking out an incompetent petition. The various advocates who appeared before us for the respective parties cited to us numerous authorities touching on various aspects of the matter. I am grateful to them for their research and diligence. I, however, have not found it necessary to use those authorities because in my view the authorities did not deal with the issue of what constitutes personal service. Most of them were directed at showing us that the decision in **KIBAKI VS. MOI** was wrong and therefore ought to be over-ruled. For reasons already stated, I have declined the invitation to over-rule the decision. It is not out of disrespect to the respective learned counsel that I have not found it necessary to deal with the authorities they cited.

Nor have I found it necessary to deal with the individual grounds of appeal contained in the Appellant's memorandum of appeal. The Appellant's principal complaint was that he was not personally served with the notice of lodgement of the petition and the petition itself contrary to the decision in **KIBAKI VS. MOI**. All the grounds revolved around that issue. I have determined the issue and that determination covers all the individual grounds listed in the memorandum of appeal. I have said enough, I think, to show that I am not for allowing this appeal.

Accordingly I would propose that the appeal be dismissed with costs to the Respondents named in the appeal. As the Court agrees, those shall be the orders of the Court.

Dated and delivered at Nairobi this 16th day of September, 2005

**R.S.C. OMOLO**

**JUDGE OF APPEAL**

**JUDGMENT OF TUNOI, J.A.**

I have had the advantage of reading in draft the judgment of Omolo J.A.

I agree with it and with the orders proposed by him and have nothing to add.

*DATED and DELIVERED at NAIROBI this 16th day of September, 2005.*

**P.K. TUNOI**

**JUDGE OF APPEAL**

**JUDGMENT OF O'KUBASU, J.A.**

I have had the advantage of reading in draft judgment prepared by Omolo, J.A. with which I agree and have nothing useful to add. ***Dated and delivered at Nairobi this 16th day of September, 2005.***

**E.O. O'KUBASU**

**JUDGE OF APPEAL**

**JUDGMENT OF GITHINJI J.A.**

This is an appeal from the Ruling of the superior court (Khaminwa J) dated 19th August, 2003 wherein the superior court dismissed with costs an application by **ABU CHIABA MOHAMED** (appellant) herein to strike out an *Election Petition* – Cause No. 3 of 2003 filed by **MOHAMED BWANA BAKARI** (first

respondent herein).

By a Gazette Notice dated 3rd January, 2003, the appellant was declared to be duly elected as a member of Parliament for Lamu East constituency in the Parliament Elections held on 27th December, 2002. The petitioner then filed a petition praying that the election for Lamu East constituency be declared null and void because of various irregularities and malpractices. Thereafter, the appellant filed an application under **section 20 (1) (a)** of the National Assembly and Presidential Elections Act (Cap 7) (Act) seeking an order, inter alia, that the petition 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 result of the Parliamentary Election in the Kenya Gazette on 3rd January, 2003 or at all”.***

The first respondent filed a replying affidavit verifying, among other things, that the appellant was served with notice of presentation of the petition and the petition through three avenues, namely, by pinning the notice of the presentation of the petition and the petition on the gate of his residence in Mombasa on 28th January, 2003; by sending those documents by registered post to the last known postal address of the first respondent and by notice in the Gazette which was published on 31st January, 2003. The full facts regarding the service are contained in the judgment of Omolo, J.A.

The appellant did not dispute that he was served as described but relying on the decision of this Court in ***Mwai Kibaki v Daniel Toroitich Arap Moi***, Civil Appeal No. 172 of 1999 (unreported) contended that he was not personally served. The dispute in the superior court was aptly summarised by the superior court thus:

***“It is not disputed that the petition was presented within 28 days after publication of 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 petitions require personal service?”.***

The learned Judge answered that question in the negative and was satisfied that the appellant was duly served. This appeal arises from that decision. In ***Kibaki v Moi***, the service of the petition was through Gazette Notice published within 7 days of the filing of the Election Petition to challenge the validity of the Election, the result of which was published in the Gazette about 17 days before the filing of the petition. It was contended in that case, that service through publication in the Gazette was authorized by **Rule 14** of the National Assembly Election (Petition Rules), 1993 which provides:

***“14. (1) 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***

***(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”.***

Rule 10 referred to above states:

***“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 application to strike out the petition in **Kibaki v Moi** was based on the ground that the respondent (Moi) had not been:

***“served personally with the petition ... either within 28 days after the date of ... publication as required by section 20 (1) of the National Assembly and Presidential Elections Act (Cap 7) or at all”.***

**Section 20 (1) (a)** referred to above provides:

***“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 Gazette”.***

In support of the application to strike out the Petition in **Kibaki v Moi** it was contended that **rule 14** had become irrelevant since it was in conflict with **section 20 (1) (a)** in that whereas **section 20 (1) (a)** provided that a petition be presented and served within 28 days, **Rule 14 (1)** provided that the petition should be served within 10 days of the presentation. This Court agreed with this submissions and held:

**“We accordingly agree with the High Court 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 the plain 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) of the Act.”**

In so finding the Court in effect overruled its previous decisions, namely, **Alice Chelaite v David Manyara Njuki & 2 others** Civil Appeal No. 150 of 1998 and **David Kairu Murathe v Samuel Kamau Macharia** – Civil Appeal No. 171 of 1998, (both unreported), to the effect that there was no conflict in the two provisions.

I must confess that I have found it difficult to appreciate from the judgment the relevance of the issue of conflict of the two provisions relating to time of service (as opposed to mode of service) of a petition in **Kibaki v Moi** to the application which was before the Court because it was not there contended that service was outside the 28 days or outside the 10 days after the presentation of the petition.

It seems from the judgment, however, that, the effect of the conflict was at least to render **rule 14 (1)** inoperative and to **leave section 20 (1) (a)** as the only provision dealing with the service of petition. As a consequence, the Court found that section 20(1) (a) does not prescribe any mode of service and hence applied the provisions of the Civil Procedure Act regarding requirement of personal service. The Court then emphatically held that:

***“Service by way of publication in the Kenya Gazette, in view of sections 20 (1) (a) of the Act, cannot be proper service”, and later that:- “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.”***

The Court nevertheless, agreed that the National Assembly and the Presidential Elections Act and the National Assembly Elections (Election Petition) Rules both form a complete regime and other legislation or rules can only be applicable to election petitions if they are made applicable by the Act itself or the rules. In the present case, the superior court was urged not to follow the decision in **Kibaki v Moi** on the ground that it was made per incuriam. The learned Judge was referred to many authorities on the question of the interpretation of statutes and on the doctrine of precedent. The learned Judge (Khaminwa, J.) found, inter alia, that the Court of Appeal in **Kibaki v Moi** failed to comment on **rule 14(2)**; that **rule 14(2)** is not in conflict with section 20(1) (a) of the Act; that Parliament had not expressly required nor intended personal service of Election Petitions, that service through publication in the Gazette is not

inconsistent with **section 20(1) (a)**; that the decision of the Court of Appeal was per incuriam and therefore not binding on the High Court. Those are weighty legal issues indeed.

The decision in ***Kibaki v Moi*** and the interpretation of that decision by the superior court is the central focus of this appeal. The court has been urged specifically to make a finding that the decision in ***Kibaki v Moi*** was made per incuriam and to overrule it.

The purpose of the construction of a statute is to find out the intention of Legislature. If the words of the statute are clear and unambiguous effect must be given to them for the statute speaks the intention of the Legislature. It is not permissible in the construction of statutes to imply a provision in the statute which is inconsistent with the words expressly used. The law is concisely stated in Halsbury's Laws of England – 3rd Ed. Para 582 thus:-

***“Statutes must be construed to make them operative. If is possible the words of a statute must be construed so as to give a sensible meaning to them ..... A statute must, if possible, be construed in the sense which makes it operative, and nothing short of impossibility so to construe it should allow a court, to declare a statute unworkable. Thus where a statute has some meaning, even though there is little to choose between them, the courts must decide what meaning the statute is to bear rather than reject it as a nullity. It is not permissible to treat a statutory provision as void for mere uncertainty, unless the uncertainty can not be resolved and the provision can be given no sensible or ascertainable meaning and must therefore be rendered as meaningless.***

***Where the main object and intention of a statute are clear, it should not be reduced to a nullity by a literal following of language which may be due to want of skill or knowledge on the part of a draftsman unless such language is intractable”.***

This Court is bound by principle of stare decisis to follow its own decisions except where, inter alia, the decision was given per incuriam and a decision is given per incuriam if it is given in ignorance or forgetfulness of some inconsistent statutory provision or authority binding on it (See ***Young vs. Bristol Aero plane Co. Ltd*** [1944] 1 KB 718. ***Kiriri Cotton Co. v. R.K. Devani*** [1958] EA 259; ***Dodhia v. Nat & Grindlays Bank Ltd*** [1970] EA 195 and ***Income Tax v. T.*** [1974] EA 546).

The law is the same as it was when ***Kibaki v Moi*** was decided. Section 20 (1) (a) of the Act does not decree as the Court in ***Kibaki v Moi*** erroneously, in my view, said, that service of Election Petitions must be personal. The section does not indeed deal with the mode of service. It merely prescribes the time of service. The Court of Appeal did not in ***Kibaki v Moi*** construe **Rule 14 (2)** which is a subsidiary legislation having the same status as an Act of Parliament. That rule prescribes three statutory modes of service of election petitions which do not include personal service. www.kenyalaw.org Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR 18 The prescribed mode of service include service by notice published in the Gazette which was one of the three modes used in this case.

In ***Ferrell v Alexander*** [1976] 1 All ER 129, Lord Denning MR said in part at page 137 paragraph d:

***“No court is entitled to throw over the plain words of a statute by referring to a previous judicial decision. When there is a conflict between a plain statute and a previous decision the statute must prevail”.***

As I have said above, the Court did not in ***Kibaki v Moi*** embark on a construction of the provisions of **Rule 14 (2)** which were the only statutory provisions prescribing the mode of service. The Court with respect ignored the provisions of the rule and imported into the Act the requirement of personal service of Election Petition (which is not in the Act or Rules) in disregard of the cannons of the construction of statutes. In my humble view, the decision in ***Kibaki v Moi*** was given per incuriam. I would further hold that the decision does not establish any discernable precedent as the court did not infact construe any specific provisions of the Act or the Rules, in particular, **Rule 14 (2)**. Had the Court construed any specific words of the statute e.g. **Rule 14 (2)** and judicially interpreted the provision, either wrongly or

rightly then the decision can be said to be an authority on the meaning of the specific words of a statute and would therefore be a binding precedent. It follows that what the court said in *Kibaki v Moi* about personal service, which was not connected with any provision of the statute, was merely a dictum.

In the circumstances, the superior court, was, in my view, free to construe the specific provisions of the statute particularly **Rule 14 (2)** as it understood them. I am satisfied that the superior court made a valiant and correct construction of the statute particularly **Rule 14 (2)**. The learned Judge deserves due tribute. The appeal has no merit.

For those reasons, I dismiss the appeal with costs.

www.kenyalaw.org Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR 19

Dated and delivered at Nairobi this 16th day September, 2005.

**E. M. GITHINJI**

**JUDGE OF APPEAL**

**JUDGMENT OF WAKI J.A**

I have had the advantage of reading in draft the judgment of my brother Omolo JA.

I agree with Omolo JA that the appeal before us rests on its own facts and does not call for a discourse on the decision of this Court in *Kibaki v Moi*. Such discourse would be largely obiter. The occasion will no doubt arise, unless Parliament effects the proposed amendments in the law, when the *ratio decidend* in that over-used decision will be re-examined in a proper forum of this Court or by a higher court.

The appeal before us is for dismissal for the reasons given in the judgment of Omolo J.A and I have nothing useful to add.

Dated and delivered at Nairobi this 16th day of September, 2005.

**P.N. WAKI .....**

**JUDGE OF APPEAL**

**JUDGMENT OF ONYANGO OTIENO, J.A**

. I have had the advantage of reading in draft judgment of Omolo, J.A. I do agree with it in toto and I have nothing useful to add. In my mind, this appeal should be dismissed and I would so dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 16th day of September, 2005.

www.kenyalaw.org Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR 20

**J.W. ONYANGO OTIENO**

**JUDGE OF APPEAL**

**JUDGMENT OF DEVERELL, J.A.**

I have had the advantage of reading in draft the judgment of Omolo, J.A. and agree with the orders proposed by him. Dated and delivered at Nairobi this 16th day of September, 2005.

**W. S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**