Kibaki v Moi

(Appeal from an Order of the High Court of Kenya at Nairobi (O\\\\\\\'Kubasu, Mbogholi-Msagha & Ole Keiwua JJ) dated 22nd July, 1999 in Election Petition No 1 of 1998)

December 10, 1999

Chunga CJ, Omolo, Shah, Lakha & Owuor JJ A

December 10, 1999, the following Judgment of the Court was delivered.

These two appeals, apart from the undeniable fact that they involve persons of no mean status in our country, raise issues very crucial to the jurisprudence of our legal system as we have hither-to understood it to be. The appellant in both appeals is the Hon. Mwai Kibaki who is the leader of the official opposition in Parliament. The respondent in Civil Appeal No. 172 of 1999 is the Hon. Daniel Toroitich Arap Moi, the 15 President and Commander-in-Chief of the armed forces of the Republic. We shall hereinafter refer to him as the 1st respondent. There are two other respondents in Civil Appeal No. 173 of 1999. They are S.M. Kivuitu and the Electoral Commission of Kenya; we shall hereinafter refer to these latter two as the 2\\\\\\\'d and 3rd respondents respectively. The 2nd respondent is the Chairman of the 3rd respondent. The 3rd respondent is a body created by section 41 of the country\\\\\\\'s Constitution and by virtue of section 42 A of the Constitution, the 3rd respondent\\\\\\\'s functions are tabulated to be:

(a) the registration of voters and the maintenance and revision of the register of voters;

(b) directing and supervising the Presidential National Assembly and local government elections;

(c) promoting free and fair elections;

(d) promoting voter education in Kenya; and

(e) such other functions as may be prescribed by law.

It is clear from this tabulation that the 3rd respondent and its Chairman the 211 respondent are crucial to the democratic system of governance that Kenya, like all other emerging democracies, is struggling to put in place.

We said from the outset that the parties involved in the two appeals are persons of no mean status in our Republic. That must be apparent from the short description we have so far given to each one of them. We only need to add that the two appeals were consolidated by the consent of all parties.

The Republic of Kenya held its last general elections on the 29th and 30th December, 1997. At those elections the appellant and the 1st respondent were among the candidates who contested for the Office of the President. The result of the Presidential election was published in the Kenya Gazette No. 79 of 1998 and dated the 5th January, 1998. The 1st respondent was declared the winner with 2,445,801 votes. The appellant was the runner?up with 1,895,527 votes.

Pursuant to section 44 of the Constitution, the appellant, on the 22nd January, 1998, filed in the High Court, Election Petition No. **1** of 1998 to challenge the validity of the I st respondent\\\\\\\'s election as the President of Kenya. On the 29t[h] January, 1998, the appellant had published in the
Kenya Gazette Notice No. 395 the following and we quote:

"The Constitution Of Kenya: The National Assembly And

Presidential Elections Act (Cap 7)

And

Election Offences Act (Cap 66)

In The High Court Of Kenya At Nairobi

Election Petition No. **1** of 1998

Between

Mwai Kibaki (Petitioner)

Versus

Daniel Toroitich Arap Moi

S.M. Kivuitu

Electoral Commission Of Kenya (respondents)

25

Notice

To:

Daniel Toroitich Arap Moi S.M. Kivuitu

Electoral Commission Of Kenya

Take notice that an election petition has been presented and filed in the High Court of Kenya at Nairobi, by Mwai Kibaki, relating to the election of Daniel Toroitich arap Moi, as the President of the Republic of Kenya in the Presidential Elections that took place on the 29t[h] and 30th December, 1997. And further take notice that a true copy of the petition may be obtained by you on application at the office of the Registrar/the Deputy

Registrar, High Court of Kenya, Law Courts, P.O. Box 30014, Nairobi.

Dated the 22nd January, 1998.

PHEROZE NOWROJEE

Advocate for the Petitioner."

We have found it necessary to set out this notice in full because it was agreed on all sides that this was the only mode adopted by the appellant in serving all the respondents with the petition lodged in the High Court on the 22nd January, 1998.

The 1st respondent, in turn appointed M/s Kilonzo & Company Advocates as his advocates on the 2nd February, 1998. The 2nd and 3rd respondents also appointed their advocates on the 3rd February, 1998. We assume that before the appointment of M/s Kilonzo & Company Advocates by the 1st respondent on the 2nd February, 1998, the 1st respondent had not, pursuant to Rule **10** of the National Assembly Elections (Election Petition) Rules, "the Rules" hereinafter, left at the office of the Registrar a 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. Where no such writing is left with the Registrar by an elected person, all notices and proceedings may be given or served by leaving them at the office of the Registrar. The relevance of these observations will in due course become apparent. We have alreadysaid that all the respondents were served with the petition through the Gazette Notice of 29" January, 1998 and which notice we have set out in full. On the 25\\\\\\\' January, 1999, one year after the presentation of the petition, the 1\\\\\\\' respondent took out a notice of motion which was said to be under section 20 of the National Assembly and Presidential Elections Act Cap 7, "the Act" hereinafter, and in his motion, the 1st respondent asked for three basic orders, namely:

(1) That the petition be struck out on the ground that the same was not served on the 1st respondent within 28 days after the date of the publication of the result of the Presidential Election in the Gazette or at all; and

(2) That pending the hearing and determination of this application, all proceedings herein be stayed; and

(3) That the petitioner do pay the costs of the 1st respondent in respect of the petition as well as of this application.

The motion was supported by the affidavit of the 1strespondent and in that affidavit, the 1st respondent\\\\\\\'s averments were to this effect:

"2. That a notice of the result of the 1997 Presidential Election, whereby I was declared to be elected as President, was published in the Gazette on 5th January, 1998. I learnt of this fact from the local newspapers.

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

4. That on 2nd February, 1998, I instructed Messrs. Kilonzo & Company Advocates of Nairobi to act

for me in this matter and to obtain a copy of the Petition from the Court Registry.

5. That what is stated above is true to my knowledge."

It is thus clear from the notice of motion and the supporting affidavit that the question of service under section 20 (1) of the Act was directly put in issue.

The 2nd and 3rd respondents also joined in the fray and on the 26th January, 1999, they also filed a second notice of motion seeking similar orders as those sought in the motion by the 1st respondent. But the motion by the 2nd and 3rd respondents was stated to have been brought not only under section 20 of the Act, but also pursuant to Rule 14 of the Rules.

Needless to say the two motions were vigorously opposed by the appellant who in turn filed Grounds of Objection and also replying affidavits. The two motions were heard together by O\\\\\\\'Kubasu, Mbogholi-Msagha and Ole Keiwua, JJ and by their ruling delivered on the 22nd July, 1999, the learned Judges acceded to the motions by the respondents and struck out the appellant\\\\\\\'s petition. It is that order striking out the appellant\\\\\\\'s petition which has provoked the appeals before us.

We started this judgment by remarking that the two appeals before us raise issues very crucial to the jurisprudence of our legal system as we have hitherto understood it to be. We can now show the relevance of that remark. In Civil Appeal No. 172 of 1999, the first ten grounds of appeal are as follows:

1. The High Court over-ruled the Court of Appeal.
2. The High Court erred in flouting the first principles of precedent and the doctrine of *stare decisis.*

3. The High Court has no power or status to determine whether the decision, reasoning or words of the Court of Appeal judgments are or are not "rather wide".

4. The High Court accordingly erred in denying on that basis the appellant of his lawful orders, rights and dues in the High Court.

5. The High Court cannot deny a party a decision in accordance with the Court of Appeal\\\\\\\'s existing judgments or conclusions on the basis that it disagrees with those conclusions or judgments.

6. The High Court was bound by the numerous Court of Appeal judgments and decisions cited and its refusal to follow them has damaged our legal system and has brought it into disrepute.

7. The High Court was bound by each of the said Court of Appeal judgments and decisions and erred in allowing the respondent\\\\\\\'s application to strike out the Election Petition in the face of those judgments and decisions.

8. In the High Court the respondent submitted that the Court of Appeal was wrong in several parts of several of its said judgments and decisions and the High Court erred and was unprofessional in entertaining and eventually upholding such flawed and unprofessional submissions.

9. The High Court had no jurisdiction so to do.

10. The High Court has acted without and/or in excess of its jurisdiction and powers."

The basic substance to be gleaned from these ten grounds is that there are several decisions of this Court establishing certain principles of law, that those principles were all in favour of the appellant, that the High Court was bound by those principles on the basis of the doctrine of *stare decisis,* but that in contumacious violation of that doctrine, namely the doctrine of *stare decisis* aforesaid, the High Court set at nought the principles of law previously established by the Court of Appeal and thus deprived the appellant of what was his established right or entitlement at law. If we were to be satisfied that the High Court did all or any of these things that would constitute a very serious indictment of our judicial system.

We would join the appellant and Mr Nowrojee in asserting and we assert together with them:

(i) That the High Court has no power to over-rule the Court of Appeal;

(ii) The High Court has no jurisdiction to flout the first principles of precedent and *stare decisis;* and

(iii) That the High Court, while it has the right and indeed the duty to critically examine the decisions of this Court must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that °*biter dictum* if applicable.

The principles of precedent and *stare decisis* are so well established in the Commonwealth jurisdictions that even the ever-crusading Lord Denning was hardly able to make any appreciable dent in them. In *Broome v Cassel & Co Ltd [197112* ALL ER 187, Lord Denning took on the House of Lords in these words:

"Yet, when the House of Lords, came to deliver their speeches, Lord Devlin threw over all that we ever knew about exemplary damages. He knocked down the common law as it had existed for centuries. He laid down a new doctrine about exemplary damages. He said that they could only be awarded in two very limited categories, but in no other, category; and all the other Lords agreed with him.

This new doctrine has up till now been assumed in this Court as doctrine to be applied: see *McCarey V Associated Newspapers Ltd; Broadway Approvals Ltd V Odhams Press Ltd; Fielding v Variety Incorporated; and Mafo v Adams.* It was applied by Widgery, J in *Manson v Associated Newspapers Ltd.* But it has not been accepted in the countries of the Commonwealth.The High Court of Australia has subjected this new doctrine to devastating criticism and has refused to follow it: see *Uren v John Carfax & Sons Pty Ltd.* The Privy Council has supported the High Court of Australia in a judgment which marshals with convincing force the arguments against the new doctrine: see *Australian Consolidated Press v Uren.* The Supreme Court of Canada together with the Courts of Alberta, Ontario, British Columbia and Manitoba have repudiated the new doctrine: see *McElroy v Cowper-Smith & Woodman; McKinnon v F.W. Woolworth Co Ltd & Johnson; &diner v Marwest Hotel Co Ltd* and *Fraser v Wilson.* The Courts of New Zealand also declined to follow it: see *Foggy v McKnight.* The courts of theUnited States of America know nothing about this new doctrine. They go by the settled doctrine of the common law as to punitive damages and would not dream ofchanging it. It is well stated in the *Re statement of the Law of Torts.*

This wholesale condemnation justifies us, **I** think, in examining this new doctrine, for ourselves; and **I** make so bold as to say that it should not be followed any longer in this country. **I** say this primarily because the common law of England on this subject was so well settled before 1964 - and on such sound and secure foundations - that it was not open to the House of Lords to overthrow it. It could only be done by the legislature. We say it also because the counsel who argued *Rookes V Barnard* accepted the common law as it had been understood for centuries and did not suggest any

alteration of it. Yet, the House without argument, laid down this new doctrine. If the House were going to lay down this new doctrine - so as to be binding on all our courts - it ought at least to have required it to be argued. They might then have been told of the difficulties which it might bring in its wake, particularly when there are two defendants as in this case. Next, I say that there were two previous cases in which the House of Lords clearly approved the award of exemplary damages in accordance with the settled doctrine of common law. They were *Hilton v Jones* and *Levy v Hamilton.* It was not open to the House of Lords in 1964 to go against those decisions. Lord Devlin must have overlooked them or misunderstood them, for he said that: "There is not any decision of this House approving an award of exemplary damages"; and yet there were those two. Finally we say that the doctrine is hopelessly illogical and inconsistent. ……..”

Here was Lord Denning at his intellectual best, not only criticising but refusing to follow the case of *Rookes v Barnard* [1964] 1 ALL ER 367; [1964] AC 1129 which was a decision of the House of Lords, a court superior to the Court of Appeal of England where Lord Denning, as the Master of the Rolls, presided. Lord Denning not only refused to follow *Rookes v Barnard,* but went further to advise other courts below the Court of Appeal not to follow *Rookes v Barnard.* Not surprisingly, there was an appeal to the House of Lords from the decision of the Court of Appeal. Delivering his speech in the House of Lords, Lord Hailsham of St. Marylebone, LC, had this to say, and we quote him:

"The fact is, and I hope it will never be necessary to say so again, that, in the hierarchial system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplance Co Ltd* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even in this House, since it has taken freedom to review its own decisions, will do so cautiously. That this is so is apparent from the terms of the declaration of 1966 itself where Lord Gardner, LC said:

“Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House."

It is also apparent from the recent case of *Jones V Secretary Of State For Social Services,* where the decision in *Minister Of Social Security V Amalgamated Engineering Union* came up for review under the 1966 declaration, that the House will act sparingly and cautiously in the use made of the freedom assumed by this declaration. In addition, the last sentence of the declaration as quoted above clearly affirms the continued adherence of this House to the doctrine of precedent as it has been hitherto applied to and in the Court of Appeal - see Lord Hailsham, LC in *Cassel & Co Ltd v Broome & Another,* [1972] 1 ALL. ER 801 at pages 809 letters g to j and 910 letters a to c."

We have found it necessary to extensively quote from these cases in 15 England because they illustrate very well the kind of problems we are called up to decide, particularly as regards Grounds **1** to 10 in the Memorandum of Appeal which we have set out elsewhere in the judgment. It is also worth

remarking here that the 1966 declaration by the House of Lords was adopted by the Court of Appeal for East Africa, the predecessor of this Court, in the case of *Dodhia v National & Grindlay\\\\\\\'s Bank Ltd & Another,* [1970] EA 195, where it was held that:

"The Court of Appeal, while it would normally regard a previous decision of its own binding, should feel free in both civil and criminal cases to depart from such decisions when it appears right to do so."

The Kenya Court of Appeal has steadfastly remained loyal to this principle and the consequence of that is that the courts of this country have continued to adhere to the principles of precedent and *stare decisis* and that is why we have joined the appellant and his counsel in asserting the continued adherence to the principles. We can then now turn to an examination of whether the High Court by its decision appealed from is guilty of all or any of the grounds listed as one to ten in the memorandum of appeal.

The question that was argued before the High Court was whether section 20 (1) (a) of the Act was in an irreconcilable conflict with Rule 14 of the Rules. Section 20 (1) after its amendment by Act No. 10 of 1997 now reads:

¯20 (1) A petition -
(a)to question the validity of an election, shall be presented and served within 28 days after the date of publication of the result of the election in the Gazette;

(b) to seek a declaration that a seat in the National Assembly has not become vacant, shall be presented and served within 28 days after the date of publication of the notice published under section 18;

(c) to seek a declaration that a seat in the National Assembly has become vacant, may be presented at any time.

Provided that -

(i)

(ii)

Before the amendment of 1997, section 20 **(1)** (a) merely provided that a petition was to be presented within 28 days but the 1997 amendment introduced another requirement, namely that not only must a petition be presented within 28 days but that it must also be served within the same 28 days. The issue of service of the petition was not dealt with in section 20 (1) before the 1997 amendment. Rule 14, however, has not been amended and remains as it was in 1997. The rule 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 a copy of it may be obtained by the

respondent on application at the office of the Registrar."

We have, elsewhere, set out in full the notice published by the appellant in the Gazette. We also pointed out that it is likely the 1st respondent in particular did not leave with the Registrar a writing signed by him showing who his advocates were and their address in Kenya or that he was to act for himself and where he could be served. So the appellant chose to serve all the respondents thorough the Gazette Notice and they contended they were entitled to do so under and in accordance with Rule 14. The motion by each respondent seeking to strike out the petition was predicated on the contention that since the amendment of section 20 (I) (a) of the Act, Rule 14 has become irrelevant as it is in conflict with the section. The conflict which the respondents asserted was that section 20 (1) (a) requires that the petition be filed and served within 28 days while Rule 14 provides that it can be served within 10 days after the date of presentation so that if a party filed his petition say on the 28t1 day after the publication of the result in the Gazette, such a party would still have another 10 days from the 28th day to serve the respondent. That would be good service under Rule 14, but it would clearly be bad service under the Act.

The appellant, on the other hand, contended that there was no such irreconcilable conflict between section 20 (1) (a) of the Act and Rule 14. Both in the High Court and before us, Mr Nowrojee, for the appellant, relied on the passage of Gicheru, JA in the case of *Emmanuel Karisa Maitha vs Said Hemed Said & Hotham Nyange,* Civil Appeal No. 292 of 1998, where in dealing with the issue of conflict between a statute and rule made thereunder that learned Judge says this:

"At page 302 of the 9th Edition of the *Construction of Deeds and Statutes* by Sir Charles Odgers, it is stipulated as follows in connection with interpretation of delegated legislation and in particular the rules made under an Act of Parliament:

"Rules must be read together with their relevant Act; they cannot repeal or contradict the express provisions in the Act from which their authority."

If the Act is plain, the rules must be interpreted so as to be reconciled with it, or, if it cannot be reconciled, the rule must give way to the plain terms of the Act. Where an Act passed subsequently to the making of the rules, is inconsistent with them, the Act must prevail with them (sic) unless it was clearly passed with a different object and then the two will stand together."

The issue in the *Maitha* case in which these observations were made was whether there was a conflict between section 23 (4) of the Act, which provides that "subject to sub-section (5) an appeal shall lie to the Court of Appeal from any decision of an Election Court, whether the decision be interlocutory or final, within 30 days of the decision" and the Rules of the Court of Appeal under which a notice of appeal is to be lodged within 14 days from the date of the decision and the appeal itself being lodgeable within a further 60 days from the date of lodging the notice of appeal. *Maitha* had filed a notice of appeal within 14 days and then lodged his appeal well before the expiry of the 60 days allowed by the rules of the Court of Appeal but outside the 30 days prescribed under section 23 (5) of the Act. The majority of the Court, which included Gicheru, JA, had no difficulty in holding that the appeal was incompetent as it had been lodged outside the period permitted by the statute though it was within the period allowed by the rules. The rules had to give way to the plain

provisions of the statute and that is what is set out in the passage from the ruling of Gicheru, JA which we have quoted.

The appellant\\\\\\\'s contention, however, was that the Court of Appeal itself had decided in at least

two cases that there was in fact no conflict between section 20 **(1)** (a) of the Act and Rule 14. These cases are *Aiken J.r. 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). In *Chelaite**'s* Case, Kwach JA, is recorded as saying:

"... Assuming for the purposes of argument only that rule 14 (1) is in conflict with section 20 (1) (a) of the Act then under the ordinary canons of statutory interpretation, the provisions of the Act must prevail. I am satisfied that Parliament has properly exercised the powers given to it by section 44 of the Constitution and that there is no conflict between that section of the Constitution and section 20 (1) (a) of the Act. I am equally satisfied that in dealing with the issue of service under section 20 (1) (a) of the Act rather than leaving it to the Rules Committee, Parliament acted within its legislative authority and did not unsurp the powers of the Rules Committee. As a matter of construction rule 14 (1) can still be reconciled with section 20 (1) (a)of the Act and there is really no conflict between the two provisions."

Earlier on, the learned Judge of Appeal had said and we once again quote him:

... All that section 20 (1) (a) of the Act says is that a petitioner must present and serve his petition within 28 days from the date of publication of the result of the election in the Gazette. In fixing the date of presentation of the petition the petitioner must make sure not only that service is effected on the respondent within ten days from the date of presentation of the petition as required by rule 14 (1) of the Rules, but also that this is done within twenty eight days, from the date of publication of the result of the election in the Gazette. So in effect presentation is governed by publication of the result while service is governed by presentation and both these steps must be taken within twenty eight days."

The late Pall, JA, was the second member of the Court in *Chelaite**'s* case and for his part, he had this to say:

"I do not find any conflict in section 20 (1) (a) of the Act and rule 14 of the Rules and in case there be any conflict then section 20 (1) (a) of the Act, being an Act of Parliament must prevail over rule 14 which is a subsidiary legislation. Similarly **I** do not find any conflict in section 44 (4) of the Constitution and section 23 (3) of the Act and in case of any conflict section 44 of the Constitution will supersede section 23 (3) of the Act by virtue of section 3 of the Constitution."

The third member of the Court, Owuor, JA, originally had reservations of her own, but in the end, she agreed with the other members of the court and concluded:

"Inthe course of argument, I was inclined to think that there was indeed a conflict between section 20 (1) (a) of the National Assembly and Presidential ElectionsAct Cap 7 and Rule 14 (1) of the National Assembly Elections (Election Petition) Rules, but on reflection and having read my brothers\\\\\\\' judgments, I am satisfied that there is none. The efficacy of Rule 14 (1) has not been affected by the amendment of section 20 (1) (a) of the Act introduced by Act No. 10 of 1997."

So that the appellant is fully justified in saying that in the *Chelaite* case, the Court of Appeal had held that there was in fact no irreconcilable conflict or any other conflict between section 20 (1) (a) of the Act and rule 14 (1) of the Rules. That now brings us to the case of *David Wakairu Murathe r Samuel Kamau Macharia, ante,* and the members of the Court once again included Kwach & Pall, JJA the new member being Tunoi JA. This time round, Kwach, JA said:

"The result of the election was published in a special issue of the Kenya Gazette dated 6th January,

1998 and for the purposes of section 20 (1) (a) of the Act twenty eight days allowed for presentation and service of petitions started to run on 7th January, 1998. So anyone who wished to present a petition had to do so, and also have it served on or before 3\\\\\\\' February, 1998, subject to compliance with Rule 14 (1) of the National Assembly Elections (Election Petition) Rules, ……."

The learned Judge of Appeal still made it clear that not only had a petitioner to comply with section 20 (1) (a) of the Act but also with Rule 14**.** And Pall, JA repeats:

"But to me there seems to be no conflict. As the electorate of the constituency in particular and Kenya in general are entitled to know as soon as possible as to who has been validly elected from that particular constituency, Parliament in its wisdom has cut down the period of 38 days previously allowed for the presentation and service of petition to 28 days. The two provisions can easily be reconciled. The period of 28 days now is the over-all period within which a petition must not only presented but also served and, not going beyond this period of 28 days, rule 14 (1) says the petition must be served within 10 days of the presentation ……."

The learned Judge of Appeal was clearly still of the view that there was no conflict between the Act and the rule.

Tunoi, JA, the new member in the decision was obviously not happy with this view, but he did not dissent from it. He says in his judgment:

"In my view it is a fallacious contention to aver that only the Act was amended but the rules remained intact, for if it were so the legislative intent would have been devoid of concept of purpose and would have reduced the amendment to futility. Further, since election petitions have elaborate procedures of their own relating to filing and serving election petitions the Civil Procedure Rules and or any other statutes should not be applied when computing time. ……."

Like Owuor, JA, in the *Chelaite* case, Tunoi, JA, also had his doubts on the issue but the relevant fact is that none of them dissented. So once again the appellant is right in contending that the Court of Appeal had held in this case too that there is in fact no conflict between section 20 (1) (a) of 5 the Act and Rule 14(1) of the Rules.

How then, did the High Court deal with these cases which were expressly cited to them" We think we can only turn to their ruling to find out what they said about the cases. We quote them:

"We see the core issue to be decided in the *Chelaite vs Njuki* case as being whether service of the petition was good given the fact that it was effected outside the twenty eight days period provided under section 20 (1) (a) of the Act but within the ten days provided under Rule 14 of the Election Petition Rules. The other matters were *obiter dicta* which do not bind this Court."

It is apparent from this passage that the judges of the High Court who decided the matter at the very least know that they are bound by the decisions of the Court of Appeal. But it is also apparent that they equally know that if the Court of Appeal purports to decide a matter which does not fall for consideration in a particular case, that is, a matter which it is not necessary to decide in order to arrive at a decision disposing of the particular case, then they are not bound by such a side decision. That is why they are saying that the other remarks made by the Court of Appeal in the *Chelaite* case were not binding on them because those remarks constituted what the lawyers designate as *"obiter dicta"* (plural) or "obiter dictum" (singular). In *Chelaite* *'s* case the High Court was asked to strike out the petition on the ground that it was served outside the twenty eight days prescribed by section 20 (1) (a) of the Act. In the

view of the High Court, to decide that issue it was not necessary to decide the question of whether section 20 (1) (a) was in conflict with Rule 14**.** It was agreed in both the *Chelaite* case and the *Murathe* case that service of the relevant documents upon the respondents in those cases had been effected outside the twenty eight day period prescribed under the Act. The question of whether the Act was in conflict with the rules did not, accordingly, arise and was irrelevant to the decision. Aluoch, J, who decided the *Chelaite* case in the High Court did not at all purport to consider the issue of whether or not there was a conflict between the two provisions. Nor did Mr Ochieng Odhiambo who represented *Chelaite* throughout the whole case contention both in the High Court and in the Court of Appeal was to the effect that section 44 of the Constitution only gave Parliament the power to make provisions dealing with the circumstances and manner in which, the time within which, and the conditions upon which a petition may be filed in the High Court and also the powers, practice and procedure of the High Court in relation to petitions. Mr Odhiambo had argued from these provisions that Parliament was not entitled to prescribe the period within which a petition had to be served and that in prescribing the period of twenty eight days for service in section 20 (1) (a) Parliament was exceeding the authority conferred on it by the Constitution. That argument was obviously for rejection and was rightly rejected by both courts. But the point we are making is that the question of whether section 20 (1) (a) of the Act was in conflict with Rule 14 was never raised in the High Court. It was also not raised in the High Court in the *Murathe* case, but even if it had been raised, it would have really been unnecessary to decide it since it was irrelevant to the issue of the petitions being incompetent for having been filed outside the twenty eight days prescribed by section 20 (1) (a). That is why the three learned Judges of the High Court who decided this petition thought they were not bound by the holdings in the *Chelaite* and *Murathe* cases - they said the holdings were obiter. We were referred to *Halsbury\\\\\\\'s Laws Of England,* 4th Edition, Volume 26 Paragraph 573 which deals with the question of the *"ratio decidendi"* in a decided case. It is therein stated:

"... The enunciation of the reason of principle upon which a question before a court has been decided is alone binding as a precedent. This underlying principle is called the *ratio decidendi,* namely the general reasons given for the decision or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision. What constitutes the binding precedent is the *ratio decidendi,* and this is almost always to be ascertained by analysis of the material facts of the case, for judicial decision is often reached by a process of reasoning involving, a major premise consisting of a pre-existing rule of law,either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration."

Our understanding of this passage is this. In the case of *Chelaite,* for example, the major premise was section 20 (1) (a) which lays it down that a petition must be filed and served within twenty eight days from the publication of the election result in the Gazette. *Chelaite* filed her petition within the twenty eight days but she served it outside that period. That was the minor premise existing of facts. Then it was contended that the petition was incompetent because though presented within the prescribed period of twenty eight days, yet it was incompetent because it was served outside the prescribed period. This contention was upheld by the High Court and the Court of Appeal and the petition was struck out as incompetent. What would constitute the general principle, the *ratio decidendi,* which would be applied in all subsequent cases is that since section 20 (1) (a) of the Act prescribes twenty eight days as the period within which a petition must be served, any petition which is served outside that period is incompetent and must be struck out. It is this general principle which would be binding on the courts. There will of course be other conclusions within the main decision, such as whether section 20 (1) (a) is in conflict with Rule 14 and so on but these are what are designated as *obiter dicta* and these are not binding. Halsbury puts it like this at paragraph 574:

"Dicta: Statements which are not necessary to the decision, which go beyond the occasion and lay

down that it is unnecessary for the purpose in hand are generally termed *"dicta".* They have no binding authority on another court, although they may have some persuasive efficacy. Mere passing remarks of a judge are known as *"obiter dicta",* whilst considered enunciations of the judges\\\\\\\' opinion on a point not arising for decision, and so not part of the *ratio decidendi,* have been termed "judicial *dicta". ……"*

Like the three judges of the High Court, we also agree that in deciding the question of whether the petitions in *Chelaite*\\\\\\\'*s* and *Murathe*\\\\\\\'*s* cases were incompetent or not, it was not necessary to decide the issue of whether or not section 20 (1) (a) of the Act was in conflict with Rule 14. We agree that the pronouncements made in the two cases to the effect that section 20 (1) (a) is not in conflict with Rule 14 amounted to no more than "judicial dicta" and were not binding on the High Court.

We were also referred, on the same point, to the second case of *Murathe, Namely David Wakairu Murathe v Samuel Kamau Macharia,* Civil Appeal No. 25 of 1999 (unreported) which was presided over by Gicheru, Tunoi & Shah, JJA., but that appeal involved a petition which had been filed pursuant to section 20 (1) *(c)* of the Act for a declaration that a seat in the National Assembly had become vacant. Such a petition can be filed at any time and section 20 (1) (c) was not affected by the amendments brought in by Act No. 10 of 1997. Rule 14 would still be applicable to that section. The Judges of the High Court were only considering whether, in view of the amendment to section 20 (I) (a), Rule 14 could still apply to that section. The second *Murathe* case is, with respect, irrelevant to the issue at hand. Shah, JA, in the second *Murathe* appeal correctly distinguished the difference between section 20 (1) (a) and 20 (I) (c) insofaras service of the petition is concerned.

We are ourselves satisfied that the issue of whether or not section 20 (1) (a) was in conflict with Rule 14 (1) was, as it were, still *"terra rosa"* and therefore, still open to the High Court to discuss. We so find and hold and in view of that, grounds one to ten in the memorandum of appeal No. 172 of 1999 must accordingly fail.

The High Court considered the issue of whether or not section 20 (1) (a) of the Act was in conflict with Rule 14(1) of the Rules and the learned Judges came to the conclusion that the two provisions were in an irreconcilable conflict with each other. That conclusion is questioned in both appeals and we must deal with it. Section 20 (1) (a) lays it down that a petition must be presented and served within 28 days after publication of the result of an election in the Gazette. It is agreed on all sides that presentation and service under the section must be within 28 days and any service done outside that period is invalid and the petition itself is rendered incurably defective. That is the *ratio decidendi* in the cases of *Chelaite* and *Murathe.* Rule 14 (1), however, says expressly that service of the notice of presentation of a petition accompanied by a copy of the petition:

"shall, within ten days of the presentation of petition, be served by the petitioner on the respondent."

If the two provisions are not in conflict with each other, then our understanding of the position is that each of them must be given its full application. The rule binds a petitioner to lodge and serve the petition within ten days from the date of lodging the petition. If this rule is to be given its full application then it would mean that a petitioner who lodges a petition on the 20th day, for example, would still be entitled, under the rule to ten days from that date which would carry the matter to the 30th day. The rule can only be reconciled to the Act by deducting some days from the ten days given by it (rule) or by making sure that the petition is filed within an earlier period as would allow a period of ten days to run. As the learned Judges of the High Court correctly point out if the provisions of the rule were to be given their full application, then the cases of *Chelaite* and *Murathe* ought not to have been struck out because service of the petitions in those cases fully complied with rule 14 (1) of the Rules. That is why the Judges say

that decisions such as those of *Chelaite* are examples of the conflict between the two provisions. To reconcile the two decisions, one has to modify the application of rule 14 (1) and we do not know that a court is entitled to modify the provisions of a written enactment, whether it be a statute or subsidiary legislation. We once again quote Gicheru, JA in *Maitha v Said Honed & Another, ante:*

"Rules must be read together with their relevant Act; they cannot repeal or contradict express provisions in the Act from which they derive their authority. "If the Act is plain the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the plain terms of the Act." Wherean Act passed subsequently to the making of the rules is inconsistent with them, the Act must prevail unless it was clearly passed with a different object and then the two will stand together."

As we pointed out earlier, the conflict being considered in the case above was between section 23 (4) of the Act which provides that an appeal to the Court of Appeal must be lodged within 30 days from the decision against which the appeal is brought, and the Rules of the Court of Appeal. Rule 74 (1) of the Court of Appeal Rules provides for the giving of the notice of appeal within 14 days from the date of the decision while Rule 81 (1) provides that the appeal itself is to be lodged within 60 days from the date of lodging the notice of appeal. The appeal by *Maitha,* as we pointed out earlier, was lodged outside the 30 days prescribed under section 23 (4) of the Act but within the 60 days. The majority of the Court - Gicheru & Omolo, JJA had no difficulty in holding that the appeal was incompetent and there was no question of attempting to reconcile the provisions of section 23 (4) of the Act with those of the Court of Appeal Rules. The Court of Appeal Rules were in conflict with the provisions of the statute and they (rules) had to give way to the plain words of section 23 (4). We see no difference between the position in the *Maitha* case *ante,* and the one now under consideration. 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. Indeed, under section 20 (1) (a) of the Act, all that one needs to serve is a copy of the petition but we would have no quarrel with it if a party chose to include an unnecessary document like a notice of presentation, which, for the purposes of section 20(1) (a) of the Act is really irrelevant. We can now discuss the mode in which an election petition is to be served. We agree with Mr Nowrojee and Mr Orengo that the Act and the 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. We also agree that the purpose of the regime is to have election petitions dealt with in as quick a manner as is reasonably possible and the reason for this is not difficult to understand. The voters in a particular constituency and also the general voters in Kenya are interested in knowing who their legitimate representative in Parliament is. We are in entire agreement with the principles set out in the ancient case of *County Of Tipperary* which was decided way back in 1875 and we agree that the principles enunciated in that case are embodied in our Rules. Those principles, however, cannot answer for us the question of how service of a petition is to be effected.

Section 20 (1) (a) which we have extensively dealt with merely says that a petition shall be presented and served within twenty eight days. We have held that Rule 14 can no longer apply to petitions filed pursuant to section 20 (1) (a) of the Act. Mr Orengo pointed out to us, rightly in our view, that section 20 (1) (a) does not say who is to be served and how service is to be effected. On the issue of who is to be served, we very much doubt if a party who has taken a great deal of trouble to draw up a petition would be ignorant as to the person or persons against whom he is complaining and the reliefs he seeks from that person or persons. We think parties are very likely to know whom to bring their petitions against; whether those persons against whom petitions are brought are the correct parties is, of course, a wholly different issue.

Section 20 (1) (a) sets out what is to be served - a petition. It (section) also says when the petition is to be filed - within 28 days from the date of publication of an election result. The period within which it is to be served is also the same period. Parliament, however, has not stated in the section how the service is to be effected. Under Rule 10 of the Rules:

"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."

It is obvious from this rule that it is not mandatory for a person elected to do any of the things set out in the rule. The expression is that:

"A person elected may" not that "A person elected shall".

So that we have a situation in which the only provision in section 20 (1) (a) is that a petition is to be presented and served within 28 days from a certain event. Rule 10 does not compel an elected person to leave his address or that of his advocate with the Registrar. If he was compelled to do so, then one would be entitled to assume that service can be effected on him at the address left with the Registrar and if no address is left, then by leaving the documents with the Registrar. We think we should state at this stage that if the amendments of 1997 had not intervened, the question of the mode of service was well settled and even in the other cases brought in after the amendments, the issue of any conflict between section 20 (1) (a) of the Act and Rule 14 of the Rules had not been raised. We have already dealt with this aspect of the matter and we need not repeat ourselves. Where Parliament simply says that a party is to be "served" without specifying how the service is to be effected, what does it (Parliament) mean or intend"

In ordinary language, to serve a person with a document is to deliver that document to that person. For example, Order 5 of the Civil Procedure Rules deal with service of summons in ordinary civil cases. Rule 7 deals with mode of service and is to the effect that:

"Service of the summons shall be made by delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints in this behalf, and sealedwith the seal of the court."

Rule 9(1) and (2) of Order 5 of the Civil Procedure Rules deal specifically with service on a party or his agent. The general tenor of service under this Order is that unless there is an appointed agent or unless a defendant cannot be found service is normally personal. Exceptions only come when

personal service is not practicable.

We would add this with regard to service of petitions upon an elected person. Service by way of publication in the Kenya Gazette, in view of section 20 (1) (a) of the Act, cannot be proper service. The publication in the Gazette, as in this case, directs a respondent to obtain a copy of the petition from the office of the Registrar/Deputy Registrar of the High Court of Kenya. In view of the fact that section 20 (1) (a) requires presentation and Service of the petition (emphasis supplied), asking a respondent to collect a copy thereof from the High Court Registry cannot be proper service. This is yet another aspect which shows that Rule 14 (I) is in conflict with section 20 (1) (a) of the Act.

Mr Nowrojee also cited and made available to us the Parliamentary Election Petition Rules of 1868 of

England. Rule 14 of those rules was to the effect that:

"Where the respondent has named an agent or given an address, the service of an election petition may be by delivery of it to the agent, or by posting it in a registered letter to the address given at such time that, in the ordinary course of post, it would be delivered within the prescribed time."

This rule is similar to our Rule 10**,** so that if an address of the advocate or the respondent himself is left with the Registrar then service may be effected on the advocate or at the address given. But of more interest is the commentary found immediately under the English Rule 14 which we have set out:

"In other cases, service must be personal on the respondent, unless a judge, on an application made to him not later than five days after the petition is presented on affidavit showing what has been done, shall be satisfied all reasonable effort has been made to effect personal service and cause the matter to come to the knowledge of the respondent, including when practicable, service upon an agent for election expenses, in which case, the judge may order that what has been done shall be considered sufficient service, subject to such conditions as he may think reasonable."

It is agreed on all sides that election petitions are not ordinary civil suits; as Mr Nowrojee submitted before us, an election petition is a dispute *in rein,* though of course it must, of necessity, be fought out between or amongst certain named parties. They are disputes of great importance to the public but some specified person or persons still have to answer to certain alleged defaults. How is it then, that in ordinary civil litigation the parties concerned have to be served in person unless it is impossible to find them when other modes of service may be adopted"

The question arose that if only personal service would suffice, the respondents would seek to evade service by, for example, travelling out of the country or just staying out of sight until after the expiry of the prescribed 28 days. That fear may be genuine but it must also be remembered that election petitions generally involve Kenyans who very much prize their title of "Honourable" and we do not contemplate that those involved in petitions will wilfully take cover in order to avoid the process of the law.

What we are saying, however, is that election petitions are of such importance to the parties concerned and to the general public that unless Parliament has itself specifically dispensed with the need for personal service, then the courts must insist on such service. We cannot read from section 20 (1) (a) that Parliament intended to dispense with personal service. Even under Rule 14 (2) of the Rules personal service was not dispensed with. The other modes of service were only alternative modes of service to personal service. That is why in the various other cases quoted to us personal service was always described as the best form of service. Section 20 (1) (a) of the Act does not prescribed 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 lst 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 lst respondent was made and repelled. In any case that reason could not be offered in respect of the 2nd and 3rd respondents. The 2\\\\\\\' and 3rd respondents are themselves not elected persons in terms of Rule 10 of the Rules though they are truly respondents within the Rules and the long standing decision of the court in *Mudavadi v Kibisu & Another [1970]* EA 85. But though the 2nd and 3rd respondents are "respondents" they cannot take advantage of Rule 10 of the Rules because that rule is only available to elected persons, so that the 2nd and 3rd respondents could not have provided the Registrar with their or their advocates\\\\\\\' addresses in Kenya. That being so, the appellant had to serve them in accordance with section 20 (1) (a) of the Act and as we have said, that had to be personal service.

In the event, we are satisfied the three learned Judges of the High Court were fully justified in holding that as the law now stands only personal service will suffice in respect of election petitions filed under section 20 (1) (a) of the Act. It may be unjust, but so is section 6 of the Land Control Act, Cap 302 which once made Apaloo, JA (as he then was) lament in the following words:

"A" sold agricultural land to "Ir. The former was unco-operative in getting "B" to obtain the consent of the Land Control Board. "A" however obtained full payment of the purchase price and duly put "B" into possession. On the faith of this sale, "B" spent a large sum of money in developing and improving the land. Ten years afterwards, "A" motivated by the prospect of obtaining higher price for the land sells the self-same land to "C" then with "A"s active co operation, hurriedly obtained consent (this in one day) and thereafter registered his title. "C" then proceeds to ask "B"s eviction from the land. Without the aid of section 6 (2) of the Act, "C" cannot obtain title to the land superior to "B"s. Yet as the law stands at present, "C" will be held entitled to evict "B".

Indeed "A" would be entitled to say to "B": "Yes I accept that I sold the land to you, obtained full payment of the consideration money and put you in possession for 10 years and you may well have developed the land. But I say that an Act of Parliament entitles me to resell to "C" and you must be content with the return of the purchase price you paid me ten years ago". To think such a thing could be possible offends against one\\\\\\\'s idea of propriety and fairness" - see *Gabriel Makokha Wamukota v Sylvester Nyongesa Donati,* Civil Appeal No. 6 of 1986, reported in Court of Appeal Judgments, Civil Appeals, 1986 Volume II.

Mr Justice Apaloo was appalled that the kind of thing he set out could happen, but it did happen in the case in which he spoke and it still continues to happen to this day. As Kwach, JA says in *Chelaite,* Parliament in its wisdom, and it is forever wise, can and often does decree certain things which may not seem wise to persons unschooled in its way of doing things. But the courts must accept the wisdom of Parliament, unless, of course, they are contrary to the provisions of the Constitution. It has 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 that law until Parliament should itself be minded to change it.

We shall conclude this judgment by briefly touching on Mr Nowrojee\\\\\\\'s complaint that in applying to the High Court to strike out the appellant\\\\\\\'s petition, the 2n^{d} and 3r^{d} respondents were abusing the process of the court. The 2nd and 3rd respondents, it was contended, had, in two previous cases, one at Nakuru and another one at Mombasa, taken a position diametrically opposed to the position they took in this petition. The 2nd and 3" respondents are by law required to be impartial and they ought not to be perceived to be taking a particular position in support of a particular candidate. We agree with Mr Nowrojee that the 2\\\\\\\' and 3rd respondents must always remain impartial. We said at the beginning of this judgment that the 2nd and 3rd respondents are crucial to the democratic process Kenya is evolving. The High Court did not itself say anything about this aspect of the 2nd and 3rd respondents abusing the process of the court. For our part, we would say this. The 2nd and 3rd respondents must remain impartial in matters of elections. The law binds them to be impartial. But when they are sued and allegations of impropriety or wrong-doing is made against them, then unless they admit improper conduct or wrong-doing on their part, they must somehow challenge those allegations. If they are sued, then they become parties to the suit in which they are sued, and as parties surely they must be partisan in the defence of their interest. They are,

in the position of parties, entitled to make whatever submissions they like to make and leave the decision on their submissions to the presiding judge or judges. That is how the adversarial system of justice operates. We would, however, state that once a party has, in a previous case, taken a particular

stand on an issue of law, then good practice would demand that if the position previously taken is being changed, the party ought to disclose that a contrary view had been previously taken and argued, but that there had been a change and the reason or reasons for the change stated. Mr Kapila, in the High Court merely termed the submissions of Mr Nowrojee as being harsh while not offering any reason why the change was necessary. However, the Hh-4-h Court was made aware by Mr Nowrojee that the 2nd and 3rd respondents had previously taken a contrary stand. The Judges of the High Court did not find it necessary to decide the issue, and Mr Kapila cannot be blamed for that. Had the High Court been unaware of the previous position taken by the 2"d and 3\\\\\\\'d respondents and it was only discovered later, then in those circumstances the 2"d and 3rd respondents could be legitimately accused of misleading the court. But as it is, we do not think it would be right to hold that the 2nd and 3rd respondents\\\\\\\' failure to put forward a defence to their conduct during the hearing of the application amounted to an abuse of the judicial process.

We have said enough, we think, to show that all the grounds listed in the two appeals do not convince us that we should allow the appeals. Although there were in total in the two appeals, 173 grounds argued before us in groups, we are satisfied that in our judgment we have dealt with all of them. To have considered each and every ground separately would have made this judgment much longer than it is. We think each of the grounds has found its place in the judgment.

Before we leave the matter, we must commend the advocates for the very able manner in which they advanced arguments for their respective clients before us. Their learned and very detailed submissions have made our task in writing the judgment that much easier. We are greatly indebted to them.

In the event, our final order in Civil Appeal No. 172 of 1999 is and shall be that the appeal is dismissed with costs certified for two counsel.

As regards Civil Appeal No. 173 of 1999**,** while we dismiss the same, we are not inclined to award any costs to the 2"d and 3rd respondents. They have taken inconsistent stands on the matters falling for consideration and neither here nor in the superior court did they offer any valid reason for changing their position. The order which accordingly commends itself to us is that Civil Appeal No. 173 of 1999 be dismissed but with no order as to the costs thereof. We would further order that the order for costs awarded to the 2\\\\\\\' and 3rd respondents in the High Court is also set aside and the result of that is that there will be no costs to the 2"d and 3rd respondents both here and in the High Court.

Those shall be our orders in the two appeals.