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Date Delivered:	19 Dec 2008
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Riaga Samuel Cornelius Omolo, Samuel Elikana Ondari Bosire, Joyce Adhiambo Aluoch
Citation:	Boni Khalwale v Bernard Shinali Masaka & 2 others [2008] eKLR
Advocates:	M/s Julie Sowetto Aullo for the Appellant Mr. Stephen Mwenesi, for the 1st Respondent Mr. Gabriel Kwoba Mukele for the 2nd and 3rd Respondents
Case Summary:	.
Court Division:	-
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	2 of 2008
Case Outcome:	Appeal Dismissed
History County:	Kakamega
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 156 OF 2008

DR. BONI KHALWALE APPELLANT

AND

BERNARD SHINALI MASAKA 1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA 2ND RESPONDENT

JANE WASILWA 3RD RESPONDENT

(An appeal from a ruling and order of the High Court of Kenya at Kakamega (Ochieng',J)

dated 25th June, 2008

In

H.C. Election Petition No. 2 of 2008)

JUDGMENT OF THE COURT

Dr. Boni Khalwale, the Appellant herein, is the sitting Member of Parliament for Ikolomani Constituency. He was declared the winner of that seat by the Returning Officer for that Constituency following the general elections held in Kenya on 27th December, 2007. The Returning Officer is cited in the proceedings before us as Jane Wasilwa, the 3rd Respondent. Having been declared the winner by the 3rd Respondent, the Electoral Commission of Kenya, the 2nd Respondent, duly gazetted the Appellant as the Member of Parliament for Ikolomani Constituency. The relevant Gazette Notice was No. 103 of 30th December, 2007.

During the elections which the Appellant was the declared winner, the Appellant had been opposed by a total of eleven other candidates, among them Shinali Bernard Masaka, the 1st Respondent herein. The 1st Respondent was the Appellant's closest challenger, with the Appellant said to have received 8,386 votes while the 1st Respondent was credited with 8,121 votes, a difference of some 265 votes.

The 1st Respondent thought the Appellant's victory was not justified; we need not go into the reasons as to why the 1st Respondent thought so. The 1st Respondent, therefore, filed Election Petition No. 30 of 2008 challenging the validity of the Appellant's victory. The petition was lodged in the High Court of Kenya at Nairobi on 25th January, 2008 but the Hon. the Chief Justice subsequently directed that the petition be heard by Ochieng' , J at the High Court of Kenya at Kakamega.

Section 20 (1) (a) of the National Assembly and Presidential Elections Act, Chapter 7 Laws of Kenya, hereinafter the Act, provides as follows:-

“20 (1) A petition –

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

The result of the election in Ikolomani Constituency was published in the Gazette on 30th December, 2007. Anyone wanting to challenge the result had to file and serve a petition within twenty-eight days from the 30th December, 2007. The 1st Respondent lodged his petition in the High Court at Nairobi on 25th January, 2008; that was within the twenty-eight days prescribed by **section 20 (1) (a)** of the Act. But the 1st Respondent still had to serve the petition upon all the parties concerned before the expiry of the same twenty-eight days from 30th December, 2007. By 25th January, 2008 when the petition was lodged, 26 days of the 28 days had run their course and only two days were left within which to serve the Appellant and the other parties involved in the dispute. That is where the problem before us started.

The Appellant, relying on this Court's over-worked decision in KIBAKI VS. MOI [2001] 1 EA 115, contended that the 1st Respondent had not personally served him with the relevant documents pertaining to the petition. So by a notice of motion dated 8th February 2008 but lodged in the election court on 11th February, 2008, the Appellant, through his then Advocates, J.A.B Orenge Advocates, moved the election court for orders that:-

“1. The petition be struck out.

2. Costs be provided for.”

The grounds upon which these prayers were based were stated on the face of the motion as follows:-

“(a) There is no proper and valid petition before the Honourable Court.

(b) The Petitioner has not presented, filed and served the petition within twenty-eight days after publication of the result of the election in the Gazette.

(c) The Petitioner has not exercised due diligence to serve the petition in accordance with section 20 (1) of the National Assembly and Presidential Elections Act.

(d) The petition and/or the notice of the presentation of the petition has not been served in accordance with section 20(1) and the proviso (iv) of section 20 (1) of the National Assembly and Presidential Elections Act and the Schedule to the Statute Law (Miscellaneous Amendments) Act, 2007.

(e) The Honourable Court lacks jurisdiction.”

The motion and the grounds stated thereon were supported by a ten-paragraph affidavit sworn by the Appellant and in that affidavit the Appellant deponed as follows:-

“1. I am the first Respondent herein and therefore competent to swear this affidavit.

2. I am an elected Member of Parliament representing Ikolomani Constituency in the National Assembly, having been elected in the general elections held on 27th December, 2007.

3. My election as a Member of Parliament was published on 30th December, 2007 in a special Issue of the Kenya Gazette Vol. CIX-103 Gazette Notice No. 12615 in a composite list containing the names of

the elected Members of the National Assembly, being the results of the Parliamentary elections. I annex herewith a photocopy of the said Gazette notice and mark it Exhibit "BK1."

4. I live in Malinya, Shirumba location, Ikolomani and also have a residence in Plainsview Estate Nairobi in the Republic of Kenya.

5. On 30th January, 2008 my attention was drawn to a newspaper advertisement in the Daily Nation Newspaper of 26th January, 2008 which was a publication of a notice addressed to the respondents in this petition stating that an election petition had been filed against the respondents. I annex herewith the notice of presentation published on page 32 of the Daily Nation of 26th January, 2008 and mark it Exhibit "BK2."

6. I then proceeded to seek legal advice from my advocates on record and on 5th February, 2008 duly instructed them to act for me in this petition and to obtain a copy thereof.

7. Prior to 30th January, 2008 I was not aware that an election petition had been filed against me and I had not been served personally with any notice of presentation of the petition or the petition.

8. I have been advised by my advocates on record and verily believe the advice to be correct that the petition has not been filed and served in accordance with section 20 (1) and proviso (iv) thereof and the Statute Law (miscellaneous Amendments) Act 2007, and, in particular, for the following specific provisions of the law, facts and reasons which provisions, facts and reason have been explained to me by my advocates on record and/or are known to me from my own personal knowledge:-

(a) I have not been personally served with the petition;

(b) I know as a matter of fact that the Petitioner has not filed and served the petition within twenty-eight days after the publication of the result of the election in the Kenya Gazette;

(c) I have been informed by my advocates on record which information I believe to be correct that no Gazette notice of the presentation of the election petition was published in the Kenya Gazette within the statutory period;

(d) I have been shown the Kenya Gazette of Friday 25th January, 2008 and subsequent issues of the Kenya Gazette by my advocates on record and I have not seen any notice published regarding an election petition presented against my election as the Member of Parliament for Ikolomani Constituency;

(e) I have not seen or read in any daily Swahili newspaper from the 24th January, 2008 to date containing a notice of the presentation of the petition herein except the publication in English contained in exhibit "BK2".

(f) I have been advised by my advocates on record and verily believe the advice to be correct that the service by way of publication cannot be proper and valid service if the notice is not published simultaneously within the statutory period in three publications, to wit, the Kenya Gazette, one English local daily newspaper with the highest national circulation and one Kiswahili local daily newspaper with the highest national circulation.

9. I swear this affidavit in support of my application for an order striking and/or dismissing the election petition herein.

10. *What is deponed hereto is true to the best of my knowledge, information and belief.*”

The substance of the complaints in this affidavit can be categorized into two major heads, the first being that the 1st Respondent did not personally serve the Appellant with the notice of presentation of the petition and the petition itself and secondly that since no personal service had been effected, the purported service by way of publication in the newspapers was invalid because of the provisions of section 20 of the Act. By Act No. 7 of 2007 i.e. the Statute Law (Miscellaneous Amendments) Act, Parliament added a proviso to section 20 (1) (a) and that proviso is in the following terms:-

“(iv) where after due diligence it is not possible to effect service under paragraphs (a) and (b), the presentation may be effected by its publication in the Gazette and in one English and one Kiswahili local daily newspaper with the highest national circulation in each case.”

The meaning of that proviso is clear; one can only resort to publication of the notice of presentation after one has made due diligence to personally serve the petition on parties affected by it. What amounts to due diligence is left to the interpretation of an election court and we think that is right because in interpreting the term “*due diligence*” the election court must bear in mind all the circumstances surrounding a particular petition. Where publication of the notice of presentation of a petition is resorted to, a petitioner is required by the Act to do three things at the same time, namely:-

- (i) publish the presentation in the Kenya Gazette;
- (ii) publish the presentation in one local English language daily newspaper with the largest national circulation; and
- (iii) publish the presentation in one Swahili language daily newspaper with the largest national circulation.

The Appellant says the 1st Respondent only published the presentation of the petition in the Daily Nation, which is a paper published in the English language but did not publish the petition in the Kenya Gazette and in one Swahili language paper. So that the Appellant was alleging that he was not personally served and that the purported publication of the notice of presentation was not effectual because the 1st Respondent did not publish it in the Kenya Gazette and in one Kiswahili newspaper. It was on this basis that the Appellant asked the election court to strike out the petition.

Faced with this position, the 1st Respondent sought to show that the Appellant had in fact been personally served with the notice of presentation of the petition and the petition itself on 26th January, 2008 at about 7.30 p.m. at the Jomo Kenyatta International Airport, Nairobi. The 1st Respondent swore a replying affidavit running into some 48 paragraphs. Most of those paragraphs are really not relevant to the matters in hand and merely express disgust at what the 1st Respondent sees as dishonesty in the conduct of the Appellant. In some paragraphs of his affidavit the 1st Respondent raises the issue of Rule 10 of the National Assembly Elections (Election Petition) Rules, which provides that:-

“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 1st Respondent appears to argue in his replying affidavit that an honest or candid person elected

to represent his or her people would or must leave his address for service with the Registrar of the High Court so that those who may wish to challenge his election can serve him or her at the address left with the Registrar. Mr. Mwenesi who represented the Appellant before us also appeared to think that it was obligatory on a person elected to leave the address of service with the Registrar. The intention of Rule 10 was obviously to make it easier for those with complaints against an election to find a place where the elected person can be served. But it would be wholly wrong to say that the rule makes it mandatory that the elected person MUST or SHALL leave with the Registrar the address at which documents intended for him are to be left. If that was so the rule maker would have not used the term "MAY" but instead would have used words such as "SHALL" or "MUST" or any other expression implying compulsion. That was the position taken by the Court in KIBAKI VS. MOI, supra, and nothing has changed since to warrant the Court saying that a person elected must leave with the Registrar an address at which he or she is to be served. It still remains optional for our elected Members of Parliament to leave such an address and as far as we ourselves can guess, the possibility of the same members compelling themselves to leave their address with the Registrar looks very remote and far-fetched.

But the 1st Respondent swore in his affidavit that he knew that the Appellant was personally served. From Paragraph 29 onwards, the 1st Respondent swore as follows:-

"29 THAT I do believe that the 1st Respondent/Applicant is being less than candid with the Honourable Court and the Court ought to receive his application on that basis – that he is not a candid applicant.

30. THAT I know as a matter of fact that my lawyers and I exercised due diligence as required by the law soon after we filed the petition.

31. THAT I am aware of affidavits of service of Cosmas Muthama Mbuvi and Robert Mbeja sworn on the 30th January, 2008.

32. THAT I produce the bundle of the two affidavits and mark it "BMS 3."

33. THAT I believe that the affidavits of service speak for themselves. They show that on the 26th January, 2008 Mr. Mbeja a process server did go to the 1st Respondent's /Applicant's home in Malinya village at Shirumba location of Ikolomani Division to effect personal service. Mr. Mbeja has narrated how he was informed by the 1st Respondent's/Applicant's wife at the Malinya village home that the 1st Respondent/Applicant had travelled to Nairobi via Kisumu Airport. Mr. Mbeja has stated how I accompanied him to Kisumu Airport and how we found the 1st Respondent/Applicant who dodged personal service knowing full well what was to be served on him. Mr. Mbuvi has narrated how he met the 1st Respondent/Applicant at Jomo Kenyatta International Airport on 26th January, 2008, got to him in his motor vehicle and explained the purpose of their meeting. He has narrated how the 1st Respondent/Applicant received a copy of the petition and said that he would go and consult with his lawyers about it.

34. THAT I have noted the 1st Respondent/Applicant does not say anything about the encounters with Mr. Mbeja and Mr. Mbuvi. He chosen (sic) to hide the facts stated and sworn to in the affidavits of the process servers from the Honourable Court. They are unchallenged facts.

35. THAT I am obliged to produce to the Honourable Court a true copy of the passenger manifest for East African Safari Air Flight B5 710 from Kisumu to Nairobi on the 26th January, 2008. It shows that Boni Khalwale, the Respondent/Applicant in these proceedings was booked on the flight on ticket

number 30561180000164 and on seat number 16B. I mark the copy "BMS 4." I obtained the manifest on request to East African Safari Air Express.

36. THAT I and the two process servers as well as Rogers Polycarp Muhinda who is referred to in the affidavit of Mr. Mbuvi are available for cross-examination and to confirm the fact that the 1st Respondent/Applicant was served and has been aware of the petition since 26th January, 2008."

We think it is right to set out in full the respective affidavits of Robert O. Mbeja and Cosmas Muthama Mbuvi which the 1st Respondent produced as annexures to his replying affidavit. We start with that of Robert O. Mbeja and in the paragraphs relevant to our discussion, Mbeja swore as follows:-

"1. THAT I am a duly authorized process-server.

2. THAT on 25th day of January, 2008 I received two sets each of A Petition, Notice of Presentation of A Petition, Notice of Acceptance and notice of Appointment and Receipt from Kadima & Company Advocates with instructions to serve the same upon the 1st Respondent one Dr. Boni Khalwale.

3. THAT on 26th January 2008 I travelled to Malinya sub-location, Shirumba location of Ikolomani Constituency where the home of Dr. Boni Khalwale the 1st Respondent is situated but not being able to trace him personally, I was informed by his wife one Adelaide Shikanga that he had left for Nairobi via Kisumu airport.

4. THAT on the same date and in the company of the Petitioner, we travelled to Kisumu City and then to Kisumu Airport and I traced Dr. Boni Khalwale the 1st Respondent but when I was in the process of effecting service upon him, he dodged me and entered the VIP lounge which is exclusively for VIP's therefore (sic) frustrating my effort to effect service of the petition upon him.

5. THAT he then boarded an East African plane to Nairobi at about 6.00 p.m. without me serving him."

Now, listen to what the other process server Mbuvi stated in his oath:-

"1. THAT I am a duly authorized Court Process Server.

2. THAT on 25th day of January 2008 I received two sets each of A Petition, Notice of Presentation of A Petition, notice of Acceptance and notice of Appointment and Receipt from Kadima & Company Advocates with instructions to serve the same upon the 1st Respondent, one Dr. Boni Khalwale.

3. THAT on 26th January, 2008 at about 6.45 p.m. I was further informed by Kadima Advocates that the 1st Respondent had earlier traveled (sic) to his rural home at Ikolomani Constituency in Western Kenya and that he was said to have boarded East African flight from Kisumu and was due to arrive at Jomo Kenyatta International Airport from 7.00 p.m. onwards.

4. THAT on 26th January 2008 on receiving this information, I immediately proceeded to the airport. I was accompanied by one Polycarp Rogers Muhinda who was introduced to me by Kadima Advocates as the person who could identify Dr. Boni Khalwale's car a Nissan hard body KAW 509 G parked at the long-term parking lot.

5. THAT we arrived at the local arrivals at Jomo Kenyatta International Airport and after waiting for sometime the East African plane arrived at about 7.30 p.m. The 1st Respondent appeared and was

pointed out to me by his cousin Polycarp Rogers Muhinda who greeted him by shaking his hand. He wore a blue Jeans shirt and blue Jeans Trouser (sic) and was carrying a brief-case. I then followed him to his car as I introduced myself to him and the purpose of my meeting him at the airport.

6. THAT he then told me to sit at the co-driver's seat to explain to him about the documents before he could receive them.

7. THAT at around 7.40 p.m. or thereabouts on 26th January 2008 while inside Dr. Boni Khalwale's car KAW 509 G which was parked next to the long term ticket payment booth I served Dr. Boni Khalwale with the petition, notice of Presentation of the Petition, notice of Acceptance, notice of Appointment and Receipt, he refused to sign on my copies in acceptance which I return to this Honourable Court duly served but not signed. This was witnessed by Polycarp Rogers Muhinda and a parking ticket attendant one Amy Agul.

8. THAT what is stated hereinabove is true to the best of my knowledge, information and belief."

The affidavit of Polycarp Rogers Muhinda sworn on 30th January, 2008 basically repeated the contents of Mbuvi's affidavit except that Muhinda added that:-

"--- I am well known to Dr. Boni Khalwale who is my Paternal uncle and I was also his Domestic Driver for a period of one year between 2005 and 2006. Dr. Khalwale's father and my father are first cousins."

Faced with this new position, the Appellant again swore a further affidavit in which he stated his understanding of the law with regard to service of petitions, that it was not mandatory that he leaves his address of service with the Registrar, that there was an attempt by the 1st Respondent to concoct evidence and in that attempt the 1st Respondent had roped in Mbuvi and Mbeja that he was at the Kisumu Airport for over one hour on 26th January, 2008 and never saw anyone who wished to serve him with anything, that he arrived at the Nairobi Airport at about 7.30 p.m. where he was met by his body-guard one Franklin Adu Ndula, that he never met any person or persons whom he could have taken to his car and in any case he could not have invited any one into his car as the country was then in a state of war and as a politician he could not risk his security by inviting strangers to his car. The Appellant also denied the assertions of Mbeja regarding the latter's alleged visit to his rural home. In short the Appellant swore he was never personally served as deponed to by the two process servers and his cousin Muhinda. As far as the Appellant was concerned Muhinda was conspiring with the 1st Respondent with a view to settling an undisclosed personal score with the Appellant and that Muhinda ought not to be believed because he was dismissed from the police force for criminal reasons. The Appellant's body-guard Franklin Adu Ndula also swore an affidavit in which he denied having seen anyone attempting to serve the Appellant with any documents. Muhinda in turn swore a further affidavit in which he basically answered the assertions made by the Appellant against him.

These were the very conflicting versions upon which Ochieng' J was called upon to either strike out the petition as not having been duly or properly served or to sustain the same and let it proceed to hearing on its merits. The learned Judge, though obviously vexed by the nature of the conflict, had no difficulty in rejecting the motion to strike out the petition. He says in the relevant portion of his Ruling:-

As it is, the applicant confirmed that Polycarp Rogers Muhinda was his nephew, who had previously visited his house at Plainsview. According to the applicant, Muhinda was therefore in a position to take the process serve to the applicant's house, for purposes of effecting service upon the applicant.

Because of that concession, I find and hold that the only reason why Muhinda did not deem it necessary to take the process server to the applicant's house was because the applicant had already been served at the parking lot at the Jomo Kenyatta International Airport. I so find because it would otherwise defy all logic for the petitioner to have so closely monitored the movements of the applicant, yet fail to effect service on him, even though he had every opportunity to do so.

Doing the best I can, in the absence of cross-examination of any of the deponents who swore affidavits in this application, I find and hold that the applicant was personally served with the petition on 26th January, 2008, at the parking lot at the Jomo Kenyatta International Airport, Nairobi.

Accordingly, the petition on record was not only presented but also appropriately served within the time prescribed by law. -----."

Our understanding of the learned Judge's conclusion is that he believed the affidavit evidence of the 1st Respondent, Muthama Mbuvi, Robert Mbeja and Polycarp Rogers Muhinda, on the one hand and rejected the affidavit evidence of the Appellant and that of his body-guard Franklin Adu Ndula. Of course this being a first appeal to us we are not necessarily bound to accept the conclusions reached by the learned Judge, particularly in view of the fact that even he himself (i.e. the learned Judge) did not have the advantage of seeing and hearing the deponents of the various affidavits before him. We ourselves are just in as good a position as the learned Judge was to re-assess and re-evaluate the material which the parties chose to place before the Judge and come to our own conclusions on that material. In this particular appeal, we are not hindered by considerations such as that we have neither seen nor heard the witnesses; the learned Judge was in a similar situation, though of course we must be careful not to simply put aside the findings and conclusions of the trial Judge .

We have, as fully as we can, set out the facts as contained in the affidavits which were placed before the learned Judge. From those facts, there can be no shadow of a doubt that the 1st Respondent and his witnesses knew that the Appellant had on 25th January, 2008 travelled from Nairobi to his rural home in Malinya village. Robert Mbeja and Cosmas Muthama Mbuvi became involved in the matter by virtue of their official positions as process servers of the court. While the Appellant was able to assign some motive as to why Polycarp Rogers Muhinda would want to tell lies in the matter, i.e. that he had some score to settle with the Appellant, nobody, not even the Appellant himself nor his body-guard Ndula were able to suggest any improper motive or design on the part of the two process servers.

Mbeja swore he went to the Appellant's home in Malinya, did not find the Appellant but found the Appellant's wife whose name he gave as Adelaide Shikanga. In his further affidavit at paragraph 20 the Appellant swore that:-

"It is also not true that ROBERT O. MBEJA spoke to my wife Adelaide Shikanga as she was not at home at the time the said process server purportedly spoke to my wife Adelaide Shikanga."

The Appellant there conceded that he has a wife called Adelaide Shikanga. He did not, however, say that when Mbeja went to his home, he himself was there while his wife was not there. Mbeja swore the Appellant was not there and in the absence of any assertion by the Appellant that he was then at his home, it is idle for him to say Mbeja did not visit his home. Of course if he had been there when Mbeja visited the home, the next logical question would be why Mbeja did not serve him there. We also note that despite the fact that Adelaide Shikanga was specifically mentioned as having told Mbeja that the Appellant was on his way to Nairobi via Kisumu Airport, Adelaide was herself not asked to swear an affidavit to state that she was not at her home and therefore, could not have spoken to Mbeja. It is one thing for a man to make on oath allegations which may in the end be found to be false. It is another

thing to bring members of the family to swear to such allegations.

Mbeja in the company of the 1st Respondent then followed the Appellant to Kisumu Airport and it cannot be denied that the Appellant was at that Airport on that day and took a flight from there to Nairobi. Mbeja explained why he was unable to serve the Appellant at Kisumu Airport. According to Mbeja, the Appellant dodged him and entered the VIP Lounge at the Airport. Mbeja, swore he was denied access into the lounge. There is nothing unreasonable about that explanation.

From Kisumu Airport, the drama shifted to Nairobi where Cosmas Mbuvi was waiting to pounce. Even if Muhinda was to be held to have been lying, no reason was shown as to why Mbuvi would want to swear falsely that he waited for the Appellant, that upon arrival Muhinda pointed out the Appellant to Mbuvi, that the Appellant was dressed in a blue jeans shirt and blue jeans trousers and that Mbuvi went with the Appellant upto the parking lot where his vehicle Reg. No. KAW 509G was and that Mbuvi served him but the Appellant refused to sign for the service. In the face of these details, can it be said that Mbuvi simply dreamt them up or that he was simply tutored by the 1st Respondent to make that oath" That is what the Appellant seemed to suggest for in Paragraph 8 of his further affidavit which we set out earlier, the Appellant swore that:-

"There is an attempt by the petitioner to concoct stories and stage manage events that never occurred that there was an attempted personal service upon me and he has used COSMAS MUTHAMA MBUVI and ROBERT O. MBEJA to help in fabricating a story."

We suppose that the 1st Respondent would have a interest in proving that the Appellant was served. We suppose further that the 1st Respondent, being a politician like the Appellant, might perhaps resort to the use of means fair or foul. But in his affidavit, the Appellant does not say why he thought Mbuvi and Mbeja would join the 1st Respondent in such evil schemes.

The plain truth of the matter is that the Appellant was personally served at the Jomo Kenyatta International Airport, Nairobi and on that finding and conclusion we agree with the learned Judge. The learned Judge over-relied on the fact that the Appellant had failed to call the 1st Respondent and his witnesses for cross-examination and M/s Aullo, learned counsel for the Appellant, heavily criticized that over-reliance in attacking the decision of the learned Judge. But we think the decision of the Judge on that point must be read in the context of the fact that the 1st Respondent had specifically sworn in his replying affidavit that he and his witnesses were ready to be cross-examined on their respective affidavits. The Appellant and his legal advisors did not take up that challenge; nor did they make the same offer.

The Appellant, of course, was aware of this Court's decision in KIBAKI VS. MOI, supra, and he was obviously trying his best to avoid being personally served so that he would have the petition against him struck out. Listen to paragraph 21 of his further affidavit.

"There was no attempt at personal service upon me by either of the persons above mentioned and the petitioner's claim that I dodged service of any court process either at the airport in Kisumu or Nairobi, or invited one of the process servers in my car is untrue."

The Appellant knew right from the very beginning that he had to be personally served and he was determined to avoid that eventuality. He was beaten to it by Mbuvi at the Jomo Kenyatta International Airport where he was served at about 7.40 p.m. The time of service was odd. In NTOITHA M'MITHIARU VS. RICHARD MAOKA MAORE & TWO OTHERS, Civil Appeal No. 272 of 2003 (unreported) , GITHINJI, J.A dealt with the issue of time of service as follows:-

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

‘Service shall normally be effected on a week day other than Saturday and before the hour of five in the afternoon.’

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

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

The other members of the Court in the above-cited appeal were OMOLO & ONYANGO-OTINEO, JJ.A. None of them specifically dealt with the issue of the time by which an election petition is to be served.

Order XLIX Rule 8 (2) specifically say that service:-

“---shall normally -----”

Our understanding of that expression is that it does not mean that service must always be before the hour of five. In normal circumstances, service “*shall*” be before five O’clock. What about in circumstances which are not normal, like when the person to be served is determined to evade such service” In our present case, if the Appellant had been ready and willing to accept service, he would have been served at Kisumu Airport before 5.00 p.m. But he was determined not to be served there and in our view, that rendered the circumstances not normal and the 1st Respondent was fully entitled to pursue him to Nairobi and serve him there at whatever time he was cornered. Mbuvi eventually cornered him at about 7.40 p.m. They were entitled to serve him at that time because the Appellant himself was unwilling to accept a civilized, system of law and agree to be served at Kisumu. Members of Parliament must understand that the courts will not allow them to invoke dishonourable methods or subterfuge to evade service of court processes and having successfully done so, think that they will be allowed to use the courts whose processes they have evaded to strike out otherwise valid election petitions against them. If they are able to read and know the provisions of KIBAKI VS. MOI, supra, they should also be able to read and know the provisions contained in ABU CHIABA MOHAMED VS. MOHAMED BWANA BAKARI & TWO OTHERS , Civil Appeal No. 238 of 2003 (unreported).

We have said enough, we think, to show that this appeal must fail. We, of course did not set out in this judgment the nine grounds of appeal set out in the Appellant’s Memorandum of Appeal and deal with each and every one of them. We found it unnecessary to do so as we were of the clear view that the important issue in the appeal concerned the question of whether it was the Appellant and his witness who told the truth in their respective affidavits or whether it was the 1st Respondent and his three witnesses who did so. Like the learned trial Judge, we have no doubt as to where the truth lay in the matter. The truth lay with the 1st Respondent and his three witnesses.

It only remains for us to thank M/s Julie Sowetto Aullo, for the Appellant, Mr. Stephen Mwenesi, for the 1st Respondent and Mr. Gabriel Kwoba Mukele, for the 2nd and 3rd Respondents, for the very commendable job they did on behalf of their respective clients. Our final order in the matter shall be that this appeal be and is hereby dismissed with the costs thereof to be paid by the Appellant to the 1st Respondent only. The 2nd & 3rd Respondents shall bear their own costs of the appeal as they chose to side with the Appellant. We so order.

Dated and delivered at Nairobi this 19th day of December, 2008

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.



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