# THE LAW OF POLITICS OR THE POLITICS OF THE LAW?: An Evaluation of the "*Mwai Vs Moi*" Rule as to Personal Service of Election Petitions in Kenya

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> Judges are liars. They routinely engage in delusions. They occupy a paradoxical position in this world, one in which their functions require them to make law, while their legitimacy depends on the fiction that they interpret the law. It is a strange fiction, but is a necessary one.[1]

## 1.0 Introduction

For quite some time, the decision of the five-judge bench[2] of the Court of Appeal of Kenya sitting at Nairobi, delivered on the 10th day of December 1999[3] has been a ghost that has haunted petitioners, practitioners and judges of the High Court of Kenya sitting as an election court alike.

In these Appeals that pitted Mwai Emilio Kibaki as the Appellant against Daniel Toroitich Arap Moi, S.M. Kivuitu and the Electoral Commission of Kenya as Respondents (hereinafter referred to as ***Mwai Vs Moi***), the Court of Appeal found and declared thus:

> In the event, we are satisfied the three 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.

Following this pronouncement, petitioners have been met by technical objections on the modes of service that they have employed and many an election petition have been struck out for non-compliance with the rule as to personal service as enunciated in ***Mwai Vs Moi*** even on occasions when the respondents have deliberately avoided service. In other instances, the High Court, which falls below the Court of Appeal in the country's judicial hierarchy, has expressed doubts as to the credibility and legal thrust of the averment that personal service is the only mode of service recognized under the National Assembly and

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[1] Pintip Homphem Dunn, How Judges overrule: Speech Act Theory and the Doctrine of *Stare Decisis*, The Yale Law Journal, Vol 113, Nov. 2003, No. 2 Page 493.

[2] B. Chunga, C.J. (As he then was), R.S.C. Omolo, J.A., A.B. Shah, J.A. (As he then was), A.A. Lakha, J.A. (As he then was) and E. Owuor J.A. (As she then was).

[3] Civil Appeal No. 172 of 1999 as consolidated with Civil Appeal No. 173 of 1999.

Presidential Elections Act and, at some point in time, the High Court has outrightly rejected the reasoning of the Court of Appeal in ***Mwai Vs Moi.***[4] This state of affairs has had the inevitable consequence of bringing the judicial process, so far as it relates to election petitions, into disrepute.

In this paper, the authors seek to examine the rules governing service of election petitions under the National Assembly and Presidential Elections Act[5]. In so examining the rule, the authors seek to interrogate the issue as to whether or not the judges of the Court of Appeal were right in law in stating that the law as it stood then, and as a matter of fact, as it still stands now, only personal service will suffice in respect of election petitions filed under Section 20(1)(a) of the National Assembly and Presidential Elections Act.
The authors will give a detailed attention to the practical consequences that have attended the said statement of principle as promulgated by the Court of Appeal, and the precedent value of the same, considering the recent attempt by the High Court to depart it.

From the very outset, it is the authors' view that the appellate law Lords were caught in the muddles of political expediency as they engaged in blatant disregard of the basic tenets of statutory interpretation and far-fetched emotional reasoning, totally indefensible on legal and logical grounds, in reaching the above finding. It shall be the authors' contention that, looked at from the point of view of the literal meaning of the statutory section in issue, the golden rule of interpreting the law according to the intent of "them that make it", and, the mischief rule of ensuring that the person against whom an election petition in lodged has the knowledge of the impending petition against him/her and prepares accordingly for his/her day in court, the appellate law Lords were totally on a tangent of their own, far removed from the law as it was, and as it still is, in making the finding aforesaid.

The National Assembly and Presidential Elections Act is a law that provides for registration of electors and holding of elections to the office of President and to the National Assembly and various matters connected with and incidental to the same[6].
Needless to say, the electioneering process is a political process – a dirty game in terms of the journalistic vocabulary.

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[4] See Mohammed Bwana Bakari Vs Abu Chiaba Mohammed & 2 Others, Mombasa High Court Election Petition Number 3 of 2003 [Unreported]. The same is examined later in this paper.
[5] Cap 7 of the Laws of Kenya.
[6] See Preamble to the National Assembly and Presidential Elections Act.

For all practical intents and purposes, this law, therefore, is intended to inject some sense of sanity of the law and order in this substantially political process and not to flavour the legal process with political rhetoric. It is hereby emphasized, and this has been demonstrated herein, that the learned judges in ***Mwai Vs Moi*** decided to engage in a game of topsy-turvy and, rather than let the law govern the political process, decided to let politics govern the legal process in reaching their finding above.

Before surgically analyzing the legal issues above, first a look at the background to the Appeal in ***Mwai Vs Moi***.

## 2.0 BACKGROUND TO THE APPEAL IN *MWAI VS MOI*

On 29th December 1997, Kenyans went to the polls to elect a president, Members of *Parliament* and civic leaders whereupon D.T. Moi was declared by the Electoral Commission of Kenya as having been elected president of the Republic of Kenya by 2,445,801 votes. The said Declaration was by way of Gazette Notice No. 79 of 1998 published on 5th January 1998.

Pursuant to the provisions of Section 44 of the Constitution of the Republic of Kenya, Emilio Mwai Kibaki, one of the Presidential contestants and the runner-up in the election who had polled 1,895,527 votes filed in the High Court at Nairobi Election Petition No. 1 of 1998 challenging the validity of president [as he then was] Moi's election as the President of the Republic of Kenya.

Mr. Mwai Kibaki [as he then was], on the 29th January 1998, through his lawyer, published in the Kenya Gazette Notice No. 395 of 1998, a notification of his petition against Moi's election as president. The petition named D.T. Moi, S.M. Kivuitu [at all material times he was the Chairman to the Electoral Commission of Kenya] and the Electoral Commission of Kenya as respondents. In the same Notice, the petitioner informed the respondents that a true copy of the said petition was obtainable on the respondents' application at the office of the Registrar/ the Deputy Registrar, High Court of Kenya, law Courts at P.O. Box 30014, Nairobi. This was the only mode adopted by the petitioner in serving all the respondents with the petition lodged in the High Court on the 22nd January 1998.

The First Respondent appointed a firm of advocates on 2nd February 1998 to act for him in this petition. The inevitable deduction from this would be that he [the 1st respondent] had not, pursuant to Rule 10 of

the National Assembly and Presidential Elections [Election Petitions] Rules, left at the Registrar's office, a writing signed by him or on his behalf appointing an advocate to act for him should there be a petition against him or stating that he intends to act in person and, in either case, giving an address in Kenya at which notices addressed to him may be left.

It is noteworthy that 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[7].

On 25th January 1999, the First Respondent moved the court under Section 20 of the Act for Orders that the petition against him be struck out on the ground of bad service and that all proceedings be stayed pending the hearing and determination of the application. He further, as expected, asked for costs.

As if taking cue from the First Respondent, the 2nd and 3rd Respondents on the 26th of January 1999, by way of Motion on Notice, made an application seeking similar orders as those sought in the First Respondent's Motion. The only difference was that, in addition to having been brought under Section 20(1) of the Act, this Motion was also founded upon the provisions of Rule 14 of the Rules.

The Appellant opposed the two motions by dint of Grounds of Opposition and Replying Affidavit hence the two applications were heard together by O'Kubasu, Mbogholi Msagha and Ole Keiwua, JJ [as they then were]. By their ruling delivered on 22nd July 1999, the Puisne judges struck out the petition on the ground that the same had not been properly served upon the Respondents.
It was this ruling of the High Court that culminated in the appeal under scrutiny.
The grounds of Appeal were the following:

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.

[7] Rule 14(2) of the Election Petition Rules.

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.

It is the above set of facts and the law to be set out hereunder that drove the Court of Appeal judges to declare preambularly that:

> 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 hitherto understood it to be.

## 3.0 Sections 20(1) of the Act and Rule 14 of the Election Rules Revisited

The polemics surrounding the relationship between Section 20(1) of the National Assembly and Presidential Act and Rule 14 of the National Assembly [Election Petition] Rules traces its ancestry to Act No. 10 of 1997.

Prior to this Act, Section 20(1) of the Act read as follows:

> 20(1) A petition
> (a) to question the validity of an election, shall be presented within twenty eight 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 become vacant, may be presented at any time:
> Provided that-
> (i) a petition questioning a return or an election upon the ground of a corrupt practice and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his election agent may, so far as respects the corrupt practice, be presented at any time within twenty-eight days after the date of the alleged payment or act;
> (ii) a petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, agent in

pursuance or furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be presented at any time within twenty-eight days after the date of the alleged payment or act;

(iii) a petition questioning a return or an election upon an allegation of an illegal practice in relation to a return of expenses under part VA may, unless a condoning order excusing what would otherwise be an illegal practice has already been obtained under Section 18J, so far as respects the illegal practice be presented at any time within twenty-eight days of the notice of reception of the return having been exhibited by the returning officer under Section 18I (3).

With the advent of Act no. 10 of 1997, Section 20(1) of the Act remained substantially intact with the exception that paragraph (a) was rephrased to read:

> 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. (Emphasis ours).

Rule 14 of the National Assembly Elections (Election Petition) Rules provides as follows:

> 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.

Because Rule 10 appears to have preoccupied the minds of the rule maker within the meaning of Rule 14, we consider it wise to set out the same here in full for a comprehensive appreciation of its tenor and purport. It provides thus:

> 10. A person elected may at any time after he is elected send or leave at the office of the Registrar a notice in writing signed by him or on his behalf appointing an advocate to act as his advocate in case there should be a petition against him or stating that he intends to act for himself, and in either case giving an address in Kenya at which notices addressed to him may be left or if no such writing is left all notices and proceedings may be given or served by leaving them at the office of the Registrar.

It is apparent that the phrase "and served" as employed by the amendment to Section 20(1)(a) of the Act brought the all-important

difference in the relationship between the parent statute and subsidiary legislation that was material to this appeal.
The rest of the Section and the relevant rules remained unaltered.

## 4.0 Rules of Statutory Interpretation

By interpretation or construction is meant the process by which the courts seek to ascertain the meaning of the legislature through the medium of authoritative forms in which it is expressed[8].

Laws have always been expressed in words as a medium of communication. Words, it is a truism, are not mathematical instruments. The same are thus proper subjects of interpretation. This process of interpretation must be tailored in such a manner as to avoid unnecessary ambiguity and absurdity.
Speaking of words as a fallible medium of communication, the High Court of Kenya, {Mbaluto and Kuloba JJ [As they then were]} stated thus[9]:

> We all know that unless it is heavenly drafted, nearly every legislation has its own hidden caves and galleys, dark alleys, potholes, and mysteries. This is, and must, always be expected, because of the nature of language itself as a means of human communication. As long as language remains word based, ambiguity and contradictions will continue to torment mankind. This problem is a familiar feature of decision making.
> Ambiguity, contradiction and difficult are often concomitant weeds to word-based tools of human communication, because words are not transparent and unchanging crystals; they are a tangle: a loose bundle of a living thought and may vary greatly in colour and content according to the circumstances and the time in which they are used. It is for judges to give meaning to what the legislature has said, and it is this process of interpretation which constitutes the most creative and thrilling functions of a judge. ***Every judge has learnt and knows the cardinal features of language, and avoids being encumbered by any obscure or questionable philosophical theory.*** .....
> ..... ..... ..... ..... ..... .....
> .....
> ..... Vague terms can be deliberate and sensible. Communication of the affect of an enactment may be obscured by poor grammatical construction: syntactic ambiguity, that is, within the framework of the sentence, a particular word or expression is capable of affecting two or more other parts of the sentence, thereby raising inconsistent or incompatible interpretations as to the effect of the enactment as a whole. For example, take a law having the phrase "standard brown eggs". It looks simple. Does it not? But there may be an ambiguity, which permits two or more alternative interpretations. It may be said that it means eggs of any shape or size, which

[8] Per Salmond, Jurisprudence, 11th Ed, P. 152.
[9] In the celebrated case of Ruturi and Another Vs the Minister for Finance and Another [2001] 1 EA 253 at P. 266 et seq.

> are also brown in colour. So, we generally resort to the context in which the phrase is used to resolve such an ambiguity.
> In essence, we are saying that enacted laws more often than not contain difficulties and ambiguities; that rapid changes which characterize modern society constantly create new problems with which the legal order, usually through the legislature, try to deal; that in responding to pressing demands for new law, the legislators labour under severe handicaps. In the process, although they see one facet of a problem reasonably clearly, or one specific context in which the problem may arise, they may fail to foresee all possible contingencies and various guises in which the problem may appear and to state the legal solution in a form of language that will embrace all of the cases to be covered. The result is that doubts may arise as to whether the rule was intended to apply in circumstances that the legislature seems not to have anticipated. We are saying that even if the draftsman wishes to anticipate every contingency, language is too imprecise and malleable an instrument to foreclose every possibility. Words, as verbal symbols of the legislature's intention have a fluidity and ambiguity, which is very frustrating. ***They are not instruments of mathematical precision.*** [Emphasis supplied].

The above erudite speech from the judgment of the learned judges has been quoted *in extenso* in order to demonstrate how the task of statutory interpretation is so necessary and yet so delicate that it should be performed in extreme of caution.

In interpreting a statute, the court is enjoined to consider the following guiding principles[10]:

a) The intention of the legislature.
b) The Statute must be read as a whole.
c) The statute must be construed so make it effective and workable.
d) If the meaning is plain, effect must be given to it irrespective of the consequences.

In addition to these broad principles of statutory interpretation, there are also rules of language[11] and internal aids[12] within a statute that give direction in the court's performance of the task of interpretation of statutes.

The learned judges in the case of ***Ruturi & Anor Vs the Minister for Finance & Anor***[13] stated the position on the existence of these principles of statutory interpretation as follows:

> There are, for example, rules of interpretation, which say that if two or more sections are repugnant, the known rule is that the last must prevail (See *Wood Vs Riley [1867] LR 3 CP 26 at 27, per Keating J).* It is also a cardinal

[10] Per G.P. Singh, Principles of Statutory Interpretation, 3rd Ed. Bharat House P. 3 et seq.
[11] Such Rules as *Ejusdem Generis, Noscitur A Sociis, Reddendo Singula Singulis*
[12] Such as The Long Tile, Preamble, Headings, Marginal notes, Punctuation, Illustrations, Definition sections or interpretation clauses, proviso, explanations, schedules etc.
[13] Supra note 8.

> principle in the interpretation of a statute that if there are two or more inconsistent enactments, it must be seen if one cannot read a qualification of the other or others (See *Ebbs Vs Boulnois [1875]LR 10 Ch 479, at 484,* Per James LJ; and Lopes LJ, in *Imray Vs Oakshette* [1897] 2 Q13 218, at 223). Moreover, every Act of *Parliament* must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every Act is made either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment, practice, custom, or economic policy (See Lord Larlgdale MR in *The Dean of Ely Vs Bliss* [1842] 5 Beav 574, at 582. ... ... ... ... ... ..... ... ... ... ... ... ... ... ... ... ... ..... ..... ..... ..... We are saying that there are in place many rules and principles for the legal interpretation of every statute. There are rules for interpreting remedial statutes; for statutes creating new rights, obligations, duty, liability, and remedies; for fiscal, taxing and charging statutes; and for every other type of statute.

The point sought to be underscored here is that as at the time the appellate law lords were making their way around the practical issues raised in ***Mwai Vs Moi***, they were cognizant of the multifarious rules of statutory interpretation that have been in place for centuries on end and whether they availed themselves the diversity of these rules to reach a well reasoned finding is an issue to be deduced later from this article.

## 5.0 Political Jurisprudence – The Reasoning of the Court of Appeal in *Mwai Vs Moi*

It has been pointed out earlier that the appellate law lords opened their judgment by pronouncing thus:

> 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 hitherto understood it to be***. [Emphasis ours].

It is apparent from the foregoing declaration that the judges knew that there was the way the election law in respect of service of election petitions had been understood by, among others, the same judges of appeal. It is this prior understanding that they sought, and indeed managed, to radically depart from.

Law is an instrument of achieving some societal order and the guaranteeing of certainty is a fundamental and time-honoured function of the law. For the judges to know that the law has been understood in a particular manner and to expressly seek to depart from that understanding, they ought to have very good and compelling reasons for so doing – reasons that have a logical beginning and that achieve a logical end.

## 5.1 The Doctrine of Judicial Precedent put to test

The doctrine of precedent presents the rule that every court binds lower court and the same court bind even themselves (sic).[14] It is discernible from the grounds of appeal in ***Mwai Vs Moi*** and the issues for determination in certain subsequent cases to be considered later that the place of the doctrine of precedent is in serious question in Kenya's election petition jurisprudence.

## 5.2 The Question of Interpreting the Meaning of S.20(1) of the Statute as against Rule 14 of the Rules

In dealing with the two motions aforesaid that were before them in election Petition Number 1 of 1998, the Superior Court judges were invited to grapple with the question of service under Section 20(1) of the Act.

The First Respondent, D.T. Moi, had averred at Paragraph 3 of the Supporting Affidavit to his application for striking out the Petition thus:

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

The Superior Court in agreement with the Applicants held that Section 20(1) of the Act provides for personal Service and struck out the petition for bad service. In so doing, the High Court declared that Section 20(1) (a) of the Act was in irreconcilable conflict with Rule 14 and, as a result, service of summons under the guidance of Rule 14(2) is no service at all since the rule conflicts with Section 20(1) of the Act.

The bottom-line of the appeal under scrutiny, from the grounds set out above, was that the High Court had overruled the Court of Appeal. The appellant contended that by striking out his petition and further declaring Section 20 (1)(a) to be in conflict with Rule 14, the High Court had, in fact, overruled the Court of Appeal in its earlier decisions in at least two cases.

The two cases in question were ***Alicen J.R. Chelaite Vs David Manyara Njuki & 2 Others***[15], and ***David Kairu Murathe Vs Samuel Kamau Macharia***[16].

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[14] Glenville Williams, Learning the Law, Stevens & Sons Limited, 1982, 11th Ed. 84

[15] Civil Appeal No. 150 of 1998

In both cases, hereinafter referred to as "the **Chelaite** Case" and "the **Murathe** case" respectively, service of the relevant documents had been done outside the twenty-eight days period prescribed under the Act, but within ten days from the date of their presentation as Rule 14(1) provides. The Court of Appeal, in dealing with the appeals that followed the dismissal of the two petitions, observed that there was no irreconcilable conflict between Section 20(1) of the Act and Rule 14(1) and, that since Section 20(1)(a), being a part of the parent statute, provides for both presentation and service within 28 days, the section reconciles with Rule 14(1) by prevailing upon the Rule in case of any possible disharmony.
The Court of Appeal, like the High Court, in the **Chelaite** and **Murathe** cases held, and we totally agree, that, any petition, which is served outside the 28 days period, is incompetent and must be struck out. It must be emphasized here that the borne of contention in the two appeals was the time and not the mode of service. It was in so deciding on the question of service effected outside the **statutorily** prescribed period that the appellate court observed that there is no conflict between Section 20 and Rule 14.

In ***Mwai Vs Moi***, the High Court held that an irreconcilable conflict between the Section and the Rule exists. It was this declaration by the High Court, which the appellant contended had amounted to the High Court overruling the Court of Appeal.

When the two appeals came up for hearing, the appellate judges held that the High Court had not overruled the Court of Appeal by its declaration of a conflict between Section 20(1) and Rule 14 since, in the Chelaite and Murathe cases, the core issue for determination was the fate of a petition served outside the prescribed period. The other issues as to there being a conflict between Section 20 and Rule 14, were, according to the appellate law lords, mere *obiter* – some kind of gratuitous advice - that the High Court had not been bound to take.
In so declaring the observation of the same court in Chelaite and Murathe cases *obiter*, the court was of a further view that the issue as to whether or not Section 20(1)(a) was in conflict with Rule 14 was *"terra rosa"* and, therefore, still open to the High Court to discuss. It was not the *ratio decidendi,* which is to say, the rule of law upon which the decision[17] was founded, hence, the High Court had not overruled the Court of Appeal.

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[16] Civil Appeal No. 171 of 1998 Civil Appeal No. 171 of 1998
[17] Glanville Williams, supra note 14. p.67

In principle, the Judges of Appeal were right in declaring the observations in Chelaite and Murathe cases as *obiter dicta* since such a decision made without a situation demanding full attention of the same is probably made without full consideration of all the consequences that may follow therefrom, or the judges may not have expressed a concluded opinion. We, however, hasten to note that the fact that a point is expressed *obiter* is not *per se* a ground for departing from it. An argument must actually be presented setting out the necessity to disregard the *obiter dicta* in the previous decision.
At Page 29 of their judgment, the learned Court of Appeal judges declared thus:

> 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.** [Emphasis supplied].

This is where "the rains started beating" the learned bench. The law lords had veered and taken a ride off the tangent and without possibility of recovery. The court in a sweeping declaration blanketly declared Rule 14 as being in conflict with Section 20(1)((a) of the Act in total lack of consideration of the extent of the inconsistency between the two legal provisions.

A careful examination and juxtaposition of the Section and the Rule simply, and without undue difficulty nor ambiguity, reveal that the disharmony existing between the rule and the Act is only to the extent that the rule declares the time of service as being 10 days from the time of presentation of the petition, and such a conflict shall exist if, and only if, an election petition is served at the expiry of twenty eight days from the date of publication of election results but within ten days from the date of its presentation. Only then do the two provisions conflict and, Section 20(1)(a), therefore, takes precedence, meaning that a petitioner has to comply with Section 20(1)(a) of the Act so far as the same relates to the time of presentation and service of the election petition. The inconsistency alluded to thus only touches on Rule 14(1)(a) of the Act leaving the other sub rules under Rule 14 intact. It is emphasized here that Section 20(1)(a) of the Act, and indeed any other Section of the Act, does not even remotely allude to the mode of service of the Petition. Be it emphasized, further, that at no point in the entire judgment did the court comment on the import of Rule 14(2) of the Rules, which expressly sets out the modes of service of election petitions.

In declaring the entire Rule 14 of the Act to be inconsistent with Section 20(1)(a) of the Act, the judges were reading strange and nonexistent words into the language of the statute. This is not to be allowed lightly.
In ***Stock Vs Frank Jones (Tipton) Ltd***[18]**.** Lord Edmund stated:

> But dislike of the effect of a statute has never been an accepted reason for departing from its plain language. .....
> 'It is a strong thing to read into an Act of *Parliament* words, which are not there, and in the absence of a clear necessity it is a wrong thing to do' said Lord Lord Marsey in Thompson Vs Goold & Co.
> 'We are not entitled to read words into an Act of *Parliament* unless clear reason of it is to be found within the four corners of the Act itself' said Lord Loreburn L.C. in Vickers, Sons & Maim Ltd Vs Evans.

As clearly expressed above, the learned judges proceeded on the premise that Rule 14 can no longer apply to petitions filed pursuant to Section 20(1)(a) of the Act. After having rightly observed that Rule 14 must give way to the **plain** words of Section 20(1)(a) of the Act, the learned judges refused to pay homage to the plain words of Section 20(1)(a) of the Act, read words into it and at page 32 of the judgment, they asseverated:

> 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?

This is strange [is it not?] in light of Rule 14(2) of the Rules in which the Rules Committee, exercising powers delegated upon it by the same *Parliament* that was alleged by the judges to have been silent, having laboriously set out modes of service of election petitions, and *Parliament*, while tampering with the time of service of election petitions by instrumentality of Act No. 10 of 1997, presumably thought twice, and found it wise, in its unimpeachable wisdom, not to tamper with the same modes of service.
The Court, in a rare display of judicial ingenuity, reasoned that since Rule 10 by use of the word "may" does not compel an elected person to leave his address or that of his advocate with the registrar, one has no entitlement to the assumption that service can be effected on him at the address left with, the Registrar and, if no address is left, by leaving the documents with the registrar.

At page 31 of its judgment, the judges were alive to the fact that had the 1997 amendments not intervened, (i.e., by addition of the phrase "and served" to Section 20(1)(a)), the question of mode of service was

[18] [1978] 1 ALLER 948

well settled. It is thus elusive to imagine how these two innocent words changed the mode of service as it had hitherto been understood.

It is true that Rule 14(2) acknowledges that it is not mandatory for an elected person to leave his address with the Registrar. It is in pursuit for justice in situations involving those who have not left their addresses with the Registrar as aforesaid and those who have had no advocates appointed that the rule further provides for alternatives for petitioners through a Gazette Notice informing a Respondent of the Presentation of a petition.
The Court at Page 32 of the judgment was of the considered opinion that:

> 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 of the court], ***asking a respondent to collect*** *a copy thereof from the High Court Registry cannot be proper service* [Emphasis supplied].

The court here was at total loss at to the exact implication of this second mode of service by reasoning that service shall have been effected when the respondent collects the relevant copies of the petition from the Registrar yet service, in law, within the language of Rule 14(2), is simply deemed to be effected at the time of the publication of the Gazette Notice – the very fact of notification of a pending petition.

The Court expressed its understanding of service in ordinary language as meaning to deliver the document in question to that person. The Court found fortification on this stand in Order 5 of the Civil Procedure Rules as to Service of Summons where it says that:

> Service of Summons shall be made by delivering or tendering a duplicate thereof.

In the course of its reasoning, the appellate court agreed with Messrs Nowrojee and Orengo for the appellant that the National Assembly and Presidential Elections Act and the Rules made thereunder form a complete regime (for election petition matters) and other legislation can only be applicable to election petitions if they are made applicable by the Act itself or the Rules. The Court, most humbly, carried on with its odyssey by a declaration at page 30 of its judgment that:

> ***Parliament,* however, has not stated in the section how service is to be effected** [Emphasis ours]

This declaration, it should be emphasized, was made in full glare of Rule 14(2) of the Election petition Rules.

At page 34 of the judgment, the court went on as follows:

> 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* itself specifically dispensed with the need for personal service, then 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 to personal service. ..... **Section 20(1)(a) has not prescribed any mode of service** and in those circumstances, the courts must go for the best mode of service which is personal service. [Emphasis ours].

As if out of memory of the declarations above, and in a surprising departure from the above line of reasoning, the highest court on the land went on to state:

> 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 the election petitions *must be personal*** and whatever problems may arise from that, the court must enforce that law until *Parliament* should itself be minded to change. [Emphasis supplied].

The foregoing leads to a scenario where one can read that *Parliament* has not decreed the mode of service under Section 20(1)(a) of the Act and, therefore, personal service implied thereunder is "judge-made law" whereas in the same judgment, and as if determined to create untold contradictions, the court states that Parliament has decreed that service must be personal under Section 20(1)(a) of the Act.

Be that as it may, the last declaration above by the Appellate Lord Justices was the last nail in the coffin of Rule 14 as a whole.

Any Court that purports to interpret the effect of a rule *vis-à-vis* a statute must be guided by Section 33 of the Interpretation and General provisions Act, Cap 2 of the Laws of Kenya. Its provisions are:

> An act shall be deemed to be done under an Act or by virtue of the powers conferred by an Act or in pursuance or execution of the powers of or under the authority of an Act if it is done under or by virtue of or in pursuance of *subsidiary legislation made under a power contained in that Act.*

The import of this edict of the legislature is simply to emphasize the fact that rules made pursuant to a statute have the full sanctity of the law and any temptation to whittle down their statutory force, as is likely, should not be entertained.

The Halsbury's Laws of England 4th Edition Volume 1 paragraph 26 states the general rule applicable when considering the invalidity of a rule in the following terms:

> Unless the invalid part is inextricably interconnected with the valid, a court is entitled to set aside or disregard the invalid part leaving the rest intact.

If the Court of Appeal in ***Mwai Vs Moi*** had sought guidance from the above learned commentary, it would have considered declaring 'inconsistent' rule 14(1) and retain rule 14(2) of the Election Petition Rules that is applicable to modes of service.

### 5.3 The High Court Doubts and Rejects the Reasoning of the Court of Appeal

On 11th July 2003, the High Court of Kenya had occasion to grapple with the issue of service effected by way of newspaper advertisement, after the 28 statutory period but with leave of court[19].
The court while declaring the entire service as a nullity made the following gratuitous observations:

> This Court was not asked to say something about personal service as the basis to strike out the petition but Mr. Kilonzo did comment on this in a serious way. That his client tried to serve the 1st respondent but was unsuccessful. That it went by Rule 14 of the Election Petition Rules and published a gazette notice otherwise his client's rights and those of the constituents were doomed. ..... ..... ..... ..... ... ..... ..... **Much as this court may be of the view that alternative modes of service under Rule 14 were not done away with** ..... **Assuming that the alternative modes of service under Rule 14 are still intact,** they do not include substituted service. ..... The other point which is by way *vis a vis* these proceedings could be something like this: **Section 20 of the Act as well as rule 14 EPR do not contain any provision by which a court can either enlarge the time within which to serve a petition or order other modes of service.** Neither are there principles governing general civil

[19] This was in the case of Muiya Vs Nyaga & Others, Nairobi High Court Election Petition No. 7 of 2003 [Unreported] *per* Mwera J.

litigation permitted to find a place in election petition legal regime. [Emphasis supplied].

The above self-explanatory sentiments by the High Court present a situation where the High Court, although feeling bound by the doctrine of precedent had no conviction in the Court of appeal's statement of principle in ***Mwai Vs Moi*** that the amendments to Section 20(1)(a) of the Act had the effect of wiping out the entire body of Rule 14 of the Election petition Rules.

Although the case of ***Muiya Vs Nyaga*** turned on the question of a possibility of seeking to serve an election petition out of time, the learned judge too went on a frolic of *obiter dicta* by further asserting as follows:

> But this court holds a view that except for affidavits of witnesses (Rule 18) where Order 18 of the Civil procedure Rules and Oaths and Statutory Declarations Act apply the entire Act and Rules do not allow applications of any other statute. One should not even dream of amending a petition.

These latter sentiments by the judge are a bit intriguing. Does it imply that much as the courts in all other matters are called upon to, as far as practicable, determine matters on the true position of facts by instrumentality of amendment of pleadings, in election petitions the law is different?
In latter-day jurisprudence on amendment of pleadings, Ringera J., [As he then was] while invited to consider the question of amendment of a company winding up petition noted as follows:

> The Companies (Winding-up) rules do not provide for an amendment to a petition. **However the power to amend any pleadings or proceedings is one of the inherent powers of the High Court of judicature and, as the respondent's counsel aptly submitted, the same could be exercised by invoking both Section 3A and 100 of the Civil Procedure Act. ..... Thus we can say straight away that there is jurisdiction to entertain an application to amend a petition.**[20] [Emphasis supplied]

One may be justified in questioning, what then is so special about election petitions?
Before the heat and dust of ***Muiya Vs Nyaga*** could settle, on 19th August 2003, the High Court of Kenya sitting at Mombasa did the unimaginable – it overruled the Court of Appeal's reasoning in ***Mwai***

[20] In the matter of YorkHouse Properties Co. Ltd. Nairobi [Milimani] Civil suit No. (Winding Up Cause) 10 of 2003. [Unreported].

***Vs Moi***. This was in the case of ***Mohammed Bwana Bakari Vs Abu Chiaba Mohamed & 2 Others***[21].

The material facts of this case were almost on all fours with those in ***Mwai Vs Moi*** in that the election results in this matter were published in the Kenya Gazette on 3rd January 2003. The Petitioner filed an election petition in respect of the same results and had it published in the Kenya Gazette Volume CV – No. 10 dated 31st January 2003 being notice number 687. On 30th January 2003, the petitioner's process server pasted a copy of the petition on the 1st Respondent's gate. The 1st Respondent thereafter moved the court by instrumentality of Section 20(1)(a) of the National assembly and Presidential Elections Act on the principal ground that:

> The petition herein be struck out on the ground that the same was not personally served on the first Respondent within 28 days after the date of publication of the result of *Parliamentary* Election in the Gazette on 3rd January 2003.

In considering this motion, the learned judge[22] correctly set out the following as the basic premise from which she proceeded to decide the motion:

> It is not disputed that the petition herein was presented within 28 days after publication of election result. It is not disputed that it was served within the time limited. The dispute is that the service was not personal service upon the Respondent. Now the issue is, does the law regarding election petitions require **personal service?** This issue has occupied our election courts on several occasions. [Emphasis of the Court].

The learned judge considered that Section 20(1)(a) of the Act does not specify the manner in which the service of the petition will be effected. The Court went further to evaluate the force of law of delegated legislation with particular emphasis on the fact that the Election Petition Rules were made by the rules committee pursuant to Section 27 of the Act and, that this Section was repealed by Section 10 of Act No. 8 of 1974. The Court found fortification in finding that the rules remained law in Section 24 of the Interpretation and General provisions Act, which provides thus:

> Where an Act or part of an Act is repealed, legislation under subsidiary legislation under or made by virtue thereof shall unless contrary intention appears remain in force, so far as it is not inconsistent with the repealed Act, until it has been revoked or repealed by subsidiary legislation issued or made

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[21] Mombasa H.C. Election petition No. 3 of 2003 [Unreported]
[22] Joyce Khaminwa, J.

under the provisions of the repealing Act, and shall be deemed for all purposes to have been made there under.

The court in this matter clearly set out the basic provisions of the National Assembly Elections (Election Petition) Rules 1993 before reproducing the text of Rules 10 and 14 (1) and (2) of the Rules and Section 20(1)(a) of the Act.
At page 11 of her judgment, after noting the ouster of operation of Rule 14 of the Rules by the court of Appeal in ***Mwai Vs Moi***, the learned judge acknowledged thus:

> This court should find itself bound by this decision of the Court of Appeal

Having noted this, the High Court, while disagreeing with the statement by the Court of Appeal in ***Mwai Vs Moi*** that Rule 14 of the Rules could no longer apply to petitions which concern Section 20(1)(a), stated thus:

> With greatest respect the court failed to comment on the second limb of the Rule that is rule 14(2), which deals with the mode of service. This rule simply provides the manner of service and is not in conflict with section 20(1)(a) of the Act. Its provisions are to be read together with rule 10 referred to therein which rule provides for address for service in case there should be a petition against the respondent, granted the rule is not mandatory. However, rule 14(2) indicates that where a party has failed to comply with rule 10 service may be effected by advertisement in the Gazette
>
> On the issue of interpretation of the effect of the rules a court is bound to consider the provisions of Section 33 of Cap 2 – Interpretation and General provisions Act which provides:
>
> > "33 An act shall be deemed to be done by an Act or in pursuance or execution of the powers of or under the authority of an act, if it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act."
>
> This provision clearly shows that the rules here have the sanctity of the law. The court of Appeal did not consider this provision. ..... ..... ..... In Halsbury's Laws of England 4th Edition Volume 1 Paragraph 26 is stated the general rule to be applied when considering invalidity of rules thus:
>
> > "Unless the invalid part is inextricably interconnected with the valid a court is entitled to set aside or disregard the invalid part leaving the rest intact"
>
> It was therefore possible to make declaration on the inconsistent rule 14(1) and retain rule 14(2) as applicable.

Upon having presented the above, manifestly well reasoned, analysis of the interplay between Section 20(1)(a) of the Act and Rule 14 of the Rules, the High Court was obviously in a dilemma as to whether to

proceed and pay due regard to the doctrine of precedent or to uphold the proper position of the law.

To go around this quandary, the court said the following:

> The doctrine of *stare decisis* was discussed at length in the Kibaki-Moi decision. The judges of appeal went to great lengths to examine the relevant authorities and I totally agree with their conclusion on that issue. However, in this case in considering the legal effect of the Act and the Rules and particularly sections 14(1)(a) and 14(2), the provisions of the Interpretations and general provisions Act Cap 2 set out namely Section 24 and Section 33 were not considered. The authorities referred to me indicated that in the circumstances the court acted "in ignorance or forgetfulness" of these provisions and therefore the decision is *per incuriam.* ..... ... ..... I agree that this court is bound by decisions of the Court of Appeal except where there is strong argument against the application of the doctrine of *stare decisis*. I am convinced; however, that the expression of the decision of the Court of Appeal in Kibaki-Moi are as to the validity of Rule 14(2) was made *per incuriam.* ..... I therefore do not find that I am bound by that decision.

The question that immediately presents itself for scrutiny is whether the High Court had jurisdiction to declare a decision of the Court of appeal to have been made *per incuriam.*
The House of Lords had had occasion to brood over this issue in the case of ***Cassell & Co. Ltd. Vs Broome and Another***[23] where Lord Hailsham of Marylebone LC eruditely put it in strong terms as:

> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exist 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 Vs Bristol Aeroplane Co. Ltd* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered opinions in the upper tiers with the same freedom. Even 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 Gardiner LC said (See Note [1966] 3 ALLER 77, [1966] 1 WLR 1234:
>
> > 'Their lordships regard 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 recognize 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 connection they will bear in mind the danger of disturbing

[23] [1972] 1 ALL ER 801

> retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the special need for certainty as to the criminal law. **This announcement is not *intended to affect the use of precedent elsewhere than in this House.***'[Emphasis supplied].

As if taking cue from Lord Hailsham, Lord Wilberforce put it more bluntly thus:

> The Court of Appeal found themselves able to disregard the decision of this House in *Rookes Vs Barnard* by applying to it the label *per incuriam.* That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or **to the right of a judge of the High Court to disregard a decision of the Court of Appeal.** Even if the jurisdiction of the Court of Appeal had been co-ordinate with the jurisdiction of this House and not inferiour to it the lebel *per incuriam* would have been misused.[Emphasis ours].

Lord Reid, Lord Morris of Borth-y-Gest, Viscount Dilhourne, Lord Diplock and Lord Kilbrandom concurred with these sentiments.

Back home, the High Court of Kenya had already expressed its subservience to the guidance of the Court of Appeal by the following speech of Ringera J. (As he then was),[24]:

> Be that as it may, in ***Mwanthi Vs Imanene [1982] KLR 323*** (a decision which, I confess, was not brought to my attention by either Advocate), the Coourt of Appeal took a different view. It held that failure to strictly comply with the manner of making the application for Summary judgment as prescribed in form 3A was not fatal. It reasoned that the deposition that the defendant was justly and truly indebted to the Plaintiff was another way of verifying the plaintiff's belief that there was no defence to the suit and that, in any case, the defect of form was saved by the provisions of Section 72 of the Interpretation and General Provisions Act, cap 2, as the same did not affect the substance of the affidavit and it was not calculated to mislead. **Under the doctrine of *Stare decisis* I am bound by the decision of the Court of Appeal regardless of whether I agree with it or not.** [Emphasis supplied].

Although the High Court undisputedly appears to have been right in its interpretation of Section 20(1)(a) of the National Assembly and Presidential Elections Act and Rule 14 of the Election Petition Rules, nevertheless, it was on the wrong side of the law in declaring the Court of Appeal to have decided *per incuriam.*

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[24] Deposit Protection Fund Board Vs Sunbeam Supermarket Limited & 2 Others Nairobi [Milimani] H.C.C.C. No. 3099 of 1996.[Unreported].

The cases relied on by the High Court, namely ***Rakhit Vs Carty*** [25] and ***Henry J. Garnet & Co. Vs Ewing***[26] entailed situations where the Court of Appeal of England departed from its own decision and not from a decision of a higher tribunal.
The best the High Court would have done would have been to express its reservations but proceed to declare its hands tied by the earlier authority of ***Mwai Vs Moi***. It would have been upon the litigants to move the Court of Appeal for a constitution of a larger bench to re-examine its earlier reasoning and the consequent principle established in ***Mwai Vs Moi***.

### 5.4 Punishing the Litigant for the Fault of the Lawmaker?

Courts of law have often excused breaches of procedural requirements on the ground that the party who wants to make a litigation meal out of the breach of the procedural requirement has not suffered any prejudice as a consequence of the breach. This is founded on the maxim that rules of procedure are good servants but bad masters.
In the case of ***Mwai Vs Moi***, it was not disputed that the Respondents had received the notice of a pending election petition as against them. It was, further, not disputed that Rule 14 of the Rules had never been repealed or amended. Assuming for the sake of argument only that the said rule was totally in contravention of the Act, in the circumstances, it would have been prudent for the Court to have noted that the breach had not occasioned any prejudice on the part of the Respondents.

### 6.0 Practical Consequences of *Mwai Vs Moi*

With the declaration that "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..," at page 36 of its judgment, a new dawn of judicially sanctioned anarchy and confusion appears to have been heralded in the realm of election petitions by the appellate court.

The sudden departure from the hitherto conventionally and statutorily acceptable mode of service of election petitions has been attended by highly expected and obvious consequences:

First, intended respondents have evaded service of petitions upon them and engaged petitioners in hide-and-seek games. This, one has to do for only twenty-eight days from the date of gazettement of

[25] [1990] 2 ALL ER 202
[26] [1991] 4 ALL ER 891

election results. If one is thereafter served upon resurfacing, he shall point a finger at Section 20(1)(a) of the Act and retort, "behold, I was not served within twenty-eight days from the date of gazettement of my election."
On the other hand, where any other mode of service is employed, either within twenty-eight days or outside, the same service evader will go to court waving **Mwai *Vs Moi*** menacingly and authoritatively submit, "I was not personally served as required under Section 20(1)(a)". The petition will either way be automatically struck out for bad service much as not even the devil knows where section 20(1)(a) provides for personal service or any other possible mode of service at all, under the sun and known to law.

This situation was envisaged and canvassed in ***Mwai Vs Moi*** but the learned judges, in their wisdom, wished it away as follows:

> The question arose that if only personal service would suffice, the respondents would seek to evade service by, for example, traveling out of the country or just staying out of sight until after of the prescribed twenty-eight 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 willfully take cover in order to avoid the process of the law.

Well, we may not know, but in the event that the court was taking judicial notice of the fact that those who are ordinarily identified by the title Honourable cannot evade service, the presumption was a bit dangerous.

In ***Mohammed Bwana Bakari*** case, the issue of the Respondent having evaded service arose.
Indeed, in ***Muiya Vs Nyaga***, the question of impossibility of personal service too surfaced in the following manner:

> Mr. Kilonzo wondered, and perhaps rightly so, as to whether *Parliament* meant that a petitioner who found himself in the circumstances like that of his client had no recourse for relief in law. That the constituents of Gachoka had their constitutional rights at stake. Yet it was being made to appear that where service was impossible that was the end of the road for them. ..... ..... ..... ..... ..... Mr. Nowrojee then rounded up his plea that this application (for striking out) should succeed. That this petition was not unique on the claim that the 1st Respondent evaded service. That the court of appeal addressed the point in Mwai Kibaki case and found that nothing turned on such a basis and that only *Parliament* had the mandate to address situations where a petitioner found it near impossible, if not so, to serve a petition. ..... ..... ..... ..... ..... The principle does bind this court here and the result is that this petition is struck out.

The other practical consequence of ***Mwai Vs Moi*** has been the embarrassing situation the judicial process has been exposed to in the sense that a petitioner today does not know whether to brandish ***Mwai Vs Moi*** or **Mohammed Bwana Bakari.**

## 7.0 CONCLUSION

The National Assembly and Presidential Elections Act is an important law of this land. The Rules made there-under are of no mean significance. This is one of the Statutes that breath life in the provisions of Section 1A of the Supreme Law of the land – The Constitution of the Republic of Kenya.

The fact of the significance of the electoral process has formed the meeting point of the *minds* of the judges of the superior and appellate court in all questions relating to election petitions.
In ***Mwai Vs Moi***, the appellate judges noted that:

> 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* itself specifically dispensed with the need for personal service, then the court must insist on such service.

In ***Mohamed Bwana Bakari*** the high court observed as follows:

> It is to be pointed out that it is not only the petitioner who has an interest in the outcome of the petition but also members of the constituency concerned.

In total appreciation of these matters, the court in ***Muiya Vs Nyaga & Others*** observed:

> On this strictness, this court has one thing or two to say: Election petitions are serious matters of a state with its citizens. As elections are held, the outcome announced, the electorate must know their political leader quickly and assuredly

Section 1A of the Constitution of the Republic of Kenya provides as follows:

> The Republic of Kenya shall be a multiparty **democratic** state. [Emphasis ours].

The type of democracy that is practised in Kenya is representative democracy. Needless to say, the people of Kenya deserve the least fettered opportunity to be represented by leaders of their free choice.

Those who impose themselves on the people of Kenya through election malpractices must consequently face stiff opposition through the election petition process.

The election court is thus a significant forum, not just of interpreting the law, but of upholding the hallowed and the age-old principle of democracy of the medieval Greek extractions.

Although those who approach the election court have no option but to abide by the rules of procedure – the handmaidens of justice- it is not the business of the election court to tactfully duck those who seek democratic redress. Such a situation would ordinarily lead the people to losing confidence in the due process of the law. Those who feel offended may resort to election violence and other related rules, whose proper place is the jungle, for redress. It is not the proper function of the election court to breed this unhappy situation.

This article set out to examine the jurisprudential worth and the legal foundation of the rule as to personal service of election petitions as midwifed by the Kenya Court of Appeal in the case of ***Mwai Vs Moi***. It is apparent that the rule, which still shamelessly towers high in Kenya's election jurisprudence, has wrecked havoc in the election petition process.
Perhaps a time has come when a larger bench of eminent judges of the Court of Appeal ought to be constituted to re-evaluate the wisdom in this rule and mend the dent it has created in Kenya's democratic jurisprudence. The sooner this is done, the better the case for the Kenyan voter.

The rules Committee, it is appalling, has never reconsidered Rule 14(1) since the ruling ***Mwai Vs Moi.*** Perhaps a time has come too for the rules Committee to re-evaluate and harmonize this portion of the delegated legislation with the parent statute.