

**KOKER v BAIMBA III**

(1962) SIERA LEONE ONLINE JUDGEMENTS (SLOJ) XX

In the Supreme Court of Sierra Leone

On Tuesday, the 9<sup>th</sup> day of August, 1962

Suit No: E.P. 7/62

CORAM

BANKOLE JONES P.J. Justice of the Supreme Court of Sierra Leone

Between

PARAMOUNT CHIEF R. B. S. KOKER

Appellant

AND

PARAMOUNT CHIEF ABU BAIMBA III

Respondent

**Ratio/Holding**

Election petition-Service of notice of presentation of petition-Affidavit of time and manner of service-Rules 15 and 19 of House of Representa.lives Election Petition Rules (P.N. 97 of 1951) (Vol. VI, Laws of Sierra Leone, 1960, p. 407).

**Cases Cited**

Williams v. The Mayor of Tenby (1879) 42 L.T. 187;

Kanagbo and others v. Kamanda Bongay (July 27, 1962), Court of Appeal of Sierra Leone, Civil Appeal 14/62.

**Legislation Referenced**

Rules 15 and 19 of House of Representa.lives Election

Petition Rules (P.N. 97 of 1951) (Vol. VI, Laws of Sierra Leone, 1960, p. 407).

## Other Sources Referenced

BANKOLE JONES P.J.

Petitioner's election petition was presented to the master on June 7, 1962, pursuant to rule 2 of the House of Representatives Election Petition Rules. On June 14, a copy of the petition was served on respondent's solicitor. At the bottom of the petition was indorsed the following: "This petition is presented by me, Cyrus Rogers-Wright, of 18, Bathurst Street, Freetown, solicitor and agent for the petitioner, Paramount Chief Raymond B. S. Koker." On June 18, an affidavit of service of the copy of the petition was sworn, and this affidavit was filed on June 19. A notice of the presentation of the petition was served on respondent or his solicitor on June 19. Rule 15 of the House of Representatives Election Petition Rules provides: "Notice of the presentation of a petition ... accompanied by a copy of the petition shall be served by the petitioner on the respondent within 10 days after [the presentation of the petition to the Master]." Rule 19 provides: "The petitioner or his agent shall immediately after notice of the presentation of a petition shall have been served, file with the master an affidavit of the time and manner of service thereof." Respondent moved that the petition be struck out on the ground that petitioner had not complied with rules 15 and 19. Held, (1) that the service of the copy of the petition with the endorsement thereon on June 14 did not fulfil the requirements of rule 15. (2) That the service of the notice of presentation of the petition on June 19 did not comply with rule 15, because it was not accompanied by a copy of the petition and it was served more than 10 days after the presentation of the petition to the master; and (3) That the affidavit of service filed on June 19 did not comply with Rule 19 because it was sworn before the service of the notice of presentation of the petition. The court also said, obiter, that even if the service of the copy of the petition on June 14 had been sufficient to satisfy rule 15, the affidavit filed on June 19 still would have been insufficient, because not filed "immediately after" such service, as required by rule 19. Cases referred to: Williams's v. The Mayor of Tenby (1879) 42 L.T. 187; Kanagbo and others v. Kamanda Bongay (July 27, 1962), Court of Appeal of Sierra Leone, Civil Appeal 14/62. Cyrus Rogers-Wright for the petitioner. Macaulay & Co. for the respondent. BANKOLE JONES P.J. This is an application by the respondent, by way of motion, to strike out the petition in this matter on the ground that the petitioner has failed to comply with Rules 15 and 19 of the House of Representatives Election Petition Rules, P.N. 97 of 1951, made applicable to these proceedings by the Electoral Provisions Act, 1962. Rule 15 reads as follows: "Notice of the presentation of a petition. • accompanied by a copy of the petition shall 55 Freetown August 9, 1962 Bankole Jones P.J. s. c. 1962 PARAMOUNT CHIEF KOKER v. PARAMOUNT CHIEF ABU BAIMBA III Bank ole Jones P.J. be served by the petitioner on the respondent within 10 days after such presentation, exclusive of the day of presentation." The petition in this case was presented to the master on June 7, 1962, in compliance with rule 2. At the bottom of the petition was indorsed the following: "This petition is presented by me, Cyrus Rogers-Wright, of 18, Bathurst Street, Freetown, solicitor and agent for the petitioner, Paramount Chief Raymond B. S. Koker." Mr. Rogers-Wright submitted that this indorsement is sufficient to constitute the kind of notice envisaged in rule 15. It does not matter how the notice is given, he says, so long as it is brought to the knowledge of the respondent that a presentation of the petition has been made; and that this was exactly what the indorsement did, and, whether it was so intended or not, is of no moment. The fact that he filed what may be regarded as another notice of presentation of the petition on June 19 is, he says, a mere surplusage, because nowhere in the rules is the filing of such a document made obligatory. However, he not only filed it but served it on the other side on the same day. If this

argument is correct, then I must hold that Mr. Rogers-Wright has substantially complied with the rule in question. However, ingenious as it sounds, this argument does not appear to have any merit. Rule 15, in my view, ought to be construed in its ordinary grammatical sense and in the context of all the other rules dealing with "notices." So construed, I think that the notice of presentation must be subsequent to the presentation of the petition to the master, that is, the filing or presentation of the petition must precede the notice of presentation. The expression "accompanied by a copy of the petition" in rule 15 does not mean "indorsed on the petition." It means that the document containing the notice of presentation must be served together with the copy document of the petition filed. The law, therefore, in my view, envisages two documents and not one. When Mr. Rogers-Wright served the other notice of presentation of the petition on June 19, 1962, he complied with rule 15 in so far as service of this document is concerned. But rule 15 makes it mandatory for such a notice to be accompanied by a copy of the petition and for both to be served within 10 days after presentation of the original petition exclusive of the day of such presentation. It is here, I think, that the petitioner went wrong. He not only failed to accompany his notice with a copy of the petition, but served it two days out of time. Rule 15 is not only mandatory in language but peremptory and obligatory as to its compliance: see *Williams's v. The Mayor of Tenby* (1879) 42 L.T. 187. I find, therefore, that the petitioner's disobedience of this rule puts him out of court. Although this finding of mine tolls the death knell of the petitioner's petition, yet, I feel myself constrained to examine the arguments of counsel as to whether or not rule 19 was complied with. This rule, now made famous or infamous, depending on what side of the fence one stands, reads as follows: "The petitioner or his agent shall, immediately after notice of the presentation of a petition shall have been served, file with the master an affidavit of the time and manner of service thereof." I find that the affidavit of service sworn by one Sorie Sesay, although filed on June 19, was so sworn on June 18 and speaks, among other things, of the service of the petition on the respondent's solicitor at 4 o'clock in the 56 afternoon of June 14, 1962. The notice of the presentation of the petition was also served on June 19. Mr. Berthan Macaulay argued that there has not been compliance with the rule because, in the first place, the affidavit was sworn on the day prior to the service of the notice of presentation and not after. In the second place, he submitted that the affidavit is not an affidavit of service of notice of the presentation of the petition. He buttressed his argument by referring me to Volume 8 of Lord Atkin's *Encyclopaedia of Court Forms and Precedents*, p. 582, Form 20, which conforms to the relevant English petition rule of which our rule 15 is in substance the same. This form speaks of the service on the respondent of a notice of the presentation of the petition and not of the service of the petition itself: see also Volume 14 of *Halsbury's Laws of England* (Simonds ed.) at p. 261, the last paragraph of paragraph 455. Mr. Rogers-Wright submitted that the fact that his affidavit did not speak of the service of the notice of the presentation of the petition cannot be fatal because it can be cured by rule 59, which reads as follows: "No proceedings under the House of Representatives (Elections) Regulations, 1957, shall be defeated by any formal objection." He said that Mr. Berthan Macaulay's objection was a formal one, and can be cured. With respect, I do not agree. If the affidavit in question is one which purports to inform the master of the time and manner of the service of the notice of presentation of the petition, then it was not only sworn before the service of the notice took place, but it only informs the master of the time and manner of the service of the petition itself. The two last words in rule 19, namely: "service thereof," must refer, in my opinion, to the whole expression "notice of the presentation of a petition" and not to the petition. How can it, therefore, be countered that Mr. Berthan Macaulay's objection is formal? The effect of his objection, as I see it, is to deprive the affidavit of life and limb, and rule 59 is accordingly impotent to effect any restoration. Now, it was argued that if

service of the notice of presentation of the petition as indorsed on the petition was effected on June 14, then the filing of the affidavit on June 19, that is, if this affidavit complies with rule 19, was done, to use the language of the rule, " immediately after " such service. I find myself in respectful disagreement with this submission: see Kanagbo & ors. v. Kamanda Bongay, decided in the Appeal Court last month, and with particular reference to the judgment of Dove-Edwin J.A. I think where both solicitors, as agents for their respective clients, have their offices in Freetown, and not even two miles apart at that, to allow a period of five days to elapse before filing the required affidavit cannot be said to be an act done with all convenient speed or with reasonable promptness having regard to the circumstances. I rule, therefore, that rules 15 and 19 have not been complied with by the petitioner and I accordingly order that his petition be struck out with costs to be taxed.

#### Apperances

Cyrus Rogers Wright

For the Appellant

Macaulay and Co.

For the Respondent

**COLE v SESSAY**

**(1962) SIERRA LEONE ONLINE JUDGEMENT (SLOJ)-XX**

**In the Supreme Court of Sierra Leone**

**On Thursday, the 3<sup>rd</sup> of August, 1962**

**Suit No: [E.P. 2/62]**

CORAM

BANKOLE JONES P.J Justice of the Supreme Court of Sierra Leone

Between

AARON COLE

Appellant

AND

SAMURA SESSAY

Respondent

**Ratio/Holding**

Election Petition-Validity of nomination-Candidate's nominai.Qr not elector of electoral area for which he was candidate--Residence of nominaJ.or--El.ectoral Provisions Act, 1962 (No. 14 of 1962), ss. 12 (1), 16 (2) (a)-Sierra Leone Constitution (P.N. 78 of 1961), s. 38 (1)-Franchise and Electoral Registration Act, 1961 (No. 44 of 1961), ss. 3 (2), 4.

**Cases Cited**

The Borough of Oldham Case (1869) 1 O'M. & H. 151;

The Pembroke Boroughs Case (1901) 5 O'M. & H. 135.

**Legislation Cited**

Electoral Provisions Act, 1962 (No. 14 of 1962), ss. 12 (1), 16 (2) (a)-Sierra Leone Constitution (P.N. 78 of 1961), s. 38 (1)-Franchise and Electoral Registration Act, 1961 (No. 44 of 1961), ss. 3 (2), 4

See section 3 (2) of Act No. 44 of 1961.

See section 38 (1) of the Constitution.

Section 12 (1) of Act 14 of 1962.

Section 16 (2) (a) of Act No. 14 of 1962,

## **Other Sourced Referenced**

### **BANKOLE JONES P. J.**

At the General Election for the House of Representatives held in Freetown on May 25, 1962, the respondent ran first in the West 1 Electoral Constituency, and petitioner ran second. Petitioner then brought an election petition challenging respondent's election. The ground of the petition was that respondent had violated section 12 (1) of the Electoral Provisions Act, 1962, in that one of his nominators was not an elector of the electoral area for which he was a candidate, i.e., the West 1 Electoral Constituency. Section 12 (1) of the Electoral Provisions Act, 1962, Provides: "Every candidate shall be nominated in writing by three electors of the electoral area for which he is a candidate ...." One of respondent's nominators was not a resident of the West 1 Electoral Constituency. Held, for the petitioner, the fact that one of the respondent's nominators was not an elector of his constituency invalidated his nomination. Cases referred to: The Borough of Oldham Case (1869) 1 O'M. & H. 151; The Pembroke Boroughs Case (1901) 5 O'M. & H. 135. 52 Berthan Macaulay, Freddie A. Short and Hudson Harding for the petitioner. John E. R. Candappa and Emile Thompson-Davies for the re

BANKOLE JONES P. J. At the General Election held in Freetown on May 25, 1962, four candidates presented themselves for election at the West 1 electoral constituency. The respondent, Samura Sessay, topped the poll with 1,161 votes and the petitioner, Aaron Cole, came second with 1,021 votes. The former was accordingly duly elected. These proceedings have been brought to question the right of the respondent to have stood election and, a fortiori, his entitlement to have been duly elected. The case for the petitioner is that the respondent violated the provision of section 12 (1) of the Electoral Provisions Act, No. 14 of 1962, in that one of his nominators was not an elector of the electoral area, that is, the West 1 electoral constituency, for which he was a candidate. Section 12 (1) reads as follows: "Every candidate shall be nominated in writing by three electors of the electoral area for which he is a candidate. . . ." When the respondent submitted his nomination paper to Mr. Dillsworth, between May 5 and 7, 1962, a then Assistant Returning Officer, one of his nominators, was one Amina H. Ture, housewife, of 2, Sanders Street, who described herself as an elector of the constituency for which the respondent was seeking election, that is, the West 1 electoral constituency. At this date there was in existence one comprehensive register of electors for the West Ward and this register did not indicate the names and addresses of the electors falling within the West 1 Constituency. The compilation of a register of electors for each ward is statutory: see section 4 of the Franchise and Electoral Registration Act, No. 44 of 1961. The object of this Act is clearly set out in its headnote and reads: " An Act to provide for the regulation of the franchise and the registration of electors for the election of members to the House of Representatives and to local authorities and for the combination of registers of electors for the House of Representatives with registers of electors for local authorities" (emphasis supplied). I find that the division of the city of Freetown into wards is not the function of the Electoral Commission but it appears to be that of the Minister of Internal Affairs: see section 3 (2) of Act No. 44 of 1961. The function of the

Electoral Commission, among other things, is to divide Sierra Leone into constituencies for the purpose of electing members to the House of Representatives: see section 38 (1) of the Constitution. In performing this function it may well be that some electors whose names and addresses are to be found in the register of one ward may find themselves in a different electoral constituency as opposed to an electoral ward. But the law prescribes that there should be one general register for each ward and I can find nowhere either in the Constitution or in any of the relevant Acts that there should be compiled a separate register of voters for the different constituencies. This may have been a desirable thing for the legislature to have done in order to set at rest any doubt a voter or candidate may have, especially as this was the first time that universal adult suffrage was introduced into this country. In the present case, the Electoral Commission, I think, was right in using the comprehensive register of voters for the West ward and when Mr. Dillsworth found the nominator's name in this register, he obviously acted in good faith, especially so when there was no objection made on the nomination paper of the respondent. It, however, came out in evidence that the nominator, Amina H. Ture or A. H. Turay of 2, Sanders Street, was not an elector in the West 1 electoral constituency but one in the Central 2 electoral constituency. Mr. Candappa submitted in the first place that the West Ward register (Exhibit " D ") is conclusive and that if the name of the nominator was in it, then it must be accepted that she was an elector who falls within the meaning of section 12 (1) of Act 14 of 1962. He submitted further that it was the duty of the petitioner to have produced and tendered a register for the West 1 Constituency and that not having done so, Exhibit "D " is the only register to look at for the nominator's name. He cited the Oldham case, reported in (1869) 1 O'M. & H. at p. 51, and the Pembroke Boroughs case, reported in Volume 5 of the collection of cases by the same authors. The principles in these cases are familiar and well founded, but, with respect, have no application to the present case. In this case, the division of Sierra Leone into constituencies, so far as is relevant here, was published in the "Sierra Leone Gazette" of April 30, 1962, before nomination day. I concede that in the West 1 electoral constituency there is not even the mention of Sanders Street, but the petitioner deposed that candidates were told at the Electoral Office to go to the Surveys and Lands Department, where, obviously, they could see on a map the demarcation of each constituency showing streets, etc. This he did. Had the respondent himself done so he would have found, as depicted in Exhibit " E;" the map produced in evidence, that Sanders Street fell into two constituencies, and with reasonable diligence on his part he would have discovered that No. 2, Sanders Street was not in his constituency. He cannot, therefore, now blame the Electoral Commission for his own lack of diligence. The question as to whether the petitioner should have produced a separate register of the West 1 electoral constituency is a matter which he could not have done, because, as I have pointed out, the compilation of such a register is not provided for by law. Another submission of Mr. Candappa is that the failure of the petitioner to take an objection to the respondent's nomination paper when he knew of the defect is tantamount to a waiver, and that, therefore, these proceedings cannot be sustained. Whilst I agree that it would have been eminently desirable for the petitioner to have caused an objection to have been taken on the respondent's nomination paper under section 16 (2) (a) of Act No. 14 of 1962, yet these proceedings stand on a different footing. The petitioner is here questioning the validity of the respondent's nomination as opposed to the validity of his nomination paper. As I held in a ruling I gave quite early in this case, there was no "decision " given by either the Returning Officer or the Electoral Commission regarding the validity of the respondent's nomination paper, one which could not have been questioned in this court. It seems to me, therefore, that the fact that one of the respondent's nominators, namely, Amina H. Ture, was not an elector of his constituency

invalidates his nomination as a candidate and that he was not entitled to have been duly elected, and I accordingly declare that the respondent, the said Samura Sessay, was not so duly elected and that the election holden on May 25, 1962, was void. The respondent is ordered to pay the costs of these proceedings.

**Appearance**

Berthan Macaulay, Freddie A. Short and Hudson Harding

For Appellant

John E. R. Candappa and Emile Thompson-Davies

For the respondent.



**M'BRIWA v BONA**

**(1962) SIERA LEONE ONLINE JUDGEMENTS (SLOJ) – XX**

**In the Supreme Court of Sierra Leone**

**On Tuesday, 13<sup>th</sup> day of August, 1962**

Suit No: E.P. 13/62

CORAM

BANKOLE JONES J. Justice of the Supreme Court of Sierra Leone

**Between**

PARAMOUNT CHIEF TAMBA S. M'BRIWA

Appellant

AND

PARAMOUNT CHIEF DUDU B. BONA.

Respondent

**Ratio/ Holding**

Election Petition-Service of notice of presentation of petition-Whether objection to lack of service merely formal or technical-Whether there can be waiver of requirements of rules 15 and 19 of House of Representatives Election Petition Rules (Vol. VI, Laws of Sierra Leone, 1960, p. 407)-Filing of affidavit. Of time and manner of service.

**Cases Cited**

The Shrewsbury Petition Case (1868) 19 L.T. 499; Kanagbo and others v. Bongay, Sierra Leone Court of Appeal, July 27, 1962, Civil Appeal 14/62; Williams's v. The Mayor of Tenby (1879) 49 L.J.Q.B. 325; 42 L.T. 187; Paramount Chief R. B.S. Koker v. Paramount Chief Abu Baimba III, Sierra Leone Supreme Court, August 9, 1962, E.P. 7/62; Macfoy v. United Africa Co. Ltd. [1961] 3 W.L.R. 1405.

**Legislation Referenced**

Electoral Provisions Act (No. 14 of 1962), have not been complied with Rule 15

Requirements of rules 15 and 19 of House of Representatives Election Petition Rules (Vol. VI, Laws of Sierra Leone, 1960, p. 407)-Filing of affidavit. Of time and manner of service.

**Other Sources Referenced**

BANKOLE JONES J. P J

Petitioner filed an election petition on June 12, 1962. On June 22, he served on respondent's solicitor's clerk a copy of the petition, a notice of motion for order for security for costs, a notice of appointment of petitioner's agent and the appointment of petitioner's agent. On June 29, respondent's solicitor told petitioner's solicitor that he had accepted service of the petition and he filed an entry of appearance for the respondent. Respondent also applied for and obtained further particulars from petitioner. On July 3, petitioner filed an affidavit stating that "the above entitled petition and other papers connected therewith" had been served. On July 31, respondent filed an application that the petition be struck out for failure to comply with rules 15 and 19 of the House of Representatives Election Petition Rules. Rule 15 provides: "Notice of the presentation of a petition ... accompanied by a copy of the petition shall be served by the petitioner on the respondent within 10 days after such presentation ...." Rule 19 provides: "The petitioner or his agent shall, immediately after notice of the presentation of a petition shall have been served, file with the master an affidavit of the time and manner of service thereof." Petitioner argued, first, that respondent's objections were merely formal and, therefore, should not be allowed to defeat the petition and, second, that respondent had waived the requirements of rules 15 and 19 by applying for and obtaining further particulars. Held, striking out the petition, (1) that the requirements of rules 15 and 19 of the House of Representatives Election Petition Rules are mandatory and cannot be waived; and (2) That, even if petitioner had complied with rule 15, the affidavit filed was out of time and was not the kind of affidavit contemplated by rule 19. Note: This decision was reversed by the Sierra Leone Court of Appeal on November 14, 1962 (Civil Appeal 21/62). Cases referred to: The Shrewsbury Petition Case (1868) 19 L.T. 499; Kanagbo and others v. Bongay, Sierra Leone Court of Appeal, July 27, 1962, Civil Appeal 14/62; Williams's v. The Mayor of Tenby (1879) 49 L.J.Q.B. 325; 42 L.T. 187; Paramount Chief R. B.S. Koker v. Paramount Chief Abu Baimba III, Sierra Leone Supreme Court, August 9, 1962, E.P. 7/62; Macfoy v. United Africa Co. Ltd. [1961] 3 W.L.R. 1405. John E. R. Candappa for the petitioner. Zinenool L. Khan for the respondent. BANKOLE JONES J. The application here is to strike out the petitioner's petition on the ground that rules 15 and 19 of the House of Representatives Election Petition Rules (P.N. 97 of 1951), made applicable to these proceedings by the Electoral Provisions Act (No. 14 of 1962), have not been complied with. Rule 15 reads as follows: "Notice of the presentation of a petition ... accompanied by a copy of the petition shall be served by the petitioner on the respondent within 10 days after such presentation, exclusive of the day of presentation." The petition in this case was presented to the master on June 12, 1962. No document containing the notice of the presentation of the petition and accompanied by a copy of the petition was ever served on the respondent within 10 days or at all. Mr. Candappa contends that as all the petition rules are procedural, any objection as to their rigorous compliance is merely technical and formal and he cites The Shrewsbury Petition Case (1868) 19 L.T. 499, a case which he said might have turned the scales in Kanagbo and Ors. v. Kamanda Bongay, Court of Appeal, July 27, 1962, Civil Appeal 14/62. In this case, that is, the Shrewsbury Petition Case, I find that, even if Mr. Candappa has rightly extracted a principle which appears to support his contention, I am hesitant to apply it to the present case, because, in the first place, with respect, no reasons were given by Martin B. in his very short judgment and, in the second place, there are later decisions which run contrary to his views, if those in fact were his views; e.g., Williams v. The Mayor of Tenby and ors. (1879) 42 L.T. 187 is one such case which was decided 10 years after the Shrewsbury Petition Case and by two judges at that. By this, I do not at all mean it to be inferred that all later decisions on any matter in issue are necessarily the right ones and have greater force than earlier decisions. All I want to say is that I prefer to accept this later decision as against the earlier one, if indeed

the earlier one conflicts with the later decision. Mr. Candappa, therefore, argues that if a solicitor accepts service of the petition, enters an appearance (an unnecessary step, he concedes) but also applies for and obtains further particulars (a fresh step) from the other side, as is the case here, then that solicitor is the last person to be heard to say that the lack of service on him of a formal document like the notice of the presentation of the petition ought to throw the petitioner's petition out of court. This cannot be so in all fairness, he says, because the subsequent behaviour of the respondent acts as a waiver and rule 59 can, therefore, be invoked, a rule which reads as follows: "No proceedings under the House of Representatives (Elections) Regulations, 1957, shall be defeated by any formal objection." Now, in a ruling I gave on the 9th of this month in the case of Paramount Chief R. B. S. Koker v. Paramount Chief Abu Baimba III, Supreme Court, August 9, 1962, E.P. 7 j 62, I adverted to the question of the construction of the rule now under consideration, and this was what I said: "Rule 15, in my view, ought to be construed in its ordinary grammatical sense and in the context of all the other rules dealing with ' notices.' So construed, I think that the notice of presentation must be subsequent to the presentation of the petition to the master, that is, the filing or the presentation must precede the notice of presentation. The expression ' accompanied by ' a copy of the petition . . . means that the document containing the notice of presentation must be served together with the copy document of the petition filed. The law, therefore, envisages two documents.... "Later in the same ruling, I said: "Rule 15 is not only mandatory in language but peremptory and obligatory as to its compliance." No compelling authorities have been produced to persuade me to change the views I expressed in the above case. It seems to me, therefore, that no inference from the service of other documents nor any fresh step taken by the respondent can cure the obligatory demands of rule 15. If the required documents contemplated by this rule are not served on the respondent, and that within the prescribed time, then not even rule 59 can breathe new life into that which is dead. By the non-compliance with the provisions of rule 15, the petition becomes dead and merely awaits burial at my hands. As to rule 19, Mr. Candappa advanced the same arguments as he did in the case of rule 15 and cited several cases and textual authorities, none of which convinces me that in all the circumstances of this case this rule should not be 65 2 s. -5 s. c. 1962 PARAMOUNT CHIEF T. s. M'BRIWA v. PARAMOUNT CHIEF D. B. BONA Bankole Jones I. s. c. 1962 PARAMOUNT CHIEF T. s. M'BRIWA v. PARAMOUNT CHIEF D. B. BONA Bankole Jones 1. Construed in the mandatory manner in which the Court of Appeal construed it in Bongay's case. It is important to remind ourselves of this never-to-be-forgotten rule. It reads: "The petitioner or his agent shall, immediately after notice of the presentation of a petition shall have been served, file with the master an affidavit of the time and manner of service thereof." In this case, as I have pointed out, the petitioner did not serve the notice of the presentation of the petition as required by rule 15. It is true that on July 3 he filed an affidavit, stating, among other things, that he had caused to be served on the respondent on June 22, 1962, the petition and "other papers connected therewith." But even if it is said that service of the petition and other papers connected therewith amounts by inference to the service of the notice of the presentation of the petition, the affidavit filed was hopelessly out of time, and, besides, it is not the kind of affidavit contemplated by rule 19: see Paramount Chief R. B.S. Koker v. Paramount Chief Abu Baimba III, E.P. 7/62, August 9, 1962. This disposes of the submission relating to rule 19, and I hold that there has not been compliance with this rule. But Mr. Candappa most strenuously argued, almost to the point of conviction, that any fresh step taken by a respondent constitutes in law a waiver of the non-compliance with the rules in question. Unfortunately, he did not support this general proposition with any authority and, regretfully, I received little assistance from the other side. The question of waiver was considered by the appeal court judges in Bongay's case and although they may have treated it as obiter, yet the

learned Chief Justice had this to say of rule 19 and I make bold to say that he would have said it also of rule 15: "This, however, is a statutory mandatory obligatory provision as to procedure and cannot be waived by the respondent." It seems to me, therefore, that, when once there has been a breach of the mandatory provisions of rules 15 and 19, any fresh step taken by a respondent, as, for example, in this case, the application for and supply of further particulars, is automatically null and void and without more ado. And if I may only borrow the language of Lord Denning in the Privy Council case of Benjamin Macfoy v. U.A.C. Ltd. [1961] 3 W.L.R. 1405, 1409, I would say: "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad . . . and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse." Whatever the purpose of our legislature relating to the Electoral Provisions Act (No. 14 of 1962) may be, that purpose is brought to nought, when there is a complete disregard of provisions which are mandatory so far as their compliance goes. It, therefore, follows, for the reasons given, that I must order that the petition in this matter be struck out with costs, and I so order.

#### Appearance

John E. R. Candappa

For the Appellant.

Zinenool L. Khan

For the Respondent.