IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: NYALALI, C.J., MFALILA, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 4 OF 1997

IBRAHIM SAID MSABAHA ..... APPELLANT

AND

LUTTER SYMPHORIAN NELSON ..... 1ST RESPONDENT
THE ATTORNEY GENERAL ..... 2ND RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Dar es Salaam) (Mkwawa, J) dated 6th December 1996

in

Miscellaneous Civil Cause No. 124 of 1995

JUDGEMENT OF THE COURT

NYALALI, C.J.:

This is an appeal from an interlocutory decision made by the High Court of Tanzania, MKWAWA, J, in the course of hearing an election petition challenging the election of one IBRAHIM SAID MSABAHA as a Member of Parliament for Kibaha Constituency. The petitioner in that case is one LUTTER SYMPHORIAN NELSON and the respondents are two, namely the Attorney-General being the 1st Respondent, and the said IBRAHIM SAIDI MSABAHA being the 2nd Respondent. It is apparent from the record of the High Court that when the second witness for the petitioner was testifying, an objection was raised by both counsel for the respondents against the witness testifying on certain matters not specifically pleaded in the petition. The High Court made a ruling on the objection, and it is in respect of that ruling that this appeal was made. Mr. Nchora, learned advocate, appears for the appellant, whereas Mr. Magafu, learned advocate, holds the brief for Dr. Lamwai, learned advocate for the First Respondent, and Mr. Salula, learned Senior State Attorney, represents the Second Respondent.

..../2

When this appeal came up for hearing as scheduled, it would have been adjourned and consequently delayed if the court had been less vigilant and conscientious in discharging its responsibilities. Counsel for the appellant informed the court to the effect that after this appeal was instituted, a notice of motion in the court was filed seeking adjournment of the appeal so that measures could be taken to rectify the record of the High Court. Counsel stated that the trial judge had failed to record an earlier interlocutory ruling which is inconsistent with the ruling appealed against. Counsel further informed us that the unrecorded earlier ruling was needed to support arguments to be advanced in this appeal on the appellant's side. After we had informed the parties that the Court of Appeal does not favour adjournments unless there are exceptional circumstances, and after closely examining counsel for the appellant, it became evident that the move to adjourn had no merits whatsoever. This is because, firstly, counsel for the appellant had not ascertained whether the other side was disputing the unrecorded ruling; secondly, there was nothing in law to prevent counsel for the appellant relying on the unrecorded ruling; thirdly, there is nothing in law which makes that ruling binding on us and fourthly, the fate of this appeal does not depend on the unrecorded ruling.

We think that the approach of this court which seeks to discourage adjournments of cases on flimsy or no grounds at all should be followed by all courts in this country, not only because delay amounts to a denial of justice, but also because it is common knowledge that there is a widespread outcry by the people of this country against unnecessary and rampant adjournments of cases by the courts. We do emphasize the point that the discretion of a court to adjourn a case which is scheduled for hearing must

..../3

always be exercised judicially, that is, for good cause which must be recorded.

We now turn to the merits of this appeal. It is apparent from the record of the High Court that the testimony which was objected to by Counsel for the appellant at the trial tended to implicate one Lawrence Gama in corrupt activities allegedly committed by him as an agent of the appellant. The reason for the objection was that the testimony concerned an allegation not pleaded in the petition. Counsel for the petitioner replied to the effect that this specific allegation is implied in the general allegation contained in sub-paragraph (g) of paragraph 4 of the petition concerning bribery of voters. In the alternative, the defect could be rectified by allowing the petition to be amended by inserting the words "and or his agents" in sub-paragraph (g) of paragraph 6 of the petition. The learned trial judge sustained the objection and also granted the request by counsel for the petitioner to amend the relevant sub-paragraph so that it reads as follows:

> "The 2nd Respondent and/or his agents bribed the electorate by distributing large sums of money".

Thus it is clear that the central issue for decision by this court is whether the learned trial judge was correct in so deciding. Having carefully considered the arguments advanced on both sides and closely examined the record of the proceedings in the High Court, it seems that the answer to the issue is to be found from the record itself. As is usual in civil cases, the issues in this case were agreed by both sides and were embodied in a Memorandum of Agreed Issues. One of these agreed issues is in paragraph 6 which reads as follows:

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"Whether the Second Respondent and/or his agents bribed the electorate by distributing money."

It is obvious that the amendment sought by counsel for the petitioner and which was granted by the trial High Court was an exact replica or repetition of what was already agreed by both sides to be an issue of fact for trial. Since in law parties are required to adduce evidence on facts which are in issue, we are unable to comprehend why counsel for the respondents' side objected to the testimony being given by the second witness for the petitioner on a mutually agreed issue of fact. It may well be that the agreed issue was and is ill-advised, as in effect it gives the petitioner a licence to go on a fishing expedition for unlimited corrupt practices allegedly committed by undisclosed and unlimited agents. The respondents' side however cannot be heard to complain against a self-inflicted wound. It is a well established principle that in civil cases, parties are at liberty to compromise their rights by agreement and the courts are duty bound to respect such compromise, unless it amounts to an abuse of court process or is violative of the law or public policy. Since there is no suggestion that the agreed issue in this case is thus tainted, the respondent's side is clearly not entitled to complain. One expects the petitioner's side to have responded to the objection by reminding the objectors and the court of this position. The fact that the petitioner's side failed to say what was obvious from the proceedings and instead requested for a superflous amendment is in our view beyond comprehension. We are almost certain that had the petitioner's side stood by the agreed issues, it is unlikely that the learned trial judge would have ruled as he did, and this appeal, together with its consequential costs of appeal and delay of the trial would have been avoided.

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In the final analysis therefore and for the reasons we have stated, this appeal must fail and is hereby dismissed with the following directions:

(i) the trial in the High Court is to proceed from the point reached before the objection was made; and

(ii) each side of this case is to bear the costs of this appeal.

DATED at DAR ES SALAAM this 26th day of February, 1997.

F. L. NYALALI
CHIEF JUSTICE

L. M. MFALILA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

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

(M. S. KHAMGALI)
DEPUTY REGISTRAR