IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MFALILA, J.A., LUBUVA, J.A., And SAMATTA, J.A.)

CIVIL APPEAL NO. 29 OF 1997

BETWEEN

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| 1. [illegible] | | |
| 2. HERMAN GRAY<br>3. SIFUNI ZEPHANIA<br>4. BARNABAS DAFFI<br>5. JOSEPH NYONGO<br>6. PASCAL BUKHA | . . . . . | APPELLANTS |

AND

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| 1. WILBROAD PETER SLAA<br>2. THE HON. ATTORNEY GENERAL | . . | RESPONDENTS |

(Appeal from the Ruling/Decision and Orders of the High Court of Tanzania at Arusha)

(Nchalla, J.)

dated the 25th day of November, 1996

in

Miscellaneous Civil Cause No. 9 of 1995

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JUDGEMENT OF THE COURT

LUBUVA, J.A.:

On 29th October, 1995, General Elections were held in the country. This involved Parliamentary and Presidential elections. In the Karatu constituency, the first respondent, Dr. Wilbroad Peter Slaa, a candidate sponsored by the political party Chama cha Demokrasia na Maendeleo, commonly known by its acronym CHADEMA, was declared to be the elected member of Parliament. The appellants as registered voters, were dissatisfied with the results of the election. They filed an election petition in the High Court at Arusha i.e. Miscellaneous Civil Cause No. 9 of 1995. From the pleadings, the petition sought among others, the following reliefs:- First, the election results in Karatu Constituency to be declared null and void. Secondly, an order

.../2

for a scrutiny by way of re-count. The Honourable the Attorney General was joined as the second respondent among the parties.

Before the trial commenced, the Court ordered the issue regarding scrutiny to be tried first. During the trial on the issue on scrutiny, the petitioners, the appellants in this appeal, applied for leave to amend paragraph C in the petition regarding reliefs. As a result, paragraph C was amended by substituting the words "scrutiny by way of recount for the words" "recount of the votes". At the conclusion of the trial on the issue of scrutiny, the learned judge (Nchalla, J.) held that the relief sought for scrutiny by way of recount of votes was misperceived and incompetent in law. The application was therefore dismissed. This appeal is against the order of dismissal.

In this appeal, the appellants are represented by Mr. Musei, learned Counsel. The first respondent, Dr. Wilbroad Peter Slaa, is represented by Mr. Maira and Mr. Mirambo, learned advocates. The second respondent, the Honourable the Attorney General, is represented by Mrs. Lyimo, learned Principal State Attorney. A seven point memorandum of appeal was filed. In paragraphs 6 and 7 of the memorandum of appeal it is stated:

> 6. The Honourable trial Judge misdirected himself in law in discriminating against the voter petitioner respecting the relief of scrutiny under Section 112 of the Elections Act No. 1 of 1985.
>
> 7. That the Honourable trial judge further erred in law in wrongly interpreting and applying the term 'SCRUTINY'

From the totality of these grounds, it is our view that one central issue is raised in this appeal. That is, whether the relief sought, namely, scrutiny by way of recount of votes is available under the Elections Act, 1985. Mr. Musei, learned Counsel, strongly contended that the learned trial judge erred in law in not ordering a recount of votes as sought in the reliefs. The reason he stated, was that while it is conceded that the Elections Act, 1985 does not provide for the recount of votes as a relief in an election petition, still he maintained, the relief could be granted by applying the English law. In support of this submission he referred the Court to the book by the distinguished author, Norman and Schefield on Parliamentary Elections, Third Edition at page 536 wherein "scrutiny" is described as follows:-

> "Scrutiny is the term used to describe a reviewing of ballot papers following an order of the Court.
>
> The petitioner, respondent, their Counsel, solicitors and agents are at liberty to be present at the inspection which takes the form of a recount.
>
> Each side makes its own list of ballot papers which it objects to or claims to be added." (underlining supplied).

On the basis of this authority, Mr. Musei further submitted that as the law in Tanzania provides for the relief of scrutiny in an election petition and not a recount, a wide interpretation should be given to the word scrutiny so as to accord to it a similar meaning as that obtaining under the English law. He went on in his submission, by applying the English law under the provision

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of Section 2 of the Judicature and application of Laws Ordinance, Chapter 453, the relief of a recount would be available as urged by the petitioners, the appellants in this case. That is so, he insisted, because, under the English law, scrutiny takes the form of a recount.

Mr. Maira, learned Counsel for the first respondent was quick to respond to these submissions. He said, Mr. Musei's resort to apply the English law is misconceived. As there is a specific legislation governing elections in Tanzania, he stated, the English law cannot be applied. Furthermore Mr. Maira urged, by virtue of the Judicature and Application of Laws Ordinance, Chapter 453, in appropriate situations, the English Statutes which would be applied in Tanzania are statutes of general application. In this case, Mr. Maira maintained, the law on elections is not a statute of general application in which case, it would not apply in Tanzania. Addressing himself at length on the law relating to elections in Tanzania Mr. Maira stressed that as the conditions set out under Section 112 (d) of the Elections Act, 1985 and Rule 12 of the Elections (Election Petitions) Rules 1971 were not satisfied, there was no legal basis for ordering a scrutiny. Mrs. Lyimo, learned Principal State Attorney for the second respondent fully associated herself with Mr. Maira's submissions.

As already indicated, the issue in this appeal is whether the relief of a scrutiny was, in the circumstances available. We wish to make it clear from the outset that it is apparent from the record that in dealing with the issue of scrutiny, the matter was further complicated and confused by the manner in which it was handled at the trial. As a result, it seems to

us that throughout the proceedings on the issue of scrutiny, the learned judge, with respect, confuses scrutiny on one hand and recount on the other. From the record, the following sequence of events in the proceedings bears this out. Before the commencement of the trial, the Court ordered the issue on scrutiny to be tried first. What is more, it is also apparent that at some stage, while the issue on scrutiny was still being tried, the court also allowed an amendment to be effected in the pleadings. The amendment so effected, in our view, introduced a new element to the pleadings. That is, the relief of scrutiny as originally sought, was further qualified by adding the words "by way of recount". The new element of a recount, as we have observed, is not provided under the Elections Act, 1985 as one of the reliefs to be sought in an election petition. Yet, with due respect to the learned trial judge, he allowed the amendment which, to some extent, contributed towards the confusion that ensued in the proceedings that culminated in the ruling, the subject of this appeal. We shall revert to this issue later.

We shall next deal with the issue whether the English law would be applicable in order to avail the relief of a recount. Mr. Musei learned Counsel firmly maintained that it would. With respect, we do not agree. There is no gainsaying that under the Judicature and Application of Laws Ordinance, Chapter 453, two conditions are necessary for an English statute to apply in Tanzania. First, the statute concerned must be a statute of general application. Secondly, there should be no specific legislation enacted in Tanzania dealing with the matter in question. In the instant case, the first condition is not satisfied because, the legislation involved is not a statute of general application. The second condition is not met either.

../6

This is because in Tanzania there is the Elections Act, 1985 which specifically provides for election matters. In that situation, we can find no basis for applying the English law in Tanzania as contended by Mr. Musei. Consequently, we are in agreement with Mr. Mairs, learned Counsel for the first respondent that the applicable law in this case was the Elections Act, 1985. In our considered opinion, the English law on Parliamentary elections though in part is similar to the Elections Act, 1985 of Tanzania is not applicable for the reasons we have already given. Having taken this view, it follows that we are of the view that the amendment to the pleadings in this case which was effected on the authority of the English law, was misconceived under the law in Tanzania.

Next, we intend to address on the question of scrutiny. This is one of the reliefs that may be claimed under Section 112 (d) of the Elections Act, 1985. The question is whether in terms of the provisions of this Act, scrutiny as sought in the petition was warranted. The learned trial judge held that the conditions set out in the Act were not satisfied for which reason, Mr. Musei, raises serious complaint of dissatisfaction. In part, Section 112 of the Act provides:

> (a) -------
> (b) -------
> (c) -------
> (d) Where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes a scrutiny (emphasis supplied).

From the provisions of sub-clause (d) of Section 112 of the Elections Act, 1985, a necessary requirement is that the pleadings should indicate that a named particular candidate who was unsuccessful in the election had a majority of lawful votes. In other words, if certain invalid votes which are objected to, are to be added, such an unsuccessful candidate would be the winner. In the case before us, apart from the prayer for scrutiny which was, as already pointed out, qualified with the request for a recount of votes, it is not indicated in the pleadings that any of the unsuccessful candidates, had a majority of votes. Because of this omission in the pleadirgs, the learned trial judge held that the application was misconceived in terms of Section 112 (d) of the Elections Act, 1985. He addressed himself in these words:

> "On a careful interpretation of the above quoted provisions in relation to this petition on the issue of scrutiny, I find that the petitioners did not comply with Section 112 (d) of the Elections Act in that they omitted to plead in their petition that a particular unsuccessful candidate in the Karatu Parliamentary elections had a majority of lawful votes.
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> ..... Four of the candidates were defeated. Now which one of these four unsuccessful candidates are the petitioners claiming for scrutiny to be held in his favour?" (emphasis supplied).

In considering the requirements of the law under Section 112 (d) of the Act as shown in the above extract of the judgment, the learned judge took into account further conditions which are provided under Rule 12 of the Elections (Election Petitions) Rules, 1971 which provides:-

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12 (1) - "Where scrutiny under the provisions of paragraph (d) of Section 112 of the Act is sought either by the petitioner or a respondent, the party seeking such scrutiny shall not less than six days before the day fixed for the hearing of the petition, lodge with the Registrar a list of votes intended to be objected to by him and of the objections to each vote. -----"

To our minds, the provisions of this rule are clear and unambiguous. It is a mandatory requirement that in processing the petition, the party seeking scrutiny shall lodge with the Registrar of the High Court a list of votes intended to be objected to not less than six days before the date fixed for hearing the petition. In here, no list at all of votes intended to be objected to was lodged, let alone the time prescribed of not less than six days before the day fixed for hearing the petition. With great respect, it is ridiculous and impractical to seek a scrutiny of all the votes in the whole constituency of Karatu as Mr. Musei was apparently endeavouring to do in this case. That, to our minds, was not the objective of the legislature in providing in the Elections Act, 1985 for scrutiny. Needless to overemphasize, scrutiny is aimed at disputed and specified votes which are the subject of scrutiny in order to ascertain the claim by the petitioner that he had a majority of votes. In our total, in this case, scrutiny was sought in such generalised form that it amounts in effect to re-doing the whole exercise of counting the votes in the whole constituency. For that reason we are satisfied that the learned judge was justified in his conclusion that the conditions set out under Section 112 (a) of the Elections Act, 1985 and Rule 12

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of the Elections Rules, 1971 were not satisfied. We cannot accept Mr. Musei's claim that the omission in the pleadings to specify that a particular unsuccessful candidate among the petitioners had a majority of lawful votes was a mere slip. It is a fundamental and mandatory requirement which goes to the very root of the matter with which failure to comply renders the granting of scrutiny untenable. Such, we are satisfied, was the position in this case. That being the legal requirement which was not complied with, we are unable to accept Mr. Musei's assertion that the learned judge erred in holding that the prayer for scrutiny by recount of the votes was legally misconceived and incompetent.

At this juncture, we pose to consider the distinction between recount and scrutiny. From the record, it is apparent that the learned trial judge referred to recount of votes and scrutiny interchangeably. In order to clear the confusion, it is desirable to briefly address on the difference between scrutiny and recount in relation to the law. From the outset, it should be made clear that the two reliefs are distinctly different and available under the Elections Act, 1985 at different stages of the process of counting of votes and the period after the declaration of the election results. These differences have to be looked into against the background of the major changes that have been effected on the Elections Act, 1985. It is common knowledge that the Elections (Amendment) Act, 1990 and the Elections (Amendment) Act, 1992 together with other subsequent amendments were aimed at, among others, ensuring close supervision and monitoring of the process of voting by presiding officers, polling assistants and polling agents at every stage in the course

.../10

of counting votes. In the process of counting votes Sections 78 and 80 of the Elections Act, 1985 provide for the recount of votes at two stages. First, at the stage when the counting of votes is being completed at the polling station. At that stage a presiding officer may be requested for a recount of votes by the candidate or his counting agent present when the counting of votes takes place. Second, when the addition of votes takes place at the office of the Returning Officer, the candidate or the polling agent present at the polling station may request the Returning Officer to check the addition in order to ascertain the accuracy of the disputed report of the results from the polling stations.

After the addition of votes and declaration of the results, the Elections Act, 1985 does not provide for the recount of the votes. That is, Section 80 (3) of the Elections, Act 1985 provides for the last stage when a recount of votes is sought. For the period that follows after the declaration of the results, to seek a recount of votes as a relief as it happened in this case would be untenable and misconceived in law. The period that follows after the declaration of results may well involve the time an election petition is filed in Court. It is common knowledge that in an election petition, one of the reliefs that may be claimed is a scrutiny. Section 112 (d) of the Elections Act, 1985 provides for scrutiny among other reliefs. Recount is not one of the reliefs set out under this section. For this reason, it is in our view, legally incorrect to introduce in the pleadings the element of a recount of votes as a relief in an election petition. On that basis and with due respect, we think the learned judge confused and mixed up the two reliefs

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which are, as already indicated, available at different stages, In part, he stated:

> "Consequently, on the totality of my findings based on the interpretation of the Election Act, 1985 I rule that the prayer for scrutiny by recount of the votes in the 1995 Parliamentary elections for Karatu Constituency is both misconceived and legally incompetent."

In our view, on the face of this statement, the general impression which emerges is that both the reliefs for recount and scrutiny were legally incompetent. This, with respect, is not correct because, one of them, namely, scrutiny was a competent prayer allowed by law in an election petition. As already observed, it is the recount of votes that the law does not provide for. It was this relief which was incompetent and misconceived in law because it was being sought at a stage when the law does not allow as correctly held by the learned judge. In short, it is our view that the two reliefs have been described in such a way that it is misleading and confusing. We are however, satisfied that as regards scrutiny the application was properly rejected on the grounds that the conditions under Section 112 (d) of the Elections Act, 1985 and Rule 12 of the Elections (Election Petitions) Rules, 1971 were not satisfied. In the result, despite the mix up and confusion on recount and scrutiny, we agree with the final conclusion that scrutiny was not in the circumstances, available.

In ground one, Mr. Musei, learned Counsel had also raised the issue of Res judicata. Having closely listened to his

.../12

submissions it is apparent that he was not referring to Res judicatare in its strict sense as provided under Section 9 of the Civil Procedure Code, 1966. Rather, we understood him to take the view that it was a contradiction on the part of the learned judge to hold that the Court had no jurisdiction to grant a scrutiny contrary to an earlier ruling of the Court on 12.9.1996. With respect, we do not agree with Mr. Musei, learned Counsel on this submission. As countered by Mr. Maira, learned Counsel and Mrs Lyimo, learned Principal State Attorney, we agree that there is no contradiction in this ruling, the subject of the appeal and the earlier ruling by the learned trial judge as regards the issue of scrutiny. The reason is simple. That is, that the earlier ruling involved the issue whether the Court had jurisdiction to deal with the application for scrutiny. On that, the learned judge held and correctly so in our view, that the Court had jurisdiction to deal with the matter. On the other hand, the issue involved in the ruling, the subject of this appeal, was whether in the circumstances of the case scrutiny was warranted. The learned judge was convinced that the requisite conditions were not satisfied for the granting of scrutiny, he dismissed the application. On our part, the legal position is so clear that the learned judge can hardly be faulted in his decision on this point. In the earlier ruling the judge was of the view that the Court had jurisdiction to deal with the issue while in the subsequent ruling which gave rise to this appeal, the Court in exercise of its jurisdiction, dismissed the application on the grounds that there was no merit in it. In those circumstances, we are satisfied that there was no contradiction in between the

.../13

earlier ruling and the one complained against in this appeal. We reject this ground.

In the result, and for the foregoing reasons, the appeal is dismissed with costs to the respondents. We also remit the case to the High Court for continuation of the hearing of the petition where we hope it will proceed expeditiously from the point where the ruling of the High Court of 25.11.1996 was delivered.

DATED AT DAR ES SALAAM THIS 26TH DAY OF SEPTEMBER, 1997.

L.M. MFALILA
JUSTICE OF APPEAL

THE COURT OF APPEAL OF TANZANIA

D.Z. LUBUVA
JUSTICE OF APPEAL

B.A. SAMATTA
JUSTICE OF APPEAL

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

( M.S. SHANGALI )
DEPUTY REGISTRAR