
**FREEMAN AIKAELI MBOWE AND THE ATTORNEY
GENERAL v. ALEX O LEMA**

**COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(Samatta, C.J., Kisanga, Lubuva, Lugakingira and Mroso,
JJ.A.)

CIVIL APPEAL No. 84 OF 2001

(From the decision of the High Court of Tanzania at Moshi, Mandia, J., dated 20
September 2001, in Miscellaneous Civil Cause No. 1 of 2001)

*Civil Practice and Procedure – Appeals – Leave to appeal – Leave to appeal
refused by High Court – When leave to appeal is necessary.*

*Civil Practice and Procedure – Appeals – Appeals in election petitions – Appeal
against interlocutory orders in an election petition – Whether permitted.*

*Court of Appeal – Full Bench – Reversal of Court's earlier decision by Full
Bench of the Court – Articles 117(4) and 83(4) of the Constitution – Section
5(1) of the Appellate Jurisdiction Act 1979.*

*Statute – Interpretation of statutes – Interpretation of Article 83(4) of the
Constitution – Whether the provision allows a party aggrieved by a decision
of the High Court to appeal as of right to the Court of Appeal – Ngalai's
case revisited.*

The respondent had petitioned the High Court seeking, *inter alia*, avoidance of an
election result and a declaration that the first appellant was duly elected a Member of
Parliament for Hai Constituency in Kilimanjaro Region. In that petition, the respondent
had alleged corruption against the first appellant. The first appellant had raised a
preliminary objection to the effect that the allegations of corruption disclosed no cause

- A of action and so asked the High Court to strike out the petition. Instead of striking out the petition, the High Court ordered the respondent to supply to the first appellant better particulars thereof. Aggrieved by that order, the first appellant applied to the High Court for leave to appeal against it but the High Court rejected the application.
- B Nevertheless the appellants filed the appeal in the Court of Appeal and when it came up for hearing the Court of Appeal sought an explanation on how the appeal was still instituted after leave to appeal had been refused. Counsel for the first appellant explained that he had relied on the decision of the Court in the case of *Leonsi Silayo Ngalai v. Justine Alfred Salakana and another* (1) and article 83(4) of the Constitution of Tanzania as granting the right to appeal as of right against any decision of the High Court in an election petition. The Court then referred the matter to the Full Bench of the Court to consider whether *Ngalai's* case correctly interpreted article 83(4) of the Constitution.
- D

Held: (i) In *Ngalai's* case the Court interpreted article 83(4) of the Constitution as providing for a right of appeal against any decision of the High Court in election petition cases, and that interpretation is sufficiently wide to cover appeals against interlocutory decisions or orders of the High Court in election petition cases such as the one at hand;

E

(ii) However, the right of appeal provided for in article 83(4) of the Constitution does not extend to every decision of the High Court in an election petition but only to those decisions in which the issue was the legality or otherwise of the election or nomination of any person as a Member of Parliament, or whether a Parliamentary seat has become vacant or not; and the case was first instituted and heard in the High Court, and the High Court finally determined the matter;

F

(iii) In the case at hand the second condition was not fully satisfied because although the matter was admittedly first instituted in the High Court, it was not heard and finally determined in that Court;

G

(iv) While it is conceivable that some interlocutory decisions are capable of disposing of the case finally, the interlocutory decision in the case at hand was not one such decision because after it was made the case was to proceed to hearing; the interlocutory decision in this case, therefore, did not come within the scope of article 83(4) of the Constitution which provides for appeal as of right to the Court but that such decision is appealable with leave;

H

I

(v) Although the Court made the observation in *Ngalai*'s case that "...the current and widespread practice of seeking leave to appeal in such cases is misconceived and unnecessary in law", the said case was not decided on the basis of the Court's interpretation of article 83(4) of the Constitution;

(vi) The interlocutory decision in the case at hand did not come within the scope of article 83(4) of the Constitution and therefore the appeal from it was governed entirely by the provisions of section 5(1) of the Appellate Jurisdiction Act 1979;

(vii) The matter should be sent back to the Full Court for the appeal to be dealt with in the usual manner.

Order accordingly

Case referred to:

- (1) *Leonsi Silayo Ngalai v. Justine Alfred Salakana and another* Court of Appeal of Tanzania Civil Appeal Number 38 of 1996 (unreported).

Statutory provisions referred to:

- (1) The Constitution of the United Republic of Tanzania 1977, art. 83(4); 117(4)
- (2) Appellate Jurisdiction Act 1979, section 5(1)

Mr Bob Makani and *Mr CJ Maruma* for the first Appellant

Mrs Sumari, Principal State Attorney, for second Appellant

Dr Lamwai for the Respondent

RULING/ORDER

(Dated 19 April 2002)

Kisanga, JA: The respondent, Mr Alex O Lema, had filed in the High Court at Moshi an election petition against both appellants seeking, among other things, a declaration that the election of the first appellant, Mr Freeman Mbowe, as a Member of Parliament for the Hai Constituency in Kilimanjaro Region was null and void. In the said petition the respondent made allegations of corruption against

- A the first appellant. In the course of reply to the petition the first appellant raised a preliminary objection that the said allegations of corruption disclosed no cause of action; he accordingly urged the Court to strike them out. However, instead of striking them out as
- B urged, the Trial Court (Mandia, J) ordered the respondent to supply to the first appellant further and better particulars thereof. The first appellant was thereby aggrieved and sought leave to appeal to this Court but the High Court refused to grant the same. Notwithstanding
- C such refusal, however, the appellants proceeded to institute this appeal.

The appeal came before the Court on 6 December 2001, but before it could proceed to hearing, the Court sought an explanation on why the appeal was instituted, without further ado, after leave to appeal was refused by the High Court. Counsel for the first appellant informed

D the Court that he had adopted that course of action on the strength of the decision of the Court in the case of *Leonsi Silayo Ngalai v. Justine Alfred Salakana and another* (1) in which it was stated

E that article 83(4) of the Constitution of the United Republic of Tanzania (hereinafter referred to as the Constitution) provides for appeal as of right against any decision of the High Court in election petition cases. After a brief exchange with counsel for both sides, the Court

F decided that this was a fit vase to adjourn for consideration by Full Bench of the Court whether in *Ngalai's* case (1) the Court had interpreted article 83(4) too widely. The case was adjourned accordingly and it is now before us for that purpose. The first appellant is represented

G by Mr Bob Makani and Mr CJ Maruma, learned advocates; the second appellant has the services of Mrs Sumari, learned Principal State Attorney while Dr Lamwai and Mr Mdamu, learned advocates, appear for the respondent.

H The issue before us is a narrow one and involves little or no controversy. As stated before, the High Court had made an interlocutory order refusing to strike out allegations of corruption contained in the respondent's petition, and ordering, instead, the supply of further

I and better particulars; and the question is whether that decision was appealable as of right or with leave. Counsel for both sides concurrently

submitted that such decision was appealable only with leave and that it is not within the scope of article 83(4) of the Constitution which provides for appeal as of right in election petition cases. For the better understanding of Sub-article (4) of article 83 of the Constitution, we think it is desirable to reproduce the whole of article 83. It says:

83(1) Every case concerning determination of the issue.

(a) whether the election or nomination of any person as a Member of Parliament was lawful or otherwise or

(b) whether a Member of Parliament has ceased to be such a member and his Parliamentary seat has consequently become vacant or not, shall be instituted and heard first in the High Court of the United Republic of Tanzania without prejudice to the provisions contained in Sub-article (2) of this article.

(2) Whenever the Electoral Commission, in the exercise of its responsibilities pursuant to the provisions of article 41(3) of this Constitution, declares any member of Parliament to be duly elected as President, then the issue of whether that person's Parliamentary seat has become vacant shall not be inquired into by any Court or other body.

(3) Parliament may enact a law providing for:

(a) the persons who may institute a case in the High Court for determination of any issue pursuant to the provisions of this Article;

(b) the grounds and time for instituting such a case, the procedure for instituting and the requirements that have to be fulfilled in such a case, and

(c) the powers of the High Court in such a case and the procedure for its hearing.

(4) *There shall be a right of appeal to the Court of Appeal of Tanzania against the decision of the High Court in respect of any case heard under the provisions of this article. [Emphasis supplied]*

- A In *Ngalai's* case (1) the Court in interpreting sub-article (4) said:
It [sub-article (4)] provides clearly for a right of appeal against any decision of the High Court in election petition cases. This means that a party to such a case, aggrieved by a decision made by the High Court, may appeal as a matter of right to the Court of Appeal.

- B Quite clearly this statement is sufficiently wide to cover appeals against interlocutory decisions or orders of the High Court in election cases such as in the instant case. Counsel for both sides, however, submitted that such interpretation of the Sub-Article went beyond the scope of that sub-article. With respect to the learned counsel, we agree.

- C On a careful reading of this Sub-Article we think that the right of appeal provided therein does not extend to every decision of the High Court in an election petition. To hold otherwise would lead to undesirable consequences in that unscrupulous respondents would seek to appeal unnecessarily from interlocutory decisions or orders so as to ensure that they remain in Parliament for as long as possible before the petition itself is heard and determined. That, we think, cannot have been the intention of Parliament. Then the question is: To which decisions does sub-article (4) extend? We think that it extends only to those decisions where it is shown that the following conditions exist:

- D 1. the case falls within one of the categories of cases specified in paragraphs (a) or (b) of sub-article (1), namely, whether the election or nomination of any person as a Member of Parliament has ceased to be such a member and his Parliamentary seat has consequently become vacant or not;
- E 2. the case was first instituted and heard in the High Court's and
- F 3. the High Court finally determined the matter.

- G Where these conditions do not exist a party cannot invoke the sub-article and seek to appeal as of right.

H

I

Now, relating this analysis to the facts of the present case, the first condition is satisfied because the case concerns the question whether the election of the first appellant was lawful or otherwise. Condition number two exists only partially. For, while admittedly the matter was first instituted in the High Court, it was not heard, i.e, the question whether the election of the first appellant was lawful or otherwise is yet to be tried. And lastly the High Court, by its interlocutory decision, did not finally determine the matter. It is conceivable that some interlocutory decisions are capable of disposing of the case finally, for instance, where a preliminary objection is sustained on the ground of the petition being time-barred or for non-disclosure of cause of action. However, the interlocutory decision in the instant case was not one such decision because after it was made the case was to proceed to hearing. We therefore uphold the concurrent submissions by counsel for both sides that the Court in *Ngalai's* case (1) interpreted article 83(4) too widely. We further hold that the interlocutory decision in the instant case does not come within the scope of article 83(4) which provides for appeal as of right to this Court that decision is appealable with leave.

Before we take leave of the matter we wish to make one or two observations. First, we need to point out that the view we have taken that the Court in *Ngalai's* case (1) interpreted article 83(4) of the Constitution too widely has no bearing whatsoever on the outcome of that case. Because in that case the Court found that leave to appeal from an interlocutory order of the High Court had been sought and granted, but the Court considered it desirable to state the law generally, for future guidance, governing appeals from the decisions of the High Court in election petition cases following its observation that "...the current and widespread practice of seeking leave to appeal in such cases is misconceived and unnecessary in law." So *Ngalai's* case (1) was not decided on the basis of the Court's interpretation of article 83(4), and, therefore, the fact that we have now interpreted that sub-article differently can have no bearing at all on the decision in that case.

A Secondly, in dealing with this matter in *Ngalai's* case (1) the Court took the view that article 83(4) of the Constitution is applicable to election petition cases by virtue of section 5(1) of the Appellate Jurisdiction Act 1979. That provision says:

B 5(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal ...

C The remaining part of the sub-section is not applicable. The Court construed article 83(4) of the Constitution as being one such written law referred to in this sub-section. The Court said:

D ... it is apparent that the provisions of section 5 of the Appellate Jurisdiction Act 1979 do not apply to all cases. Exceptions are recognized where there is a written law providing for a contrary position. *There is no doubt in our minds that sub-article (4) of article 83 of the Constitution is such a written law.* It provides clearly for a right of appeal against any decision of the High Court in election petition cases. [emphasis supplied]

E This would appear to suggest that article 83(4) of the Constitution derives its authority from section 5(1) of the Appellate Jurisdiction Act. In other words, it means that one has to look to section 5(1) of the Act as the basis for applying article 83(4) of the Constitution.

F Counsel for both sides submitted, and rightly in our view, that this approach is wrong in as much as it tends to equate the Constitution with, or subordinate it to, ordinary legislation. The correct position

G is that the Constitution is the basic law from which section 5(1) of the Appellate Jurisdiction Act derives its existence. Article 117(4) of the Constitution says:

H (4) A law enacted in accordance with the provisions of this Constitution by Parliament ... may make provisions stipulating procedure for lodging appeals in the Court of Appeal, the time and grounds for lodging the appeals, and the manner in which such appeals shall be dealt with.

I It is under this provision of the Constitution that section 5(1) of the Appellate Jurisdiction Act was enacted to make provision relating

to appeals to the Court of Appeal. We think that it would be wrong to construe that sub-section as the basis for invoking article 83(4), a provision of the very basic law which creates the sub-section. Thus we are of the view that where an appeal from the decision of the High Court lies to the Court of Appeal under article 83(4) of Constitution the appeal is to be filed solely in reliance of that provision and it would be unnecessary, indeed wrong, to make any reference to section 5(1) of the Appellate Jurisdiction Act. However, as we have made it abundantly clear, the interlocutory decision in the present case did not come within the scope of article 83(4) of the Constitution and therefore the appeal from it is governed by the provisions of section 5(1) of the Appellate Jurisdiction Act.

Having determined the question which was referred to the Full Bench we now send the matter back to the Full Court for the appeal to be dealt with in the usual manner.