

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: KIMARO, J.A., MANDIA, J.A., And KAIJAGE, J.A.)**

**CIVIL APPEALS NO.18 AND 8 OF 2013**

**ATTORNEY GENERAL AND**

**RETURNING OFFICER OF IGUNGA CONSTITUENCY.....1<sup>ST</sup> APPELLANT**

**DALALY PETER KAFUMU ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOSEPH MWANDU KASHINDYE.....RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania**

**sitting at Nzega)**

**(Shangali, J.)**

**Dated the 21<sup>st</sup> day of August, 2012**

**in**

**Misc.Civil Cause No. 10 of 2011**

.....

**JUDGMENT OF THE COURT.**

3<sup>rd</sup> & 9<sup>th</sup> May, 2013

**KIMARO, J.A.:**

By- elections were conducted in the Constituency of Igunga on 2<sup>nd</sup> October, 2011 for the seat of the Member of Parliament for the Constituency after the same fell vacant. Prior to the elections, political campaigns were conducted by the respective political parties that participated in the elections from 2<sup>nd</sup> September to a day that preceded the

elections. The second appellant and the respondent were among the contestants in the elections. The 2<sup>nd</sup> appellant was sponsored by Chama Cha Mapinduzi, known by its acronym as CCM, and the respondent by Chama Cha Demokrasia na Maendeleao, its acronym being CHADEMA. The 2<sup>nd</sup> respondent won the elections by a score of 26,484 votes, while the respondent scored 23, 260 votes. The difference of votes between the second appellant and the respondent, the contestant who scored majority of the votes was 3224.

As a results of the scores in votes in the by –elections, the Returning Officer for the Igunga Constituency declared the second appellant the winner of the by– elections, hence a Member of Parliament for the Constituency.

The respondent was aggrieved not only by the results of the by-elections but also by the way the campaigns were conducted. On 31<sup>st</sup> October, 2011 he filed a petition in the High Court of Tanzania at Tabora, in Misc. Civil Cause No. 10 of 2011 challenging the validity and outcome of the by-elections. He listed a number of irregularities and misconduct that

occurred during the election campaigns alleging that they made the whole process of the elections not free, fair and transparent. The petition was filed against Dalaly Peter Kafumu as first Respondent, The Returning Officer of Igunga Constituency as 2<sup>nd</sup> Respondent and the Attorney General was the 3<sup>rd</sup> Respondent. The appellants denied all the irregularities and misconducts which the petitioner alleged were conducted. They maintained that the whole process of elections was free and fair.

At the end of the trial, the learned trial judge made a finding that the petitioner proved some of the irregularities and malpractices he asserted and declared the Igunga Constituency by-election null and void. Consequently, she declared the election of the second appellant Dr. Dalaly Peter Kafumu as a Member of Parliament for Igunga Constituency in October, 2011 null and void. The parliamentary seat for the Igunga Constituency was then declared vacant.

All the respondents were aggrieved by the decision of the High Court. The Attorney General and the Returning Officer for Igunga filed Civil Appeal No. 18 of 2013 faulting the decision of the trial Court. They were the first and second appellants respectively. The 1<sup>st</sup> respondent in the appeal is

Joseph Mwandu Kashindye and 2<sup>nd</sup> respondent is Dalaly Peter Kafumu. At the same time, Dalaly Peter Kafumu filed Civil Appeal No.8 of 2013. The respondents in the said appeal are Joseph Mwandu Kashinde 1<sup>st</sup> Respondent, The Returning Officer of Igunga Constituency 2<sup>nd</sup> Respondent and The Honourable Attorney General 3<sup>rd</sup> Respondent.

The two appeals were called for hearing on 3<sup>rd</sup> May, 2013. Dr. Masumbuko Lamwai, learned advocate represented the appellant in Civil Appeal No. 8 of 2013. He moved the Court under Rule 110 of the Court of Appeal Rules 2009 to have the two appeals consolidated and heard together. Mr. Gabriel Malata, learned Principal State Attorney who represented the respondents in Civil Appeal No. 8 of 2013 and Professor Safari learned advocate who represented Joseph Mwandu Kashindye in both appeals, conceded to the prayer for consolidation and hearing of the appeals together. The two appeals were then consolidated under Rule 110 of the Court of Appeal Rules, 2009, with the Attorney General and the Returning Officer of Igunga Constituency now becoming the first appellant and Dalaly Peter Kafumu, the second appellant as reflected in the names of

the parties in the consolidated appeals. Joseph Mwandu Kashindye is the respondent.

The appellants filed several grounds of appeal faulting the decision of the High Court.

- 1 The first ground of appeal, common for both Appellants, faults the trial Court for proceeding with the trial without ascertain that the respondent had complied with the mandatory requirement of depositing security for cost, a prerequisite for trials in election petitions.
2. The appellants complained that the learned trial judge upheld allegations on malpractices alleged to have occurred in the elections campaigns while they were not reported to "*Kamati ya Maadili ya Kata au Jimbo.*"
3. The learned judge was faulted for her finding that

Hon. John Magufuli used his position as a Minister to influence voters to vote for the second appellant while the evidence of the witnesses was conflicting on the dates and place where the words were spoken.

4. The finding by the learned trial Judge that Hon. Ismail Aden Rage informed the voters that the respondent had withdrawn from the contest was faulted for not having been substantiated by evidence.
5. On the finding that the appellants used religious influence to influence voters not to vote for the respondent, the appellants complained that there was no evidence to show that the second respondent was the one who uttered the words or that the one who uttered the same was his agent, or that he acted with his consent or approval.

6. The learned judge is faulted for holding that the distribution of maize by the Government during the campaign period was a catalyst in influencing the voters to vote for the second appellant because he was a CCM candidate.
7. The learned trial judge misdirected herself in the evaluation of the oral and documentary evidence that was put in the trial.
8. The appellants complained that the learned trial judge erred in shifting the burden of proof to the appellants.
9. The learned trial judge is also faulted for her finding that the statement of Wilson Mukama that Chadema brought 33 commandoes from different countries scared voters and reduced the number of voters.
10. The trial judge is also faulted for her finding that Hon. Magufuli gave an election promise to

construct the Mbutu bridge after she was satisfied that it was budgeted for by the Government.

11. The learned trial judge is also faulted for holding that making a statement that was already contained in an election manifesto during election campaigns was wrong.
12. The appellants also faulted the learned trial judge for framing issues in the course of composing the judgment. They complained that this denied the appellants the opportunity of properly defending themselves to the new issue.
14. The learned judge is faulted for holding that the non-compliances established affected the results of the election when no evidence had been produced to substantiate the claim.
15. The learned judge is also faulted for deciding on matters not pleaded.



17. The learned judge is also faulted for misdirecting herself in law and fact in drawing adverse inferences against the appellants upon Hon. Magufuli failing to appear in Court to testify on his role in the election campaigns.
18. The learned Judge is also faulted in employing a lower standard of proof in an election petition, despite her recognition of the fact that election petitions are proved beyond reasonable doubt.
19. The learned Judge is faulted in law and fact for amending issue No. 6 as regards the date of the Rally at the time of writing the judgment, while, the respondent had pleaded a different date instead of finding that the respondent failed to prove issue No. 6.

The appearance of the learned advocates and the sequence of addressing the Court was as follows: Mr. Gabriel Malata, learned Principal

State Attorney represented the Attorney General and the Returning Officer who are the first appellant, Dr. Masumbuko Lamwai, learned Advocate represented the second appellant as lead counsel, assisted by Mr. Kamaliza Kamoga Kayaga, learned advocate. Professor Abdallah Safari, learned advocate represented the respondent. Both Mr. Malata learned Principal State Attorney and Professor Safari learned advocate filed written submissions to support their respective positions in the appeal under Rule 106(1) and 106(8) of the Court of Appeal Rules, 2009. Dr. Lamwai was granted waiver by the Court, under sub-rule 19 of Rule 106 to file written submissions after the Court was satisfied that he faced problems which disabled him to file the submissions. The reasons were beyond his control. He lost both parents within a short period and he had to close his office for a while, and take a rest to cure the stress that followed the death of his parents. He argued the appeal orally.

In arguing the first ground of appeal, the learned Principal State Attorney said the High Court made a determination on 9<sup>th</sup> March 2012 that the respondent had to deposit in court , as security for costs, a right of occupancy or letter of offer in respect of Plot No. 555 Block "H" as a

guarantee for shillings 1,000,000/=. In terms of section 111(7) of the National Elections Acts, [CAP. 343 R.E.2010] the respondent was required by the said provision to deposit the Right of Occupancy or letter of Offer within a period of 14 days from the date of the order. When the trial started, the learned State Attorney contended, the respondent had not complied with the order. He said non - compliance with the order by the respondent barred the High Court from proceeding with the trial of the petition.

The learned Principal State Attorney further submitted that because the respondent did not comply with the order for deposit of security, the Registrar High Court was barred by section 111 (2) of CAP 343 from fixing the petition for hearing. The learned State Attorney was also of the view that before the respondent deposited the right of occupancy, the land had to be valued to ascertain whether its value was T shillings 1,000,000/= as ordered by the Court. Failure to ascertain the value, argued the learned State Attorney, violated section 111 (5) of the National Elections Act. He said he has not seen any report showing that the respondent ever complied with the order. Given the default, contended the learned State Attorney,

the trial Court had no jurisdiction to entertain the petition. He requested the Court to nullify the proceedings and the judgment of the High Court with costs.

In his submission Dr. Lamwai learned advocate supported the submission made by Mr. Malata. He added that the case file in which the order for deposit of security was made, that is Miscellaneous Civil Cause No.48 of 2011 contains no order indicating that the respondent complied with the deposit for security. He said since it is not unusual for certificates of occupancy to be forged, the case file had to contain an order showing compliance of its own order that security for not less than shillings 1,000,000/= was deposited as directed. Since the record of the case file does not show that there was anything else which proceeded after the order for payment of security was given on 9<sup>th</sup> March 2012, the High Court lacked jurisdiction to hear the petition. He agreed with Mr. Maleta that the default was brought to the attention of the learned trial judge while she heard preliminary objections but it was not decided in her ruling. He too prayed that the proceedings be declared null and void.

On his part, Professor Safari learned advocate relied on a letter written on 23<sup>rd</sup> January, 2013 bearing reference No. J/HCT/23/Vol.11/110 by the District Registrar of the High Court of Tanzania at Tabora informing the respondent who had requested for the return of his certificate of title that it could not be returned to him because there was a pending appeal. He requested the Court to take Judicial notice of the letter under sections 58 and 59(1) of the Law of Evidence Act, [CAP 6.R.E.2002] and find that the respondent deposited the certificate of title in court.

In brief rejoinder on this ground, both Mr. Malata, learned Principal Attorney and Dr. Lamwai learned advocate reiterated their earlier submissions on the non-compliance with the order for deposit of security. They also reiterated the prayer to have the judgment of the High Court nullified. They also made a prayer for their costs.

Section 111(2) of the Elections Act provides:-

*“The Registrar shall not fix a date for the hearing any election petition unless the petitioner has paid into court, as security for costs, an*

*amount not exceeding five million shillings in respect of each respondent.”*

Where the amount of security which the petitioner has to pay has been determined by the trial Court under section 111(3) or section 111(5) (a) of the Act, the petitioner is required to deposit that security within fourteen days from the date of the order for the deposit of security.

The learned Principal State Attorney and the learned advocates appearing in the appeals correctly submitted that the order for deposit of security was made in Miscellaneous Civil Application No. 48 of 2012 on 9<sup>th</sup> March, 2012. From there on, there is no other order indicating how the respondent complied with that order.

What Miscellaneous Civil Case No.10 of 2011 shows is that on 9<sup>th</sup> March, 2012 Mr.Gasper Mwanalyela appeared for the petitioners, Mr. Kayaga for the 1<sup>st</sup> Respondent and Mukandara for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Unfortunately, the respective titles of learned State Attorney and the Advocates are not given. It is important for the record of proceedings to give the titles of the respective State Attorney and

advocates appearing in any case proceedings instead of mentioning only names without indicating their titles. The Acting District Registrar indicated his title. He had an obligation of indicating the titles of the respective State Attorney and the advocates who made appearance before him.

On that day, the Acting District Registrar fixed a date for the hearing of the petition for 26<sup>th</sup> March 2012. However, before fixing the petition for hearing, the Acting District Registrar did not show that the respondent complied with the order for deposit of security as ordered by the learned Judge who presided over the application for the determination of the security for costs.

An inspection of the record of appeal for Civil Appeal No 18 of 2013 at page 197 shows that before hearing of the petition commenced on 26<sup>th</sup> March 2012 in the High Court which sat at Nzega, there were preliminary objections raised. Among them was that of non-compliance with deposit for security as required by section 111(7) of the National Elections Act, CAP 343. The learned trial judge was alerted by Mr. Malata learned Principal State Attorney that security for costs had not been paid by the respondent.

The determination of that objection was important for purposes of ascertaining whether the petitioner had deposited the required security in court before the Court could proceed to hear the petition. In her ruling the learned judge did not make a finding on this point. She proceeded with hearing the petition.

Section 111(7) says:-

*“In the event for security of costs not being paid into court within fourteen days from the date of the determination by the court of the amount payable as security for costs, no further proceedings shall be heard of the petition.”*

In his submission Professor Safari learned advocate for the respondent concedes that there was no order of the Court showing that the respondent complied with the order for the deposit for security. His argument is that since the respondent wrote a letter to the Court requesting it to hand back to him the certificate of title, then the Court should take judicial notice, that he deposited the certificate of title in Court.



We indicated earlier that this point was seriously objected to by Dr. Lamwai and we will say he had good reasons. First, the letter is an annexure to his written submissions which are not supposed to be accompanied by annexures. Second, Dr. Lamwai said the respondent was served with the memorandum of appeal on 15<sup>th</sup> January 2013 and the letter which the Court is requested to take judicial notice of was written on the same day by the respondent requesting for the return of the certificate of title, hence making it suspicious. Moreover, added Dr. Lamwai, the letter has a reference of normal correspondence file instead of the reference number of the case file which granted the application. What the respondent had to show is an order showing that he deposited the certificate of title as security for costs.

In this appeal it is clear that there was no compliance with section 111(7) of the National Elections Act, CAP 343. Section 111(2) read together with section 111(7) of CAP 343 is clear that the Registrar could not fix the petition for hearing, and the learned trial judge could not proceed with the hearing of the petition. Payment of security for costs is a prerequisite for

jurisdiction of the High Court to hear any election petition is ousted.

Professor Safari urged the Court to dismiss this ground. He urged us to distinguish an election petition with other case because elections are source of democracy. With respect we cannot agree to that reasoning. The respondent took steps to file an application for determination of security. A determination was made under section 111(5) (a) of CAP 343 allowing him to give other form of security. He was required to comply with that order. Dr. Lamwai submitted correctly that we cannot take judicial notice of the letter the respondent wrote to the Registrar because of the deficiencies we have already pointed out, which we totally agree with.

Having determined that the petition was heard without deposit of security, the first ground of appeal succeeds. Since the trial court heard the petition without having jurisdiction, the proceedings of the trial Court from 26<sup>th</sup> March, 2012 are a nullity. We declare the said proceedings null and void. This ground suffices to dispose off the appeal. We allow the appeal

by the appellants on this ground with costs. We also restore the second appellant to his seat as Member of Parliament for Igunga Constituency.

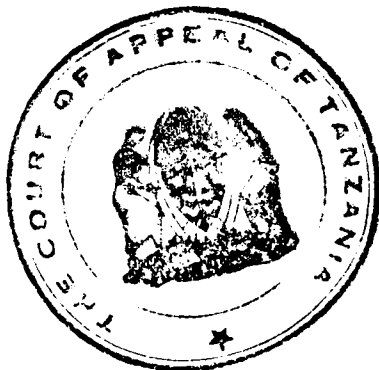
**DATED** at **TABORA** this 9<sup>th</sup> day of May, 2013.

N.P. KIMARO  
**JUSTICE OF APPEAL**

W.S. MANDIA  
**JUSTICE OF APPEAL**

S.S. KAIJAGE  
**JUSTICE OF APPEAL**

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



M.A. MALEWO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**