IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MJASIRI, J.A., MUSSA, J.A., And JUMA, J.A.)

CIVIL APPEAL NO. 129 OF 2016

ONESMO NANGOLE ..... APPELLANT

VERSUS

DR. STERVEN LEMOMO KIRUSWA ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha)

(Mwangesi, J.)

dated the 29th day of June, 2016
in
Misc. Civil Cause No. 36 of 2015

.....

RULING OF THE COURT

13th & 24th October, 2016
MUSSA, J.A.:

In the general elections that were held on the 25th day of October, 2015 the appellant and the respondent, among others, contested the parliamentary seat for Longido constituency in Arusha Region. The appellant and the respondent contested the election as, respectively, candidates of Chama cha Demokrasia na Maendeleo (CHADEMA) and Chama cha Mapinduzi (CCM). The other contestants in the race were, namely, Julius

Parteyie Syokino and Lucas Yohana Oleng'iria who vied for the seat as candidates of Alliance for Change and Transparency (ACT) and Civil United Front (CUF), respectively.

At the end of the exercise, election results were pronounced by the returning officer according to which appellant polled 20,076 votes; the respondent 19,352 votes; the CUF candidate 307 votes and; the ACT candidate 253 votes. The appellant was, therefore, declared the winner with a majority of 724 votes over his nearest rival, the respondent.

Dissatisfied, the respondent petitioned the High Court and sought to avoid the elections results upon a variety of points of grievance pertaining to indecent statements allegedly made by the appellant during the election campaigns which were calculated to obtain advantage over the respondent; the late opening of some of the polling stations; illegal voting by non-citizens; illegal practice or intimidation by the appellant and/or his agents and; chaotic instances at the tallying room as well as the slotting of improper forms during the tallying process. In the petition, the appellant was impleaded as the first respondent, whereas the Attorney General and the Returning Officer for the constituency were captioned as the second and third respondents,

respectively. Thus, with a hindsight of the grounds of grievance, at the outset of the hearing, the following issues were agreed by the parties and formulated by the trial Court:-

1. *Whether in the campaign rallies held during the parliamentary election campaigns for the constituency of Longido in the year 2015, the first respondent by himself or through his agents did make some statements calculated to obtain advantage over the petitioner on the basis of Kiswahili language and Maasai cultural and social attitudes on the dates, time and at places, named under paragraph 8 of the petition;*
2. *Whether there were people eligible for voting who did not vote at the polling stations of Orpukel, Engosokwan, Loosoito, Naadare, King'una and Sokon because the polling stations were opened late by the election presiding officers. And if the answer to the second issue above is in the affirmative, then whether the consequence thereof was in the detriment of the petitioner;*
3. *Whether the presiding officers and militiamen stationed at the polling stations of Ngereyani, Eleng'ata, Dapash and Kamwanga did influence the electorate to vote for the candidate sponsored by CHADEMA political party;*

4. *Whether the first respondent did instigate Chaos/altercation in the tallying room at Longido tallying center, when the exercise was in progress;*
5. *If the answer in the fourth issue above is in the affirmative, whether as a result of the chaos/altercation the Returning Officer, who happens to be the third respondent, did order the petitioner and his agents as well as the other candidates, with their agents, to get out of the tallying room;*
6. *Whether some of the figures of the results of the polling stations appearing in forms 21B when compared to the figures contained in the spreadsheet, which were later transferred in form 24B are fictitious;*
7. *Whether the motor vehicles which have been listed under paragraph 9 (ix), (b), (c), (e) and (f) of the petition, which were alleged to belong to avid supporters of CHADEMA political party, were used by the third respondent to transport ballot boxes from the polling stations to the tallying center at Longido;*
8. *Whether the motor vehicles which have been listed under paragraph 9 (ix) (h), (i) and (j) which are said to be owned by avid supporters of CHADEMA political party, were used to perform the task of escorting ballot boxes from the polling stations to the tallying center at Longido;*

9. *Whether there were any Kenyan Nationals who did vote at the polling stations of Namanga, Kima Kouwa and Kamwanga in the parliamentary general election of Tanzania which was held in the year 2015;*
10. *Whether the anomalies and/or irregularities which have been pointed out in the issues named above, if established, did affect the parliamentary results for the constituency of Longido;*
11. *To what reliefs each of the parties to this petition are entitled.*

At the hearing, the trial Court adopted two modes of receiving evidence. The first mode involved the conventional method of receiving evidence through the direct oral testimony of a witness followed by his/her cross-examination by the adversary party. In the second mode, the court received the evidence of a witness through his/her sworn/affirmed affidavit which was followed by cross-examination of the witness by the adversary party. It is noteworthy that the latter mode is a wavebrain of National Elections (Election Petitions) (Amendment) Rules, 2012 which is comprised in Government Notice No 106 of 2012.

Thus, more particularly, the respondent gave his testimony through the conventional method but the rest of his twenty seven (27) witnesses

gave affidavital evidence. In addition the respondent produced upon evidence several documentary exhibits, a flash drive, three still pictures and a cellular phone. For their part, all the three respondents and their witnesses, including the appellant, gave testimony through affidavits. The appellant featured nine (9) witnesses to support his account, whereas the Attorney general and the Returning Officer countered the petition through the affidavital testimonies of four witnesses.

In the course of the trial, the respondent abandoned issue No. 3 and, perhaps, it is worth appraising at this stage that in its final deliberations, the trial Court answered issues Nos. 1, 2, 7, 8 and 9 in the negative. Conversely, the court answered issues Nos. 4, 5 and 6 affirmatively and, on account of the positive findings on those issues, the presiding Judge enumerated the established irregularities thus;

> *"First, that there was chaos in the tallying room which did move the Returning officer to require the candidates and their agents to get out of the tallying room. Secondly, that the tallying exercise of the votes in the tallying room was made in the absence of the petitioner and agents for no apparent reasons.*

Third, that the declaration of the first respondent to be the winner for the parliamentary election for the constituency of Longido was made by the Returning officer in the absence of the petitioner after he had been requested to get out of the tallying room.

Fourth, that there were irregularities occasioned in the course of posting the results from forms 21B into the spreadsheet which was used as the working program and ultimately in form 24B.

Fifth, that the whereabouts of the original forms 21B for the polling stations of Kwenia, Elang'ata Engopito, Irimanya and Lumbwa Madukani was not made known and instead thereof there were slotted in other forms in the process of tallying the votes."

In the upshot, the trial court concluded thus:-

"When it comes to the question of chaos, conclusion of taking votes and declaring the winner in the absence of a candidate for no justifiable reason, as well a slotting improper forms in the tallying process cannot be said to have been occasioned by human error. To the contrary I consider the act of slotting in improper forms 21B in the tallying process to have been aimed at cheating the result and thereby diverting the choices of the electorate . . . . .

To that end, I answer the tenth issue in the affirmative that the irregularities which were occasioned in the election at issue at the tallying room, to be precise, did fundamentally affect the result of the election. As a result, I hereby nullify the election which was held in October, 2015 for the constituency of Longido and direct that a by-election be conducted to enable the electorate to freely and fairly exercise their right of electing a representative of their choice."

In the end result, the trial court issued a certificate to that effect to the Director of the National Election Commission in terms of section 113 (1) of the National Election Act, Chapter 343 of the Revised Edition 2015 (NEA). The appellant is aggrieved and has lodged a memorandum of appeal which is comprised of six points of grievance, namely:-

1. *That the learned trial judge erred in law in failing to decide whether what transpired in the tallying room amounted to chaos or was merely a squabble as he put it.*
2. *That the learned trial judge erred in law in failing to hold that the respondent deliberately and willfully absented himself, from the tallying room during the declaration of the results.*

3. *That the learned trial judge erred on the facts in holding that the* ***"circumstance at the tallying room in the matter at hand was clearly not friendly so as to give results which did indeed reflect the wishes and real conscience of the electorate of Longido constituency."***
4. *That the learned trial judge grossly misdirected himself in describing* ***"as other (five) irregularities"*** *matters which he ultimately held to be mere circumstances that led the Returning Officer (RW13) to declare the results in the absence of the respondent and his agents.*
5. *That the learned trial judge erred in law in failing to draw an adverse inference on the respondent's refusal to state the outcome of the tallying done by his team using form 21B from all 175 polling stations.*
6. *That the learned trial judge erred in law in holding that the irregularities that happened at the tallying room did fundamentally affect the result of the election even after holding that the appellant defeated the respondent by a margin of 397 of the undisputed votes.*

At the foot of the memorandum of appeal, the appellant proposes to ask the Court to allow the appeal in its entirety and set aside the judgment and decree of the trial court and substitute for it the following orders:-

> *"(a) A declaration that the appellant was lawfully and validly elected as Member of Parliament for the Longido constituency in the 2015 General Elections;*
>
> *(b) An order condemning the respondent to costs of the appeal and the trial in the High Court, and;*
>
> *(c) The cancellation of the High Court's order directing the issuance of the certificate to the Director of Elections informing him of the nullification of the Parliamentary Election for Longido Constituency in terms of section 113 (1) of the National Elections Act, Cap. 343 R.E. 2015."*

For his part, the respondent initially greeted the memorandum of appeal with a Notice of cross-appeal whose details we need not recite on account of what we will shortly unfold. Incidentally, the Notice of cross-appeal was objected to by the appellant for being belatedly served on him.

In addition, the respondent enjoined a Notice of preliminary objection which goes thus:-

> *"**TAKE NOTICE** that on the hearing of this appeal, the above-named respondent will raise a preliminary point of law to the effect that the Appeal is incompetent and ought to be struck out with costs in that although the 2nd and 3rd Respondents in the Petition were served with the Notice of appeal they have not been impleaded in the appeal without the Appellant having sought for and given directions as to whether they should be impleaded or not."*

At the hearing before us, the appellant was represented by Messrs Method Kimomogoro and John Materu, learned Advocates, whereas the respondent had the services of three learned Advocates, namely, Dr. Masumbuko Lamwai, Mr. Daudi Haraka and Mr. Edmund Ngemela. We impressed upon the learned counsels to argue both the preliminary points of objection and the appeal and that our decision will be comprised in the final judgment depending on the outcome of the raised preliminary points of objection. As it turned out, Dr. Lamwai readily conceded to the appellant's preliminary point of objection with respect to the Notice of Cross-appeal and, accordingly, the same was struck out for incompetence.

Coming to the preliminary point of objection raised by his client, Dr. Lamwai reminded us that in the petition which was presented before the trial court, the appellant herein, the Attorney General and the Returning Officer for Longido constituency were impleaded as respondents. The impleading of the Attorney General and the Returning Officer, he submitted, was necessitated by the provisions of Rule 6 of the National Elections (Election Petitions) Rules, 2010 (the Election Petition Rules) which stipulates:-

> *"6 - (1) Except for a petition presented by the Attorney General, in every petition the Attorney General shall be made a party thereto as the respondent.*
>
> *(2) Where a petition alleges any misconduct or contravention of any provisions of any written law by the successful candidate or by any person acting for or on behalf of the successful candidate, the successful candidate shall be made a party to the petition in addition to the Attorney General.*
>
> *(3) Where a petition alleges any misconduct or contravention of any provisions of the Act or any written law by the election officer, such election officer shall be made a party to the petition in addition to the Attorney General.*

(4) N/A . . . . . .

The learned counsel for the respondent then strenuously contended that much as the appellant presently seeks to deplore the manner in which the election was conducted, both the Attorney General and the Returning Officer are necessary parties who should have been impleaded in the memorandum and record of appeal. Dr. Lamwai further submitted that the grounds of appeal relate to the irregularities that were committed by the Returning Officer and, in that regard, both the Attorney General and the Returning Officer will be directly affected by the outcome of the appeal. To that extent, he submitted, they ought to have been impleaded as necessary parties before any adverse order is made against them. In sum, Dr. Lamwai urged that without impleading the Attorney General and the Returning Officer, the appeal, as it stands, is incomplete and rendered incompetent. He prayed that the same be struck out with costs.

In reply, Mr. Kimomogoro, contended that the preliminary point of objection is baseless much as Rule 6 of the Election Petitions Rules only governs petitions lodged before the High Court. There is no corresponding requirement, he said, with respect to election appeals before this Court. The learned counsel for the appellant submitted that all what was required of the

appellant was to serve copies of the Notice of Appeal on all persons who seemed to him to be directly affected by the appeal in terms of Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). According to Mr. Kimomogoro the appellant actually served a Notice of Appeal on both the Attorney General and the Returning Officer on the terms of Rule 84 (1) of the Rules; just as they also served them with a memorandum and record of appeal in terms of Rule 97 (2) of the Rules. To that end, counsel for the appellant contended, the appellant complied with all the requirements comprised in the Rules and that the preliminary point of objection should be overruled with costs.

In a brief rejoinder, Dr. Lamwai reiterated his position that it is not enough to only serve the Attorney General and the Returning Officer with the memorandum and the record of appeal; rather, both of them should have been impleaded and joined as necessary parties to enable the Court to give an effectual decision.

Having heard the rival learned arguments on the preliminary point of objection, we are sincerely grateful for the lucid submissions from both counsels. To begin with, we wish to express at once that, from the findings

of the trial court, the nullification of the election results almost entirely arose from irregularities which were allegedly occasioned by the Returning Officer. Likewise, the mainstay of the memorandum of appeal is to fault the findings of the trial judge with respect to what happened in the tallying room, his findings on the other irregularities which were allegedly occasioned by the returning officer and the subsequent pronouncement of the election result by the Returning Officer which the judge found was done in the absence of the respondent for no justifiable cause. The findings of the trial court, so to speak, almost invariably relate to the mishandling of the tallying procedure by the Returning Officer.

It is, however noteworthy that, in his testimony during the trial, the Returning Officer refuted the claim of there being any chaos in the tallying room just as he denied the detail about ordering the candidates and their agents out of the tallying room. Incidentally, we further note, his account was fervently defended by the Attorney General. To say the least, if we were to deliberate this appeal, certainly, we would be called to decide this detail and the alleged irregularities one way or the other and, perhaps, if need be, adversely to both the Attorney General and the Returning Officer. It is beyond question that whatever finding we arrive at would impact on the

Returning Officer and, indeed, the Attorney General in his capacity as custodian of the legal affairs of the government. Thus, if we were to deliberate the appeal in their absence, the Court would lend itself in the mischief of condemning both the Attorney General and the Returning Officer without affording them the opportunity of being heard. That the appellant was minded to serve them with the Notice of appeal as well as the memorandum and record of appeal is, to us, clear indication that he was aware that the Attorney General and the Returning Officer are likely to be affected by the outcome of the appeal.

As we have hinted upon, if we decided to deliberate this appeal in their absence, we will offend the *audi alteram partem* rule of natural justice. In this regard, we pay full homage to obtain guidance from the unreported Civil Appeal No. 45 of 2000 - **Mbeya - Rukwa Auto Parts and Transport Ltd Vs. Jestina George Mwakyoma** where it was observed:-

> *"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law and stipulates in part;*

(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kikamilifu."

In yet another unreported Civil Application No. 33 of 2002 - **Abbas Sherally and Another Vs. Abdul Fazalboy,** the Court went further and observed:-

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

Thus, consistent with the constitutional right to be heard as well as settled law, we are of the firm view that, in the circumstances of this case, it will be in the best interests of justice if both the Attorney General and the Returning Officer are impleaded and joined as necessary parties to the appeal before any deliberations are taken by the Court, adverse or

otherwise. We take this as a matter of serious concern, more particularly, since the mishandling of the electoral process by an election officer, if established, could lead to far reaching consequences. In, for instance, the unreported High Court Civil Application No. 98 of 2010 - **Fred Mpendazoe Vs. The Attorney General and Two others,** which was referred to us by Mr. Kimomogoro, it was observed as follows:-

> *"The law, through sections 89A, 89B and 89C of the Act takes a very serious view against misconduct committed by election officers. Section 89C defines these election officers as including the Regional Election Coordinator, Returning Officer, AROs-Ward, AROs-Constituency, Presiding Officer and Polling Assistant. If proved to the satisfaction of this court, misconduct like tampering with election results forms can lead to certification to the Attorney General that an election officer concerned has mishandled an electoral process within the meaning ascribed by section 89A (2) and (3) of the Act . . . Similarly section 89B leaves the Government with an option to recover any loss, costs or damages it incurred as a result of misconduct by an election officer."*

Granted that the Rules do not have a corresponding requirement of the like of Rule 6 of the Election Petition Rules: But, we are constrained to

give a direction under Rule 4 (2) (a) to the effect that, in a situation such as the present, where the nullification of the results of an election arose from irregularities or non-compliances allegedly occasioned by an election officer, an appellant is implicitly obliged to implead and join as necessary parties both the Attorney General and the Returning Officer. The direction, in our view, will be in accord with, and would translate into practical terms the constitutional right to be heard.

We are, however, not persuaded by Dr. Lamwai's urge that the non-joinder of the Attorney General and the Returning Officer in the matter presently before us has the effect of rendering the appeal incompetent. We cannot read any incompetence in the appeal and, accordingly, we refrain from accepting the urge and, instead, we give leave and allow the appellant to amend the Notice of Appeal as well as the memorandum and record of appeal in terms of Rule 111 of the Rules so as to implead and join as necessary parties, both the Attorney General and the Retuning Officer. The amended version of the documents should be lodged within twenty one days (21) from the date of the delivery of this Ruling.

To this end, the preliminary point of objection partly succeeds and fails. Costs to abide by the result in the main cause and, having ordered an amendment, needless to have to belabor on the merits of the appeal. In the meantime, the hearing of the appeal is adjourned to a date to be fixed. Order accordingly.

DATED at **ARUSHA** this 20th day of October, 2016.

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL