

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

CIVIL APPEAL NO. 49 OF 2016

(CORAM: RUTAKANGWA, J.A., MUSSA, J.A., JUMA, J.A., MWARIJA, J.A., And MUGASHA, J.A.)

**1. MAGAMBO J. MASATO
2. MATWIGA M. MATWIGA
3. JANES S. EZEKIEL
4. ASCETIC N. MALAGILA****APPELLANTS**

VERSUS

**1. ESTER AMOS BULAYA
2. RETURNING OFFICER OF BUNDA URBAN
 CONSTITUENCY
3. THE ATTORNEY GENERAL****RESPONDENTS**

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Gwae, J.)

**Dated 25th day of January, 2016
in
Miscellaneous Civil Cause No. 1 of 2015**

JUDGMENT OF THE COURT

1st & 12th July, 2016

JUMA, J.A.

We have found it germane and irresistible to preface this judgment with the immutable words of His Lordship Justice V. R. Krishna Iyer in **Mohinder Singh Gil & Another v. Chief Election Commission, New Delhi & Others**, (1978) 1 SCC 405, Para. 2. He aptly said:-

"2. Every significant case has an unwritten legend and indelible lesson. This appeal is no exception, whatever its formal result. The message, as we will see at the end of the decision, relates to the pervasive philosophy of democratic elections which Sir Winston Churchill vivified in matchless words:

'At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper—no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.'

If we may add, the little, large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods, or subtle perversion of discretion by 'men dressed in little, brief authority'. For 'be you ever so high, the law is above you."

These words were recently quoted with approval by the same Supreme Court of India in Civil Appeal No. 5044 of 2014 in **Ashok Shankarrao Chavan v. Dr. Madhavrao Kinhalkar & Others**.

The overarching issue in the appeal before us is the *locus standi* or the scope of the right of a registered voter in Tanzania to file an election petition. Specifically, whether the plain meaning of the words in the text of section 111 (1) (a) of the National Elections Act, Cap. 343 ("**the Act**"), oblige the registered voters wishing to file election petitions, to plead and *prima facie* show how their respective rights to vote have been interfered with or violated in an election concerned. At the centre of this overarching issue, is the operating part of the Ruling of the trial High Court of Tanzania at Mwanza in Miscellaneous Civil Cause No. 1 of 2015 ("**the Petition**"), wherein Gwae, J. struck out the appellants' election petition. In striking out the Petition, the learned judge reasoned thus:

"...Having found that the petitioners have no locus standi in this election for not pleading if their rights were violated, if it was in affirmative, if the alleged violations or infringements affected them and or if

*relief claimed would benefit them taking into account that this petition has **not** been brought under article 26 (2) of the Constitution. The petitioners' petition, for reasons stated above, is hereby struck out with no order as to costs due to the reason that petitioners wrongly filed their petition and purported it to be a public litigation."*

During the 2015 General Elections in Tanzania, Magambo J. Masato, Matwiga M. Matwiga, Janes S. Ezekiel and Ascetic N. Malagila ("the first, second, third and fourth appellants respectively, or the appellants"), were registered as voters in the Bunda Urban Constituency. On October, 25th 2015 which was the "Election Day", they voted to elect a Member of Parliament for their Constituency. Hon. Ester Amos Bulaya ("**the first respondent**") was declared by the Returning Officer ("**the second respondent**") to have scored the majority of votes, and therefore, the duly elected Member of Parliament for the Bunda Urban Constituency.

The appellants were aggrieved by what they described in their Petition as an election that was "*fraught with non-compliances and*

irregularities resulting into unfairness of the entire parliamentary election”.

They accordingly filed the petition in the High Court of Tanzania at Mwanza. Apart from the first and second respondents, the appellants also impleaded the Attorney-General (“**the third respondent**”).

The petition was opposed by the three respondents. Apart from replies to the Petition which the three respondents duly filed, they also lodged Notices of Preliminary Objection. For purposes of this appeal, the Notice of Preliminary Objection which Mr. Tundu A.M. Lissu, learned advocate, filed on behalf of the first respondent, states:

*“(a)-That as mere registered voters in the parliamentary election the subject of this Petition, the 1st, 2nd and 3rd Petitioners have no **locus standi** to file and prosecute this Petition for they have not pleaded how and whether the irregularities alleged in the Petition affected their rights as voters;*

*(b)-That though a candidate in the parliamentary election the subject of this Petition, the 4th Petitioner is without **locus standi** to file and*

prosecute the Petition as he had not pleaded how and whether the irregularities alleged in the Petition affected him personally as the candidate in the Parliamentary election aforesaid;....”

In the High Court, the Attorney General was represented by Mr. Paschal Marungu, learned Senior State Attorney. Mr. Marungu also raised a Notice of Preliminary Objection on behalf of the second and third respondents, contending that the first, the second and the third appellants herein lacked the *locus standi* to file an election petition.

At the hearing of the preliminary objection before Gwae, J., Mr. Lissu, learned counsel, advocated for the first respondent. He relied as his decisive authority on the decision of this Court in **Godbless Jonathan Lema vs. Mussa Hamis Mkanga, Agness Gidion Mollel and Happy Emanuel Kivuyo**, Civil Appeal No. 47 of 2012 (unreported), hereinafter referred to as “**Lema’s case**” which described the *locus standi* to be a common law right which was not open to the appellants without them showing how the results affected them as individual voters.

Mr. Lissu surmised that the Court in **Lema's case** held that it is up to the candidate who lost in a Parliamentary election to challenge the results because of violation of the candidate's rights but not the voters, who fail to show how the results affected them as voters. The learned advocate further submitted that the fourth appellant similarly lacked *locus standi* because he did not plead in the petition to show how, as a parliamentary candidate, he was affected by the irregularities he alleged in the petition.

Mr. Pascal Marungu fully associated himself with the submissions of Mr. Lissu, contending that the appellants lacked the requisite *locus standi* to initiate an election petition to avoid the election of a Member of Parliament. He further agreed with Mr. Lissu that the decision of the Court in **Lema's case** is a binding authority to support their legal proposition that registered voters could not file an election petition as a public litigation exercise because what the petitioners were craving for, was not of any benefit to the wider society or the public at large. Mr. Marungu, therefore, urged the trial Judge to strike out the petition.

In the High Court, the appellants were represented by Mr. Constantine Mutalemwa, learned advocate. He opposed the preliminary grounds of objection contending that as voters, the appellants had *locus standi* to lodge the petition. He submitted that as long as the appellants had pleaded in their petition that they were registered voters and voted in the Bunda Urban Constituency they, *ipso facto*, had legal standing to petition for the avoidance of the election.

Placing reliance on **Lema's case**, Gwae, J., as alluded to earlier on, sustained the objection and agreed with the two learned counsel that registered voters lacked *locus standi* to petition for the annulment of the election of the first respondent as a Member of Parliament for the Bunda Urban Constituency.

Aggrieved by the striking out of their petition, and after making several unnecessary applications for leave of the High Court to appeal to this Court, the appellants filed this appeal based on six (6) grounds of appeal.

In their essence, the six grounds of appeal would like the Full Bench of the Court to not only overturn the decision of Gwae, J. but also to depart from its own decision in **Lema's case**.

When this appeal came up for hearing on 1st day of July, 2016, it emerged that two learned Counsel for the appellants, Mr. Constantine Mutalemwa and Mr. Yasin Membar, had filed written submissions in support of their appeal which Mr. Mutalemwa adopted. The second and third respondents were also represented by two learned counsel, Mr. Obadiah Kameya, learned Principal State Attorney assisted by Mr. Baraka Nyambita, learned State Attorney. Mr. Sylvester Anthony Mwakitalu, learned State Attorney had earlier filed the written submissions on behalf of the second and third respondents, which Mr. Kameya adopted.

The first respondent, who did not file any written submissions, was absent when the appeal came up for hearing. The records of service show that she was duly served on 16/6/2016 and on 20/6/2016 through Mr. Lissu, her learned counsel. In terms of Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009, the Court acceded to Mr. Mutalemwa's application

for the hearing of the appeal to proceed in the absence of the first respondent.

Mr. Mutalemwa expounded on the written submissions by highlighting three issues of law which he regarded to be pertinent for the determination of this appeal by the Full Bench of the Court. First, he invited us to depart from the Court's position on *locus standi* of registered voters taken in **Lema's case**. That position, according to the learned advocate, is *per in curiam* as the voters' right to petition challenging an election is provided for and guaranteed under section 111 (1) (a) of **the Act**. He submitted that the plain meaning of the words used in section 111 (1) (a) of **the Act** unequivocally recognize the right of voters to lodge a petition seeking the annulment of the election of a Member of Parliament in which such a voter was registered and became eligible to vote. This provision is the *locus standi* provision and there was no need to resort to the common law to look for a legal standing to lodge a petition. Mr. Mutalemwa faulted the decision of the Court in **Lema's case** for constricting the *locus standi* of voters by holding that—

"...we think in our view section 111 (1) (a) of the Act gives rights to a registered voter whose right to vote have been interfered with or violated. In case violation affects the candidate it is for the candidate to challenge the election because his rights were violated. To give the section a broader interpretation that he has absolute right to petition even where his rights were not interfered with is to defeat the well-established principle of law of locus standi and indeed it does not sound well..."

Mr. Mutalemwa reasoned that in **Lema's case** the Court overlooked the plain meaning of the statutory words by reading into the law a requirement that voters must plead what benefits they intend to gain should the trial court nullify the election results of a Member of Parliament. He pointed out that the voters' right to lodge election petitions has been in the statute books in electoral laws enacted in 1964 and 1970 before being re-enacted under **the Act** and its revised edition of 2010.

He further insisted that **Lema's case** was out of conformity with the basic right the citizens have under Article 21 of the Constitution, to participate in the affairs of their country. He urged us to take the law back to its proper position which will allow the registered voters to ensure that candidates who win by resorting to illegalities should not be allowed to sit in Parliament. Mr. Mutalemwa urged us to allow the appeal and direct the High Court to hear the appellants' petition on its merits.

Before he sat down at the conclusion of his oral presentation, the Court asked Mr. Mutalemwa to offer his response to two salient matters. First, we asked him to read and comment on the relevance of Article 83 of the Constitution. He readily conceded that this provision, is the basis of **the Act**, specifically the power which the Constitution confers on Parliament to enact provisions to determine persons who can file election petitions to seek for the avoidance of election of Members of Parliament.

Secondly, we asked why the appellants wasted their time by lodging several applications seeking leave of the High Court to appeal to this Court. Inevitably, this exchange with the learned counsel, brings out the question whether, appeals to this Court from the High Court after conclusively

determining an election petition is conditional on obtaining prior leave to appeal. Mr. Mutalemwa was candid enough to acknowledge his mistaken belief that because the High Court merely struck out the petition instead of dismissing it, the matter was interlocutory and required prior leave of the High Court.

We are of the settled minds that, after the trial court had struck out the petition, that marked the end of its life in the High Court. There was nothing remaining before Gwae, J. that can be described as interlocutory. It was therefore taking a journey of futility when Mr. Mutalemwa filed so many applications for leave on assumptions that he was destined to appeal against an interlocutory order: see- **Republic vs. Harry Msamire Kitilya, Shose Mori Sinare and Sioi Graham Solomon**, Criminal Appeal No. 124 of 2016 (unreported).

It seems clear to us that from the perspectives of Article 83 (4) of the Constitution and section 115 (4) of the Act, appeals from decisions of the High Court on election petitions may go to the Court of Appeal without obtaining prior leave of the High Court. Article 83 (4) furnishes the basis

for appeals from election petition courts to lie to this Court. Article 83 (4) provides:-

"(4) There shall be a right of appeal to the Court of Appeal of Tanzania against a decision of the High Court in any matter which was heard in accordance with the provisions of this Article."[Emphasis added].

This provision was re-enacted by section 115 (4) of **the Act**:-

*"**115 (4)**-An appeal lodged pursuant to this section shall lie to the Court of Appeal."*

As this Court stated in **Morris Hamza Azizi vs. Angelina Simon Mhavile and Rupesh Chandrakant Kanabar**, Civil Appeal No. 73 of 2013 (unreported), section 5 (1) of the Appellate Jurisdiction Act, Cap. 141 (**the AJA**) has deliberately left it open for other written laws to make provisions for unconditional rights to appeal to this Court. We thus held:

*"The Court has on several occasions interpreted the scope of the words "**except where any other written law for the time being in force provides otherwise**" in section 5 (1). These words imply that the Appellate Jurisdiction Act is not the only written law that provides the statutory right of appealing to the Court. In other words, section 5 (1) leaves open to other written laws to enact statutory rights for appealing to the Court. This was discussed in **East African Development Bank vs. Khalfan Transport Co. Limited, CIVIL APPEAL No. 68 of 2003** (unreported)..."*

Thus, where such law does not impose a requirement to first seek leave to appeal, as the Lands Disputes Courts Act, Cap. 216 does, the right to appeal is automatic where the impugned decision finally disposes of the matter in the High Court or Tribunal.

In his replying submissions, Mr. Kameya was at pains to defend the position of the Court in **Lema's case** on *locus standi*, describing it *obiter*

dicta but still a good law which was correctly invoked by the trial Judge who struck out the appellants' election petition. In so far as the learned State Attorney is concerned, Gwae, J. was right to be guided by the restrictive interpretation of section 111 (1) (a) of **the Act** to the effect that only those voters whose rights to vote had been interfered with or violated could lodge an election petition.

Responding to the question whether *locus standi* in election petitions is statutorily provided for or is common law, Mr. Kameya submitted that it is *sui generis* and provided for under section 111 (1) of **the Act**. The learned Principal State Attorney similarly conceded that the Constitution and written laws invariably take precedence ahead of any principle of common law or equity. Mr. Kameya concluded his submissions by urging us to order the hearing of the grounds of objection left undetermined by the High Court, should the Court be minded to allow the appeal.

Like the learned counsel for the appellants, Mr. Kameya conceded that Article 83 of the Constitution is the authority behind the power of the Parliament to enact **the Act** and to identify persons who can file an election petition to contest parliamentary election results.

From his submission, Mr. Kameya, though conceding that section 111 (1) (a) of **the Act** is very plain, came out very openly first, to support the decision of the trial court to strike out the petition, and by extension he supported **Lema's case**, albeit by describing it as an *obiter dicta* but still good law.

In the light of those contrasting positions, it is appropriate to revisit what the Court said in **Lema's case** and how the trial High Court relied on that statement of the law to strike out the petition. The Court in **Lema's case** stated:

*"...In case violation affects the candidate it is for the candidate to challenge the election because his rights were violated. To give the section a **broader interpretation that he has absolute right to petition even where his rights were not interfered with is to defeat the well-established principle of law of locus standi** and indeed it does not sound well. We are not prepared to do so. We entirely agree with Mr.*

*Vitalis, Mr. Kimogomoro and Mr. Lissu on the issue of standing of a registered voter. In view of the above finding we are of the settled mind **that Mgonja Case was wrongly decided on the question of locus standi.** This is because we don't think that the legislature intended to say for example **any voter irrespective of the place where he had registered and voted can challenge any election results in any constituency in the country.** That is absurd. The statute must be construed to make it effective and workable."*

In order to determine whether we can go along with the **Lema's case** in its holding that **Mgonja's case** was wrongly decided on the question of *locus standi*, we need to ask ourselves whether the text of the words the Legislature has used in section 111 (1) (a) of the Act are not plain enough so as to require interpolations.

Both Mr. Mutalemwa and Mr. Kameya, have correctly submitted that Article 83 of the Constitution is the basis of **the Act** and the *locus standi* that is specified under section 111 (1) (a). We would like to trace *locus standi* of registered voters in Tanzania from the perspectives of Article 83 (3) of the Constitution of the United Republic. This provision vests in the Parliament the power to enact the appropriate law to prescribe such diverse electoral matters as identification of the persons who may lodge election petitions in the High Court, grounds of election petitions, time-frames within which to file the petition, procedure for litigating election petitions and laying the foundation for the right to appeal to the Court of Appeal. The relevant Article 83 (3) provides:

"83 (3) Parliament may enact legislation providing for the following matters:

(a) persons who may institute proceedings in the High Court seeking for determination of any question in accordance with the provisions of this Article;

*(b) the grounds and times for instituting such proceedings, procedure for instituting proceedings **and conditions** which have to be fulfilled in respect of every such proceeding; and*

*(c) prescribing the **powers of the High Court over such proceedings** and specifying **the procedure for the hearing** of the matter itself.”*

[Emphasis added].

True to the spirit of Article 83 (3), the Parliament enacted **the Act** to provide *locus standi* or ability of voters to lodge an election petition as a statutory right under section 111 (1) (a) which states:

*"**111 (1)** An election petition may be presented by any one or more of the following persons, namely-*

(a) a person who lawfully voted or had a right to vote at the election to which the petition relates;.....”

[Emphasis added].

It is very clear to us that the wording of the above provision includes the voters in the list of persons who are vested with statutory *locus standi* to institute a petition challenging the election. We therefore had to take some more interest in the legislative history of the right of voters to petition at the very least to appreciate where the law shifted course, away from recognizing the *locus standi* of voters.

Looking back, Mr. Mutalemwa is right to submit that the voters' ability to petition elections has never been an issue in light of plain reading of the statutory provisions in the 1964, 1970, 1985 Acts and in the 2010 revised edition of **the Act**. In other words, the text of the law vesting registered voters with *locus standi* has never changed from the position it is today since 1964. Just as what pertains today, election petitions seeking for the avoidance of the election of a Member of Parliament under the National Assembly (Elections) Act, 1964 [Act No. 11 of 1964] was triable in the High Court. Section 102 of Act No. 11 of 1964 lists voters first amongst the persons who were then allowed to present election petitions. The relevant Section 102 states:-

"102. An election petition may be presented by any one or more of the following persons, namely:-

*(a) **a person who lawfully voted or had a right to vote at the election Petitions to which the petition relates;***

(b) a person claiming to have had a right to be nominated or elected at such election;

(c) a person alleging himself to have been a candidate at such election."[Emphasis added].

Act No. 11 of 1964 was repealed by the Elections Act, 1970 [Act No. 25 of 1970]. Apart from retaining the right of voters to petition an election, Act No. 25 of 1970 made an extra mileage when, for the very first time added paragraph (d) to section 126 to include the Attorney General in the list of persons who could file an election petition thus:-

"126. An election petition may be presented by any one or more of the following persons, namely-

(a) a person who lawfully voted or had a right to vote at the election to which the petition relates;

(b) a person claiming to have had a right to be nominated or elected at such election;

(c) a person alleging himself to have been a candidate at such election;

*(d) **the Attorney-General.***" [Emphasis added].

There is no doubt from the above section 126 (a), that registered voters were accorded *locus standi* to present election petitions. In fact, voters successfully employed section 126 (a) of Act No. 25 of 1970 in **William Bakari and Othiniel Ahia vs. Chediell Yohane Mgonja and The Hon. Attorney General**, Civil Appeal No. 5 of 1982 (unreported, which we shall refer to as "**Mgonja's case**") to petition for the annulment of the election of their Member of Parliament.

Mgonja's case arose from the General Elections of October 1980. Mr. Chediell Mgonja won the Same Constituency by polling 17,156 votes against Mr. Manongi who garnered 14,494 votes. The appellants, who were duly registered voters in that constituency, filed an election petition in the High Court at Arusha. The High Court bench of Maganga, J., Rubama, J., and Chipeta, J., composed three separate judgments and each made separate findings on the contested issues. The majority of the High Court Bench (Maganga, J., and Rubama, J.) dismissed the petition and declared the election of Mr. Mgonja valid. On the minority, Chipeta, J., held the election void.

When the **Mgonja case** went on appeal, the *locus standi* of the two registered voters to petition the election of a Member of Parliament was neither challenged, nor was it made a contentious issue at all. So much so, the registered voters' appeal was successful leading to the avoidance of the election of Chediell Yohane Mgonja.

Although an interlude of thirty years separates **Mgonja's case** from **Lema's case**, the words used in the law on *locus standi* has remained the

same and continues to recognize the voters as amongst the persons who can file election petitions in the High Court.

Despite the fact that the language employed in section 126 (a) of Act No 25 of 1970 is in *pari materia* with the wording of section 111 (1) of the Act vesting in voters with the *locus standi*, in **Lema's case** the Court came out clearly and distinguished its earlier decision in **Mgonja's case** on the ground that the latter was wrongly decided on the question of *locus standi* because the right of voters to petition was given "**a very broad interpretation**". To that extent, Mr. Mutalemwa is right to submit that the Court in **Lema's case** constricted the interpretation of section 111 (1) (a) of Act to the effect that a voter no longer enjoys what the Court in **Lema's case** described as "**an absolute right**" to challenge the election of a Member of Parliament. According to **Lema's case**, a registered voter wishing to contest the election of a Member of Parliament, must be clothed with *locus standi* that is provided for under Article 26 (2) of the Constitution by showing how and where his rights were interfered with. It reasoned as follows:-

"Assuming for argument sake that the respondents were registered voters, did they have locus standi to petition and challenge the election basing on the alleged uncivil words the appellant is said to have uttered during the campaign period?

.....First, **we wish to state categorically that the rule of locus standi is governed by common law.** The rule is applicable in our courts by **virtue of section 2 (3) of the current Judicature and Application of Laws Act, Cap 358 RE 2002 subject to modification to suit the local conditions...** Currently **the rule in Tanzania has been extended to cater for matters of public interest under Article 26 (2) of the Constitution then a citizen of this country has locus standi to sue for the benefit of the society.**

...In our case the issue for consideration and decision is **whether or not a registered voter under section 111 (1) (a) of the Act has an absolute right to challenge**

the election result where his rights were not infringed. We have given a deep thought to the matter. First, we wish to point out that **election petitions are not in our view public interest litigation though they are matters of great public importance. This is because the relief sought would not benefit the entire society as a whole. Second the petition was not brought under Article 26 (2) of the Constitution which permits any person to bring public interest litigation...** We think in our view, **section 111 (1) (a) of the Act gives rights to registered voter whose rights to vote have been interfered with or violated.** In case violation affects the candidate it is for the candidate to challenge the election because his rights were violated. To give the section a broader interpretation that he has an absolute right to petition even where his rights were not interfered with is to defeat the well-established principle of law of locus standi..."

[Emphasis added].

Mr. Mutalemwa has urged us to restore the plain meaning interpretation of section 111 (1) (a) of the Act and move away from the constriction imposed on the provision by the Court in **Lema's case**. From the survey of legislative history of *locus standi* within the context of Article 83 of the Constitution, our inevitable conclusion is that *locus standi* or right of voters in Tanzania to institute election petitions emanates neither from the common law nor does it trace its legal validity from public litigation provisions of Article 26 (2) of the Constitution as suggested in **Lema's case**. It is statutorily provided for under section 111 (1) (a) of the Act just as it has existed under Act No. 11 of 1964 and Act 25 of 1970.

Further, section 111 (1) (a) is not, in our view, so wide as to allow voters the right to present petitions to annul results of any constituency of their choice as the Court held in **Lema's case**. The plain language of this provision shows that the right of voters to present petitions is specifically restricted to the "***election to which the petition relates***" within the Constituency in which he or she was registered to vote.

There is no doubt in our minds that literally, the text in the wording of section 111 (1) (a) is plainly clear and there was no need for the Court in **Lema's case** to resort to Article 26 (2) of the Constitution or the common law to find the *locus standi* of registered voters to present a petition to challenge the results of the election concerned. The Full Bench of the Court in **Chiriko Haruna David vs. Kangi Alphaxard Lugora, The Returning Officer for Mwibara Constituency and the Attorney General**, Civil Appeal No. 36 of 2012 (unreported) looking at the provisions governing security for costs under section 111 of **the Act** restated the settled cardinal rule of construction that courts should give pieces of legislation their respective plain meanings.

In its plain language, section 111 (1) (a) of **the Act** shows that the intention of the legislature is to accord a "***person who lawfully voted or had a right to vote***" *locus standi* free of any conditionality or interpolations. There is no room for the election petition court to interpolate or read into the section, the words that voters have to show how their rights or interests had been interfered with. If the Parliament in

its enduring wisdom had so intended, it definitely would have so plainly stated, particularly after **the Mgonja** decision.

The Act having prescribed that a "*person who lawfully voted or had a right to vote*" (like the registered voters) may lodge election petitions, it was, in our respectful opinion, not proper for the Court in **Lema's case** to suggest that election petition courts should fall back to the common law through the Judicature and Application of Laws Act, Cap 358 (**JALA**) to locate *locus standi* of registered voters to institute election petitions. **The JALA** prescribes circumstances where to apply Acts of Parliament, Customary law, Islamic Law and even Common Law. But, where there is an Act of Parliament, as there is section 111 (1) of **the Act**, which in unequivocal words states that voters can challenge the election of a Member of Parliament in an election petition, election petition courts cannot resort to the other sources of law including the Common Law. To do so would be trespassing into the exclusive preserve of the Parliament bestowed upon it only by Article 83 (3) of the Constitution. Our restatement here is in accord with what the Supreme Court of India stated in **Jyoti Basu & Others vs. Debi Ghosal & Others** 1982 AIR 983 where

it was emphasized that the electoral law is *sui generis* and self-contained in what it prescribes. This extends to prescribing who can petition an election:

"8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must

remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a strait jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. **So the**

Representation of the People Act has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute. *We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on Common Law or Equity. We see that **we must seek an answer to the question within the four corners of the statute. What does the Act says?***

We have to point out here that the Indian Supreme Court took that clear position despite the fact that the Indian Constitution has no similar provision like our Article 21 of our Constitution.

A similar approach was taken in **Mr. Adewale Segun Sunday & Anor v. Independent National Electoral Commission (INEC) & Others**, (2008) LPELR-CA/L/EPT/LAS/HA/003/07, where the Court of

Appeal of Nigeria had the occasion to discuss the parameters of section 144 (1) of the Electoral Act, 2006 of Nigeria which deals with persons entitled to present election petitions. This provision states:

"144. (1) An election petition may be presented by one or more of the following persons:

(a) a candidate in an election;

(b) a political party which participated in the election."

The Nigerian Court of Appeal restated its position regarding *locus standi* in election petitions, and specifically how to discern from the pleadings whether a person has the legal right to be heard in an election petition:

"...Locus standi in election petitions is statutorily defined and leaves no room for hide and seek. Election petitions are sui generis distinctively different from other civil proceedings. The right to present a petition

under that unique procedure is stricto sensu as provided by the relevant statutes. A petitioner's locus standi is established by the averments in the petition showing prima facie evidence that the petitioner falls within the class of persons entitled to present an election petition. **A Court or tribunal is therefore, bound by the averments in the election petition as the sole source and only avenue for determining the petitioner's locus standi...**" [Emphasis added].

We are persuaded by the above two decisions of the Supreme Court of India and the Court of Appeal of Nigeria and accordingly hold that registered voters in Tanzania still retain not only their statutory right but fundamental right to petition for the annulment of the election of their Members of Parliament under the clear provisions of the Act.

We should also point out here that the right of voters to so petition is not a uniquely Tanzanian invention. Similar provisions appear in other jurisdictions. Section 19 of the Electoral Act, Cap 13 of Zambia and section

17 of the Representation of the People Law, 1992 of Ghana are two examples:

Electoral Act of Zambia:

"19. An election petition may be presented to the High Court by one or more of the following persons-

(a)-a person who lawfully voted or had a right to vote at the election to which the election petition relates;

(b)-a person claiming to have had a right to be nominated as a candidate or elected at the election to which the election petition relates;

(c)-a person claiming to have been a candidate at the election to which the election petition relates;

(d)-the Attorney-General."

Representation of the People Law, 1992 of Ghana:

"17. An election petition may be presented by one or more of the following persons-

(a)-a person who lawfully voted or had a right to vote at the election to which the petition relates;

(b)-a person claiming to have had a right to be elected at the election;

(c)-a person alleging himself to have been a candidate at the election;

(d)-a person claiming to have had a right to be nominated as a candidate at the election."

[Emphasis added].

We take a leaf from the decision of the Court of Appeal of Nigeria in **Mr. Adewale Segun Sunday & Anor v. Independent National Electoral Commission (INEC) & Others** (supra) that the trial High Court was, in the determination of the *locus standi* of the appellants before

it, "***bound by the averments in the election petition as the sole source and only avenue for determining the petitioner's locus standi....***" Having averred in paragraphs 1 to 4 of their Petition in the High Court about their respective Tanzanian citizenship, coupled with their registration as voters and having voted in the Bunda Urban Parliamentary Constituency, the four appellants herein were legally entitled to be heard in their petition under section 111 (1) (a) of **the Act**.

After filing their petitions with averments showing their registration status as voters in the Bunda Urban Constituency, these voters challenging the election of their elected Member of Parliament, bear the same burden of proof like other categories of petitioners, to satisfy the trial High Court on the grounds for the avoidance of the election of the first respondent in terms of section 108 (2) of **the Act**.

We would like to agree with Mr. Mutalemwa that the provisions of Article 83 of the Constitution read together with section 111 (1) (a) of **the Act** which confer *locus standi* on voters of Tanzania, manifest several other underlying constitutional rationales. First, the *locus standi* extended to

registered voters in Tanzania underpins the **“Fundamental Objectives and Directive Principles of State Policy”** in Part II of the Constitution to the effect that the Executive, the Legislature and the Judiciary are to serve the people of Tanzania. Article 8 (1) (a) reminds these three branches of the State that *“sovereignty resides in the people and it is from the people that the Government through this Constitution shall derive all its power and authority.”* Secondly, the *locus standi* of voters manifests the constitutional underpinning that citizens should participate in the affairs of their Government **(see-Articles 8 (1) (d) and 21 of the Constitution)**. Apart from enacting laws which affect their wellbeing including their economic activities, Parliament is also the principal organ working on behalf of the people, vested with the authority to oversee and advise the Government of the United Republic.

We think, section 111 (1) (a) is an important weapon of some sort which the people of Tanzania have retained to ensure the purity of elections in a working democracy and that the people they elect to Parliament to oversee the Government on their behalf, have not violated the electoral laws, in the entire process of being elected. This is where the

benefit to the wider society becomes manifest. To uphold the impugned High Court Ruling, in our considered view, would be tantamount to flouting the express intention of Parliament and forcing an irreconcilable interpretation on section 111 (1) (a).

In the light of our conclusion that it is section 111 (1) (a) of **the Act** which confers *locus standi* on voters of Tanzania, we are of the firm view that it is appropriate for the Court to vacate part of its holding in **Lema's case** which, we respectfully find not to be good law. We accept, though, the holding in **Lema's case** that to be successful in the petition, the petitioner must first of all prove by way of evidence and not at the threshold level, that he:

"was a person who lawfully voted or had a right to vote at the election to which the petition relates"

a condition precedent not met by the petitioners in the **Lema case**.

Having considered the comprehensive arguments of both counsel and fully considered the relevant laws, we hold that this appeal has merit and we allow it. The Ruling of the trial High Court (Gwae, J.) dated 25th January, 2016 striking out the appellants' Miscellaneous Civil Cause No. 1

of 2015 is hereby quashed and set aside. The record is hereby sent back to the trial High Court to be heard on its merit by a different Judge beginning with preliminary points of objections which were left undetermined. Each party to bear its own costs.

DATED at **DAR ES SALAAM** this 8th day of July, 2016.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

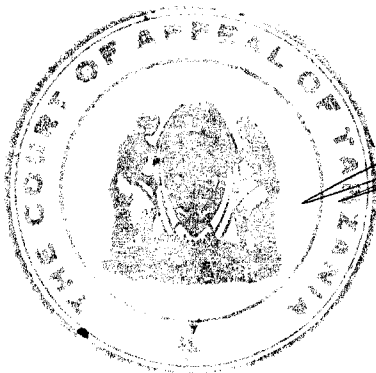
K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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




E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL