IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A, And MMILLA, J.A.)

CONSOLIDATED CIVIL REVISION NOS. 1, 3 & 4 OF 2016

1. ZELLA ADAM ABRAHAMAN .....1ST APPLICANT
2. AMINA M. MWADAU .....2ND APPLICANT
3. DR. STEVEN L. KIRUSHWA.....3RD APPLICANT

VERSUS

1. THE HON. ATTORNEY GENERAL .....1ST RESPONDENT
2. ORAN MANASE NJEZA.....2ND RESPONDENT
3. THE RETURNING OFFICER MBEYA VIJIJINI PARLIAMENTARY CONSTITUENCY.....3RD RESPONDENT
4. JUMA H. AWESO.....4TH RESPONDENT
5. THE RETURNING OFFICER, PANGANI CONSTITUENCY.....5TH RESPONDENT
6. ONESMO NANGOLE.....6THRESPONDENT
7. THE RETURNING OFFICER, LONGIDO CONSTITUENCY.....7TH RESPONDENT

(Revision from the Proceedings and /or Orders of the High Court of Tanzania at Mbeya, Tanga and Arusha)
(Teemba, J., Fikirini, J., And Mwangesi, J.)
In
Miscellaneous Civil Causes No. 4 of 2015, 3 of 2015 & 36 of 2015
Respectively

RULING OF THE COURT

12thApril, & 5th May, 2016

RUTAKANGWA, J.A.:

It is religiously said, but we are not certain if it is sufficiently remembered, if at all, that *"Justice delayed, is Justice denied."* Conversely, conventional wisdom has it that *"Justice hurried, is Justice buried."*

Admittedly, these twin evils impede the smooth administration of what should be a credible justice system, and should, therefore, be roundly abhorred and eliminated.

In our considered opinion, therefore, in any properly functioning or delivering justice system, the overriding vision should be to avoid denying justice through unexplainable delays and/or sacrificing it at the altar of speed and expediency.

The need for speedy but not hasty justice delivery gets constitutional recognition in Article 107A (2) of our 1977 Constitution ("the Constitution") which partly reads:

> *"In delivering decisions in matters of a civil and criminal nature in accordance with the laws, the courts shall observe the following principles, that is to say-*
>
> *(a) impartiality to all without due regard to ones social or economic status;*
>
> *(b) not to delay dispensation of justice* ***without reasonable ground****;*
>
> (c) *to dispense justice without being tied up with undue technical provisions which may obstruct dispensation of justice."*

[Emphasis is ours].

We have deliberately laid emphasis on the phrase *"without reasonable ground"*. This is because, although it is a constitutional imperative to deliver timely justice, the same Constitution recognizes that ***at times*** justice may be delayed on account of unavoidable or acceptable reasons. For instance, you cannot expect the courts to deliver timely, quality and accessible justice, if the Judiciary is not adequately funded and/or manned etc. The complexity of a case may also occasion delays, etc. Cognisant of these realities, the African Court on Human and Peoples' Rights in para 135 of its judgment dated 18th March, 2016, in Application 006/2013, **In the Matter of Wilfred Onyango Nyanyi and 9 Others v. United Republic of Tanzania**, echoed similar sentiments thus:-

> *"The Court notes from the onset that there is no standard period that is considered "as reasonable" for a court to dispose of a matter. In determining whether time is reasonable or not, each case must be treated on its own merits."*

With these preliminary pertinent observations, it is now incumbent upon us to address ourselves to the specifics, that is, the endemic delays in disposing of election petitions, without which, we believe, these *suo motu* revision proceedings would not have been necessary.

The Preamble to the Constitution sets out its foundations. It partly reads thus:-

> *"WHEREAS WE, the people of the United Republic of Tanzania, have firmly and solemnly resolved to build in our country a society founded on the principles of freedom, justice, fraternity and concord,*
>
> *AND WHEREAS those principles can only be realized in a democratic society in which the Executive is accountable to a Legislature composed of elected members and representatives of the people, and also a Judiciary which is independent and dispenses justice without fear or favour, thereby ensuring that all human rights are preserved and protected and that the duties of every person are faithfully discharged:"*

As a consequence of the above, it is provided as follows in Article 8 of the Constitution:

"8.-(1) The United Republic of Tanzania is a state which adheres to the principles of democracy and social justice and accordingly-

(a) sovereignty resides in the people and it is from the people that the Government through this Constitution shall derive all its power and authority;

(b) the primary objective of the Government shall be the welfare of the people;

(c) the Government shall be accountable to the people and

(d) the people shall participate in the affairs of their Government in accordance with the provisions of this Constitution".

Consistent with the above articulated principles, the right to freedom in the participation of public affairs is guaranteed in Article 21. This Article prescribes as follows.

"21.(1) Subject to the provisions of Articles 39,47 and 67 of this Constitution and of the laws of the land in connection with the conditions for electing and being elected or for appointing and being appointed to take part in matters related to governance of the country, every citizen of the United Republic is entitled to take part in matters

pertaining to the governance of the country, either directly or through representatives freely elected by the people, in conformity with the procedures laid down by, or in accordance with, the law.

(2) Every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation".

It goes without saying, therefore, that the right to vote and to be voted into an elected office is a basic human right. See, also, the identical Articles 21, 25 and 13 of the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966 and the African Charter on Peoples' and Human Rights, 1969, respectively.

To give effect to this basic right, it is stipulated in Article 76 that *"there shall be held an election of a member of Parliament in every constituency".* It is further unequivocally provided in Article 77(1) that:

"Members of Parliament representing constituencies shall be elected by the people in accordance with the provisions of this Constitution and also the provisions of a law enacted by Parliament pursuant to this

Constitution to regulate the election of Members of Parliament representing constituencies."

The law envisaged in Article 77(1) is already in place. It is the National Elections Act, Cap 343 ("the Election Act"). It is this Act which gives powers to the Chief Justice to make rules to regulate the practice and procedure to be followed by the courts in handling election petitions. Such rules are in accord with, among others, Articles 8 and 107A (2) of the Constitution.

It is axiomatic to observe here in passing that in any true democracy as ours, a sound and credible election is the most reliable means for the determination of who the true representatives of the people envisaged by the Constitution will be. All the same, however credible the entire electoral process might be, electoral disputes will of necessity arise. Election disputes, it has been aptly observed, are inherent to all elections. Fortunately, both the Constitution and the Elections Act recognize this fact. They, therefore, prescribed a remedy for challenging actual or perceived violations of the right to vote and/or to be voted into office. This is by way of election petitions: See Article 83(1) (3) and (4) of the Constitution and sections 108, 110, 111 and 113 of the Elections Act. In this way, the basic right guaranteed under Article 21 of the Constitution is effectuated.

We take it to be a mundane truth that a vital part of any election which makes the entire process undisputably credible is the opportunity for both contesting candidates and voters alike to seek a peaceful, fair and speedy resolution of all election disputes in impartial courts or tribunals.

We have to point out at the outset that the courts, through these election petitions, have a duty to preserve our constitutionally cherished democratic principles and not to emasculate them.

They also have to adopt a balanced judicial approach giving the electoral laws which enhance our basic rights, purposive and liberal interpretations, avoiding relying on undue technicalities. In so doing they will be preserving the sanctity of the will of the people and not subverting it and promoting the enjoyment of the basic right enshrined in Article 21 of the Constitution. This is because the legitimacy and authority of democratic governments are derived solely from the consent of the governed through the ballot box as articulated in Article 8 of the Constitution and not from the courts.

As already alluded to, the Elections Act in section 117(1), empowers the Chief Justice to make rules of practice and procedure to regulate the conduct of election petitions. In the exercise of these powers, the Chief

Justice promulgated the National Elections (Election Petitions) Rules, 2010 **vide** G.N. No. 447 of 2010 ("the Rules"). These Rules regulated the conduct of election petitions instituted in the aftermath of the 2010 General Elections. However, realizing the pressing need to promote further efficiency in the management and disposal of future election petitions, and conscious of the principles enunciated in Article 107A(2) of the Constitution, the Chief Justice amended the Rules in 2012. The amendments were effected **vide** the National Elections (Election Petitions) (Amendment) Rules, 2012, G.N. No. 106 of 2012. These amendments aimed at achieving expeditious resolutions of electoral disputes.

By these amendments, there was a radical departure from the previous practice of giving evidence in election petitions which tended to cause delays. A new Rule 21 A was introduced into the Rules, which reads thus:-

> *"21A. (1) The petitioner shall not less than forty eight hours before the time fixed by the court for trial of an election petition, deliver at the office of the Registrar an affidavit sworn by each witness whom the petitioner intends to call at the trial, setting out the substance of his evidence.*

(2) Each affidavit shall be enclosed in a sealed envelope together with sufficient certified true copies for each of the judges, all other petitioners in the same petition and the respondents, and shall be opened by the court when the witness who has sworn the affidavit is called to give evidence.

(3) The affidavit shall be read by or on behalf of the witness and shall form part of the record of the trial and a deponent may be cross-examined by the respondent and re-examined by the petitioner.

(4) Subject to sub-rule(5), a witness shall not be permitted to give evidence for the respondent unless an affidavit sworn by him, setting out the substance of his evidence, together with sufficient certified true copies for the use by the judges and the petitioner is handed to the court when called to give evidence.

(5) A witness for the petitioner or the respondent who fails to deliver affidavit made under sub-rule (2) or (4) shall not be permitted to give evidence without leave of the court, and the court shall not grant such leave unless sufficient reason is given for the failure.

(6) The provision of Order XIX of the Civil Procedure Act, and the Oaths and Statutory

Declarations Act shall apply to affidavits made under this rule."

It is worth noting here that our neighbours and Co-Partner States in the East African Community, Kenya and Uganda, have embraced similar reforms in both their Presidential and Parliamentary Elections Petitions Rules.

Rule 12(1) of the Kenya Elections (Parliamentary and County Elections) Petitions Rules, 2013 ("the Kenya Rules") provides as follows:-

"12.(1) A Petitioner shall, at the time of filing the petition, file an affidavit sworn by each witness whom the Petitioner intends to call at the trial.

(2) The affidavit under sub-rule (1) shall-

(a) state the substance of the evidence;

(b) be served on all parties to the election petition with sufficient copies filed in court; and

(c) form part of the record of the trial and a deponent may be cross-examined by the Respondents and re-examined by the Petitioner on any contested issue.

(3) Subject to sub-rule (4), a witness shall not give evidence on behalf of the

Petitioner unless an affidavit is filed in accordance with this rule.

(4) A witness for the Petitioner who fails to deliver an affidavit as required by this rule shall not be allowed to give evidence without the leave of the court.

(5) The court shall not grant leave under sub-rule (4) unless sufficient reason is given for the failure.

(6) The provision of Order 19 of the Civil Procedure Rules, 2010 and the Oaths and Statutory Declarations Act shall apply to affidavits under this rule".

On the other hand, Rule 14 of the Uganda Presidential Elections (Election Petitions) Rules, 2001("the Uganda Rules") reads thus:-

"14. Evidence at trial.

1. Subject to this rule, all evidence at the trial, in favour of or against the petition shall be by way of affidavit read in open court.

2. With leave of the Court, any person swearing an affidavit which is before the Court, may be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn.

3. The Court may, of its own motion examine any witness or call and examine or recall any witness if the court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision.

4. A person summoned as a witness by the Court under sub-rule (3) of this rule may, with leave of the Court, be cross-examined by the parties to the petition."

Our Rules became effective on 30th March, 2012. We take judicial notice of the fact that we held our last Parliamentary Elections ("the Elections") on 25th October, 2015. A number of election petitions have been filed challenging the conduct and results of the Elections in some of the constituencies. These petitions include:

(a) Misc. Civil Cause No. 4 of 2015 Between Zella Adam Abrahaman And The Hon. Attorney General, Oran Manase Njeza and the Returning Officer of Mbeya Vijijini Constituency, at Mbeya High Court sub-registry.

(b) Misc. Civil Cause No. 36 of 2015 at Arusha High Court sub-registry, Between Dr. Steven Lemomo Kirushwa And Onesmo

Nangole, The Hon. Attorney General and The Returning Officer for Longido Parliamentary Constituency; and

(c) Misc. Civil Cause No. 2 of 2015 at Tanga High Court sub-registry Between Amina Mohamed Mwidau And Jumaa Hamidu Aweso, The Returning Officer, Pangani Constituency and The Hon. Attorney General.

As the Rules became effective on 30th March, 2012, Rule 21A should have governed the procedure of giving evidence at the trials of all the petitions instituted following the Elections. Evidently, that was not the case in respect of most of these petitions that have reached the trial stage, including the above mentioned three petitions. The hitherto long established procedure of giving oral evidence in accordance with the provisions of the Evidence Act, Cap 6, for one single reason to be shown shortly, was followed. We shall elaborate on what took place in order to make one appreciate the reason behind these *suo motu* revision proceedings.

The preliminary hearing in respect of Misc. Civil Cause No. 4 of 2015 of the High Court at Mbeya was held on 29th February, 2016. The petitioner was advocated for by Mr. Ladislaus Rwekaza, learned advocate, who informed the trial court that the petitioner intended to call sixty (60)

witnesses. For Mr. Oran M. Njeza (the 2nd respondent), Ms. Joyce Kasebwa, learned advocate, appeared and said they would call five (5) witnesses. Mr. Mulisa and Mr. Mwakilasa, learned Senior State Attorneys, represented the Hon. Attorney General (1st respondent) and the Mbeya Vijijini Constituency Returning Officer (3rd respondent). They, too, intimated that they were going to call seventy (70) witnesses.)

We have no doubts in our minds that these witnesses were to be summoned under the provisions of Rule 21 of the Rules which reads as follows:-

> *"21. Witnesses* ***shall be summoned and sworn in the same manner as nearly as circumstances admit, as in a trial by the court in the exercise of its original civil jurisdiction*** *and shall, without prejudice to the provisions of any other law, be subject to the same penalties for giving false evidence or for non attendance." [Emphasis is ours]*

This particular Rule, we have learnt, is a replica of section 110(2) of the Elections Act.

Indeed, the trial started in earnest the following day, on March 1st 2016. As of 4th March, 2016, eight witnesses had given oral evidence in support of the petition.

However, on that day, when PW8 Mariam Simon Mwamahonje was under cross-examination from Mr. Mrema, learned State Attorney, one Mr. Haruna Matagane, learned Senior State Attorney, who was teaming up together with Mr. Mulisa and Mr. Mrema and had just finished cross-examining ***in detail,*** PW8 Mariam, intervened. Addressing the learned trial judge, he said:-

> *"**There is information** that the Government Notice No. 106 of 30.03.2012 which amended the National Election Petition Rules, by adding a new Rule 21 A(1) which requires the petitioner in not less than 48 hours before the time fixed for hearing to file affidavits of witnesses with the Registrar setting out the substance of their evidence".* [Emphasis is ours].

Thereafter, Mr. Rwekaza added:-

> *"Madame Judge, **let us be given time to get the Government Notice referred to** so that we may properly address the court."* [Emphasis is ours].

Ms. Kasebwa concurred. The trial then stood adjourned until 13.30 hrs.

When the trial court reconvened at 14.00 hrs, Mr. Mulisa was the first to address the court thus:-

> *"This matter was adjourned for some time* ***so that we could trace the said Government Notice 106 of 2012. We have seen the Government Notice 106/2012*** *and upon reading the same, we pray for more time to research on the same provisions of this Government Notice so that we may present to court a way forward."* [Emphasis is ours].

Both Mr. Rwekaza and Ms. Kasebwa agreed.

The learned trial judge, in the circumstances, ordered:

> *"On the basis of the legal provisions* ***which was brought to the attention of court today,*** *I agree with the learned State Attorney and counsel. Hearing on 08.03.2016."* [Emphasis is ours].

This was the last order made in the case, going by the trial court's record. When, at the hearing of these revisional proceedings, we enquired as to what was the ruling of the trial court on their submissions, we were told that no submissions were made. When they re-convened, we were told, the learned trial judge informed them that she was not in possession of the

court record as it had been sent to Dar es salaam upon urgent request. All the same, suffice it to say here that what transpired in court on 4th March, 2016 proves beyond any shadow of doubt that the learned trial judge, State Attorneys, advocates and the litigants were, respectfully, totally unaware or ignorant of the existence of GN. No. 106 of 2012.

Regarding Misc. Civil Cause No. 36 of 2015 of the High Court, at Arusha, the story is similar. The preliminary hearing was conducted on 11th February, 2016. Dr. Masumbuko Lamwai, learned advocate for the Petitioner, had informed the trial court that they intended to call *"not less than 40 witnesses."* On their part, Mr. Method Kimomogoro, learned advocate for the 1st respondent and Mr. Muhalila, learned State Attorney, for the 2nd and 3rd respondents, intimated that they would call at least thirty (30) and five (5) witnesses respectively.

The trial of this petition started on 29 February, 2016. The petitioner testified for four days continuously before the second witness entered the witness box on 3rd March, 2016. The hearing was scheduled to continue on the following day.

Before the hearing resumed on 4th March, 2016, the learned trial judge informed the parties and their counsel that he had discovered that the trial began without complying with the provisions of Rule 21A of the Rules. Mr.

Juma Ramadhani, learned Senior State Attorney and counsel for the 2nd and 3rd respondents, responded thus:

> *"Hon. Judge, it is unfortunate that we were not aware of amendment made under GN. No. 106 of 2012."*

Given this fact, all counsel unanimously prayed for an adjournment in order to peruse the said new provision of law. The prayer was granted so as to enable:

> *"the learned counsel to go through the amendment and address the court on the way forward."*

When the trial court reconvened on 4th March, 2016, counsel did not address the court. Instead, the learned trial judge observed that the failure of the witnesses of the petitioner to lodge affidavits arose *"from the fact that the said amendment did escape the mind of the court as well as the learned counsel for both sides."* He accordingly referred the matter to this Court *"for proper derectives".*

On receiving that record, it was directed that **suo motu** revision proceedings under s. 4(3) of the Appellate Jurisdiction Act, Cap 141, be opened for the sole purpose of *"determining whether or not non-compliance*

with Rule 21A of G.N. No. 106 of 2012 was a material irregularity affecting the legality of the trial" of the petition, hence Civil Revision No. 2 of 2016.

The trial of Misc. Civil Cause No. 3 of 2016 in the High Court at Tanga started with the holding of the preliminary hearing on 25th February, 2016.

At the preliminary hearing, Mr. Mashaka Ngole, learned advocate for the petitioner, had indicated that they were going to call about forty three (43) witnesses. Mr. Werema Kibaha, learned advocate for the 1st respondent, told the trial court that they too, would call not less than twenty one (21) witnesses. On his part, Mr. Saraji Iboru, learned Senior State Attorney, said the 2nd and 3rd respondents would settle for fifteen (15) witnesses.

The substantive trial commenced on 29th February, 2016, with the evidence of the petitioner followed by five witnesses. After the sixth witness had completed her oral testimony, Mr. Ngole had breaking news. He told the trial court that:-

> *"While on tea break, I* ***received information from my colleagues on a legal procedure which I believe escaped all our minds. The information was the amendment of Rule 21*** *of the National Elections.....Rules, which was under GN No. 106 which was published on 30th March, 2012. The amendments add Rule 21A... Pursuant to Rule*

21 A parties are required before calling a witness to appear in court, as a witness, there has to be his/her sworn affidavit. ***Since it was an over-sight on our part, we pray to comply to (sic) the requirement on the remaining witnesses. We pray rule 21 A, parties are required before calling a witness to appear in court as a witness there has to be his/her sworn affidavit. Since it was an over-sight on our part we pray to comply to (sic) the requirement on the remaining witnesses.*** *We pray for us to be given forty eight hours as from Monday, for the affidavits of those witnesses to be submitted...." [Emphasis is ours].*

Mr. Sylvester Mwakitalu, learned Senior State Attorney for the 2nd and 3rd respondents, thus responded:

"We have heard the prayer made by the petitioner's counsel and leave it upon the court to make its decision."

Mr. Kanyama, learned advocate for the 1st respondent, echoed similar sentiments.

In her carefully considered opinion, the learned trial judge ruled as follows:-

> *"**Court**: To err is human, to forgive a Divine". In this situation likewise, **I consider the oversight as to involve all of us since we all have a duty and an obligation to remind the party and the court of any amendment in place or anything which has been over looked.** That was of course not the case. Fortunately the oversight was noted very early into the conduct of the case. The damage can therefore be easily salvaged. I believe the gist behind the amendment was to see trials especially the election petitions which are in nature long and with a long list of witnesses, with lengthy testimonies be shortened by way of an affidavit. A sworn affidavit received from a witness as required on the law would without a doubt shorten the process. The idea is therefore embraced fully. Nevertheless, in the present case there is a hurdle as there are five (5) witnesses who have already testified. The witnesses have already been cross-examined and re-examined. In short these five (5) witnesses have fully processed.*
>
> *In my view, since the affidavit to be sworn is equivalent to examination in chief, I consider that the*

intended purpose or procedure has been followed, albeit not in compliance to the amendment stated in Rule 21A, but since the court under rule 21A(5) can grant leave for the witness to testify without an affidavit prior to his/her testimony, I thus take a liberty to waive the requirement of them filing an affidavit based on what their testimonies has gone full circle , to ask them to redo the same would in a way be redundant.

As for the remaining witnesses for the parties including the petitioner, the requirement of R 21A should be complied with. Since the requirement demand the sworn affidavit be filed within forty eight (48) hours, I thus hereby order for the Rule to be complied with and the time will start running as from Monday the 7th March, 2016 and the first witness appear in court for cross examination on Wednesday 9th March 2016. I have given such an extension so that a good number of witnesses can be prepared and the process of hearing be speeded up.

As for the petitioner, she also falls within the ambit of filing a sworn affidavit as she had not completed her examination in chief, neither cross-examined nor re-examined. Her evidence is therefore not complete. Due to the need of compliance to requirement she would therefore as well as file an

affidavit. This is irrespective of part testimony she made to the court. It is so ordered.

Signed: P. Fikirini

JUDGE

29/02/2016"

We learnt from counsel for all parties in the petition that as was the case in the Mbeya petition, the hearing could not continue on 9th March, 2016, as scheduled because the court record had been sent Dar es Salaam, hence Civil Revision No. 2 of 2016.

When the three revision applications came before us for hearing on 12th April, 2016, counsel for all the parties were agreed that there was only one pertinent common legal issue. This was:

> *"Whether or not non-compliance with Rule 21A of GN. No. 106 of 2012 was a material irregularity affecting the legality of the trials in the three petitions."*

They accordingly urged us to consolidate the three applications and hear them together. A consent consolidation order was made accordingly. This ruling, therefore, covers the three applications.

Following the consolidation order, the parties became as follows: -

1. *Zella A. Abrahaman ..... 1st Applicant*
2. *Amina M. Mwadau ..... 2nd Applicant*
3. *Dr. Steven L. Kirushwa ..... 3rd Applicant*

Vs.

1. *The Hon. Attorney General.....1st Respondent*
2. *Own M. Njeza ..... 2nd Respondent*
3. *The Returning Officer, Mbeya Vijijini Constituency ..... 3rd Respondent*
4. *Juma H. Aweso.....4th Respondent*
5. *The Returning Officer, Pangani Constituency.....5th Respondent*
6. *Onesmo Nangole.....6th Respondent*
7. *The Returning Officer, Longido Constituency..... 7th Respondent*

Appearance for the parties was as follows:

Advocate Ladislaus Rwekaza for the 1st Applicant.

Advocate Mashaka Ngole for the 2nd Applicant

Advocate Dr. Masumbuko Lamwai for the 3rd Applicant

Mr. Obadia Kameya, Principal State Attorney, Mr. David Kakwaya, Principal State Attorney, Mr. Sylvester Mwakitalu, Senior State Attorney and

Mr. Paul Shaidi, Senior State Attorney for the 1st, 3rd, 5th and 7th Respondents.

Advocate Joyce Kasebwa for the 2nd Respondent

Advocate Anthony Kanyama for the 4th Respondent

Advocate John Materu for the 6th Respondent

On the side of the Applicants, Dr. Lamwai was the lead counsel, by consent of the concerned learned advocates. Lead counsel for the Respondents, also by consent, was Mr. Obadia Kameya, Principal State Attorney. Counsel for both sides, admittedly, made brief but focused oral submissions before us.

Submitting on behalf of his colleagues, Dr. Lamwai contended that "*Rule 21 of the Rules enacts the principle of orality of proceedings,*" *in that "proceedings have to be oral in the sense that evidence has to be given* ***viva voce***". In his elaboration, he stressed that as the Civil Procedure Act, Cap 33, requires witnesses to address the courts orally, in election petitions, "*witnesses have to appear before the court and testify* ***viva voce***", and be examined in accordance with the provisions of the Evidence Act, Cap 6.

Nevertheless, Dr. Lamwai argued, Rule 21A introduces a second principle of documentation, that is proof by affidavit. It was his strong

contention that currently, an election petition can be proved partly by affidavital evidence, as *"a witness cannot testify unless there is affidavital evidence"*. To him, Rule 21A negates Rule 21 without repealing it. On account of this, he reasoned that *"once a witness is in the witness box, he can give additional evidence on the basis of Rule 21"*, in addition to his/her affidavital evidence. He appeared to emphasize that Rule 21A, which appear to be discriminatory, was uncalled for since the principle of orality has not been abolished. He predicated this stance on Rule 21A (5) which gives the court discretion to grant leave to a witness to testify orally, notwithstanding his/her failure to deliver his/her affidavit in terms of Rule 21A (1).

Dr. Lamwai sought to buttress his arguments by invoking Rule 32 of the Rules, which he believes *"gives the court a way forward"*.

Rule 32 of the Rules, for ease of reference, reads as follows: -

> *"32. (1) Save as is expressly provided for to the contrary in these Rules, no petition shall be dismissed for the reason only of non-compliance with any of the provisions of these Rules or for the reason only of any other procedural irregularity unless the court is of the opinion that such non-compliance or irregularity has resulted or is likely to result in a miscarriage of justice.*

(2) Where there has been any non-compliance with any of the provisions of these Rules or any other procedural irregularity, the court may require the petitioner, subject to such terms as to costs or otherwise as the court may direct, to rectify the non-compliance or the irregularity in such manner as the court may order.

(3) Where an order has been made under sub-rule (2) of this rule, and the petitioner fails to comply with such order within such time as the court may specify, the court may dismiss the petition.

Placing much reliance on Rule 32 Dr. Lamwai, strongly contended that the court has power to grant leave retrospectively and retain evidence received without complying with Rule 21A (1), where good cause is shown, provided no injustice is occasioned to any party in the proceedings.

Rule 32 was not the only arsenal in Dr. Lamwai's armoury. He invited us to draw a distinction between irregularities which go to the root of the matter which cannot be saved even by Article 107A (2) (e) of the Constitution and those which do not and are therefore curable. On this, he referred us to the Court's decision in the case of **The Hon. Attorney General v. Rev. Christopher Mtikila**, Civil Appeal No. 20 of 2007 (unreported) and the

Kenyan Court of Appeal decision in **Githere v. Kimungu** [1976 – 1985] IEA 101 (CAK).

Having said so, Dr. Lamwai was quick to admit that in the three election petitions under scrutiny there was non-compliance with the seemingly mandatory provisions of Rule 21A (1). He conceded that these were procedural errors. He went on to tellingly submit that: -

> *"It was our duty to assist the Court, but I beg you to take judicial notice that these Acts, and Government Notices, are hardly available. This was a bona fide mistake on all the parties and the court.*
>
> *We invite the Court to invoke Rule 32 (1) and hold that the procedural irregularity did not go to the root of the petitions and should not non-suit any of the parties. This irregularity has not resulted and is not likely to result in a miscarriage of justice.*
>
> *In the testimony which was taken without affidavits, the respondents and their advocates were present in court and they had every opportunity to raise objections, to cross-examine the witnesses, to object to the admissibility of any exhibit. Their right to be heard was not curtailed..."*

In the light of the above, Dr. Lamwai pressed us to order that the testimony so far taken in the three petitions remain on record and be acted upon. This, in his view, would save time and expenses. He concluded urging that an order be made to the effect that the provisions of Rule 21A of the Rules be observed and strictly followed in respect of the would-be witnesses.

Both Mr. Rwekaza and Mr. Ngole fully associated themselves with the submission of Dr. Lamwai. Only Mr. Rwekaza added, without a good deal of elaboration, that Rule 21 and Rule 21A are contradictory because one *"cannot swear before the court to give evidence and at the same time swear an affidavit"*. But what appears to us to have been his more formidable point is his undisputed contention that: -

> *"Most of all the stakeholders had no access to GN. No. 106 of 2012 and this was good reason for the petitioners not to have complied with Rule 21A. I bought one copy of it yesterday, from the Government Printer from which I got photocopies which I have just supplied to the Court. It was the only one available there".*

Mr. Kameya was unmoved by the submissions of counsel for the applicants. His submission was by all standards shorter. By way of introduction, he stated that Rule 21 of the Rules has two scenarios: **One,** summoning of witnesses for purposes of giving evidence, and **two,** provisions for penalties. He went on to argue that Rule 21A qualifies Rule 21 for as it stood alone it *"was a bit a vague"* and so it does not contradict it. As for Rule 21 (5), it was his contention that like section 95 of the CPA, it preserves the inherent powers of the court, stressing further that Rule 32(2) gives the court discretion to rectify errors as does Rule 21A (5).

Addressing specifically his mind to the concession of Dr. Lamwai that there were procedural irregularities in the proceedings before the High Court, he stressed that such blatant non-compliance cannot be condoned by the courts. For him, there was only one remedy. This was nothing short of quashing *"the proceedings where witnesses testified without complying with Rule 21A".* He also pressed that the ruling in Tanga Misc. Cause No. 3 of 2016 dated 29th February, 2016, should also be nullified and set aside for violating the clear provisions of Rule 21A.

Commenting on the ostensible defence fronted by the petitioners/applicants as a possible defence for the admitted failure to

comply with Rule 21A, he appeared convinced that they cannot plead ignorance as ignorance of the law has never been a defence. He appeared less perturbed by the undisputed fact that even counsel for the Attorney General, the Returning Officers and the successful candidates not mentioning the learned trial judges, were totally unaware of the existence of GN. No. 106 of 2012, before the trials began.

Mr. Mwakitalu, Senior State Attorney, had an additional prayer. He prayed that Dr. Lamwai's prayer to the Court to grant leave retrospectively in order to save the oral evidence already on record, be rejected in its totality.

On his part, Mr. Materu chose, understandably, to play the role of Hamlet. His fair sense for justice, led him to admit that *"errors were committed by the courts, the parties and their counsel which led to non-compliance with Rule 21A,"* which is mandatory in nature. For this reason, he thought that the impugned proceedings can be saved by section 178 of the Evidence Act. On the other hand, he was of the view that if the evidence on record is retained, this *"would set a bad precedent"*. All the same, in response to the Court's question, he was candid enough to admit that none of the parties had been prejudiced, by the conceded procedural irregularities.

Both Mr. Kanyama and Ms. Kasebwa, joined hands with Mr. Kameya and Mr. Mwakitalu and had, therefore, no extra submission or observations to make.

In disposing of the crucial single issue before us, we have found it proper to first answer some pertinent questions arising from the submissions of both Mr. Rwekaza and Mr. Kameya.

The questions are whether both Rules 21 and 21A are contradictory and confusing and vague. On this we are in agreement with Mr. Kameya that there is no element of contradiction and/or confusion in the two Rules.

We believe that it is common knowledge that election petitions are neither ordinary civil suits nor criminal cases. They have their own peculiarities which necessitate modifications of certain rules of civil proceedings. They are proceedings of their own class. That is why it is specifically provided in Rule 21 that the court trying on election petition shall have power to summon witnesses and have them sworn or affirmed *"as nearly as circumstances admit, as in a trial by the court in the exercise of its original civil jurisdiction"*.

Once a witness has been duly summoned, and attends, he or she would be sworn or affirmed and his/her evidence taken under the provisions of the Evidence Act and the CPA. This is the true import of Rule 21. The provisions of this Rule still apply even after the introduction of Rule 21A. Witnesses for both sides will still be summoned, where a party cannot get his/her witness without the aid of the court. Witnesses will still be sworn/affirmed before testifying. This is notwithstanding whether they are giving entirely oral evidence under Order XVIII, Rules 4 and 5 of the Civil Procedure Act, Cap 33 (under the "principle of orality") or under the provisions of Rule 21A (under the "principle of documentation").

It has also occurred to us that a cursory look at Rule 21A (3), and (5), lends support to the assertion that the principle of orality has been retained partly in sub-rule (3) and wholly in sub-rule (5). This is because evidence on cross-examination and re-examination will be oral despite the witness affidavital evidence and a witness testifying under the provisions of sub-rule (5), shall give entirely oral evidence.

We have deliberately omitted to mention sub-rule (4) for one good reason. This is because unlike sub-rule (3) where the right to cross-examine and re-examine is guaranteed, such rights are not spelt out in sub-rule (4).

We can only observe in passing only, that the trial courts will have to be invoke their inherent powers in order to meet the ends of justice. All in all, we are of the settled mind that Rule 21 which was rightly retained, exists independently of Rule 21A, and it is neither vague nor does it contradict Rule 21A. That being the case, we find no modicum of truth in the assertion that Rule 21A qualifies Rule 21. On the contrary, since all witnesses under Rule 21A have to be summoned and/or sworn/affirmed, before testifying under either modality or principle, Rule 21A is subject to Rule 21. Furthermore Rule 21 cannot be said to be vague as it is a replica of s.110(2) of the Elections Act which has never been questioned in any election petition.

It now behoves us to canvass next, the request by Mr. Kameya to totally ignore the plea of the applicants/petitioners that they failed to comply with the dictates of Rule 21A(1) and (5) on account of being unaware of its existence. He found this plea totally untenable in law because, we should admit, as he correctly pointed out, it is universally held that ignorance of law is no defence.

The maxim that ignorance of the law does not excuse (*"ignorantia legis non excusat"*) is of respectable antiquity. But it is mainly a centuries – old criminal law maxim, undoubtedly, familiar to lawyer and layperson alike.

Professor Glanville Williams in his TEXT BOOK OF CRIMINAL LAW, (1978) says that *"Almost the only knowledge of law possessed by many people is that ignorance of it is no excuse"* (pg. 405). It has been given statutory recognition in our criminal justice jurisprudence, **vide** section 8 of our Penal Code, Cap. 16. The section reads as follows: -

> *"Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence."*

In spite of this fact and our long-standing allegiance to this hoary maxim, law Professor Sharon L. Davies, in his thought provoking article entitled **"The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance"**, in defence of this maxim, laments that:

> *"Despite its familiarity and wide usage, the* ***ignorantia legis*** *principle has been seriously eroded over the last century, and in recent years, this erosion has threatened to become a landslide. At one time the list of exceptions to the maxim was quite short, but the courts of the twentieth century have quietly expanded it. The number of federal criminal statutes under which courts have*

abandoned the maxim is now particularly large and challenges based on ignorance or mistake of law grounds in the federal courts are both common and frequently successful. Knowledge of illegality has now been construed to be an element in a wide variety of statutory and regulatory criminal provisions...": 19 Duke Law Journal, Vol. 48 at pp. 343-4.

That is as far as criminal law is concerned. When it comes to civil litigations, the balance tilts in favour of inapplicability of the maxim to them.

As early as the 18th century, it was thus held in **Lansdown v. Lansdown** (1930), Mos. 364:

*"That maxim of law, **ignorantia juris non excusat**, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases".*

In **Nepean Hydro Electric Comission v. Ontario Hydro** [1982] 1 SCR 347, Justice Dickson of the Supreme Court of Canada, said:

"The maxim ignorantia juris non excusat, has no relevance to the case of a man seeking to recover back money paid by him in misa-pprehension of his legal rights..."

Justice Muldoon in **Rollinson v. Canada** [1991] F.C.J. 25 held that:

> *"The rule of **criminal law**, ignorantia juris non excusat... applies only to **criminal law**."*

In the memorable words of Justice Abbot in **Montrious v. Jefferys**, 2 Car & P.113 or 172 E.R. 51 (1825):

> *"No attorney is bound to know all the law. God forbid that it should be imagined that an attorney or a counsel, or even a judge is bound to know all the law..."*

No discussion on the subject would be complete, in our opinion, without making reference to what Pringle, J. said and with which we are in full agreement, in **R. v. Crosswell**, 2007 UNCJ 25. He held:

> *"Generally, ignorance of the law is no excuse, although there are some exceptions. An exception (is)... where the charge was one of wilful failure to comply with probation and the breach was an allegation of committing a criminal offence with a separate mensrea. A further exception is recognized to the general rule that ignorance of the law is no excuse, **for cases of officially induced error**."*

Be it as it may, we are not of the settled mind that the maxim has lost its relevance in modern times. Holding so would be tantamount to introducing a dangerous precedent, and would be inimical to the smooth administration of justice, particularly, criminal justice. We are completely wary of introducing the unmanageable "easy-to-assert and difficult-to-dispute claim of ignorance that would otherwise flow from the lips of any person facing criminal" proceedings.

As far as civil litigations are concerned, and particularly election dispute litigations, in our considered opinion, the maxim should be applied sparingly and with great circumspection, in order to avoid imposing leaders on the people who are not the direct results of the peoples will. The free lawful enjoyment of the right to participate in the affairs of their Government should be not reined in on fanciful reasons. The maxim must be applied in each case, depending on its attendant peculiar circumstances.

All things considered, therefore, we find ourselves in a position to associate ourselves with this rationale for the maxim and impeccable defence to it which is postulated as follows: -

> *"The rationale of the doctrine is that if ignorance were an excuse, a person charged with criminal*

offences or a subject of a civil lawsuit would merely claim that he or she is unaware of the law in question to avoid liability, even if that person really does know what the law in question is. Thus, the law imputes knowledge of all the laws to all persons within the jurisdiction no matter how transiently...

The doctrine assumes that the law in question has been properly promulgated – published and distributed, for example, by being printed in a government gazette, made available over the internet, or printed in volumes available for sale to the public at affordable prices. In the ancient phrase of Gratian, ***Leges instituuntur cum promulgantur*** *('Laws are instituted when they are promulgated'). In order that a law obtain the binding force which is proper to a law, it must be applied to the men who have to be ruled by it. Such application is made by their being given notice by promulgation. A law can only bind when it is reasonably possible for those to whom it applies may acquire knowledge of it in order to observe it, even if actual knowledge of the law is absent for a particular individual. A secret law is no law at all" (found at https:/en.wikipedia.org/wiki/ignorantia juris non excusat).*

In our case, there is no gainsaying that Rule 21A of the Rules was gazetted in the Government Gazette of 30th March, 2012. From the material before us, that is all we can safely and confidently say about it. But, whether that Government Notice was printed in adequate numbers, sufficiently promulgated and distributed in order to be accessed by and have a positive impact on the twenty million-plus eligible voters, is anybody's guess. Whether it was posted on any official website, is beyond our ken, for we could not trace it on the webs.

We are aware and this was conceded by Mr. Kameya before us, that sometimes in August, 2015, two months before the General Elections, sensitization workshops for some Justices of Appeal, Judges of the High Court, Magistrates, advocates, etc. on "Electoral Laws and Handling of Election Matters in Tanzania" were organized. These workshops were superintended by the Principal Judge in person. Two of the papers presented were on the "Management of Election Petitions," and the "Emerging Jurisprudence from the Post-2010 Election Petitions". This was the best opportune moment to publicize GN. No. 106 of 2012 and sensitize all the stakeholders on its importance and applicability to the post – 2015 election petitions. It is apparent and unfortunate that this was not done.

The key stakeholders left the Workshops halls unaware of the existence of GN. No. 106 of 2012. We failed to take the current while it served. Can we in the circumstances justifiably blame the judges, lawyers and litigants in the trials of the post 2015 – election petitions who failed to observe it? Our considered and firm answer to this germane question is in the negative. We have no flicker of doubts in our minds that GN. No. 106 lacked the requisite promulgation and/or publicity to give it the teeth to bite its violators.

It is a fact of life that good reasons (Mr. Kameya's argument) must of force give place to better. Counsel for the Applicants have presented a convincing case. They did not wilfully or negligently flout the provisions of Rule 21A of the Rules. For reasons not attributed to them, they were totally unaware of its existence as were the judges and counsel for all the respondents. Since we judges do not leave our common sense in our chambers once we don our robes and enter the court rooms, we cannot shut our eyes from these ground realities. We accordingly respectfully find Mr. Kameya's call to us to reject the compellingly cogent explanation of the applicants to account for the failure to comply with the requirements of Rule 21A as well as to quash the ruling of the learned trial judge in Tanga Misc. Civil Cause No. 3 of 2015, totally untenable both in law and logic. Acceding

to such a prayer in the peculiar circumstances of this case, would be tantamount to a traversity of justice. We reject his prayer instead.

The next question to resolve is what should be done in the circumstances, having found and held that the applicants were prevented by good cause from complying with the mandatory provisions of Rule 21A?

Mr. Kameya invited us to adopt what we would respectfully call a draconian approach, that is, to quash the proceedings wherein the petitioners' witnesses had testified without complying with Rule 21A. Dr. Lamwai, on his part, urged us to order the retention of the testimony already taken. Indeed, that was the approach adopted by the learned trial judge in the Tanga petition.

Put in its proper perspective, the question posed above translates into whether guided by settled law, can it be safely held that the admitted irregularity is an incurable one?

As we have already shown, it is a constitutional imperative that justice should be dispensed without being unduly bound by technical provisions. All the same, as the Court succinctly held in **Attorney General v. Rev. Christopher Mtikila** (supra): -

> *"...justice can only be done in substance and not by impeding it with mere technical procedural irregularities that occasion no miscarriage of justice... not all procedural irregularities can be ignored. Some can be. Others, such as those irregularities which go to the root of the matter cannot be ignored."*

The Supreme Court of India also in **Bhagwan Swaroop v. Mool Chand** (1983) (2) SCC 132, lucidly stated thus: -

> *"Fair play in action must inhere in judicial approach also as in administrative law and court's approach should be oriented with this view whether substantial justice is done between the parties, or technical rules of procedure are given precedence over doing substantial justice in court. A Rule of procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties."*

We subscribe wholly to these holdings. This is on account of the fact that *"judicial cases do not come and go through the portals of a court of law by mere mandate of technicalities"* (**Fulgencio v. National Labor Relations Commission**, 457 Phil. 868, 880-1 (2003)).

We take it to be firmly established that where a rigid application of the rules will result in a manifest failure of justice, technicalities should be disregarded in order to resolve the case. As was correctly observed in **Pablo D. Acaylas, Jr. v. Danico G. Harayo**, [G.R. No. 1766995, July 30, 2008]:

> *"Technicality, when it deserts its proper office as an aid to justice and becomes its great hindrance and chief enemy, deserves scant consideration from courts."*

We are settled in our minds, then, that Rule 21A is pure and simple a rule of procedure and not substantive law. It is there to provide a mechanism by which the legal rights of parties in an election petition created by the Constitution and the Elections Act may be enforced or attained through production of evidence.

As already demonstrated, Rule 21A provides two modes of producing evidence in support or in opposition of an election petition. The primary mode is by affidavital evidence under sub-rules (1) and (4) and the secondary one, which co-exists with the primary one, in appropriate cases, is by oral evidence. The prevailing situation in our country is totally different from the one obtaining under the Uganda Rules wherein *"all evidence at the trial, in favour or against the petition shall be by way of affidavit read in open*

court", and cross-examination and/or re-examination is permissible only with leave of the Court.

In the circumstances, we can safely hold, as we hereby do, that Rule 21A of the Rules did not shut out completely oral evidence. So when oral evidence is taken either through ignorance of the law or mistake of the law, that evidence would be taken to have been validly taken and should not in the interests of justice be discounted at all. This is "fair play in action", which guided the learned trial judge in the Tanga High Court petition.

The aim of the courts should always be oriented towards rendering substantial justice as procedure has always been a hand-maid of justice. We should quickly point out in passing here that we have separately used the phrases "ignorance of the law" and "mistake of law", deliberately. This is because the two do not mean the same thing. They denote two different concepts. A person who acts in ignorance of the law acts in a state of unawareness as to the law's existence, as was the case in the elections petitions under scrutiny. A person who acts under a mistake of law, is aware of the existence of the law controlling his/her behavior but misunderstands what the law prohibits or commands (See, generally, Prof. Sharon L. Davies (supra).

In the light of the above discussion, then, what should be the solution of the only issue in these revision proceedings? The solution, in our considered view, should be found in the intention behind the amendment to the Rules.

We have already sufficiently demonstrated that Rule 21A was not introduced to make affidavital evidence supplant oral evidence of the litigants' own witnesses as appears to be the case under the Uganda Rules.

The driving force behind this crucial amendment was the desire to streamline procedures for expediting trials of election petitions, for ordinary rules of procedure in civil cases do not always serve to effectuate to this. As was aptly observed by Justice Uwais, CJN (as he then was) in the case of **Orubu v. NEC** (1988) 5NWLR (pt.94) 323 at page 347:

> *"As a matter of deliberate policy to enhance urgency, election petitions are expected to be devoid of the procedural clogs that cause delay in the disposition of the substantive dispute."*

Conscious of this fact, Rule 32 (supra) was incorporated into the Rules.

With the provisions of Rules 21A (5) and 32 in mind, we have asked ourselves this simple but pertinent question: Had the trial in any of these

election petitions proceeded to conclusion on the basis of oral evidence only, would the High Court on becoming aware of the requirements of Rule 21A at the time of composing its judgment (or even this Court in the exercise of its appellate or revisional jurisdiction) have dismissed the petition? Our considered answer is in the negative. Rule 32 would have saved the proceedings. That being the case, we shall not nullify the trial proceedings in any of the three election petitions. Doing so would be tantamount to making a great leap backward and defeating the main objective of amending the Rules and offending Articles 8 and 107A (2) of the Constitution. There will be unjustified delays when it is clear that the Rules do not outlaw oral evidence and would work grave injustice to the petitioners for there is no guarantee of availability of the witnesses who have already testified, let alone landing them into unnecessary expenses. The right and acceptable way forward is the one adopted by Fikirini, J. whose decision we confirm and sustain. We accordingly respectfully decline to follow the path espoused by Mr. Kameya, which will be a clog in the speedy management of these election petitions.

All said and done, we hold that the failure to comply with Rule 21A in the three petitions was not outlandish and therefore not a fatal irregularity.

It never prejudiced any party and in the peculiar circumstances already elucidated in this ruling, did not affect the legality of the proceedings. We accordingly order that the evidence already taken in the three petitions be retained and the trials continue on the basis of the approach articulated by Fikirini, J.

We so order.

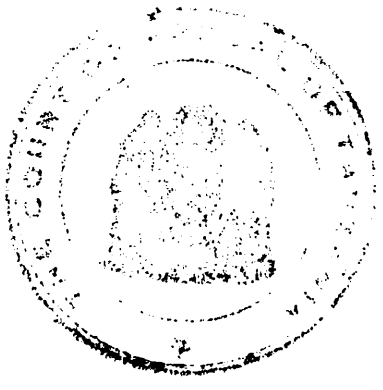
DATED at **DAR ES SALAAM** this 28th day of April, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

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



Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL