IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MBAROUK, J.A., MWARIJA, J.A. And MKUYE, J.A.)

CIVIL APPEAL NO. 199 OF 2016

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

VERSUS

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

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

(N.P.Z. Chocha. J.)

dated the 18th day of November, 2016

in

Miscellaneous Civil Case No. 01 of 2015

JUDGMENT OF THE COURT

11th May &, 28th July, 2017

MWARIJA, J.A.:

On 25/1//2015, like in other constituencies in our country, general elections were held in Bunda Urban Constituency in Mara region (hereinafter "the Constituency"). The parliamentary election in the Constituency was contested by among others, Stephen Masato Wasira sponsored by Chama Cha Mapinduzi (CCM) and Esther Amos Bulaya who vied the seat through

Chama Cha Demokrasia na Maendeleo (CHADEMA). On 26/10/2015 after the election, Esther Amos Bulaya (the 1st respondent) was declared the winner. According to the results, she scored 28,568 votes while Stephen Masato Wasira got 19,126 votes. The other candidates, Maganja Yeremia of ACT, Ascetic Malagila of DP and Dr. Lucas Webiro of TLP got 293, 136 and 74 votes respectively.

The appellants, Magambo J. Masato, Matwiga M. Matwiga, Janes S. Ezekiel and Ascetic N. Malagila (the 1st - 4th appellants respectively) were among the registered voters in the Constituency. They were aggrieved by the election results and consequently filed a petition against the respondents in the High Court. The resultant decision which has given rise to this appeal was handed down on 18/11/2016. The appellants had sought to avoid the results claiming that the election was "*null and void and fraught with non-compliances and irregularities resulting into unfairness of the entire parliamentary election.*"

According to the petition, the particulars of non-compliance and irregularities complained of by the appellants (after some of the claims were struck out by the trial court and/or abandoned by the petitioners/appellants) are as follows:

1. *That pursuant to the details embodied in Form No. 24B issued to the 4th petitioner, the number of registered voters for the Bunda urban Parliamentary Constituency is indicated as 164,794 which number is different from the official number of the registered voters issued by the 2nd Respondent to all Contesting Political parties and their respective candidates which is 69,369....*

2. *That the illegal campaigns were conducted by the followers of Chama Cha Demokrasia na Maendeleo 'Chadema' at Nyamatoke Polling Station; registration No. 200301110501 and the polling agent for the candidate sponsored by CCM known as Samweli Makindi formally complained to the presiding officer but no action was taken against the said followers.*

3. *That the 2nd respondent indicated that the total number of polling stations to be 199 while the official number of polling stations as provided by the Electoral Commlssion was 190....*

4. *Alternatively, upon completion of the voting and counting of the votes cast at all stations, the 2nd respondent issued no written notice towards notifying either Chama Cha Mapinduzi or his (sic) candidate;*

Stephen Masato Wasira on the date, time and venue for addition for all votes cast.

5. *That the 1st Respondent contested for the Bunda Urban Parliamentary Constituency without disclosing to the Registrar of the political parties the required amount of fund intended to be used for the relevant election on account that her sponsoring political party never issued the relevant certificate nor was any report lodged to the Registrar of Political Parties.*

At the hearing of the petition, the appellants relied on the evidence of three witnesses while on their part, the respondents had two witnesses. In compliance with Rule 21A of the National Election (Election Petitions) Rules, 2010 as amended by GN No. 477 of 2010 published on 30/3/2010 (hereinafter "the Election Rules"), the witnesses for both parties filed affidavits and later appeared in court for cross-examination and re-examination.

In their affidavits, the three witnesses for the appellants, Ascetic Malagila (PW1), Janes S. Ezekiel (PW2) and Stephen Masato Wassira (PW3) deponed on matters which they believed had adversely affected the results of the election. According to PW2, who was the CCM campaigns manager

in the Constituency, on 26/1/2015 when he went to the office of the Returning Officer (DW2) he found the addition of votes exercise going on. He averred that he so informed PW3 who responded that he would send an email to the Returning Officer to ask for postponement of addition of votes pending his arrival at the venue on account that he was not notified of the addition process.

According to PW2, the Returning officer proceeded with the addition and at the end, declared the 1st respondent to be the winner basing the results on the total number of 164,794 registered voters. That number was shown in the prescribed Form, PARLIAMENTARY ELECTION RESULTS IN A CONSTITUECY Form (Form No. 24B).The witness deponed also that he came to realize that the number of polling stations in the Constituency was increased by the Returning Officer from 190 to 199 without following the laid down procedure.

On his part, PW3 deponed that when he visited Nyamatoke polling station, he was informed by one Samwel Makindi that certain voters affiliated to CHADEMA and polling clerks were campaigning for that party and despite reporting the breach to the Presiding Officer that officer did not take any action. PW3 alleged further that the results of the election were based on

a wrong number of registered voters. He stated yet another irregularity that the 1st respondent did not disclose the amount of funds which she expected to use as election expenses.

The alleged irregularities were also the subject of PW1's testimony. The witness, one of the candidates who contested under sponsorship of the Democratic Party (DP) stated that before the Election Day, he was given a list consisting of 190 polling stations. He averred that, later however, without consulting the candidates or their political parties, the Returning Officer increased the number of stations to 199. Like PW2, the witness alleged that the Returning Officer indicated in Form No.24B the total number of registered voters in the constituency to be 164,794 while there was no such number of registered voters.

In cross-examination and re-examination, the witnesses maintained that the irregularities and non-compliances complained of had the effect of voiding the election results.

As stated above, in resisting the petition, the respondents relied on the evidence of two witnesses. In their affidavit and both in cross-examination and re-examination, they denied that there were irregularities and no-compliances which had the effect of voiding the results of the election. The

1st respondent (DW1) denied the claim that she failed to disclose the amount of funds she expected to use as election expenses (the budget). She testified that she complied with that requirement by disclosing the budget to the Acting District Secretary of her political party on 20/8/2015. It was her defence that had she failed to do so, the Electoral Commission of the United Republic of Tanzania (hereinafter "the Commission") would not have nominated her to contest for the parliamentary seat.

She also denied the claims that the Returning Officer had failed to notify PW3 about the date, time and the venue for addition of the votes cast (the Notice) and the contention that the Returning Officer flawed the election results by basing addition of the votes on fictitious number of registered voters. It was her evidence that whereas PW2 was in the addition hall on the material date showing that the requirement of issuing the Notice was complied with, the mistake in recording wrong number of registered voters, was corrected in the presence of the 3rd and 4th appellants, did not affect the election results.

The claims were also denied by the 2nd respondent (DW2) who was the Constituency's Returning Officer. Briefly, her evidence was to the following effect: Prior to the election date, she distributed a list of 199

proposed polling stations to all participating political parties so as to enable them prepare and appoint the agents who would represent their candidates at the polling stations on the election date. She later, however, received from the Commission the final list consisting of 190 polling stations (Exh.D1). It was only at those stations where the voting took place. Until the process was completed, she did not receive any complaint that there were any irregularities as regards voting, counting of votes or holding of any illegal campaigns at any of the polling stations.

After the voting and after having received the results in the prescribed Form- PARLIAMENTARY ELECTION RESULTS AT THE POLLING STATION (Form No.21B) from all polling stations in the constituency, she wrote a letter (Exhibit D2) notifying all the participating political parties and their respective candidates that addition of votes would be done in the District Council hall on 26/10/2015 at 5.30 p.m. The letter was served through the District Secretaries of political parties including CCM through a dispatch book titled "*UCHAGUZI MKUU 2015 OFISI KUU.*" As a result of the Notice, she said, the 1st respondent and her agent, the ACT, TLP and DP candidates as well as the CCM agent (PW2) attended at the addition process. After addition of the votes, she recorded the results in Form No. 24B. In the course of doing so,

she mistakenly indicated the number of registered voters in the Constituency to be 164,794. She however corrected the error when her attention was drawn to it. Apart from that error, there was no any other complaint as regards the correctness of the actual number of the registered voters and the analysis of the votes cast.

In cross-examination and re-examination, the witness reiterated her contention that the mistake of entering a wrong number of registered voters in Form No. 24B was not intentional but occurred due to exhaustion. She explained that the wrongly recorded number of voters was mistaken for the total number of registered voters in the three constituencies of Bunda urban, Bunda rural and Mwibara which were all under her supervision as the Returning officer. She stated that the correction, though not accurately made, was effected at the time when the 3rd appellant, who had a copy containing the error, had left from the addition hall. According to her evidence, copies of Form No.24B were distributed to the candidates and/or their agents after the election results had been recorded therein so that they could sign them in terms of Reg. 66(1) (b) of the Regulations. On the contention that PW3 had sent an email to her seeking postponement of the

addition exercise, she denied having received any communication from PW3 on that matter.

When cross-examining DW2, the learned counsel for the 3rd appellant questioned the correctness of the number of rejected votes at Guta Ward polling stations. Using documents purported to be copies of Form No. 21B the learned counsel intended to establish that the rejected votes were more than those shown in Form No. 24B. The response by DW2 was that the documents relied upon by the 2nd appellant were not genuine copies of Form No.21B. As a result, at the close of hearing, the learned counsel unsuccessfully moved the trial court to exercise the powers conferred on it by S. 176(1) of the Tanzania Evidence Act [Cap.6 R.E. 2002] (the Evidence Act) to order production of original copies of Form No. 21B for Guta Ward polling stations so as to satisfy itself as to the correctness or otherwise of the number of rejected votes.

Having considered the parties' evidence and final submissions filed by their respective learned advocates, the High Court found the petition devoid of merit and thus dismissed it. The learned judge was of the view that the evidence tendered by the appellants did not prove the claims to the standard required in an election petition, that is; proof beyond reasonable doubt.

The appellants were aggrieved by the decision of the High Court hence this appeal. In their memorandum of appeal they raised the following ten grounds of appeal.

1. *That the learned trial Judge erred in law and fact in not deciding that final election results for the Bunda Urban Parliamentary Constituency was tainted with irregularities worth of nullifying the election results on pretext that the* ***after-voting irregularities*** *are without any effect.*
2. *That the learned trial judge erred in law and fact in determining that the burden of proof towards proving the compliance of the* ***Election Expenses Act No. 6 of 2010*** *did not shift to the 1st Respondent in terms of section 115 of The Evidence Act [Cap. 6 R.E. 2006].*
3. *That the trial Judge erred in law and fact in determining that the Appellants had the duty of calling a witness towards proving or disproving that the notification letter for addition exercise*

was addressed and receive by the District Secretary of Chama Cha Mapinduzi (CCM) on behalf of its sponsored contesting candidate.

4. *That the learned trial Judge erred in law and fact in not considering the good case law on the legal consequences of not notifying the contesting candidate of the date, place and time for addition of all votes cast.*
5. *That the learned trial Judge erred in law and fact in misconstruing the Regulations 48 (2) of* ***The National Elections (Presidential and Parliamentary Elections)*** *2015 (sic) read together with sections 70 (2) and 85 of the* ***Nations Elections Act [Cap 343 R.E. 2015]*** *towards deciding that the service of the notice of invitation to the Political Party was sufficient to the candidates.*
6. *Alternatively, the learned trial Judge erred in law and fact in deciding that the modality of serving*

the notification letter to the Political Party on behalf of the contesting candidate is acceptable and so overrides the laid down mandatory procedure spelt out under the Regulation 61 of The National Elections (Presidential and Parliamentary Elections), 2015 (sic).

7. *That the learned trial Judge erred in law and fact on basing the Courts decisions on personal opinion and extraneous matters in respect of poverty in Bunda Urban Constituency, Taxpayer's burden and the generalized trend of the national elections held countrywide in 2015 as reasons for dismissing the petition and so not nullifying the relevant election results.*

8. *That the learned Judge erred in law and fact for not invoking the provisions of section 176(1) of the Evidence Act [Cap 6 R.E. 2002] and order production of final election Report or election Result Form No. 21B for Guta Polling District with*

a view of revealing the truth on the issue pertaining to correctness of the number of the rejected votes in the entire constituency as indicated in Form 24B Exhibit D-3.

9. *That the learned trial Judge erred in law and fact in deciding that the affidavits filed in election petitions under Rule 21A(6) of the* ***National Elections (Elections Petitions Rules), 2010,*** *as amended, should also be based on the information and so verified in terms of* ***Order VI Rule 15*** *of the* ***Civil Procedure Code [Cap 33 R.E. 2002****].*

10. *That the learned trial Judge erred in law in construing and deciding that the provisions of the Oaths and Statutory Declarations Act [Cap. 34 R.E. 2002] were inadvertently referred to in the Election Petitions Rules and as such do not complement of the Civil Procedure Code [Cap. 33 R.E. 2002] in respect of the affidavits filed in election petitions."*

At the hearing of the appeal, the appellants were represented by Mr. Constantine Mutalemwa assisted by Mr. Yassin Membar, learned advocates. The 1st respondent had the services of Mr. Tundu Lissu, learned advocate while Ms. Angela Lushagara and Mr. Obadia Kameya, learned Principal State Attorneys appeared for the 2nd and 3rd respondents.

We wish, as a starting point, to consider grounds 3, 4, 5, and the alternative ground No. 6. The grounds concerns the claim that the Returning Officer failed to notify PW3 and CCM the date, place and the time of carrying out addition of votes after the election as required by Reg. 61 of the Regulations. The grounds concern also the effect of non-compliance with that legal requirement. It was submitted for the appellants that the learned trial judge erred firstly, in holding that appellants had failed to prove that the requirement was not complied with. The learned judge is faulted for deciding that the appellants should have called the CCM District Secretary to prove that neither CCM nor its candidate was so notified.

Secondly, it was argued that since, according to the evidence of PW3, the 2nd appellant (PW2) was not the former's agent and because, apart from the evidence of DW2, the dispatch book relied upon as having been signed by the CCM District Secretary to acknowledge receipt of the letter (Exh. D2),

did not show that PW3 was one of the addressees of the notification letter, the trial judge's finding that there was proper notification was, for that reason, based on misapprehension of the evidence and the applicable law. It was argued further that the trial judge erred in holding that although PW3 was not served personally, service on the political party was sufficient service to a candidate. The trial judge is also faulted for basing his finding on the provisions of Reg. 48(2) of the Regulations and S. 85 of the National Elections Act (Cap. 343 R. E. 2002) (hereinafter "the NEA"), the provisions which carter for counting of votes at polling stations. The learned counsel stressed that Sections 72(2) and 85 of the NEA do not waive the requirement of complying with Reg. 61 of the Regulations.

In response, Mr. Lissu opposed the arguments made by the counsel for the appellants stating that the trial court was correct in its finding that the requirement of notifying the CCM candidate was complied with. He relied on the evidence of DW2 that the Notice was received by the CCM District Secretary. Ms. Lushagara and Mr. Kameya, learned Principal State Attorneys also supported the trial court's decision. Ms. Lushagara argued that in law, a notice to a political party is sufficient notice to its candidate. She added that the attendance of PW2 at the addition of votes exercise supports DW2's

evidence that CCM was dully served. She added that PW2 was admitted in the addition hall in his capacity as the candidate's agent. Furthermore, she argued, although the appellants denied service of the Notice on the CCM District Secretary, they did not call him to testify on that fact. For that reason, she submitted, the fact that the said official was not served remained not only hearsay, but that the omission entitled the court to draw an adverse inference that he would not have denied service. She cited to that effect the decision in the case of **Hemedi Saidi v. Mohamed Mbilu** [1984] TLR 113 in which the High Court held *inter alia* as follows:-

> *"Where for undisclosed reasons, any party fails to call a material witness on his side, the Court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests."*

Supporting Ms. Lushagara's submission, Mr. Kameya added that, from the contents of the petition, the allegation that CCM and its candidate were not served with the Notice was based on information received from an undisclosed advocate and for that reason, that evidence was hearsay, not having any evidential value.

In rejoinder, Mr. Mutalemwa reiterated his argument that the dispatch book did not indicate that PW3 was one of the candidates to whom the letter was addressed. As to the service of the Notice, the learned counsel maintained that the evidence on record does not support the respondent's case.

In deciding the issues arising from the four grounds of appeal in reference, we intend to start with the issues concerning service of the Notice. The trial court relied on the evidence of DW2 as supported by a copy of the letter (Exhibit D2) and agreed with the respondents that the CCM was dully served through its District Secretary. The relevant Regulation which was allegedly breached by the Returning Officer provides as follows:

> *"61.The Returning Officer shall, after receiving election results from all Polling Stations within the constituency, notify in writing Political Parties or candidates as to the date, time and venue for addition of all votes cast."*

It was argued for the appellants that both the CCM and its candidate ought to have been notified. That proposition is not correct. From the wording of that Regulation, a notice on a political party is sufficient notification to its

candidate. The reason is that in the provision, the disjunctive "or" is used, not a conjunctive "and". The alternative 6th ground is for this reason, without merit.

As to the issue whether the CCM was served or not, DW2 relied on Exhibit D2 and a dispatch book produced at the trial to show that the CCM District Secretary acknowledged receipt of the letter. The appellants merely disputed that evidence without calling as witness, the CCM District Secretary. We wonder why the evidence of denial should have to come from the person other than the one who, according to DW2 was served with the letter. As submitted by Ms. Lushangara, evidence from a person other than the CCM Secretary countering what was deponed by DW2, is indeed hearsay.

In our considered view, the omission to call the CCM District Secretary had a serious consequence on the appellants' case because it left the evidence of DW2 unchallenged on that aspect. The respondents did not have the burden of disproving the allegation. The burden was on the appellants. The burden is imposed on the petition by S.108 (2) of the NEA which provides as follows:

> *"The election of a candidate as a Member of Parliament shall be declared void only on an election*

petition if the following grounds [are] proved to the satisfaction of the High Court...."

Interpreting this section, we stated as follows in the case of **Manju Salum Msambya v The Attorney General & Kifu Gulam hussein Kifu,** Civil Appeal No.2 of 2002 (unreported):

"The burden of proof placed on a petitioner is a heavy one; he is required to prove his allegations to the satisfaction of the court, which has been interpreted as proof beyond reasonable doubt....The reason for putting the standard that high is not far to seek. An election is the exercise of a constitutional right and the fulfillment of an obligation by the citizenry. It is perhaps the only occasion when the people are enabled directly participate in running the affairs of their country. Courts therefore, have a duty to respect the people's conscience and not to interfere in their choice except in most compelling circumstances."

We have shown above that the appellants' evidence on the allegation is deficient. It is obvious thus that they had failed to discharge that burden as a consequence, the 3rd ground of appeal is devoid of merit.

Having so found, it is not necessary to consider the issues raised in the 4th and 5th grounds concerning the powers of the Returning Officer under sections 72 (2) and 85 of the NEA. It will not also, as a result of the above finding, serve any useful purpose in this appeal, to dwell on the effect of non-compliance with Reg. 61 of the Regulations.

With regard to the 2nd ground, Mr. Mutalemwa submitted that the 1strespondent evasively denied the allegation of non-compliance with S. 9 (1) of the Elections Expenses Act, 2010 (the EEA). He argued that the 1st respondent ought to have shown how that requirement was complied with. The learned counsel contended as follows:

> *"... in her reply the 2nd Respondent (sic) evasively denied that allegation without giving facts stating how ...* ***the Election Expenses Act*** *was complied with and equally failed to prove the said fact which was in her own knowledge as well stipulated under*

the provisions of S.115 of the Evidence Act [Cap. 6 R.E. 2002]...."

He submitted further that, according to her evidence, the 1st respondent contended that she disclosed her budget to the Ag. District Secretary of her political party on 20/8/2015 and that the said party official was not obliged to issue her with a certificate evidencing compliance with that requirement. This testimony, Mr. Mutalemwa argued, does not show that there was sufficient compliance with S. 9(1) (b), (3) and (4) of the EEA. The learned counsel submitted that since that fact was within the 1st respondent's own knowledge, the burden of proving it shifted to her. He added that, although unlike an ordinary civil suit, an election petition has its own peculiarities thus having a different standard of proof as observed in *inter alia*, the case of **Zella Abraham & Others v. The Attorney General & Others,** Consolidated Civil Revision No. 1, 3 & 4 of 2016 (unreported), S.115 of the Evidence Act has not been modified and therefore, the section applies in this matter. It was Mr. Mutalemwa's submission thus that the claim was established.

Mr. Lissu opposed the proposition that the burden of proving compliance with S.9 (1) of the EEA shifted to the 1st respondent. He argued

that the fact in issue was not only in the knowledge of the 1st respondent because, according to the law, there are other persons who were capable of having that knowledge, including the Registrar of Political Parties to whom the report of the funds must be submitted by virtue of the provisions of S. 9(4) of the EEA. Other persons according to the learned counsel are the District Secretary of the participating political parties and the Controller and Auditor General (the CAG) who are also, by virtue of their capacities under the provisions of S.9(1) (b) of the EEA and 19 (4) of the NEA respectively, capable of knowing whether the budget was disclosed or not. The learned counsel argued therefore that the appellants should have called any of those persons to testify on the matter.

Ms. Lushagara added that the appellants had the duty of proving their petition to the satisfaction of the court which under S.108 of the NEA is proof beyond reasonable doubt. She submitted that the appellants did not from the nature of the tendered evidence, discharge that burden.

In rejoinder, Mr. Mutalemwa reiterated his argument that the allegation in this ground was sufficiently proved because under S. 9(4) of the EEA compliance must have been evidenced by a certificate issued by the secretary of the candidate's political party. He insisted that the 1st

respondent had the burden of proving compliance by exhibiting that certificate.

The discord between the parties in this ground is on the burden of proving whether or not S. 9 (1) of the EEA was complied with. The allegation by the appellant is that the 1st respondent did not disclose her election petition budget. The allegation was vehemently denied by the 1st respondent. We wish to state here that under the provision in reference, a candidate is required to disclose the amount of the funds to the secretary of his or her political party, not the Registrar of Political Parties as stated in ground 2 of the Memorandum of Appeal. The relevant provision states as follows:

> *"9-(1) A candidate shall be required to disclose at* least seven days before the nomination day –
>
> *(a)....*
>
> *(b) in the case of a candidate for the post of a Member of Parliament and a member of the Council,* ***to the District Party Secretary of a Political Party which sponsored that candidate*** *the amount of funds which the candidate*
>
> *(a) has in his possession, and*
>
> *(b) expects to receive,*

intends to use as election expenses."

[Emphasis added]

The 1st respondent pressed that she disclosed her budget to the District Secretary of her political party. The learned counsel for the appellants stressed that the fact whether or not the 1st respondent complied with that requirement was on her own knowledge and for that reason, in law, the burden of proof shifted to her.

It is a general rule of evidence that the burden of proving existence of a fact is on the person who asserts it. This is in accordance with S.110 (1) of the Evidence Act which provides as follows:

> *"110-(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

The exception to that rule is where the facts sought to be proved are on the sole knowledge of one of the parties to the case. In such situation, the burden is on that party. The relevant section of the Evidence Act is S. 115 relied upon by the learned counsel for the appellant. The provision states that:

"In Civil Proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

With respect to the learned counsel for the appellants, that exception does not apply under the circumstances of this case. The provision applies only where the fact sought to be proved is, as intimated above, solely within the knowledge of the party to whom the burden is intended to be shifted. Commenting on S.106 of the Indian Evidence Act, which is in *pari materia with* S. 115 of our Evidence Act, the learned author of **Sarkar's Law of Evidence**, 17th Edition, 2010 at page 1962, makes the following pertinent statement to which we subscribe as being a correct scope of the provision in question.

"The knowledge must be in the nature of something peculiar.... 'Especially' means facts that are pre-eminently or exceptionally within one's knowledge."

At page 1959, the learned author states as follows on the applicability of the section:

"The section applies only to parties to suit.... ***It cannot apply when the fact is such as to be***

capable of being known also by persons other than the parties."

[Emphasis added]

In the present case, it is a correct position, as submitted by the learned advocates for the respondents, that the fact whether or not the 1st respondent disclosed her election expenses budget is capable of being known by persons other than the parties to the petition. As pointed out above, under S.9 (1) of the EEA a candidate is required to disclose the budget to his or her district party secretary. That official must in turn, disclose the same to the Registrar of Political Parties. This is a requirement under S. 9 (2) of the EEA which states as follows:

"Every political party which participated in any election shall, within thirty days after the nomination day, disclose to the Registrar of all funds which it intends to-

(a) use as election expenses; and

(b) use for candidates sponsored by such political party as election expenses."

The funds which shall be disclosed by a political party must obviously include the funds disclosed by the candidate.

Similarly, under Part IV of the EEA, particularly S.19 (1), a candidate is required to keep the records of *inter alia,* the received funds or the funds which are expected to be received for the purpose of auditing by the CAG who is for that reason, another person capable of knowing whether or not a candidate had made the requisite disclosure. For these reasons therefore, we agree with the learned advocates for the respondents that the 1st respondent did not have the burden of proving the manner in which she complied with S.9 (1) of the EEA because the fact was not especially within her own knowledge. The burden was on the appellants and since they could not discharge that burden by calling material witnesses to prove the allegation, this ground of appeal fails as well.

Reverting to the 1st ground of appeal, the complaint is that the election was tainted with irregularities which, although they occurred after election, contrary to the holding by the learned trial judge, affected the results of the election. Mr. Mutalemwa argued that by recording a wrong number of registered voters in Form No.24B during the addition of votes, the Returning Officer breached the laws governing the addition process and for that

reason, the election was not free and fair. He stated as follows in his written submission:-

> *"...the election process starts from the nomination date and end at stage of pronouncing the final result and therefore the final stage of addition of votes cast and preparing the Form 24B are guided by the law and as such any act done contrary to the law rendered the election being unfree and unfair and the same are worth of nullifying the election results."*

Relying on the evidence of PW1, PW3 and DW2, the learned counsel submitted that the election was flawed because that number of registered voters constituted the basis of the valid votes cast. It was his argument that the error is for that reason fatal, not trivial as found by the learned trial judge.

The learned counsel for the 1st respondent denied the argument that the irregularity had the effect of rendering the results void. He cited *inter alia,* the case of **Martha Michael Wejja v. The Hon. Attorney-General & 3 Others** [1982] TLR 35, and submitted that, not every irregularity in an election must result into avoiding of election results. He insisted that in this

case, it is the total number of voters at each polling station that constituted a correct number of registered voters in the Constituency. He added that, even if it were to be found that there was a different number of registered voters, the pro-rata method would be applicable. If that is done, he said, the unknown votes would not affect the results of the election. To support his argument, he cited the case of **Azim Premji v. The Attorney General & Another [2002]** TLR 377.

For the 2nd and the 3rdrespondents, Ms. Lushagara replied that the learned judge correctly held that after-voting irregularities are not of fatal effect. She supported the finding that the error in filling Form No. 24B was a trivial irregularity which did not prejudice the appellants. Citing the case of **Mbowe v. Eliufoo** [1967] E.A 240, the learned Principal State Attorney argued that, to succeed in that claim, the appellants ought to have shown how that error affected the results.

In rejoinder, Mr. Mutalemwa maintained his stance emphasizing that, because the number of registered voters recorded in Form No. 24B (Exhibit P3) was shown to be 16,4794, the inclusion of 95,425 unknown voters affected the results because, with that irregularity, the election could not have been free and fair.

Having considered the arguments made by the respective counsel for the parties on this ground, like the learned trial judge, we are of the considered view that the error did not affect the results of the election. From the evidence, the recording of a wrong number of registered voters was merely an accidental slip. It was a result of an arithmetical mistake, not a premeditated formulation intended to rig the election as alleged by PW3 in his evidence. At the addition hall, the Returning officer was performing the duties entrusted to her by S.80 read together with S.35 F of the NEA. The duties include; recording in Form No. 24B the total number of registered voters for each of the polling stations, the number of those who voted, the number of valid and rejected votes and the votes scored by each of the candidates.

As rightly observed by the learned trial judge, in their evidence the appellants did not dispute the statistics presented in Form 21B of each of the polling stations. It was not disputed also that the number of registered voters tallied with the official number released by the Commission in accordance with Exhibit D1. It was during the process that in adding up the total number of registered voters, DW2 inserted the figures 164,794 instead of 69,369. When her attention was drawn to the error, she effected

correction there and then by crossing out the wrongly inserted number. In so doing she substituted with it another erroneous number. The fact remained however, that the correct number was the total number of the registered voters derived from 190 polling stations, that is; the undisputed 69369 registered voters. It was that number which formed the basis of the votes scored by each of the candidates.

On the basis of the foregoing reasons, we do not agree with the learned counsel for the appellants that the irregularity had the effect of adversely affecting the results of the election. In the event, this ground is also without merit.

The 8th ground of appeal is on the application of S. 176(1) of the Evidence Act. This ground stemmed from the attempt by the counsel for the 3rd appellant to show that the rejected votes at Guta Ward Polling Stations were more than those indicated in Form No. 21B. The learned counsel cross-examined DW2 using a number of documents purported to be genuine copies of Form No.21B. The authenticity of the documents was disputed by DW2.Then, at the close of hearing of the petition, Mr. Mutalemwa urged the learned trial judge to exercise the powers vested on him by S. 176(1) of the Evidence Act to order production of original copies of Form 21B so as to

satisfy himself as to the correctness or otherwise of the number of rejected votes. The trial judge declined the prayer stating that such powers can only be exercised *suo motu* by the court and no party is entitled to move the court to exercise that discretion. Mr. Mutalemwa insisted that the learned judge erred in his interpretation of that provision of the Evidence Act.

On her part, Ms. Lushagara responded by arguing that since the issue concerning the number of rejected votes was not raised in the petition and because the documents relied upon by the learned counsel for 3rd appellant at the trial did not form part of the pleadings, the prayer was rightly refused by the trial court.

Section 176 (1) of the Evidence Act, on which the prayer was based, provides as follows:

> *"The court may, in order to discover or to obtain proper proof of relevant facts, ask any question it desires, in any form, at any time, of any witness or of the parties about any fact relevant or irrelevant and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such*

question or order nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question."

Provided that judgment shall be based upon facts declared by this Act to be relevant and duly proved.

As stated above, the learned judge refused to grant the prayer. He was of the view that such powers can only be exercised by the court *suo motu* and thus, according to his interpretation of the section, a party is not entitled to move the court to exercise the conferred discretion. He stated as follows in his ruling:

"If the provision is closely analyzed, the discretionary powers are exercised by the Court 'suo motu' and for reasons that the Court is under no obligation to assign. No party is entitled to move the Court to discharge or carry out what is required of under the provision. The Court cannot be compelled to undertake unplanned questions."

We do not think that the learned trial judge was right in according the section a general restrictive interpretation that it bars a party from moving

the court to exercise the powers conferred on it by the provision. In our considered view, there is nothing extra-ordinary in moving the court in the course of a hearing, to exercise its discretionary powers under the section. The provision does not so prohibit and as the old adage states, what the law does not prohibit, it allows it. The only implicit restriction is on how the powers should be exercised. The restriction is on the resultant judgment, that it must be based on the facts declared by the Evidence Act to be relevant, and only where such facts have been duly proved.

The above stated position notwithstanding, we find that under the circumstances of the case, the prayer was untenable. Our reasons are based on the manner and the stage of the proceedings at which the prayer was made. The issue sought to be decided was not raised in the petition. It is for this reason that the learned counsel for the appellants relied on O.XIV r. 5 (v) of the CPC and Reg. 23 of the Regulations. Order XIV r. 5 (1) provides as follows:

> *"The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for*

determining the matters in controversy between the parties shall be so made or framed."

As for Regulation 23 of the Regulations, the same provides as follows:

"The petitioner shall not save with leave of the court argue or be heard in support of any ground not set in the petition."

As argued by Mr. Mutalemwa, the learned judge expressed the position that where the parties have been allowed to argue an issue not raised in the pleadings, the court has the duty of rendering a decision thereon. That is indeed a correct position. – See for example the case of **Agro Industries Ltd v. Attorney General** [1990-1994]1 E.A 1.

In this case however, the principle is not, in our view, applicable. Firstly, the issue was not raised, argued and left for the court's determination. As pointed out above, the learned counsel for the 3rd appellant sought to introduce it when she was cross-examining the respondents' witness. Secondly, as submitted by the learned Principal State Attorneys, since the prayer for scrutiny of votes was expunged, the same could not be introduced because the conditions stated under Reg.12 (1) of

the Regulations ought to have been complied with. Under the circumstances therefore, this ground is also devoid of merit.

That said and done, we now turn to consider the 7th, 9th and 10th grounds of appeal. Arguing in support of the 7th ground, the counsel for the appellants argued that the trial judge based his decision on personal and extraneous matters when he stated that nullifying the result of the election would lead to by-election thereby causing a burden to the people of Bunda district and generally, all the taxpayers in the country. In his judgment, the learned judge stated as follows:

> *"Nullifying the results has another serious impact. After nullification the possible immediate step which the petitioners are indeed inviting this Court to direct, is to hold by-elections.... Its implementation impacts not only the citizens of the affected constituency, Bunda Urban for this matter. It spreads and affects every tax payer in the country. The reason is that any by-election has cost implication which as a matter of policy, cannot be left to be taken up by the impugned constituency alone. For Bunda it is even worse, for,*

it is an open secret that the District leave alone the constituency, is among the least poorest ranking in the country...."

As for the 9th ground, Mr. Mutalemwa submitted that the trial judge erred in stating that an allegation of fact based on information in an affidavit ought to have been verified and for that reason, Rule 21A (6) of the Rules should have stated that the provisions of O.VI r.15 shall apply instead of Cap. 34 stated in that provision of the Rules. On the 10th ground, it was the counsel's argument that the learned judge erred when he stated that Cap. 34 was inadvertently made to apply to an affidavit filed under Rule 21A (1) of the Rules because that statute cannot be made to complement the CPC.

In response, both Mr. Lissu and Ms. Lushagara submitted in essence, that the statement by the learned judge on the rate of poverty of people in Bunda district and the impact of by-election on them and all the taxpayers in the country were merely *Obiter dicta*, not forming the basis of the impugned decision. With regard to applicability of the Oaths and Statutory Declarations Act (Cap.34 R.E.2002) (Cap.34) in an affidavit filed under Rule 21A of the Rules, Mr. Lissu submitted that the Act was properly included as one of the applicable laws for affidavits filed in election petitions because,

under that Rule, apart from filing an affidavit, the deponent must be sworn or affirmed in the normal manner before he adduces evidence in court.

We have to state at the outset that the issues raised in these three grounds of appeal were based on general observations made by the learned judge in his judgment. On the statements which gave rise to the 9th and 10th grounds of appeal, the same were based on his interpretation of Rule 21A of the Rules describing it as "NOT precise" "still vague" and that as a result, it has the effect of causing "procedural confusing areas" and further that Cap. 34 was inadvertently made to apply to affidavits filed under Rule 21A of the Rules. The observations were not however, made in an endeavour to determine any of the framed issues.

With regard the statement concerning the rate of poverty in Bunda district which gave rise to the 7th ground of appeal, the same was based on the matter which was neither pleaded nor argued by the learned counsel for the parties in their final submissions. The rate of poverty did not constitute a ground of defence to the petition. It is therefore a matter which is extraneous to the case. The above stated position is manifested by the learned judge's concluding remarks on his observations where he stated as follows:

"Having travelled considerably on those general observations lets revert to the business lest the track is not (sic) lost."

Notwithstanding the observations which we think, with respect, were inappositely made thus giving rise to the 7th, 9th and 10th grounds of appeal, the learned judge clearly stated the grounds upon which his decision was based. Having answered the framed issues, he concluded his findings by stating as follows in the judgment at page 1191 of the record:

*"**For lack of satisfactory evidence,** the petitioners' invitation to nullify the election result for Bunda Urban Parliamentary Constituency for 2015 General Election conducted on the 25/10/2015 is hereby refused.*

***For flimsy evidence adduced by the petitioners which is below the required standard of proof,** I find that all petitioners have failed to prove their claims against the Respondent...."*

[Emphasis added.]

The insufficiency of evidence in proving the claims is therefore the ground upon which the petition was dismissed. The 7th, 9th and 10th grounds of appeal are, for this reason, also lacking in merit.

Having determined the grounds of appeal in the manner stated above, we find in the final analysis that this appeal was brought without sufficient reasons. In the event, we uphold the decision of the High Court and hereby dismiss the appeal with costs.

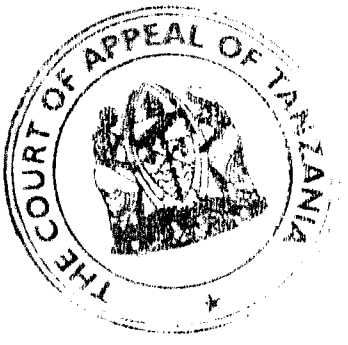
DATED at DAR ES SALAAM this 24th day of July, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL