IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MUGASHA, J.A. MZIRAY, J.A. MKUYE, J.A. And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 138 OF 2019

1. ATTORNEY GENERAL
2. THE NATIONAL ELECTORAL COMMISSION ..... **APPELLANTS**
3. THE DIRECTOR OF ELECTIONS

VERSUS

BOB CHACHA WANGWE..... RESPONDENT

[Appeal from the Ruling and Drawn Order of the High Court of Tanzania (Main Registry) at Dar es Salaam]

(Ngwala, J., Matogolo, J. and Masoud, J.)

dated the 10th day of May, 2019
in
Misc. Civil Cause No. 17 of 2018

.....

JUDGMENT OF THE COURT

30th July & 16th October, 2019

MWARIJA, J.A.:

This is an appeal from the decision of the High Court of Tanzania (Main Registry) at Dar es Salaam (Ngwala, Matogolo and Masoud, JJ.) dated 10/5/2019 in Miscellaneous Civil Cause No. 17 of 2018. In that case, the respondent, Bob Chacha Wangwe petitioned the High Court challenging the constitutionality of s. 6(1), 7(1) and (3) of the National Elections Act, [Cap. 343 R.E. 2002] (hereinafter "the NEA"). He sought

an order declaring the said provisions of the NEA unconstitutional for offending articles 21(1), (2) and 26 (1) of the Constitution of the United Republic of Tanzania, 1977 as amended [Cap. R.E. 2002] (hereinafter the Constitution).

The application was preferred by way of an originating summons under ss. 4 and 5 of the Basic Rights and Duties Enforcement Act [Cap. 3 R.E. 2002] (the BRADEA), rule 4 of the Basic Rights and Duties Enforcement Rules, 2014 and articles 26 (2) and 30 (3) of the Constitution. It was supported by an affidavit sworn by the respondent. In the petition, the respondent prayed for a declaration that sections 6 (1), 7 (1) and (3) are unconstitutional. He stated as follows in prayers 1 to 4:-

> *"1. A declaratory order that the provisions of section 6 (1) of the National Elections Act, (Cap 343 R.E 2015) are unconstitutional for offending the provisions of Articles 21 (1), 21(2), and 26 (1) of the Constitution of the United Republic of Tanzania of 1977 as amended without allowing Parliament or the Government time to correct any defect in the impugned law.*

2. *A declaratory order that the provisions of section 7(1) of the National Elections Act, (Cap. 343 R.E. 2015) are unconstitutional for offending the provisions of Articles 21(1), 21(2) and 26(1) of the Constitution of the United Republic of Tanzania of 1977 as amended, without allowing Parliament or the Government time to correct any defect in the impugned law.*

3. *An Order that section 7(2) of the National Elections Act, (Cap. 343 R.E. 2015) is invalid for unlawfully denying and violating the basic rights, freedoms or duties protected by articles 21 (1), 21 (2) and 26(1) of the Constitution of the United Republic of Tanzania of 1977 as amended, without allowing Parliament or the Government time to correct any defect in the impugned law.*

4. *An Order that section 7(3) of the National Elections Act, (Cap. 343 R.E. 2015) is invalid for unlawfully denying and violating the basic rights, freedoms or duties protected by articles 21 (1), 21 (2) and 26(1) of the Constitution of the United Republic of Tanzania of 1977 as amended, without allowing Parliament or the Government time to correct any defect in the impugned law."*

The grounds upon which the petition was based were stated by the respondent in the originating summons. Referring to the rights and duties enshrined under articles 21(1), (2) and 26 (2) of the Constitution, he contended that the basic rights guaranteed therein are violated by ss. 6(1), 7(1) and (3) of the NEA. The particulars of the breach were stated in paragraphs 7 – 29 of the grounds of the petition on which the learned counsel for the respondent anchored her submission at the hearing of the petition. The grounds essentially challenged appointment of the Director of Elections, (the D.E), City Directors, Municipal Directors and District Executive Directors (the Directors) to become Returning Officers. It was contended that, since the D.E and the Directors are appointed by the President of the United Republic of Tanzania (the President) and considering that the NEA does not set out any safeguards to ensure that they are independent from their appointing authority in matters of election, their role as Returning Officers offends the provisions of articles 21 (1), (2) and 26 (1) of the Constitution.

The respondent stated as follows in paragraphs 24, 26, 27 and 28 of his grounds of petition:-

> *"24. Under the circumstances, DEDs [District Executive Directors] and Directors of each Town,*

Municipal or City Council when acting as Returning Officers are appointed by the President; are answerable to the President and not the Electoral Commission and therefore have neither the independence nor the objectivity that is requisite in a Returning Officer under the Constitution.

25. *In addition, the National Elections Act and the Local Government Service Act do not set out any restrictions and/or limitations and/or safeguards to ensure the independence and accountability of the DEDs and the Directors of each Town, Municipal or City Council who act as Returning Officers, as is required by article 74(14) of the Constitution.*

26. *Section 6(1) and section 7(1) of the National Elections Act have ensured that the political party in power and which has a President in the State House is the party that appoints the Director of Elections and Returning Officers for all elections in this country without any safeguards, least of all the safeguard set out in article 74 (14) of the Constitution that prohibits persons concerned with the conduct of elections to join any political party.*

27. In addition, sections 7(2) and 7(3) of the National Elections Act does not provide any safeguards to ensure the Independence of the Returning Officers appointed by the National Electoral Commission, as a result the said Commission can appoint whomsoever it wishes as a Returning Officer without complying with the prohibition set out in article 74(14) of the Constitution."

It was contended further that the process of appointing the D.E. and the Directors has enabled the appointing authority to have the Returning Officers who are members of the ruling party - Chama Cha Mapinduzi (CCM) thus violating the citizens' right of free and fair elections because, from being affiliated to their political party, such Returning Officers would not act independently vis-a-vis the other political parties. It was stated as follows in paragraphs 28 and 29 of the grounds of the petition:-

"28. As a result, the 2nd and 3rd Respondents have been appointing members of CCM to act as returning officers all in an attempt to please CCM, as set out in the affidavit in support of this Originating summons.

29. Sections 6(1), 7(1), 7(2) and 7(3) of the National Elections Act has the effect of ensuring that elections in this country are owned by the political party in power and are thereby reprehensible to the very nature of a free democratic society in whose governance, the citizens participate by way of free and fair elections."

The petition was argued by way of written submissions. The submission made by the respondent's counsel was mainly based on the import of the provisions of article 21(1) and (2) as well as article 74(14) and (15) (e) of the Constitution.

Article 21(1) and (2) provides as follows:-

"21-(1) Bila ya kuathiri masharti ya ibara ya 39, ya 47 na ya 67 ya Katiba hii na ya sheria za nchi kuhusiana na masharti ya kuchagua na kuchaguliwa, au kuteua na kuteuliwa kushiriki katika shuguli za utawala wa nchi, kiia raia wa Jamhuri ya Muungano anayo haki ya kushiriki katika shughuli za utawala wa nchi, ama moja kwa moja au kwa kupitia wawakiiishi waliochaguliwa na wananchi kwa hiari yao, kwa kuzingatia utaratibu uliowekwa na sheria au kwa mujibu wa sheria.

(2) Kila raia anayo haki na uhuru wa kushiriki kwa ukamilifu katika kufikia uamuzi juu ya mambo yanayomhusu yeye, maisha yake au yanayolihusu Taifa."

As for article 74 (14) and (15) (e), the same provides as follows:-

"74 (1) – (13) ... N/A

(14) Itakuwa ni marufuku kwa watu wanohusika na uchaguzi kujiunga na chama chochote cha siasa, isipokuwa tu kwamba kila mmoja wao atakuwa na haki ya kupiga kura iliyotajwa katika ibara ya 5 ya Katiba hii.

(15) Kwa madhumuni ya ibara ndogo ya (14) watu wanaohusika na uchaguzi ni:-

(a) – (d) .... N/A

(e) Wasimamizi wote wa Uchaguzi katika miji na wilaya zote"

Having stated the responsibilities of Returning Officers as described under ss. 35 D, E and F, 56, 70A, 81, 82, 86 and 120 of the NEA, the learned counsel submitted that, from their functions, they play a central role in the election processes. They are thus required to abide

by the Constitutional requirement that they must be independent from all political parties. It was argued that, being appointees of the President and from the affidavit filed in support of the originating summons which shows that some of the persons who were appointed Directors are CCM members who lost in the CCM primary elections (intra-party elections), they cannot act independently in the performance of their functions as Returning Officers. It was thus submitted that s. 7(1) and (3) of the NEA which makes them Returning Officers, offends article 74(14) of the Constitution which prohibits persons involved in conducting elections from joining any political party.

The appellant disputed the claims that ss. 6(1) and 7(1) and (3) of the NEA are unconstitutional. The learned Principal State Attorney who represented the appellants at the hearing in the High Court, submitted that, except for the City Directors who, under s. 5 of the Public Service Act, No. 8 of 2002 are appointed by the President, the other Directors are appointed by the Minister responsible for Local Government. According to the learned Principal State Attorney, even though s. 7(1) of the NEA makes the Directors to become Returning Officers, under s. 7 (2), the National Electoral Commission (NEC) may appoint by office or name, any person amongst the public officers to become Returning

Officers. She explained that the power vested in the NEC under s. 7 (2) of the NEA is intended to ensure that the NEC replaces any Returning Officer who acts against the requirement of ensuring that elections are conducted according to the law, including observance of the safeguards stipulated under article 74 (14) of the Constitution.

It was argued further that before a Director assumes his duty as a Returning Officer, he must, under s. 7(5) of the NEA and regulation 16(1) (a) and (b) of National Elections (Presidential and Parliamentary Elections) Regulations, 2015 GN. No. 307 of 2015 (the Regulations), take an Oath of Secrecy and make a declaration that he has not joined a political party or that he has withdrawn from membership of a political party, if he had joined any. It was the appellants' contention that from those measures, the contention that the Directors become Returning Officers automatically and that they cannot act independently, is not correct.

Other safeguards, it was argued, include firstly, existence of standing orders for public service which prohibit the employees, members of the NEC and Returning Officers from participating in politics and secondly, the process of counting votes as provided under s. 57 and

70 -71 of the NEA which *inter alia,* allow appointment of agents of political parties and candidates at polling stations. It was the appellants' case therefore, that from those safeguards which ensure that the provisions of article 74 (14) of the Constitution are not breached, ss. 6(1) and 7(1) & (3) of the NEA do not infringe article 21(1) (2) and 26(1) of the Constitution.

In its decision, the High Court found that the petition gave rise to the following issue.

> *"...Whether the impugned provisions contravene the provisions of articles 21 (1), 21 (2) and 26 (1) of the Constitution which concern the right to take part in matters pertaining to governance of the country either directly or through representatives freely elected by the people, the right and freedom to participate fully in process leading to decision on matters affecting the Petitioner, his wellbeing or nation, and duty to abide by the Constitution and the law of the land."*

Having considered the opposing submissions of the learned counsel for the parties, the High Court answered that issue in the affirmative. It held that s. 7 (1) and (3) of the NEA does not reflect the safeguards stipulated under article 74(14) of the Constitution. It relied

on the affidavit evidence of the respondent to the effect that the Directors who were the Returning Officers during the 2015 elections were CCM members. According to the learned Judges, averment by the respondent in his affidavit was not controverted.

The learned Judges did not agree with the learned Principal State Attorney's argument that s. 7 (1) of the NEA does not automatically make the Directors Returning Officer upon their appointment as Directors. They were of the view that the provision which is couched in mandatory terms, specifically states that the Directors should be Returning Officers. They were also of the view that s. 7(3) of the NEA does not provide for the mechanism through which the NEC may remove a Director and appoint any other person holding a public office to be a Returning Officer.

With regard to the safeguards relied upon by the appellants which subject the Directors to *inter alia,* make declarations that they are not members of any political party or that they have withdrawn their membership from such a party, the High Court found as follows at page 166 of the record of appeal

"we are not convinced of the learned Principal State Attorney's argument for the following reasons: It is clear to us that despite making such declarations, the appointed Directors who are members and/or supporters of political parties do not relinquish their interests in the political parties. For the sake of argument, assuming that the making of such declaration is an appropriate mechanism to ensure that the Returning Officers who have affiliation in political parties relinquish their interest in such political parties by simply making the declaration as alleged, it is quite clear that justice in the conduct of multiparty election shall not be seen to have been done...."

The High Court was of the view that the safeguards stated under article 74 (14) of the Constitution could be achieved by appointing Returning Officers from amongst the Public Officers as provided for under s. 7(2) of the NEA. The learned judges reasoned as follows:-

"As the said Directors fall among the Public Servants in terms of the Public Service Act (supra), and once appointed they become Public Service Servants, who are prohibited by law to participate in political activities in terms of paragraph F. 20 of the Public Service standing orders, and who automatically are

restricted from engaging in political activities, we see no point of having such provisions of section 7(1) and (3) of the NEA which raises eyebrows or concerns in its constitutionality. In our considered opinion section 7(2) of the NEA meets the criteria of appointment of Returning Officers or Assistant Returning Officers by the Commission."

They concluded thus:-

"... it is our stand that the provisions of section 7(1) and 7(3) of the NEA do not reflect the safeguards set out in article 74 (14) of the Constitution which prohibit Returning Officers from joining political parties. We are equally satisfied that the provisions of section 7(1) and 7(3) of the NEA violate article 21(1), 21(2) and 26(1) of the Constitution."

Concerning the appointment of the D.E., the High Court found that there was no evidence showing that such appointment infringes articles 21 (1) and (2) and 26 (1) of the Constitution. Similarly, with regard to s. 7 (2) of the NEA which empowers the NEC to appoint Returning Officers from amongst the public officers, the High Court was of the view that such provision does not contravene articles 21 (1), (2) and 26 (1) of the Constitution. It found that, since s. 7 (2) of the NEA suffices to serve the purpose of appointment of Returning Officers, it is unnecessary to

leave intact s. 7 (1) and (3) of the NEA as it does not reflect the safeguards provided under article 74 (14) of the Constitution. It observed that, in view of the provisions of article 27 (2) of the Constitution which was relied upon by the appellant at the hearing of the petition to justify the use of the Directors as Returning Officers, s. 7 (2) of the NEA alone is sufficient to serve that purpose.

On the safeguards relied upon by the appellants; that the Directors are subjected to swear the oath of secrecy, make declaration that they are not members of any political party or that they have withdrawn their membership, the High Court found that those measures are insufficient to ensure independence of the Returning Officers as envisaged under article 74 (14) of the Constitution.

On those findings, the High Court held that the provision of s. 7(1) and (3) of the NEA violate articles 21(1), (2) and 26(1) of the Constitution and therefore declared them void for being unconstitutional and thus proceeded to strike them out.

The appellants were aggrieved by the decision of the High Court hence this appeal which is predicated on the following eleven grounds:-

"1. *That, the learned Judges erred in law and fact by declaring the provisions of Section 7(1) and 7(3) of the National Elections Act [Cap. 243 R.E. 2015] unconstitutional based on Article 74(14) of the Constitution which was neither pleaded as a violated Article nor made part of the reliefs sought by the Petitioner.*

2. *That, the learned Judges erred in law and fact by declaring the provisions of section 7(1) and 7(3) of the National Elections Act [Cap. 343 R.E. 2015] unconstitutional based on Article 74(14) of the Constitution which does not fall under Part III of Chapter One of the Constitution.*

3. *That, the learned Judges erred in law and in fact in finding that City Director, Municipal Director and District Executive Director upon appointment automatically become Returning Officers for purpose of conducting elections.*

4. *That, the learned Judges erred in law and in fact for determining and assessing the provisions of section 7(1) and 7(3) of the National Elections Act, [Cap. 343 R.E. 2015] in isolation of other provisions of the same Act and the entire scheme of the whole electoral management process.*

5. *That, the learned Judges erred in law and fact in failing to properly assess the prohibitions under Article 74(14) and the safeguards set out in the National Elections Act, [Cap. 343 R.E. 2015] and its regulations, Public Service Act, [No. 8 of 2002] and its regulations as well as other laws and regulations relating to the conduct and management of elections.*

6. *That, the learned Judges erred in law and in fact by failing to appreciate the legal effect of oath of secrecy and declaration of withdrawal of membership from a political party or not to be a member of a political party taken by Returning Officer before assuming office.*

7. *That, the learned Judges erred in law and in fact by failing to properly indicate how the provisions of section 7(1) and (3) of the National Elections Act [Cap. 343 R.E. 2015] violate Article 21(1), (2) and 26(1) of the Constitution of the United Republic of Tanzania, 1977 (as amended).*

8. *That, the learned Judges erred in law and in fact by failing to establish the relevance, admissibility, authenticity reliability and probative value of the evidence adduced in the affidavit relating to the allegations that some Returning Officers are members and supporters of the ruling party.*

9. *That, the learned Judges erred in law and in fact by failing to take into account the positive role of the impugned Returning Officers in the electoral management processes.*

10. *That, the learned Judges erred in law and in fact by usurping legislative powers reserved for parliament in striking out the impugned provisions of section 7(1) and (3) of the National Elections Act, Cap. 343 R.E. 2015.*

11. *That, the learned Judges erred in law and in fact by not affording time to the appellants to rectify the defects found in the National Elections Act [Cap. 343 R.E. 2015] before declaring the provisions of section 7(1) and (3) of the same Act unconstitutional."*

By these grounds, the appellant prayed to the Court to find that the decision of the High Court did not address itself to pertinent issues put forth by the appellants and consequently allow the appeal with costs.

At the hearing of the appeal, the appellants were represented by Dr. Clement Mashamba, learned Solicitor General assisted by a team of learned State Attorneys; Messrs Mark Mulwambo and George Mandepo, Ms. Alesia Mbuya, Messrs Ponsiano Lukosi, Evarist Mashiba, Lucas Malunde, all learned Principal State Attorneys, Ms. Tumaini Mfikwa,

learned Senior State Attorney, Ms. Grace Lupondo, Ms. Narindwa Sekimanga, Mr. Yohana Marco and Ms Fausta Mahenge, all learned State Attorneys.

On the other hand, the respondent was represented by Ms. Fatma Karume, learned counsel who was also being assisted by a team of advocates; Mr. Mpale Mpoki, Dr. Rugemeleza Nshala, Messrs Fulgence Massawe, Jeremia Mtobesya and Jebra Kambole, learned advocates.

In compliance with Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) the appellants filed their written submission which was adopted at the hearing. On his part, the respondent complied with the requirement of filing reply submission in terms of Rule 106 (7) of the Rules and similarly, the submission was adopted at the hearing. The learned counsel for the parties also exercised the right of highlighting their written submissions during the hearing of the appeal. The appellants' written submission filed by Dr. Mashamba was also expounded at the hearing by Mr. Mulwambo. On the part of the respondent, the oral submission highlighting the reply submission filed by Ms. Karume was made by the said learned counsel as well as Mr. Mpoki, Dr. Nshala, Messrs Massawe, Mtobesya and

Kambole. Ms. Mbuya and Messrs Lukosi and Mandepo made rejoinder submissions. We have taken into consideration the invaluable submissions made by all learned counsel for the parties.

In his written submission, Dr. Mashamba pointed out that the grounds of appeal raise the following four main issues for determination:-

> " *(i) Whether the learned trial Judges were justified in declaring the provisions of Section 7(1) and (3) of the NEA unconstitutional;*
>
> *(ii) Whether the learned Judges were justified in holding that Section 7(1) and (3) of the NEA are unconstitutional for being superfluous or unnecessary while saving Section 7(2) of the NEA as serving the purpose of managing elections at the constituency level;*
>
> *(iii) Whether the learned trial Judges were justified in holding that the President of the United Republic of Tanzania appoints DEDs as Returning Officers; and*
>
> *(iv) Whether the learned trial Judges were justified in holding speculative views about the true interpretation and application of the law in Section 7(1) and (3) of the NEA to the effect that it does*

not provide adequate safeguards envisaged under Article 74(14) of the Constitution."

Submitting on the 1st issue which arises from the 1st, 2nd, 10th and 11th grounds of appeal, the learned Solicitor General argued that the learned High Court Judges erred in declaring the provisions of s. 7(1) and (3) of NEA unconstitutional on the ground that those provisions contravene the provisions of article 74 (14) of the Constitution. With regard to the 1st and 2nd grounds of appeal, Dr. Mashamba contended that since the petition was not brought under article 74 (14) of the Constitution, the High Court was not justified in finding that the impugned provisions offend articles 21(1), (2) and 26(1) of the Constitution. Relying on the provisions of s. 6 of the BRDEA, the learned Solicitor General argued that since article 74 (14) was not pleaded, the same could not have been acted upon to find that the effect of being violated by s. 7 (1) and (3) of the NEA, amounts to violation of articles 21(1), (2) and 26(1) of the Constitution.

He stressed that, under s. 6 (1) of the BRADEA, it is only the matters falling under Part III of Chapter one of the Constitution which may be pleaded as having been infringed, that is; the rights enshrined under articles 12 -19. In the circumstances, he argued, the High Court

acted wrongly in declaring s. 7(1) and (3) of the NEA unconstitutional on account that it offends article 74(14) of the Constitution which does not fall under that part of the Constitution. To bolster his argument, he cited the cases of **Makori Wassaga v. Joshua Mwaikambo and Another** [1987] TLR 88, **Peter Karanti v. Attorney General**, Civil Appeal No. 3 of 1998; **Elisa Moses Msaki v. Yesaya Ngetau Matee**, Civil Application No. 2 of 1999 (both unreported); **James Funke Gwagilo v. Attorney General** [2002] TLR 455; **Capt. Harry Gandy v. Gaspar Air Charters Ltd** [1956] EACA 139 and **Central Bank of Kenya v. Nkabu** [2002] 1 EA 34.

It was further argued that, the jurisdiction of the High Court in entertaining a petition for enforcement of rights and duties under articles 12–29 of the Constitution is governed by article 30 (3) of the Constitution and s. 4 of the BRADEA. Citing s. 6 (d) of that Act, the learned Solicitor General argued that, in such petitions, a specific provision of the Constitution which is alleged to have been breached must be cited. Since article 74 (14) was not cited, Dr. Mashamba argued, the learned Judges erred in invoking it to declare s. 7(1) and (3) unconstitutional.

On grounds 10 and 11, it was submitted that the High Court erred in failing to allow the Parliament to correct the defect which was found to have been occasioned by the provisions of s. 7(1) and (3) of the NEA. In failing to do so, the learned Solicitor General went on to argue, the High Court usurped the powers vested in the Parliament by article 63 of the Constitution read together with s. 13 of the BRADEA. Dr. Mashamba supported his argument by citing the cases of **Judge in-Charge, High Court, Arusha and Attorney General v. N.I.N Munuo Ng'uni**, Civil Appeal No. 45 of 1999 (unreported); **Attorney General v. W.K. Butambala** [1993] TLR 46 and **BAWATA and Others v. Registrar of Societies**, Misc. Civil Cause No. 27 of 1997 (unreported) in which, after having found that the impugned provisions were unconstitutional, the Court did not strike out those provisions but allowed time to Parliament to amend them. He went on to argue that, leaving s. 7(2) of the NEA as the only provision for appointment of Returning Officers who are not Directors, will cause a number of practical problems in the management of the election processes as a whole.

On the 2nd issue, which arises from the 5th and 7th grounds of appeal, the leaned Solicitor General challenged the finding by the High Court that there is no justification for having the provision of s. 7(1) and

(3) because s. 7 (2) of the NEA suffices to achieve the purpose of ensuring compliance with the requirement of article 74 (14) of the Constitution. It was argued for the appellants that the holding by the High Court, that s. 7 (1) and (3) of the NEA are open to abuse on account of not being reflective of the safeguards stated under article 74 (14) of the Constitution, is erroneous because the three provisions save different purposes; **first,** s. 7 (1) provides for appointment of Directors as Returning Officers, **Second,** s. 7 (2) provides for appointment of any public officer where, for any reason, a Director cannot be so appointed and **third,** s. 7 (3) vests the NEC with the power of appointing any other person holding a public office to be a Returning Officer.

On the contention that s. 7 (1) and (3) of the NEA does not reflect the safeguards stated under article 74 (14) of the Constitution, Dr. Mashamba argued that the provisions need not reflect those safeguards because the two provisions verse different purposes. With regard to the finding by the High Court that s. 7 (1) and (3) of the NEA are prone to abuse, he contended that, in the absence of express indication on how those provision may be abused, that finding is erroneous because it was based on mere speculations and inferences. The learned Solicitor General argued further that the finding by the High Court that the said

provisions are unconstitutional is incorrect. He submitted that the constitutionality of a provision or statute is not found in what could happen in its operation. It is found in what it provides, he argued. He stressed that where a provision is reasonable and valid, the mere possibility of its being abused in its operation does not make it invalid. To support his argument, he cited the case of **Rev. Christopher Mtikila v. Attorney General** [1995] TLR 31.

Dr. Mashamba contended therefore that the finding that the two provisions are likely to be abused is based on apprehension and as such, the holding that the 75 Directors are likely to be biased is erroneous, the contention having been based on speculations and inferences. Citing also the case of **U.S. v. Bulter** 297 U.S. I. [1936], the learned Solicitor General argued that the High Court erred in holding that the impugned provisions are open to abuse because that is not a criterion for finding a provision of a statute unconstitutional. He stressed that the High Court ought to have squarely fitted the impugned provisions into the articles of the Constitution which were found to have been violated and decide whether or not there is such violation, the duty which, according to his argument, was not undertaken by the High Court.

Relying also on the principles of judicial interpretation as enunciated in the cases of **Julius Ishengoma Francis Ndyanabo v. Attorney General** [2004] TLR 14 and **Attorney General v. Jeremia Mtobesya,** Civil Appeal No. 65 of 2016 (unreported), the learned Solicitor General submitted that the High Court erred in failing to be guided by those principles and instead, it based its decision on mere speculations that the Directors may abuse their positions in the course of performing their duties as Returning Officers. The principles stated in the two cited cased above are **first,** that, until the contrary is proved, a legislation is presumed to be constitutional, and **second,** that a statute should receive such construction as will make it operative not inoperative.

He went on to argue that, the finding by the High Court that the Directors may abuse their positions as Returning Officers was hinged on matters of facts, yet the learned High Court Judges did not analyse the facts pointing to the contemplated abuse. He said that, as a matter of principle, matters of fact relied upon by the respondent must have been proved so as to be relied upon to render the impugned provisions unconstitutional. In that regard, he relied on the case of **Rev. Mtikila** (supra).

With regard to the finding by the High Court that the impugned provisions are unconstitutional because they do not reflect the safeguards stipulated under article 74 (14) of the Constitution, it was Dr. Mashamba's submission that the safeguards are adequately provided for under s. 7 (5) of the NEA which requires a Director to subscribe to an oath of secrecy and comply further with reg. 16(1) of the Regulations which requires a Director to take the oath of secrecy and to declare that he is not a member of a political party or that he has withdrawn his membership from a political party. He stressed that the conditions are effective because the same must be complied with by a Director before he assumes the functions of a Returning Officer. He submitted further that under s. 57 (1) (b) and (c) of the NEA, political parties are afforded the right to have an agent at a polling station to take care of their interests in the conduct of polling exercise and furthermore, that under s. 111 of the NEA, any person specified under that section may file a petition to challenge the election results. He submitted also that, whereas under s. 89 (c) of the NEA misconduct on the part of a Returning Officer has been criminalized, under the ss. 108, 104 and 107 of the Penal Code, [Cap 16 R.E. 2002], a Returning Officer is liable to be charged in the event he commits perjury after taking the oath of secrecy

under s. 7 (5) of the NEA. According to the learned Solicitor General, in its decision, the High Court did not consider these safeguards which according to his submission, are sufficient to ensure compliance with article 74 (14) of the Constitution.

In response to the argument made in respect of the 1st and 2nd issues which, as stated above, arise from the 1st, 2nd, 5th, 7th, 10th and 11th grounds of appeal, Ms. Karume began her submission by opposing the contention that the learned High Court Judges erred in their decision to the extent argued by the appellants. She countered the arguments made by the learned Solicitor General, **first,** that in order to challenge s. 7(1) and (3) of the NEA article 74(14) must have been pleaded. **Secondly,** she disagreed with the contention that the evidence contained in the supporting affidavit, to the effect that the Directors who were Returning Officers for 75 Constituencies during the 2015 elections and the Returning Officer for Kinondoni Constituency during the 2018 bye-election, were CCM members who participated in 2015 CCM primary elections should not have been relied upon for want of authenticity.

By way of prelude also, the learned counsel opposed the statement in the appellants' written submission that the High Court had

found the provisions of s. 7(1) and (3) superfluous and unnecessary. She submitted that the position taken by the High Court is that, although the use of Directors as Returning Officers, had the effect of saving Government funds and thus being in line with the requirements of article 27(1) of the Constitution, their role as both the Directors and Returning Officers while s. 7(2) allows the NEC to appoint Returning Officers from amongst the public officers, makes existence of s. 7(1) and (3) of the NEA unjustified.

With regard to the arguments that article 74 (14) was not pleaded, Ms. Karume started by stating the gist of the petition filed in the High Court, that it was based on the need to protect the citizens' right of taking part in matters relating to governance of the country by being elected or through representatives who have been elected through a free and fair elections as guaranteed by article 74(14) of the Constitution. She submitted that the rights to free and fair elections is one of the basic rights enshrined under articles 21(1), and (2) and 26(1) of the Constitution. Whereas article 21(1) and (2) provides for the basic rights and duties, article 26(1) provides for the duty of observing the rule of law by abiding by the Constitution and the laws of the United Republic. She argued therefore, that article 74(14) provides for

safeguards intended to ensure that, in exercising their democratic rights under articles 21(1) (2) and 26(1) of the Constitution, the citizens are assured that elections are conducted freely and fairly.

For that reason, she argued, any provision of the law which does not reflect those safeguards, goes against the citizen's rights and any affected person has a right to challenge any law which occasions such breach under articles 21(1), (2) and 26(1) of the Constitution. To bolster her argument that the Constitution guarantees free and fair elections, the learned counsel cited the case of **Attorney General and 2 Others v. Aman Walid Kabourou** [1996] TLR 156. She added that, such guarantee is also enshrined under article 74(7) and (11) of the Constitution which requires that the NEC shall be an autonomous body.

On the submission that the affidavital evidence deposed by the respondent is not credible for want of authenticity, Ms. Karume replied that the facts as set out in the affidavit were not controverted and therefore the High Court rightly acted on that evidence to find that the mentioned Returning Officers were CCM members. She argued further that since article 74(14) of the Constitution prohibits all persons concerned in conducting elections from joining any political party,

utilizing as Returning Officers, the Directors who, according to the respondent's affidavit were CCM members, by acting under s. 7(1) and (3) of the NEA, is a breach of articles 21(1), (2) and 26(1) of the Constitution.

With regard to the provisions of reg. 16(1) (a) and (b) of the Regulations which must be complied with by persons who are appointed as Returning Officers before they assume their duties in that capacity, the respondent's counsel contended that the requirements do not amount to sufficient safeguards because they do not ensure political neutrality on the part of the Directors. She argued that, since under the Code of Conduct for Public Officers (the Code), public officers are allowed to join political Parties so long as they adhere to the principles set out under part IX of the Code and since the Directors are public officers, their role as Returning Officers offends article 74(14) of the Constitution. She argued that, even if a Director makes a declaration to withdraw from membership of his political party, that declaration will not be effective because in effect, he had already joined a political party whereas article 74(14) prohibits **joining** any political party.

The learned counsel interpreted that provision to mean that, once a person has joined a political party, he is disqualified from becoming a Returning Officer. Similarly, Ms. Karume submitted, not only that the oath of secrecy is to be taken post the Director's appointment as Returning Officers but there is no legal mechanism which has been put in place to ensure that the Director who has joined a political party practically withdraws his membership from his party. She submitted further that the other safeguards relied upon by the appellants are equally not effective, more so because those conditions are not reflected in the NEA.

With regard to the appellant's submission that a Returning Officer may be removed when in the exercise of his duties commits a misconduct, she argued that such disciplinary measure is neither stipulated in the NEA nor does the said law provide for the right of objecting to the exercise by a Director, of the functions of the Returning Officer on the ground of misconduct.

On the submission by Dr. Mashamba that political parties have the right of appointing agents as provided for under s. 57 of the NEA, the respondent's counsel contended that, from the functions of a Returning

Officer as stated under ss. 35 D-F, 56, 70A, 80-82, 86 and 120 of the NEA, which are exercised throughout the election process, existence of a right to appoint a polling agent is confined to the voting process at the polling stations while elections are not a one day's activity but a continuous process.

As for criminalization of misconduct under s. 89A of the NEA, the learned counsel contended that such measure is not an effective safeguard because the section caters only for the manner in which a Returning Officer conducts election while article 74(14) of the Constitution takes care of the type of a person concerned with the conduct of elections. She stressed that punishment does not prohibit a Director who has joined a political party from becoming a Returning Officer. In a similar vein, Ms. Karume argued, the issue of perjury goes to the process rather than personality and therefore, she said, taking of the oath of secrecy does not ensure compliance with the requirements of article 74 (14) of the Constitution.

In her response to the appellants' complaint on the 11th ground of appeal that the High Court erred in failing to allow the Government to rectify what the learned Judges found to be the defects in the impugned

provisions, relying on article 30(5) of the Constitution and s. 13(2) of the BRADEA, the respondent's counsel submitted that the learned Judges properly exercised their discretion of either striking out the impugned provision or affording the Government time to effect the requisite rectification. She cited the **Mtobesya case** (supra) to support her argument. She stressed that, in the particular circumstances of this case, the learned Judges were justified in striking out the impugned provisions instead of allowing the Government to amend the defects found by the High Court and more so, because the appellants did not seek to be afforded that opportunity.

Finally, as regards the appellants' submissions that under s. 111 the NEA, a person who, if aggrieved by the election results, has the right of disputing such results by filing an election petition in the High Court, the respondent's counsel contended **first**, that under s. 108(1) and (2) of the NEA, the presidential election results cannot be challenged, and **second,** as for the parliamentary elections, that is the right which may be exercised after declaration of the results and does not therefore, avail a person the opportunity of challenging appointment of a Director who does not qualify in terms of article 74(14) of the Constitution from assuming the functions of a Returning Officer.

She went on to argue that, because under article 36(4) of the Constitution, the President is a disciplinary authority over the Directors, they cannot act independently in their capacity as Returning Officers as required by article 74(7) and (11) of the Constitution because they remain answerable to the President. She cited as an example, the 2nd and 3rd appellants and argued that, as proved by the supporting affidavit, they conducted the 2015 elections while they were active CCM members. The learned counsel stressed that the import of s. 7(1) and (3) of the NEA is to make the elections in the country to be owned by the political party which is in power and thus deviate from the citizens' constitutional right to free and fair elections.

According to the learned counsel, the Constitution prohibits joining a political party, not that a person who has joined a political party may withdraw his membership and participate in the conduct of elections.

Having considered the arguments of the learned counsel for the parties on the 1st and 2nd issues, with regard to grounds 1 and 2 of the appeal, we agree that under s. 6 of the BRADEA, in bringing a petition, the petitioner must base his petition on any of the articles contained in Part III of Chapter One of the Constitution.

In this case, the respondent challenged *inter alia,* s. 7(1) and (3) of the NEA on account that it infringes article 74(14) of the Constitution. His petition was based on articles 21(1), and (2) and 26(1) of the Constitution. We do not however, agree with the appellants that since article 74(14) was not pleaded, the High Court erred in entertaining the petition. This is because, article 74(14) has a bearing on how the citizens' rights under article 21(1) and (2) are safeguarded. Similarly, article 26(1) imposes to every person the duty of abiding by the Constitution and the laws of the United Republic and therefore, the respondent acted properly in applying for redress against the alleged infringement of article 74(14) which sets out the safeguards for proper exercise by the citizens, of their rights under article 21(1) and (2) of the Constitution. We do not therefore, find merit in the 1st and 2nd grounds of appeal.

As for the 10th and 11th grounds of appeal, we need not be detained much in disposing them. Article 30(5) of the Constitution, in its official Kiswahili version, provides as follows:-

> *"Endapo katika shauri lolote inadaiwa kwamba sheria yoyote iliyotungwa au hatua yoyote iliyochukuliwa na Serikali au mamlaka nyingine inafuta au inakatiza haki, uhuru na wajibu muhimu zitokanazo na ibara ya*

12 hadi 29 za Katiba hii, na Mahakama Kuu inaridhika kwamba sheria au hatua inayohusika, kwa kiwango kinachopingana na Katiba ni batili au kinyume cha Katiba basi Mahakama Kuu ikiona kuwa yafaa au hali au masilahi ya jamii yahitaji hlvyo, badala ya kutamka kuwa sheria au hatua hiyo ni batili, itakuwa na uwezo wa kuamua kutoa fursa kwa ajili ya Serikali au mamlaka nyingine yoyote inayohusika kurekebisha hitilafu iliyopo katika sheria inayotuhumiwa au hatua inayohusika katlka muda na kwa jinsi itakavyotajwa na Mahakama Kuu, na sheria hiyo au hatua inayohusika itaendeiea kuhesabiwa kuwa ni halali hadi ama marekebisho yatakapofanywa au muda uliowekwa na Mahakama Kuu utakapokwisha, mradi muda mfupi zaid ndio uzingatiwe."

As can be discerned from that article, the same vests the High Court with discretionary power of declaring any provision of law void if it finds it to be unconstitutional. It also vests the High Court with discretionary power of affording the Government or other relevant authority, the opportunity to rectify the defect found in the relevant provision of the law. In the circumstances, the exercise by the High Court of such discretion did not amount to usurping the powers of the Legislature as suggested by the appellants. Furthermore, the High Court

did not err in not affording the Government the opportunity of amending the defects complained of by the respondent because, as submitted by the respondent's counsel, they did not seek to be afforded that opportunity. For that reason, there was no material upon which the High Court could consider to exercise its discretion to allow for amendments of the defects which the learned Judges found to have been established.

In the circumstances, the 1st 2nd, 10th and 11th grounds of appeal are devoid of merit. As a result, the same are hereby dismissed.

With regard to the argument made in support of the 7th ground of appeal, that the learned High Court Judges did not indicate how s. 7(1) and (3) of the NEA violates articles 21(1), (2) and 26(1) of the Constitution, we similarly do not find merit in that ground of appeal. We have found above that in his petition, the respondent contended that s. 7(1) and (3) of the NEA does not reflect the safeguards stipulated under article 74(14) of the Constitution. The High Court agreed with the respondent and proceeded to declare that provision unconstitutional. In the ruling at page 165 of the record, the High Court observed as follows:-

> *"On our part, we are settled that the provisions of section 7 (1) and (3) of the NEA do not reflect the*

safeguards enshrined under article 74 (14) of the Constitution. The evidence of the Petitioner in his affidavit was not controverted in the counter-affidavit by the Respondents. This evidence clearly shows how the provisions of section 7 (1) and (3) of the NEA are open to abuse by appointing authorities. In particular, the evidence shows how the appointed Directors of Local Government authorities who, by virtue of section 7(1) of the NEA, automatically and in mandatory terms become Returning Officers."

The High Court went on to state as follows:-

"The uncontroverted evidence of the Petitioner has also clearly shown that there are known Directors who are members and/or supporters of the ruling party. As already pointed out, these Directors, as a matter of law, automatically become Returning Officers for the purpose of conducting elections irrespective of being members and/or ardent supporters of the ruling party".

The passages which we have reproduced above are elaborative of the approach taken by the High Court in arriving at the conclusion that the impugned section of the NEA violates articles 21(1), and (2) and 26(2) of the Constitution. Whether or not that finding is correct is a

different issue which will shortly be discussed in succeeding grounds of appeal. Ground 7 of the appeal is thus equally devoid of merit and is hereby dismissed.

We now turn to consider the 3rd issue which arises from the 3rd and 6th grounds of appeal. The learned Solicitor General argued that the Directors do not become Returning Officers automatically as held by the High Court because their appointment under s. 7(1) and (3) of the NEA is not absolute. According to his submission, the Directors assume their functions as Returning Officers after complying with the conditions stipulated under s. 7(5) of the NEA and reg. 16 (1) and (2) of the Regulations.

Furthermore, he argued, in the exercise of such functions, they are answerable to the NEC which has unfettered power of removing them in the event of their failure to carry out their duties in accordance with their oath of secrecy and their declaration on not being members of any political party or that they have withdrawn their membership from a political party. Dr. Mashamba stressed on the sanctity of oath and declaration contending that, the same are effective measures in ensuring compliance with the safeguards stipulated under article 74 (14) of the Constitution.

In reply, the respondent's counsel submitted that since it is the President who appoints the Directors on the advice of the Local Government Commission, they cannot be in the circumstances be said to be independent from political parties because the law which vests the President which such power does not set out the requisite qualification intended to guarantee compliance with the conditions stipulated under article 74(14) of the Constitution. She however, relied on ss. 22(2) and 31(1) of the Local Government Service Commission Act No. 10 of 1982 which has since been repealed by s. 35 (c) of the Public Service Act. No. 8 of 2002.

Having duly considered the rival arguments of the learned counsel for the parties on this issue, we agree with the appellants that the High Court erred in holding that, upon their appointments, the Directors automatically become Returning Officers. It is not disputed that before assumption of their functions as Returning Officers, the Directors must comply with the provisions of s. 7(5) of the NEA and reg. 16(1) of the Regulations. S. 7(5) of the NEA states as follows:-

> *"Every Returning Officer and Assistant Returning Officers shall, before embarking on the functions of that office, take and subscribe to an oath of secrecy in the prescribed form before a Magistrate."*

With regard to reg. 16(1) of the Regulations, the same provides as follows:-

> *"16(1) Every regional elections coordinator, a returning officer and an assistant returning officer shall, before assuming duties-*
>
> *(a) take an oath of secrecy prescribed in Form No. 6 set out in the First Schedule before a Magistrate; and*
>
> *(b)* ***make a declaration prescribed in Form No. 7 set out in the First Schedule to these Regulations before a Magistrate or a Commissioner for Oaths that he is not a member of any political party or that he has withdrawn his membership from a Political Party .***"
>
> [Emphasis added.]

Since therefore, it is a mandatory requirement that the Returning Officers must comply with the conditions stated in the above quoted provisions of the law before they assume their functions, the finding by the High Court that the Directors automatically become Returning Officers upon their appointment is with profound respect, erroneous.

As stated above when considering the 1st and 2nd issues, learned counsel for the respondent has however, challenged the effectiveness of the measures stipulated under the above stated provisions of the law. We think that we can conveniently consider that argument when determining the 4th issue which encompasses the 4th, 5th, 8th and 9th grounds of appeal. Ground 5 of the appeal also contains matters which have been raised in the 6th ground of appeal and can thus be considered when determining the 4th issue.

On the 4th issue, the learned Solicitor General argued that the learned Judges misinterpreted the provisions of s. 7(1) and (3) of the NEA. The basis of his contention is that, the provisions should not have been read in isolation of other laws relating to the management of election processes. He submitted that, had they considered such other provisions of the laws, which include the provisions of the Public Service Act and s. 57 (1) (b) and (c) of the NEA entitling political parties to appoint polling agents, the learned Judges would not have found that the impugned provisions infringe article 74(14) of the Constitution.

With regard to the finding by the High Court that the respondent had established by evidence that the Directors who were the Returning Officers for Kinondoni Constituency during the February, 2018 bye-

elections, in the names of Aron Kagurumjuli, Mustafa Mkwama and Harrieth Mwakifulefule were CCM members, Dr. Mashamba faulted the learned Judges for having acted on electronically generated evidence, that is, the photographs of the three named persons said to have put on CCM uniforms, the evidence which according to him was unreliable. He contended that the High Court did not only fail to weigh the authenticity and reliability of that kind of evidence before it acted on it but it so acted in contravention of s. 18 (1) and (2) of the Electronic Transactions Act, 2015. He argued also that the High Court wrongly adjudged all other 75 Directors that they were CCM members by acting on unreliable evidence of the respondent.

Dr. Mashamba challenged also the trial court's findings that by virtue of their appointments, the Directors are members and/or ardent supporters of the ruling party and thus despite the taking of oath of secrecy and making of declaration under reg. 16 (1) of the Regulations, they do not practically relinquish their interests in their political party. He reiterated his argument on the effect of the oath of secrecy and the declaration which the Directors make before they assume their functions as Returning Officers.

He submitted further that the learned Judges erred by failing to recognize the positive role of the Directors. He contended that the use of Directors as Returning Officers has a constitutional and political history dating back to the early years of multi-party elections. He pointed out that at one time, NEC appointed Returning Officers from outside the Public Service but that exercise, he said, proved to be difficult because the performance of such officers was hindered by several factors including financial constraints, limited office facilities and expertise in the electoral processes management. It was from that experience, he argued, the process of appointing Returning Officers from outside the public service was changed. He added that the use of Directors is advantageous because they are accountable by virtue of their positions. This advantage, he said, applies to all those public servants who are involved in the conduct of elections.

In response, Ms. Karume contended that the provisions of other statutes and regulations cannot be used to decide the issue whether or not the impugned provisions are unconstitutional. She reasoned that, since the requisite safeguards under article 74(14) of the Constitution are not reflected in the impugned provisions, the High Court rightly found that s. 7(1) and (3) of the NEA violates articles 21(1), (2) and

26(1) of the Constitution. Relying on the case of **Rev. Mtikila** (supra), she argued that the Court could only rely on the provisions of other laws when harmonizing the relevant provisions of the NEA relating to the management of the electoral processes.

On the historical and political relevance of using the Directors as Returning Officers, the learned counsel for the respondent urged the Court to disregard that argument on account that the same was not raised in the High Court. Notwithstanding that position, she argued that such a positive role cannot justify violation of article 74(14) of the Constitution. According to the learned counsel, in effect, their role as Returning Officers contravenes article 74(14) of the Constitution. Concerning the electronically generated evidence contained in the supporting affidavit, Ms. Karume contended **first**, that such evidence was not controverted and **second**, that admissibility thereof was not at issue because the point was not raised in the trial court. She added that, since the fact that the said Directors were CCM members was stated and verified and because the appellants filed a counter affidavit in which, they did not controvert the said fact, it is inappropriate at this stage of the proceedings to raise the issue of admissibility of the photographs.

Citing the case of **Bruno Nyalifa v. The Permanent Secretary, Ministry of Home Affairs and Hon. Attorney General**, Civil Appeal No. 82 of 2017 (unreported), the respondent's counsel submitted that, being an annexture to the affidavit, the document formed part of evidence and did not require to undergo the admissibility test. She added that, in any case, under rule 15(3) of the Basic Rights and Duties Enforcement Rules, the appellants had the right of calling the deponent for cross-examination but did not exercise that right.

We have duly considered the contending arguments made by the parties' counsel on the above stated grounds of appeal which gave rise to the 4th issue. To start with the 9th ground of appeal, the same can be disposed of briefly. We have to point out that, we agree with Ms. Karume that even though the use of Directors as Returning Officers has positive impact in the management of electoral processes, those functions must be exercised in accordance with the provisions of article 74(14) of the Constitution. The positive role of the Directors shall not therefore, justify violation of that article of the Constitution even if it is intended to save Government funds in terms of the requirements of article 27(1) of the Constitution. We therefore do not find merit in that ground of appeal. The same is hereby dismissed.

Concerning ground 8 of the appeal, it is not disputed that the copies of photographs which were attached to the respondent's affidavit are electronically generated documents. The argument by the learned counsel for the respondent was, **first**, that the averment by deponent was not disputed and **secondly**, that the appellants were at liberty to apply to call the deponent for cross-examination. With respect to the respondent's counsel, her contention that the appellants did not object to the contents of the electronically transmitted documents is not correct. The averment in question was made by the respondent in paragraphs 15 and 16 of his affidavit where he deposed as follows:-

> *"That during the Kinondoni Constituency Bye-election of 17th February, 2018, I was astounded to see that the District Executive Officer as a Returning Officer under Aron Kagurumjuli* ***is a member and/or supporter of CCM****. There is now produced and shown to me pictures of Aron Kagurumjuli in his CCM uniform and his uniform as a Returning Officer for the 2nd Respondent, which are herewith attached and marked 'BC W2'."*
>
> *16. That in addition, during the said Kinondoni Bye-election, the 2nd and 3rd Respondent appointed*

Returning Officers who were clearly CCM party members/supporters." [Emphasis added.]

The respondent named the two other persons referred to in paragraphs 15 and 16 of his affidavit to be Mustapha Mkwama and Harrieth Mwakifulefule. Their photographs allegedly showing them in CCM uniforms were attached to the affidavit and marked 'BCW 3' and BCW 4' respectively.

In paragraphs 11 and 12 of their joint counter affidavit, the appellants replied to the contents of paragraphs 15 and 16 of the respondent's affidavit as follows:-

"*11. That, the contents of paragraph 14 and 15 of the affidavit are denied. It is further stated that the said contents are speculative, unfounded and argumentative.*

12. That the contents of paragraph 16 of the Affidavit are denied. The Respondents state that, no political appointees are involved in coordination and conduct of election processes."

It was argued for the respondent that since the document was annexed to the affidavit and because from the nature of the proceedings, the admissibility procedures were not applicable, the

document was properly acted upon by the High Court as reliable evidence. Acting on the respondents affidavit, the High Court made the following general conclusion:-

> *"The uncontroverted evidence of the Petitioner has also clearly shown that there are known Directors who are members and/or supporters of the ruling party..."*

We do not, with respect, agree with that finding. **First**, as shown above, in their counter affidavit the appellants denied the allegation that the said persons were active CCM members at the time when they were executing their functions as Returning Officers. Furthermore, in the written submission, they contended as follows:-

> *"... the Directors mentioned may have been participating in politics prior to their appointment, but once appointed to hold such public offices, as public servants holding the roles of Returning Officers, under F. 20 of the Standing Order, they will automatically be restricted from engaging in political activities."*

Secondly, the case of **Bruno Nyalifa** (supra) cited by the respondent's counsel is distinguishable. In that case, the Court did not state that once a document is attached to an affidavit, it should be taken in its face value to be conclusive evidence of the alleged fact. The

principle which was reiterated by the Court is that, where the contents of a document are not disputed, the court may act upon those contents to find that the alleged fact has been proved. In any case, as argued by the learned Solicitor General, the High Court acted on the document in contravention of s. 18(1) and (2) of the Electronic Transactions Act, 2015. Sub-section (2) thereof states as follows:-

> *"18(1) N/A*
>
> *(2) In determining admissibility and evidential weight of a data message, the following shall be considered-*
>
> *(a) the reliability of the manner in which the data message was generated, stored or communicated;*
>
> *(b) the reliability of the manner in which the integrity of the data message was maintained;*
>
> *(c) the manner in which its originator was identified; and*
>
> *(d) any other factor that may be relevant in assessing the weight of evidence."*

We similarly do not agree with the argument that the appellants should have sought to call the deponent for cross-examination. Since the appellants had denied the allegation made by the respondent in his affidavit, the respondent was duty bound to prove that allegation. That is in accordance with the elementary principle of he who alleges must

prove as embodied in the provisions of s. 110(1) of the Evidence Act [Cap. 6 R.E. 2002] which states:-

> *"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."*

On the basis of the above stated reasons, we agree with the appellants that the High Court erred in holding that the Directors who were Returning Officers for Kinondoni Constituency during the February 2018 bye-elections were active CCM members at the time when they were exercising those functions.

Similarly, the evidence relied upon by the High Court in its finding that the 75 Directors who were Returning Officers during the 2015 General Elections were CCM members fell short of reliability as argued by the learned counsel for the appellants. In its finding, the High Court relied on mere allegation by the respondent in paragraph 18 of his affidavit that the President has "*appointed members of Chama cha Mapinduzi as District Executive Directors, hence Officers who are CCM, party members in place.*" **First**, that allegation was not substantiated and **secondly**, the respondent could not have a personal knowledge of

all the Directors who were Returning Officers for all 75 constituencies while according to his affidavit, he voted in Kawe constituency during the 2015 General Elections. He could not therefore be at all those constituencies at the same time. Since therefore, he did not disclose the source of information for those facts which could not be from his own knowledge, the High Court erred in acting on those bare allegations. We therefore find merit in the 8th ground of appeal and hereby allow it.

We turn next to the 4th and 5th grounds of appeal which challenge the trial court's interpretation of s. 7(1) and (3) of the NEA on account that it does not reflect the safeguards set out in article 74(14) of the Constitution. We agree with the learned Solicitor General's argument that the impugned provisions should not have been read in isolation of other provisions of the law intended to ensure compliance with article 74(14) of the Constitution.

As found above, the Directors do not automatically become Returning Officers upon their appointment. Under s. 7(5) of NEA and Reg. 16(1) of the Regulations, they are required to take an oath of secrecy and make declaration that they have not joined a political party or if they are members of any political party, declare that they have withdrawn their membership. The argument by the respondent's counsel

is that the two measures do not amount to sufficient compliance with article 74(14) of the Constitution. It was argued further that since the Directors are appointed by the President who is from the ruling party, they cannot act impartially in the execution of their functions as Returning Officers.

Moreover, we agree with the appellants that because under s. 57 of the NEA political parties are permitted to appoint polling agents for purposes of protecting the interests of the respective candidates in the polling exercise and counting of votes stations, that is another safeguard in ensuring compliance with article 74(14) of the Constitution. At the end, each polling agent is availed a copy of results of the particular polling station. Similarly, in terms of s. 71(2) of the NEA agents of political parties are allowed to be present during vote addition for the sake of ensuring involvement of the political parties in that process and the declaration of final election results.

From the arguments of the learned counsel for the respondent, it is clear that the crux of the petition is not the absence of the safeguards in ensuring that the application of s. 7 (1) and (3) of the NEA conforms to the requirements stipulated under article 74 (14) of the Constitution. It is that the available safeguards are insufficient and impracticable.

On the contention that, since the Directors are appointed by the President, they cannot abide by the Constitutional requirement of being impartial, we agree with the counsel for the appellants that such argument is speculative and based on apprehension. In that regard, we are guided by the passage in the decision of the Court in the case of **Rev. Mtikila** (supra) that:-

> *"It must be realized that the Constitutionality of a provision or statute is not found in what could happen in its operation but in what it actually provides for. Where a provision is reasonable and valid, the mere possibility of its being abused in actual operation will not make it invalid."*

We are supported further in that view by the persuasive decision in the case of **Campbell and Fell v. United Kingdom** 7 E.H.R.R 165 cited by the High Court in the case of **Mabere Nyaucho Marando and Edwin Mtei v. The Honourable Attorney General**, Civil Case No. 168 of 1993 (unreported). In that case, the European Court of Human Rights considered the issue whether or not a body whose members are appointed by the Home Secretary can be independent. It held as follows:

"The personal impartiality of a member of a body covered by article 6 is to be presumed until there is proof to the contrary . . ."

In the case at hand, like in **Campbell and Fell** (supra), the respondent did not have any evidence to prove the contrary. In the circumstances, the personal impartiality of the Directors should have been accordingly presumed unless proved otherwise.

It was argued further that the conditions stipulated under the above stated provisions and the other laws such as the Public Service Act, 2002, do not amount to sufficient compliance with the requisite safeguards stipulated under article 74 (14) of the Constitution. Ms. Karume argued that the conditions are not stated in the NEA and cannot therefore be effective in preventing infringement of article 74(14) of the Constitution. With respect, since the Regulations, particularly reg. 16(1) of the Regulations which specifically ensures compliance with the requirements of article 74(14) of the Constitution are made under the NEA, that is under s. 124, they have the same force of law as the provisions of that Act. This is clear from the provisions of s.42 of the Interpretation of Laws Act [Cap. 1 R.E. 2002] which states as follows:-

"Any act done under the subsidiary legislation shall be deemed to have been done under the written law under which the subsidiary legislation was made."

It means therefore that by acting on the provisions of reg. 16 (1) (a) and (b) of the Regulations, the Directors are deemed to have done so under the NEA and therefore the argument that the measures taken to ensure that there is compliance with article 74 (14) of the Constitution are insufficient is, with respect, not sound.

On the basis of the findings on the 3rd, 4th, 5th, 6th, and 8th grounds of appeal, we find merit in the appeal. We accordingly allow it and consequently, set aside the ruling and drawn order of the High Court. Since the matter involved a public interest litigation, we make no order as to costs.

DATED at **DAR ES SALAAM** this 15th day of October, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

R.E.S MZIRAY
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered on this 16th day of October, 2019 in the presence of Mr. Vicent Tango, assisted by Ms. Alesia Mbuya, learned Principal State Attorneys and Mr. Yohana Marco, learned State Attorney for the Appellant and Mr. Jebra Kambole, learned advocate for the Respondent; is hereby certified as a true copy of the original.

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL