

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

IN THE DISTRICT REGISTRY OF TANGA

AT TANGA

MISCELLANEOUS CIVIL CAUSE NO. 7 OF 2019

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF
TANZANIA OF 1977 [CAP 2 R.E. 2002] (AS AMENDED FROM TIME TO
TIME)**

AND

**IN THE MATTERS OF BASIC RIGHTS AND DUTIES ENFORCEMENT ACT [CAP
3 R.E. 2002]**

AND

**IN THE MATTER OF INTERPRETATION OF SECTIONS 36 AND 38A OF THE
NATIONAL ELECTIONS ACT [CAP 343 R.E. 2002], AND REGULATIONS 31
AND 34 OF GN NO. 307 OF 2015.**

AND

**IN THE MATTER OF BAISC RIGHT TO PARTICIPATE IN GOVERNANCE
PROCESS**

AND

**IN THE MATTER OF RETURNING OFFICER TO REJECT TO ISSUE THE
NOMINATION FORM TO THE CANDIDATE DULY NOMINATED BY A
POLITICAL PARTY**

BETWEEN

AMINA ALLY SAGUTI.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

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RULING

The petitioner, Amina Ally Saguti, entertained grave doubts as regards to the Power of the Returning Officer to refuse or reject to receive the nomination forms , and that if such situation arises, the Petitioner be allowed to appeal to the National Electoral Commission, and when the Returning Officer refuses to issue the Nomination Forms to a candidate duly nominated by the Political Party , that candidate be declared duly nominated, and also, when the Returning Officer refuses to receive the Nomination Forms, then the National Electoral Commission should declare the Candidate duly nominated.

In her affidavit, the Petitioner said she is a Tanzanian and a Member of CHADEMA. She filed an application under the Constitution as the citizen of Tanzania and without mentioning the provision of the Constitution under which this application was filed. She also cited the Basic Rights and Duties Enforcement Act, Cap 3 R: E 2002 without specifying the Provision of the Act invoking the jurisdiction and power of the High Court thereunder to inquire into such doubts and sought for the High Court to interpret section 36, and 38A of the National Election Act, Cap



343 R: E 2002, and Regulations 31 and 34 of GN No. 307 of 2015.

Section 36 reads:

QUALIFICATION OF CANDIDATES

36. No person shall be qualified to be a candidate for parliamentary election or elected to be as a member of parliament unless he is qualified to be so elected by and in accordance with the provisions of Articles 67 of the Constitution."

Section 38A (1) reads:

38A (1) a candidate or one of its nominators shall, at the time of delivering the nomination form pursuant to the provisions of section 38, deposit with a Returning Officer such sum of money as may be prescribed.

2) the deposit of an opposed candidate shall be forfeited to the Government if he withdraws his candidature after nomination day or if the number of votes counted in his favor at the election, is less than one tenth of



the total number of votes counted for the constituency for which he was a candidate, except that such deposit shall not be forfeited if the candidate dies.

- 3) where the deposit of a candidate is not forfeited under the provisions of subsection (2), it shall as soon as is reasonably practicable after the declaration of the results of the election, be returned to the candidate or paid to his personal legal representative by the Returning Officer."

Regulations 31 and 34 of GN No. 307 of 2015, (The National Elections (Presidential and Parliamentary Elections) Regulations, 2015, reads:

Regulation 31- Nomination for Parliamentary Election and unopposed candidate

- 1) Any person who wishes to contest for parliamentary election, shall submit to the Returning Officer a letter of introduction from a Regional or District Secretary of his



Political Party and obtain from the Returning Officer nomination Form No. 88 as prescribed in the First Schedule to these Regulations.

2) The nomination form for parliamentary election shall contain:

A)

b)

c)

d)

e)

f)

3. Subject to the provisions of the Act, a candidate for parliamentary election shall, on submitting nomination forms to the Returning Officer attach recent four colored passport size photographs and deposit with the Returning Officer a sum of fifty hundred thousand shillings.

4. The Returning Officer shall, upon being satisfied that the candidate qualifies to be nominated, certify in Form No. 8B.

5. Subject to the provisions of the Act, where only one candidate is nominated in a constituency, such candidate shall be deemed to be duly elected and shall assume office upon oath as a Member of Parliament.

Regulation 34, reads:

Regulation 34. **Appeals**

- 1) Any person who is aggrieved by the decision of the Returning Officer under Regulation 33, may appeal to the Commission within twenty-four hours, from the time of the decision or such further period as the Commission may allow.

- 2) The appeal to the Commission under sub regulation 1 shall be made in Form No. 12 as prescribed in the First Schedule to these Regulations.

3) Form No. 12 stipulated under sub regulation 2 shall contain:

a)

b)

c)

d)

e)

4. The Appellant shall obtain the Appeal Form No. 12 from the Returning Officer.

5. Subject to sub regulation 4, the appellant shall submit the Appeal to the Returning Officer who shall receive the same on behalf of the Commission.

6. The Returning Officer shall, immediately after receiving the appeal under sub regulation 5, attach Form No. 8B and 9B, and any other documentary evidence necessary to the appeal and forward the appeal to the Commission.

The applicant alleged that she was the candidate for the Parliamentary election, and she received her nomination paper, and she returned the duly completed nomination Form to the Returning officer, but the Returning officer refused to accept the nomination Form thereby denying her right as the candidate to participate in the elections.

The jurisdiction and power conferred on the Court by Article 83 of the Constitution to inquire into and decide doubts , and all questions and disputes arising out of and in connection with the election of the Member of Parliament can be exercised only after a particular candidate has been declared elected and, on an election petition filed under section 107 of the National Elections Act, Cap 343 R: E 2015. The word 'election' in Article 83 of the Constitution, in the wider sense, denotes the entire process of election culminating in a candidate being declared elected and questions and disputes arising out of and in connection with such election must include all questions and disputes relating to any stage of it, including the stage of nomination of candidates during the nomination processes.

The Applicant did not file the election petition under Section 107 of the National Elections Act, Cap 343 R: E 2002, instead she filed a miscellaneous civil cause or an application by way of an originating summons against the Attorney General only, and in the application the Returning Officer has not been made a party. The only party in the Application is the learned Attorney-General and it is not clear whether the Attorney General is appearing on behalf of the Electoral Commission or on behalf of the Returning Officer as the Electoral Commission also was not impleaded as a party.

There is no doubt, and as deponed in the affidavit of the Applicant, the issue is the interpretation of section 36 and 38A of the National Elections Act, 2015, and Regulations 31 and 34 of the GN No. 307 of 2015, (The National Elections (Presidential and Parliamentary Elections) Regulations, 2015 regarding the issue of the Returning Officer rejecting to receive or admit the nomination Forms from the nominated candidate of a Political Party on the last date for making nominations.

The Applicant states that she applied to the Returning Officer for the supply of the nomination papers, which she eventually

received. She filled the forms as required and went to the office of the Returning Officer at Korogwe for submitting the Nomination Forms. The applicant states that she was prevented from filing her nomination paper as the Returning Officer refused to accept them. She then filed the application as the citizen of Tanzania who was denied her right to participate in the elections. She should have filed the petition as a citizen of Tanzania and as an "intending candidate" for the Parliamentary election. She also complained of discrimination offending against the Constitution.

Both the parties share the same view and contend that the application is for interpretation of the election laws, in particular the powers of the Returning Officer in the elections act and regulations and since the issue has arisen in connection with the election of the Member of Parliament and such a question or issue must, under Article 83 of the Constitution, be inquired into and decided by this Court, and not by the Constitution Court. The extreme contention put forward on behalf of the applicant is that it does not matter whether the doubt is well founded or not or whether it is good, bad, or indifferent; this Court is bound to

inquire into and decide the same as soon as the question arises, and a citizen brings it before this Court for resolution thereof.

Article 83 of the Constitution undoubtedly confers jurisdiction and power on this Court to inquire into and decide all questions and disputes arising out of or in connection with the election of Member of Parliament and this Court will have to inquire into and decide the same. But the question is whether there is anything in the Constitution indicating the time and manner at which and the way such questions and disputes must be inquired into and decided. Under Article 83 (3) (a-c), the Parliament has been mandated or authorised to make rules and regulations, directions and control of proceedings, Article 83 (3), reads:

83.-(1) Every proceeding for the purposes of determining the question whether –

(a) the election or appointment of any person to be Member of Parliament was valid or not; or

(b) a Member of Parliament has ceased to be a Member of Parliament and his seat in the National Assembly is vacant, or not, shall, subject

to the provisions of sub article (2) of this Article, first be instituted and heard in the High Court of the United Republic.

(2) Where the Electoral Commission, in the discharge of its functions in accordance with the provisions of Article 41(3) of this Constitution has declared any Member of Parliament to have been elected President, then no court or any other body shall inquire further into any question concerning the seat of that Member of Parliament being vacant.

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

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

(b) the grounds and times for instituting such proceedings, procedure for instituting proceedings and conditions which must be

fulfilled in respect of every such proceeding;
and

- (c) prescribing the powers of the High Court over such proceedings and specifying the procedure for the hearing of the matter itself.
- (4) There shall be a right of appeal to the Court of Appeal of Tanzania against a decision of the High Court in any matter which was heard in accordance with the provisions of this Article.

Thus, any question of the election or appointment of any person (including nomination processes), whether the process was valid or not, shall be determined by the High Court. It will be noticed that words used, namely, " any question" arising out of or in connection with elections shall be determined by the High Court. By Article 83 (3), the Parliament was authorized to enact the legislation for election matters regarding the person entitled to institute proceedings in the High Court for determination of any question in accordance with Article 83 of the Constitution.

Indeed, the Parliament enacted the National Elections Act and its Regulations, amongst other things, section 116 of the National Election Act, 2015, the validity of nomination processes also can be inquired into by the High Court through an election Petition. The National Elections Act, in particular Section 107 of the Act provides that notwithstanding anything in the Constitution, no election to the Parliament shall be called in question except by an election Petition presented to Court in such manner as provided for by or under the National Election Act. In exercise of powers thus conferred on it, Parliament enacted the National Election Act, 2015, and its Regulations, providing how elections are to be held and how and on what grounds such elections may be called in question. It also set up a special Commission for the decision of "questions and disputes" arising out of or in connection with such nominations processes and how to appeal against any decision of the Returning Officer for that constituency, and also the period under which the person can make such appeals before the Electoral Commission.

In this matter, the applicant applied to the High Court by way of a Miscellaneous Cause or Originating Summons requiring the

Court to interpret the provisions of the election laws. The applicant does not want the Court to quash the decision of the Returning Officer rejecting her nomination paper and to direct the Returning Officer to include her name in the list of valid nominations to be published, the applicant is actually contesting the 2015 elections, which long passed, and the elections laws have been amended to suit the elections held in 2020. The question therefore is whether this Court is properly moved.

Section 107 of the National Election Act says "the election of a candidate as a member shall not be questioned except on an election petition. The most important question for determination by this Court was the meaning to be given to the word "election". That word election has by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling, or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is

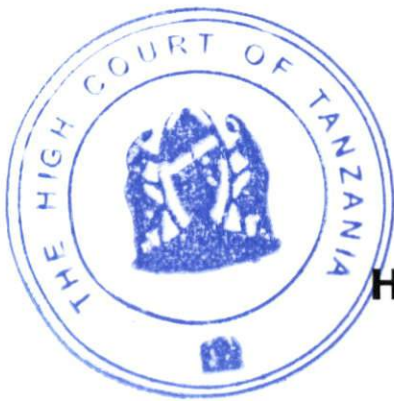


used to connote the entire process culminating in a candidate being declared elected.

In Halsbury's Laws of England, 2nd edition, Volume 12, page 237, the word "election " could be and had been properly used with respect to the entire process which consisted of several stages in the election processes including the decision or order of the Returning Officer in the nomination processes. The only way such an order could be called in question was as laid down in Article 83 of the Constitution and section 107 (1) of the National Election Act, 2015, and this could be done only by an election petition presented before the High Court after the entire process of election culminating in a candidate being declared elected had been gone through. On such election petition being filed the High Court would be properly bound to inquire into and decide "all questions and disputes arising out of or in connection with the election " irrespective of the stage in the entire election process to which the " questions and disputes relate", and this includes the act of the Returning Officer refusing to receive or admit the Nomination Form of the Applicant.

I, however, express no opinion on the merits of any of the controversies raised in the application, but, for the foregoing reasons, I hold that the present application being an election petition cannot be filed in court by way of an originating summons but by a Petition. For the foregoing reasons I, therefore, dismiss the Application, with no orders as to costs.

**DATED AND DELIVERED IN TANGA, THIS 04TH
MARCH 2022**



A handwritten signature in blue ink, appearing to read "Mansoor", is written over the printed name.

**MANSOOR, J
JUDGE
HIGH COURT, TANGA
04TH MARCH 2022**