THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(MAIN REGISTRY)

(CORAM: KIMARO, J: MASSATI, J AND MIHAYO, J)

MISCELLANEOUS CIVIL CAUSE NO.77 OF 2005

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977

AND

IN THE MATTER OF A PETITION TO ENFORCE A CONSTITUTIONAL BASIC RIGHT UNDER THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, 1994

AND

IN THE MATTER OF THE ELECTIONS ACT, NO.1 OF 1995

AND

IN THE MATTER OF A PETITION TO CHALLENGE AS UNCONSTITUTIONAL SECTIONS 98(2) AND 98(3) OF THE ELECTORAL LAW (MISCELLANEOUS AMENDMENT) ACT 4/2000

BETWEEN

LEGAL AND HUMAN RIGHTS CENTRE (LHRC) – 1ST PETITIONER

LAWYERS' ENVIRONMENTAL ACTION TEAM (LEAT - 2ND PETITIONER

NATIONAL ORGANIZATION FOR LEGAL ASSISTANCE (NOLA) - 3rd PETITIONER

VERSUS

THE ATTORNEY GENERAL - RESPONDENT

JUDGMENT OF MASSATI, J:

I have read the judgment of Kimaro J in draft. I entirely agree with her opinion and conclusion. I would however like to add the following:

As Kimaro J. has sufficiently summarized the facts and the submissions of the learned Counsel, I do not feel the need to repeat them here.

This petition seeks to annul that part of Act No. 4 of 2000 which amended s. 98 (2) of the Elections Act by deleting and replacing it by a new subsection and adding a new sub section 3. According to the Petitioners the impugned provisions are violative of Articles 13 (1) (2), 21 (1) (2) and 29 (1) of the Constitution of the United Republic of Tanzania; on the ground that they encourage corruption in elections, impinge on the right to equality before the law, and the citizens rights to vote and be voted in fair and free elections. The provisions also infringe several international human rights instruments to which Tanzania is a party.

On the other hand, the Respondent, the Honourable Attorney General has resisted the petition both in substance and on two preliminary objections. The Respondent thinks that the Petitioners have no locus standi as they are not persons contemplated by Article 30 of the Constitution and secondly that there is no cause of action.

Let me first begin with the preliminary objections. On the first objection I entirely agree with Kimaro J, that under the Interpretation of Laws and General Clauses Act, (Cap 1) the petitioners, as body corporates, are *"persons"* for the purposes of Article 30 (2) of the Constitution; and that

they have sufficient interest in this public interest litigation. On the second objection, I would begin by borrowing the definition of the term *"cause of action"* which the Court of Appeal in **JOHN M. BYOMBALIRWA VS AGENCY MARITIME INTERNATIONAL (TANZANIA) LTD** [1983] TLR. 1 put as –

> *"essentially facts which it is necessary for the Plaintiff to prove before he can succeed in the suit."*

In the present case, the Petitioner have pleaded that the provisions of s. 98 (2) and (3) of the Electoral Law (Miscellaneous Amendments) Act, 2000 infringe and abridge their Constitutional rights as citizens guaranteed by Articles 13 (1) (2) 21 (1) & 2 of the Constitution of the United Republic of Tanzania, 1977. Article 30 (3) of the Constitution provides:

> *"(3) Any person alleging that any provision in this part of this Chapter or in any law concerning his rights or duty owed to him, has been, is being, or is likely to be violated by any person anywhere in the United Republic may institute proceedings for redress in the High Court."*

So, in my view, any allegation by any person that his fundamental right or duty owed to him has been, or is likely to be violated, is sufficient to disclose a cause of action in cases of this nature. These are allegations, necessary for the petitioners to prove before they can succeed in their petition. And that the petitioners have done.

Besides, the petition raises a serious and important point of law to be determined. For that I would borrow the dictum in the Ugandan case of **KATIKIRO OF UGANDA VS ATTORNEY GENERAL OF UGANDA** [1958] EA 765 that a plaint should not be rejected where a serious and important point of law is to be determined. There, Sheridan J was considering O. VII rule 11 of the Uganda Civil Procedure Rules, which is in pari material with the Tanzanian Civil Procedure Code 1966 (O. VII rule 11) and quoted with approval the observation of **MAULTON J. in DYSON VS ATTORNEY GENERAL 4** [1911] K.B. 410; that:

> *"It is not in accordance with the practice of the Court, nor is it desirable, to refuse to allow cases raising points which involve serious arguments to go to trial so that the parties may have them decided in the ordinary way at the trial and may enjoy the right of appeal following from their being so decided."*

So I quite agree that the second preliminary objection raised by the Respondent has no merit and should be dismissed.

On the merits of the petition, I would first start by restating some of the principles of constitutional interpretation. And the first is that there is a presumption that every statute is constitutional unless proved otherwise (see **LEONS NGALAI VS ALFRED SALAKANA & ANOTHER (CAT) CA. No. 381/96** (Unreported). It is the burden of the petitioner to show that legislation is unconstitutional. Once the petitioner alleges and proves, either by evidence or arguments as in this case, the burden then shifts to the Respondent to show that the impugned legislation is saved under Article 30

(3) of the Constitution. According to case law, cited by both Counsel for the petitioners and the Respondent, in order to be saved, a legislation must be shown to have met the proportionality test: which is that, it is reasonable, not arbitrary, and necessary for societal good. In the present case the petitioners have, I think, successfully shown that the *"takrima"* provisions are unnecessary, unreasonable, and discriminatory. The Respondent on the other hand has argued that the *"takrma"* provisions were necessary as an exception to the general rule of treating. Ironically to me, the learned Principal State Attorney, has referred this Court to several decisions of the Court of Appeal such as **LUTTER NELSON VS THE HON ATTORNEY GENERAL AND IBRAHIM MSABAHA** Civil Appeal No. 24 of 1999; (unreported); **PETER MSEKALILE VS LEONARD DEREFA** (Civil Appeal No. 32 of 1997) (unreported) and **GILLIARD JOSEPH MLASEKO and 2 OTHERS VS CORONA FAIDA BUSONGO AND ANOTHER** (CA) Civil Appeal No. 57 of 1996 (unreported) as justification for the enactment of the *"takrima"* provisions. With respect, while the court would not question the wisdom of the parliament in enacting any law, it is my considered view that the fact that court could have reached such decisions without the aid of the new provisions is sufficient evidence that the new provisions are not necessary as courts already had such powers. On that score alone the *"takrima"* provisions do not meet the proportionality test. But, further according to the learned state attorney the said sections were enacted so as to serve situations where election candidates would incur expenses and costs in furthering election campaigns but not where they are meant for inducing or influencing voters, which is treating. The problem with the Respondent's reasoning is that, attractive as it may sound, there is no similar provision for checking in the field which of the offerings of a

candidate are for elections *"expenses"* and *"costs"* and which for *"inducing"* or *"influencing voters"*. Courts have been able to sort out the mess only after elections and with evidence. This means to my mind, that the *"takrima"* provisions are arbitrary and unpredictable, leaving it only to the minds of the candidate and the voters as to the true intention of the offerings. Such law is arbitrary and cannot meet the proportionality test.

Another principle of Constitutional Interpretation is that in interpreting a legislation vis a vis the constitution, both the purpose and effect of the legislation must be given effect to. (See **ATTORNEY GENERAL VS MOMODON JOBE** [1984, AC 689]. The petitioners have argued that the *"takrima"* provisions infringe Article 13 (2) and also Article 21 (1) and (2) of the Constitution which guarantee, the right to equality before the law, and the rights of the citizens to participate in the governance of their country by fair and free elections. The Respondent, on the other hand, submit that the *"takrima"* provisions treat all election candidates from political parties with equal status and to that extent are not discriminatory. They insist that those provisions were only meant to cater for genuine expenses. Although the Respondent does not dispute that Article 21 (1) of the Constitution guarantees the rights of the citizens to participate in public affairs, I can find nothing in his submission, on the effect of the *"takrima"* provisions on Article 21 (1). Whereas the Petitioners have contended that since the *"takrima"* is offered to the electorate before voting they are likely to influence the voters one way or the other, and therefore in such a situation there cannot be free and fair elections.

Taking Article 13 (1) and (2) and 21 (1) of the Constitution together I could not agree with the petitioners more. The purpose of Article 21 as a whole, is to ensure that the citizens enjoy their universal enfranchisement in full measure. The effect of the "*takrima*" provisions would certainly be to effectively curtail that right and thus deny the electorate the full benefit of the guarantee by being influenced by "*takrima*" rather that quality in voting in candidates.

So for the above reasons I would allow this petition. The petitioners are entitled to a declaration that the provisions of s. 119 (2)(b) and (3)(c) of the National Elections Act [1985] formerly s. 98 (2) and (3) of the Elections Act, 1985 as amended by Act 4 of 2000 are unconstitutional as they contravene Articles 13 (1) (2) and 21 (1) and (2) of the Constitution of the United Republic of Tanzania. As this is a public interest litigation the parties shall bear their own costs. The petition is therefore allowed, and I would agree with the order proposed by my learned sister, Kimaro J.

S.A. MASSATI

JUDGE

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