IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO 98 of 2010

FRED TUNGU MPENDAZOE **PETITIONER**

VS

1. **THE ATTORNEY GENERAL** **1ST RESPONDENT**
2. **DR. MILTON MAKONGORO MAHANGA** **2ND RESPONDENT**
3. **THE RETURNING OFFICER, SEGEREA CONSTITUENCY** **3RD RESPONDENT**

RULING

Date of last Order: 25-05-2011
Date of Judgment: 06-06-2011

JUMA, J.:

This is a ruling on three points of preliminary objections which were raised by the Attorney General (1st respondent); the Returning Officer, Segerea Constituency (3rd Respondent); and Dr. Milton Makongoro Mahanga (2nd respondent). On 4th

January 2011, the 1st and 3rd respondents raised a preliminary point of objection contending that the amended petition which Mr. Fred Tungu Mpendazoe (the petitioner) filed on 17 December 2010 is bad in law for having wrongly incorporated "Affidavit Verification and Jurat of Attestation" contrary to governing laws. For this, the 1st and 3rd respondents have asked this court to make an order to either strike out the amended petition or dismiss the petition altogether. Later on 10th March 2011 the 1st and 3rd respondents filed an additional notice of objection, asking this court to dismiss the amended petition on the ground that its particulars in paragraphs 7.4, 7.5, 7.6, 7.7, 7.10 and 7.12 are vague to the point of suffering from being unspecific and lacking in material sufficiency.

In his reply to the amended petition which he filed on 11th March 2011, the 2nd respondent sought the dismissal of the amended petition on two points of objection. In his first point, he objected that the *jurat* of attestation in the affidavit sworn by the petitioner is incurably defective in law. Secondly, he objected that the amended petition has not been properly presented in this court as required by the law.

At the hearing of the preliminary points of objection on 25-05-2011, the petitioner was represented by learned counsel, Mr. Peter Kibatala while the 2nd respondent was represented by Mr. Jerome Msemwa, the learned counsel. Mr. David Kakwaya, the learned State Attorney represented the 1st and the 3rd respondents. In his oral submissions Mr. Msemwa abandoned his first point of objection where he had contended that the jurat of attestation in the affidavit sworn by the petitioner is incurably defective in law. The three learned counsel therefore submitted on the remaining three points of objection reproduced here as follows:

i) Petition is bad in law for having wrongly incorporated Affidavit Verification and Jurat of Attestation contrary to governing laws;

ii) That the petition is untenable for being vague and unspecific as particulars contained in paragraphs 7.4, 7.5, 7.6, 7.7, 7.10 and 7.12 suffer from material insufficiency; and

iii) The amended petition has not been properly presented in Court as required by law.

With regard to the first point of objection, it may be useful to reproduce here the relevant part of the Affidavit of Verification which is objected to by the learned State Attorney:

> **AFFIDAVIT OF VERIFICATION**
>
> ***I, FRED TUNGU MPENDAZOE****, the Petitioner hereinabove named hereby swear and verify that the contents of this Petition in Paragraphs 1, 2, 3, 4, 5, 6, 7, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 7.7, 7.8, 7.9, 7.10, 7.11, 7.12, 7.13, 7.14 and 7.15 are true to the best of my knowledge.*
>
> *Dated at Dar es Salaam this 15th day of December5 2010*
>
> ---
>
> ***FRED TUNGU MPENDAZOE***
>
> *Sworn by the said*
> ***FRED TUNGU MPENDAZOE***
> *Who is identified to me by*
> *Peter Kibatala, Adv*
> *The latter known to me personally*
> *in my presence at Dar es Salaam*
> *this 16th day of December 2010*

Submitting on his objection that the "Affidavit of Verification" is bad in law, Mr. Kakwaya invited this court to look at Rule 5 (1) and (2) of the **National Elections (Election Petition) Rules, GN 447 of 2010** (hereinafter referred to as the Rules.) which identifies the basic particulars that are required to be set out in any petition. According to Mr. Kikwaya the so called "Affidavit of

Verification" is neither set out under Rule 5 (1) and (2) of Rules nor is it recognized under the **Civil Procedure Code, Cap. 33 R.E. 2002** (hereinafter referred to as the **CPC**). The learned State Attorney strongly believes that "Affidavit of Verification" is not provided for under the **National Elections Act, Cap. 343 R.E. 2010** (hereinafter referred to as the Act).

Mr. Kibatala, in his replying submission, pointed out that the learned State Attorney did not cite any provisions of the law to justify his contention that the inclusion of "Affidavit of Verification" is contrary to the governing laws. To Mr. Kibatala, as long as laws of Tanzania are silent and do not prohibit the use of "Affidavit of Verification" the petitioner has not infringed any contrary to governing laws to sustain this first point of objection. Further, Mr. Kibatala contended that the inclusion of Affidavit of Verification has not offended Order VI Rule 15 (1), (2) and (3) of the **CPC** which governs verification of pleadings. Mr. Kibatala also referred me to the case of **1. Joseph Laurent Haymu, 2. Emmanuel Denis Bura, 3. Thomas Lulu Irafay vs. 1. Attorney General, 2. Dr. Wilbrod Peter Slaa, Misc. Civil Cause No. 20 of 2005 at Arusha (unreported)**, where

Rutakangwa, J. (as he then was) saw nothing wrong with inclusion of "Affidavit of Verification".

The issue for my determination with respect to this first point of objection is whether the inclusion of "Verification of Affidavit" like the way the petitioner has, has offended the procedural laws governing election petitions in Tanzania. The CPC is a "fall-back" procedural law intended to deal with a situation where the Rules do not provide for any matter of procedure for the conduct of an election petition. Rule 22 of the Rules has specifically stated that the practice and procedures governing election petitions in Tanzania shall be regulated by procedures prescribed under the CPC. This position of law was restated by Rutakangwa, J. (as he then was) in the case of **Joseph Laurent Haymu (supra), page 8**:

> *"The rules regulating the practice and procedure in a civil suit in our courts are contained in the CPC. One such rule 15 of Order VI which provides the manner in which a pleading has to be verified. The presence of rule 26 in the Rules is impeccable proof that even election petitions fall within the ambits of the CPC for those matters not specifically covered either by the [**National Elections Act**] or the Rules [**Elections (Election Petitions) Rules, 1971**]"*

Rutakangwa, J. was referring to the **Elections (Election Petitions) Rules, 1971 GN No. 66 of 1971** which were later

revoked and replaced by the current Rules. Revocation of the **GN 66 of 1971** did not however change the position of the law recognizing the CPC as a fall-back law of procedure for election petitions. Rule 26 which Rutakangwa, J. referred to, was re-enacted as Rule 22 under the current Rules:

> ***22. (1)*** *Subject to the provisions of the Act and of these Rules, the hearing, practice and procedure in respect of a petition shall be regulated, as nearly as may be, by the rules regulating the practice and procedure in a civil suit.*
>
> *(2) Without prejudice to the generality of the provisions of paragraph (1) of this rule, the provisions of section 80 and of the First Schedule to the Civil Procedure Code , which relate to the discovery and inspection of documents, admissions, production, impounding and returning of documents, transfer of proceedings, settlement of issues and determination of suits, summoning of witnesses, admissibility of affidavits, awarding of costs, judgments and execution of a decree, shall apply mutatis mutandis to the proceedings on a trial of a petition and to the enforcement of an order for costs made by the court:*

In my opinion, Rule 5 (1) and (2) of the Rules which the learned State Attorney invited the court to look at does not cover all the procedural aspects arising from different election petitions. Rule 5 lays down what a petition must contain, like names, addresses, and grounds relied upon by the petitioner and nature of reliefs sought. Other equally important procedural requirements

election petitions should resort to the CPC. For example, on the authority of Rule 22-(1) of the Rules, the law governing verification of election petitions is found under Rule 15 of Order VI of the CPC:

> ***15***.*-(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.*
>
> *(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true.*
>
> *(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.*

From the foregoing, it is clear to me that if a verification clause of a petition satisfies the conditions prescribed under Order VI Rule 15 of the CPC that verification shall be deemed valid even if the verification clause is prefaced by the words "Affidavit of Verification". The essence and rationale of verification in an election petition is to test the genuineness and authenticity of claims the petitioner has made in his petition and also to make the petitioner responsible for those claims. Court of Appeal of Tanzania in **Anna Makanga Vs Grace Woiso Civil Reference**

No. 21 of 2006 Court of Appeal at DSM (unreported) described verification as simply a final declaration made in the presence of an authorized officer, such as a notary public, by which one swears to the truth of the statement in the document.

In so far as the verification clause in the present petition is concerned, it was signed on 15-12-2010 in Dar es Salaam by the petitioner himself. In my opinion, the "Affidavit of Verification" which the petitioner employed complied with Order VI Rule 15 (3). Similarly the petitioner has complied with Rule 15 (2) of Order VI because he has verified that the contents of all the paragraphs in his petition are true to the best of his knowledge. With respect, I do agree with Mr. Kibatala that "Affidavit of Verification" does not offend the law (i.e. Order VI Rule 15) which governs verifications of election petitions. The first preliminary point of objection has no merit and is hereby dismissed.

With regard to the second point of objection, Mr. Kakwaya submitted that paragraphs 7.4, 7.5, 7.6, 7.7, 7.10 and 7.12 of the petition suffer from material insufficiency because they are

vague, unspecific and hence they violate Order VI Rule 4 of the CPC which applies to election petitions. According to the learned State Attorney, election petitions must by virtue of Rule 22 of the Rules, comply with the CPC. The relevant Order VI Rule 4 of CPC provides,

> ***4***. *In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence and in all other case in which particulars may be necessary to substantiate any allegation, such particulars (with dates and items if necessary) shall be stated in the pleading.*

With support of provisions of the **Indian Code of Civil Procedure** with which Order VI Rule 4 of CPC is in *pari materia*, the learned State Attorney argued that the petitioner should have furnished the respondents with such particulars regarding the petition as are necessary to make the respondents appreciate the nature of the case facing them and this would enable them to prepare themselves accordingly. According to Mr. Kakwaya, the particulars that are missing from paragraph 7.4 are the actual names of the **4** Polling Stations of Buguruni Ward, **2** Polling Stations of Tabata Ward and **4** Polling Stations of Kipawa Ward.

With regard paragraph 7.5 of the petition which builds on allegations under paragraph 7.4, the learned State Attorney contends that the petitioner should have furnished the particulars of the names of the officers in charge of the 4 Polling Stations of Buguruni Ward, 2 Polling Stations of Tabata Ward and 4 Polling Stations of Kipawa Ward whose polling stations did not tally the votes because of lack of Election Results Forms Number 21B.

Mr. Kakwaya, the learned State Attorney also took objection to paragraph 7.6 of the petition on the ground of want of particulars. In paragraph 7.6 the petitioners alleged that **Election Result Forms [Form No. 21B]** were belatedly distributed to the respective polling stations, results had to be recorded in normal plain sheets of papers, thus opening the door for distortions and rigging. The petitioner; in the same paragraph 7.6 also allege that 53 Polling Stations never complied with the pasting of Election results outside their respective Polling Stations. 1st and 3rd respondents would like the petitioner to identify the 53 polling stations where Form No. 21B were belatedly distributed and whose results were not pasted at the notice board outside the polling stations.

Mr. Kakwaya's objection against paragraph 7.7 contends that petitioner should have provided better particulars of the polling station officers who did not submit their respective **Election Result Forms [Form No. 21B]** at the end of the polling day, but took these forms to their homes overnight the following day i.e. on 1st November 2010.

The learned State Attorney's objection on paragraph 7.10 of the petition revolved around what the 1st and 3rd respondents regarded as want of particulars on names of Buguruni Ward's polling stations from where ballot boxes number 15134, 151305, 151083, 15144, 15109, 15129, and 151302 whose seal was broken, originated.

Last objection on ground of want of particulars contends that petitioner should in his paragraph 7.12, have provided names of polling stations where the tallied results that were declared by the Returning Officer, fundamentally differed from those recorded by the Petitioner's own appointed agents. Mr. Kakwaya contends that this paragraph 7.12 does not pass the test of a pleading that narrows down the issues for purposes of expeditious hearing. Instead this paragraph places the

respondents in a very difficult position on how to proceed with the preparation of their defence. The learned State Attorney would like this court to strike down paragraph 7.12 using its power under Order VI Rule 16 of CPC.

The learned State Attorney surmised his submission on the second ground of objection by contending that the 1st and the 3rd respondents deserve certain amount of details which does not disclose the evidence, for purpose of appreciating a fair outline of the petitioner's case. Mr. Kakwaya invited this court to use Order VI Rule 16 of CPC to strike out the petition for being vague, and tending to prejudice, embarrass or delay the fair trial of the petition. To support his proposal to strike down the petition, the learned State Attorney invited the court to refer to a decision of SAMATTA, J.K. in **Philip Anania Masasi vs. Returning Officer, Njombe North Constituency, 2. The Attorney General, 3. Jackson M. Makwetta, Misc. Civil Cause No. 7 of 1995 HC at Songea (unreported)**.

In his replying submissions Mr. Peter Kibatala, the learned Advocate for the petitioner does not think paragraphs 7.4, 7.5, 7.6, 7.7, 7.10 and 7.12 of the petition suffer from any material

insufficiency as to violate Order VI Rule 4. Mr. Kibatala pointed that the particulars to be stated in a pleading depends on peculiar circumstance of the case. Mr. Kibatala believes that where a petitioner alleges a violation of election laws, he is entitled to withhold some information because the respondents will have their chance to cross examine witnesses. In so far as the learned Advocate is concerned, the petitioner's amended petition has furnished sufficient details to enable the respondents to mount their defence.

Instead of resorting to Preliminary Points of objection, Mr. Kibatala submitted that 1st and 3rd respondents should have requested for further and better particulars under Order VI Rule 5 of the CPC because the court under this provision, has the power to order the petitioner to furnish the respondents with further and better particulars. Mr. Kibatala illustrated this thrust of his submission by citing the example of the case of **1. Joseph Laurent Haymu, 2. Emmanuel Dennis Bura 3. Thomas Lulu Irafy vs. 1. The Attorney General, 2. Dr. Wilbrod Peter Slaa, Miscellaneous Civil Cause No. 20 of 2005** where Makaramba, J. delivered his Ruling on a Notice which had sought further and better particulars under Order VI Rule 5 of the CPC.

With regard to objection founded on paragraph 7.7, Mr. Kibatala submitted that there was no need to provide names of every polling station officers who took to their homes election results forms. Similarly, Mr. Kibatala argued that no further and better particulars are needed under Paragraph 7.10 because the petitioner has furnished the number of ballot boxes. Replying on objection based on paragraph 7.12, Mr. Kibatala contends that the petitioner will bring the concerned agent to come and testify and the respondents will have time to cross examine this agent.

After hearing the submissions of the counsel for the parties on the second ground of objection, the remaining issue for my determination is whether allegations made in some of the paragraphs of the petition are vague and lack material particulars. I will be guided in my determination by Order VI Rule 3 of CPC which in essence elaborates Rule 5 (1) and (2) of the **National Elections (Election Petitions) Rules, 2010**. I will in addition seek guidance from principles drawn from judicial pronouncements. Order VI Rule 3 of **CPC** which provides,

> *Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies*

for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively; and dates, sums and numbers may be expressed in figures.

Describing a provision in the **India Code of Civil Procedure** which is in *pari materia* with Order VI Rule 3, the case of **Virendra Kashinath Ravant & Anr Vs. Vinayak N.Joshi & Ors [1998] INSC 532** has in my view correctly observed that the object of Order VI Rule 3 is two-fold. First is to enable the opposing party to appreciate the particular facts of one's case so that one's case may be met by the other side. Second is to enable the court to determine what is really at issue between the parties. A petition, like any other pleading must be concise enough to furnish sufficient information that will enable the respondents to know the outline of the case which they will face when preparing for hearing. Petition must not be so vague that the respondents are unable to prepare but wait to be ambushed at the time of hearing of the petition.

Order VI Rule 16 of CPC provides some guidance on what this court can do where allegations that are made in some of the paragraphs of the petition are found to be vague and lacking in material particulars:

16. *The court may, at any stage of the proceedings, order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.*

In **Philip Anania Masasi vs. Returning Officer, Njombe North Constituency, 2. The Attorney General, 3. Jackson M. Makwetta, Misc. Civil Cause No. 7 of 1995 HC at Songea (unreported)** on page 10, Samatta JK (as he then was) enunciated one of the guiding principles which courts invariably use to determine whether a pleading is defective for being vague. According to Samatta-JK, pleading should be concise and precise. Pleadings are defective if they contain vague and irrelevant statements. Pleadings which are too general as to fail to indicate what was meant by the party are also defective. We are all reminded that the court, in construing pleadings, should always remember that it is the right of a party to have the opponent's case intelligently presented.

From paragraphs 7.1, 7.2, 7.3 and 7.4 I was able to discern that the Segerea Constituency is made up of the Segerea Ward, Kipawa Ward, Kimanga Ward, Tabata Ward, Kiwalani Ward,

Buguruni Ward, Kinyerezi Ward and Vingunguti Ward. These 8 Wards had a combined total of 749 polling stations. The 3rd Respondent (Returning Officer) was supposed to receive and tally or add up election results from each and every of the 749 polling stations. According to the petitioner, the 3rd Respondent (Returning Officer) did not tally results from the whole of 120 polling stations of Kiwalani Ward, whole of 129 polling stations of Vingunguti Ward, 4 polling stations of Buguruni Ward, 2 polling stations of Tabata Ward and 4 Polling Stations of Kipawa Ward. It is clear from the paragraphs of the petition that the petitioner does not complain about the tallying of votes from polling stations from three of the eight Wards of Segerea Constituency (i.e. Segerea Ward, Kimanga Ward and Kinyerezi Ward).

In so far as his preliminary point of objection on ground of vague and unspecific as particulars contained in paragraphs 7.4 is concerned; Mr. Kakwaya has no problem with the clarity of allegation that Returning Officer did not tally election results from results from the whole of 120 polling stations of Kiwalani Ward, whole of 129 polling stations of Vingunguti Ward. The learned State Attorney point of objection on paragraph 7.4 is

restricted to his demanding to know the names of the 4 polling stations of Buguruni Ward, 2 polling stations of Tabata Ward and 4 Polling Stations of Kipawa Ward whose polling station results were according to the petitioner, not included in the final results declared by the Returning Officer. The relevant paragraph 7.4 states,

> *7.4.- That, contrary to the aforesaid requirements, the Returning Officer declared the results without taking into account the **whole of** 120 Kiwalani Ward Polling Stations, the **whole of** the 129 Vingunguti Ward Polling Stations, **4 Polling Station of Buguruni Ward, 2 Polling Stations of Tabata Ward and 4 Polling Stations of Kipawa Ward.***
>
> **[Emphasis added]**

With due respect, the concern of the learned State Attorney is well founded. Without specifying how many polling stations Buguruni Ward, Tabata Ward and Kipawa Ward had in the first place, the allegation in paragraph 7.4 that the Returning Officer did not tally results from **4** polling stations of Buguruni Ward, **2** polling stations of Tabata Ward and **4** Polling Stations of Kipawa Ward is like looking for a pin in a haystack. I do not have qualms with the usage of the word "whole" in paragraph 7.4

which has clearly notified the respondents that the petitioner is complaining about polling results from the whole of the **120** polling stations of Kiwalani Ward, and **129** polling stations of Vingunguti Ward. Without similar clarity with respect to 4 polling stations of Buguruni Ward, 2 polling stations of Tabata Ward and 4 polling stations of Kipawa, respondents are placed in an embarrassing situation on how to pin down the polling stations where the petitioner has complaints. In my opinion, paragraph 7.4 does not furnish sufficient information that will enable the respondents to know which of the polling stations out of so many polling stations they should prepare for hearing with respect to Buguruni Ward, Tabata Ward and Kipawa Ward.

A small arithmetic illustrates the extent the further and better particulars that is still wanting under paragraph 7.4. From his pleadings, the total number of polling stations whose results the petitioner alleges were not tallied by the Returning Officer is **359** out of the total **749** polling stations. That is, the number of polling stations of Kiwalani Ward (**120**), Vingunguti (**129**), Buguruni (**4**), Tabata (**2**) and Kipawa (**4**) all add up to **359** polling stations. It is not clear how many polling stations there were in Segerea Ward, Kimanga Ward and Kinyerezi Ward

where in the petitioner has no claims in this petition. Paragraph 7.4 lacks material facts regarding whether there are more polling stations in Buguruni, Tabata and Kipawa Wards than the 4 polling stations in Buguruni, more than 2 in Tabata and more than 4 of Kipawa as stated in paragraph 7.4.

All this leads me to the conclusion that Mr. Kakwaya is with respect correct to demand that in the circumstances of the matter, the petitioner should have provided specific names of the **4** polling stations of Buguruni Ward, **2** polling stations of Tabata Ward and **4** Polling Stations of Kipawa Ward whose results were not taken into account by the 3rd respondent. I hereby find and hold that reference to polling stations in Buguruni (**4**), Tabata (**2**) and Kipawa (**4**) in paragraph 7.4 is not only vague for want of material particulars, but also prejudicial, embarrassing and can potentially delay the fair trial of the petition.

Claims under paragraph 7.5 are closely linked to previous paragraph 7.4 in so far as in this paragraph the petitioner makes two salient claims. First, the petitioner claims that polling stations in all the Wards referred to in paragraph 7.4 did not

conduct votes tallying at the voting stations because of lack of Forms 21B. Secondly, that the Officers in-Charge of the polling stations in the Wards referred to in paragraph 7.4 admitted at the material time that Election Results Forms No. 21B were lost. The relevant paragraph 7.5 states:

> *7.5. - That, in addition to the Non-declaration for the votes as aforesaid, the said Polling Stations did not conduct votes tallying at the voting stations because there was a lack of NEC election Results forms {Forms No. 21B}. The Officers in-Charge of the respective Polling stations admitted at the material time that the forms were lost. Leave is hereby craved to refer to the Annexed Agents forms of election figures duly annexed hereto and collectively marked as* ***Annexture FM-2.***

This paragraph 7.5 of the petition suffers from insufficiency of material particulars. I noted with respect to paragraph 7.4, the difficulty of determining how many polling stations each of the Wards of Buguruni, Tabata and Kipawa had. The petitioner did not provide the names of the **4** polling stations of Buguruni Ward, **2** polling stations of Tabata Ward and **4** Polling Stations of Kipawa Ward which did not conduct votes tallying at their respective polling stations because of lack of Election Results Forms (FORMS NO. 21B). Petitioner has in ANNEXTURE FM-2 annexed to his petition only one FORM of a polling station whose name is not even legible. In my opinion, petitioner

should have included in his ANNEXTURE FM-**2** the specific names of the **4** Polling Stations of Buguruni Ward, **2** Polling Stations of Tabata Ward and **4** Polling Stations of Kipawa Ward Polling Stations which could not conduct vote-tallying because of lack of Election Results **Form No 21B**. In so far as it has failed to indicate how many polling stations there were in the Wards of Buguruni, Tabata and Kipawa, Paragraph 7.5 suffers from the shortcoming of being too wide and in want of material particulars just like paragraph 7.4.

Without naming the polling stations out of the possible 749 polling stations in Segerea Constituency, paragraph 7.6 has two major claims. First, it claims that, election results forms No. 21B were belatedly distributed to the respective polling stations such that the results had to be recorded in normal plain sheet papers. Secondly, the paragraph alleges that 53 Polling Stations never complied with the posting of Election results at the respective Polling Stations. Paragraph 7.6 reads,

> *That, election results forms (Forms No. 21B) were belatedly distributed to the respective polling stations such that the results had to be recorded in normal plain sheet papers, thus opening the door for distortions and rigging. Further that, a total of 53 Polling Stations never complied with the posting of Election results at the respective Polling Stations.*

It is not clear from paragraph 7.6 whether Election Results Forms **(FORMS NO. 21B)** were belatedly distributed in all **749** polling stations or **FORMS NO. 21B** were belatedly distributed only in respect of the whole of **120** polling stations in Kiwalani and **129** polling stations in Vingunguti. The claim under paragraph 7.6 is further complicated by the claim that a total of **53** Polling Stations never complied with the posting of Election results outside the respective Polling Stations. The way this paragraph 7.6 stands, respondents are placed in such a difficult position that they cannot appreciate the material facts relied by the petitioner to enable them to prepare their defence. The petitioner should have for example specified which **53** polling stations out of the total **749** polling stations where, election results were not posted outside the polling stations.

It is my opinion that it is vague for paragraph 7.6 to allege without naming which of the 53 polling stations (out of possible 749 polling stations) which did not comply with the requirement to paste the results at the notice boards outside polling stations. In my opinion, paragraph 7.6 of the petition is prejudicial and embarrassing. It is so widely drafted that if left standing, it can potentially delay the fair trial of the petition.

Paragraph 7.7 of the petition alleges that there were polling stations officers who did not submit their respective **Election Result Forms [Form No. 21B]** at the end of the polling day, but instead they took these forms to their homes overnight the following day i.e. on 1st November 2010:

> *7.7.- That, due to institutional lapses, the respective Polling Station Officers never submitted the respective polling station results forms at the end of the polling day, but left with the said forms and kept them in their unsupervised homesteads overnight, until they submitted the same on the 1st November 2010. Such retention of the said forms was not only contrary to law, but also opened the door for rigging and manipulations.*

With due respect, this paragraph is vague if the total number of **749** polling stations in Segerea Constituency is to go by. The paragraph does not indicate whether officers in charge of all the **749** polling stations of Segerea Constituency took the Election Results Form No. 21B to their homes. Likewise it is not clear whether allegation in paragraph 7.7 of the amended petition is restricted to **120** polling stations of Kiwalani Ward and **129** of

Vingunguti Ward. What remains unclear is the question how the respondents will identify for the purposes of their defence, the concerned polling stations whose presiding officers, took results Form No. 21B to their homes. For the foregoing reasons, I hereby find and hold that paragraph 7.7 is vague and does not give the respondents the chance to present their own response.

The learned State Attorney has objected that paragraph 7.10 is vague for want of material particulars. The Paragraph 7.10 provides,

> *7.10.- That, Buguruni Ward Ballot Boxes No 15134, 151305, 151083, 15144, 15109, 151129, 151302 were found to lack any forms of seals, thereby raising serious questions about the sanctity of the votes therein.*

Upon reading paragraph 7.10 I do not with respect agree with Mr. Kakwaya the learned State Attorney, that this paragraph is vague. By providing the numbers of the ballot boxes, the petitioner has furnished the respondents sufficient information that will enable them to know the outline of the claim under paragraph 7.10 which they will face. The objection over paragraph 7.10 is hereby dismissed.

I have closely studied paragraph 7.12 and in my opinion this paragraph is unfortunately couched in a very wide language. It literally extends even to those polling stations in the Wards of Segerea, Kimanga and Kinyerezi where the petitioner has no complaints in his petition. Paragraph 7.12 provides,

> *7.12.- That, even in those Polling stations where the results were tallied, the figures declared by the Returning Officer fundamentally differed from those recorded by the Petitioner's appointed agents.*

One wonders whether Paragraph 7.12 claims that even in Segerea, Kimanga and Kinyerezi Wards the figures that were declared by the Returning Officer fundamentally differed from those recorded by the Petitioner's appointed agents.

In terms of Order VI Rule 16 of CPC, paragraph 7.12 falls in the category of pleadings that are unnecessarily wide with the potential to prejudice, embarrass and delay the fair trial of the petition. In **Philip Anania Masasi (supra)** Samatta-JK (as he then was) stated that pleadings which are too general as to fail to indicate what was meant by the party are defective. That principle is applicable with respect to paragraph 7.12 of the petition. Paragraph 7.12 falls in that category of pleadings; which are too general and casted so wide as to include even the

polling stations where the petitioner has no complaints in his petition.

Finally, with regard to the second preliminary objection concerning vague and unspecific as particulars contained in paragraphs **7.4**, **7.5**, **7.6**, **7.7**, **7.10** and **7.12** of the petition, the objection is sustained to the following extent: References to **4** polling stations of Buguruni Ward, **2** polling stations of Tabata Ward and **4** polling stations of Kipawa Ward in paragraph **7.4** are hereby struck out for being vague in material particulars. Paragraph **7.5** shall be restricted to the whole of **120** polling stations of the Kiwalani Ward and whole of **129** polling stations of the Vingunguti Ward. Entire paragraph **7.6** is hereby struck out for want of material particulars to enable the respondents to prepare their defence. Paragraph **7.7** is vague and is hereby struck out. Likewise, paragraph **7.12**; is struck out, for being too general without delimiting its scope, and enable the respondents to appreciate the petition they are to face.

On the third point of the preliminary objection, Mr. Jerome Msemwa, the learned counsel contends that the amended petition was not properly presented before this court. Mr.

Msemwa expounded on his point of objection by pointing out that Rule 8 (1) of the Rules requires the petitioners to present their petitions to the Registrar. That sub Rule (2) identifies the Registrar who is supposed to receive the petition. He submitted further that Rule 9 (1) follows-up by requiring the Registrar to scrutinize the petition and determine whether it has been drawn in the manner described under Rule 5 (1). According to Mr. Msemwa, the Rules require the Registrar to be manifestly seen to perform the functions mentioned under Rules 10, 13 and 14 of the 2010 Rules. Mr. Msemwa contended that the petition was not properly presented in this court as required by law because it was presented to Registry Officers instead of being presented to the Registrar. Mr. Msemwa beefed up his submission by contending that since election petitions are a special category of civil suits, only a Registrar can perform the functions indicated in Rule 9-(1) i.e. discretion to reject or return any petition for purposes of being amended. All in all, Mr. Msemwa asked this court to dismiss the petition.

In his reply, Mr. Kibatala pointed out that the actual act of presentation of a petition is an in-house process known internally by the court itself. The presentation of a petition at

the Registry Office is a normal practice. That once fees is paid, it remains an internal process within the court. Mr. Kibatala is not aware of any practice of the Registrar personally maintaining a register to admit cases. Mr. Kibatala believes that as long as the CPC is a fall back procedural law governing election petitions, presentation of petitions to Registry Officers did not infringe any law.

After hearing submissions of the learned counsel on this third ground of objection, I am with respect, in full agreement with Mr. Kibatala that the presentation of petitions to registry officers did not infringe applicable Rules and the CPC. I have already restated the law that the practice and procedures governing election petitions in Tanzania is regulated by procedures prescribed under the CPC. Under the CPC the Registrars are vested with both judicial and administrative functions. Registrars perform many of their administrative functions through other administrative support of the registry clerks and accounts clerks. Rules 8 and 9 envisages administrative and judicial stages through which a petition passes. In my opinion, Rule 8 of the Rules discloses the administrative role of the Registrar and his supporting registry

officers. According to Rule 8 (1) a petition is presented when the filing fee that is prescribed in the Second Schedule is paid. The petition is not presented to the registrar merely on the presentation of the petition. After its presentation the petition enters a judicial stage where it is scrutinized in terms of Rule 9 (1). This scrutiny of the petition by the Registrar need not be manifestly seen by the parties to the petition. It is this scrutiny which invariably determines if there are any defects in the petition; resulting in the rejection or return of the petition for the purpose of rectification by amendment. It is in this second stage where the Registrar is internally involved. It is only after the defects are removed that the petition is entered in the Miscellaneous Civil Cause register and also given its number in the register. It is also my opinion that the prominent role of the Registrar under Rule 9-(1) does not absolve the petitioner from his duty to ensure that a petition is drawn in compliance with the law.

All said on this point of objection, my reading of Rule 8-(1) leaves me in no doubt that this petition was properly presented to this court when fees was paid. Having found that the petition was lawfully filed, the third ground of objection is dismissed.

Having sustained the second point of objection to the extent striking out some paragraphs from the petition, the next important question for my determination is what the fate of the remainder of the petition is. Samatta-JK in the case of **Philip Anania Masasi (supra)** faced a similar question with respect to what remedies are in place when some portions of a pleading of a party are found defective.

According to **Samatta JK** the following remedies are available. First, the court can issue an order requiring the party to give particulars or further particulars. Secondly, the court can order the objectionable portion or portions of the pleading to be struck out. Thirdly, where the pleading is a plaint and it is defective for disclosing no cause of action, the court can reject the plaint. My choice of the remedies will depend on the question whether the remaining paragraphs of the petition, if read as a whole or as individual paragraphs, disclose complete cause of action and does not suffer from any omission of material particulars. I will also have regard to the need to expedite the hearing of the petition to conclude within the prescribed 12 months.

Several cases decided by this court have expounded on what a cause of action is. For example, Rugazia J., in **Aikangai Alphonce Riwa vs. Kinondoni Municipal Council & Others, Land Case No.113 of 2004 (Land Division DSM) Unreported)** considered the question of what a cause of action is. He referred to the case of **Jackson vs. Spitall (1890) LR 5 CP 542** which defined "cause of action" to mean the act on the part of the defendant which gives the plaintiff his cause of complaint. Rugazia, J. also referred to another case of **Jeray Shariff & Co v Chotai Fancy Store, [1960] EA 394** where it is stated that the question whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone together with anything attach to it so as to form part of it and upon an assumption that any express or implied allegations of fact in it are true.

In my opinion the remaining paragraphs of the petition including what remains of paragraphs 7.4 and 7.5 of the petition, disclose sufficient cause of action for the petition to proceed after the amendment to delete the paragraphs which this court has struck out. In my opinion, the cause of action that still remains in paragraphs 7.4 and 7.5 centres on the claim that

the Returning Officer declared the results without taking into account the whole of 120 Kiwalani Ward Polling Stations and the whole of 129 Vingunguti Ward Polling Stations. There is also a cause of action in the claim that the Returning Officer in the whole of 120 Kiwalani Ward Polling Stations and the whole of 129 Vingunguti Ward Polling Stations did not tally the votes at the voting stations because there was lack of NEC election results Form No. 21B.

The petitioner is therefore directed to amend the petition in strict compliance with this Ruling. The amended petition shall be filed within 14 days of this Ruling. The costs leading up to this Ruling shall be costs in the petition.

It is so ordered.

I.H. Juma
JUDGE
06-06-2011

Delivered in presence of: Mr. Kibatala, Advocate(for Petitioner), Mr. David Kakwaya, State Attorney (for 1st & 3rd Respondents). Mr. Kibatala held Mr. Msemwa's brief for 2nd Respondent.

I.H. Juma
JUDGE
06-06-2011