IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 59 OF 1995

AUGUSTINE LYATONGA MREMA & 12 OTHERS

VERSUS

THE ATTORNEY-GENERAL & 3 OTHERS

RULING OF THE COURT

Mackanja, J.

This is an application of great public interest. We are asked by the applicants to order the Director of Elections, the second respondent, not to declare any results in the on going general elections pending the final determination of the petition which is the genesis of this application. We are also asked to order the said Director of Elections not to proceed with the conduct of elections in Dar es Salaam Region pending the determination of the said petition.

The matters we are called upon to decide will be put in clearer focus after a brief reference to the pleadings in the petition. According to paragraph 1 of the Petition Mr. Augustino Lyatonga Mrema, Professor Ibrahim Lipumba, and Mr. John Cheyo, the first, second and third petitioners, respectively, are presidential candidates for NCCR-MAGEUZI, CUF and UDP, in that

order. Chief Abdallah Fundikira, Flora Kambona, Thomas Ngowi, Wilfrem Mwakitwange and Emanuel Makaidi, the fourth, fifth, sixth, seventh and the eighth petitioners are, in terms of paragraph 2 of the petition, registered voters of political parties listed as UMD, TADEA, NCCR-MAGEUZI, PONA and NLD. And the 9th, 10th, 11th, 12th, 13th, 14th and 15th Petitioners are, in terms of the third and the fourth paragraphs, officials of various ranks of NCCR-MAGEUZI, CUF, TADEA, UPDP, NAREA and CHADEMA political parties. The petitioners are alleging a number of irregularities which, in their contention, have rendered the October 29th Presidential and Parliamentary elections not free and fair. They seek declaratory orders in the manner claimed in paragraph 12 of the Petition, namely, that the whole electoral process nationwide be nullified; that the Electoral Commission be reconstituted after some condition is fulfilled; that fresh general elections be held nationwide; that the third and fourth respondents be barred from participating in any elections for five years; the usual claim for costs; and the traditional prayer for any reliefs this Court may deem fit to award.

In these proceedings Dr. Lamwai and Dr. Mvungi advocate for the petitioners. Mr. Salula (Senior State Attorney), Mr. Mwidunda and Mrs. Katinda (State Attorneys) appear for the first and second respondents; Mr. Kapinga appears for the third respondent and Mr. Muccadam appears for the fourth respondent. Although all the respondents were served with the chamber summons with which the application was instituted, Dr. Lamwai has made it clear

during his submissions that the relief his clients seek is directed at the second respondent.

As is the practice of this Court this application is supported by an affidavit. In this case the supporting affidavit was sworn by Willy Ringo Tenga, the Acting General-Secretary of the NNCR-MAGEUZI. He appears in these proceedings as the nineth petitioner. He swears partly on matters which form the subject of the Petition, and partly, according to paragraph 4 of that affidavit, that they have been compelled to bring the petition at this stage on the following grounds:-

(a) that the misconducts complained of in the petition have been made throughout the country and practically in every constituency;

(b) that the Presidential election is involved in the Petition; and

(c) that once a Presidential candidate is declared elected, the jurisdiction of this Court is ousted.

Dr. Lamwai has argued very forcefully in support of the application, especially as regards the evidential quality of the affidavit which supports the application. He contends that according to paragraph three of that affidavit the elections were illegal and that they were not free and fair. He realizes the normal practice of filing petitions under section 108 of the

Elections Act but he contends that it became necessary for them to file a Petition respecting the entire Presidential and Parliamentary elections because Article 41 (7) the Constitution of the United Republic of Tanzania ousts the jurisdiction of this Court once a Presidential candidate has been declared a winner. If, therefore, the equittable order they seek from this Court is not issued, this Court will cease to have jurisdiction to hear any petition against the President's election. When he was asked from what law this Court derives power to declare the general elections null and void in one Petition, Dr. Lamwai responded by saying that the Court derives that inherent power from section 2(2) of the Judicature and Application of Law Ordinance which confers on this Court unlimited civil jurisdiction. Thus if, in in his view, it is found that the whole general election is irregular, then the entire electoral process and its results should be nullified. He has drawn our attention to paragraph 9 of the Petition under which all the alleged irregularities are listed. At some stage in his submissions, however, Dr. Lamwai abandoned his application for a restraining order against the declaration of results involving Parliamentary candidates because almost all the results are out by now. So we are left with the Presidential and the Dar es Salaam elections.

As regards the Presidential elections, it is the contention of Dr. Lamwai that it is not the intention of the Constitution, nor of the law, to close the Court's jurisdiction in delcaring a President who is not elected in a free and fair election. He

therefore urged that the case be concluded before the general elections for Dar es Salaam Region are held, presumably if the Petition will succeed. For if those elections are conducted before the determination of the Petition, the whole proceeding will be superfluous. It is their complaint that the President will not be elected lawfully during the ongoing elections and that the nation should not be compelled to live with a President who is forced upon it. So that the election of another President would rather be delayed as no vaccuum in the Presidency will thereby be created. The incumbent President has, according to Dr. Lamwai, and we think he is right, all the constitutional authority until he hands over the reigns of power to the Presidential candidate who will be declared the winner. So His Excellency President Ali Hassan Mwinyi will be constitutionally in power until another President is elected. In a country which has respect for the rule of law, however, the delay in electing another President should not be inordinate.

Now, there are several conditions-precedent before the applicants can succeed. Dr. Lamwai has cited **Ibrahim Mancharle Marwa v. The Attorney-General and the Director of Elections.** Civil Case (Main Registry) No. 3 of 1995 where this Court, (Mapigano, J.) recently held that one of those conditions is that there must be a serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed in the substantive claim. It is learned counsel's submissions that they have a strong case if they are

given an opportunity to lead evidence in proof of the allegations which are contained in paragraph 9 of the Petition.

It is the contention of the Petitioners that the Dar es Salaam elections will be illegal because they contravene section 67(1) of the Elections Act in that the power to postpone an election is conferred on a Returning Officer. Learned counsel's attention was drawn to the fact that the Dar es Salaam elections are not covered in the Petition. He responded by saying that he has covered those elections in his arguments because his clients have as one of their prayers to have the National Electoral Commission dissolved and reconstituted, which means that the Commission cannot therefore conduct the elections. We doubt if this contention is sound.

It is the further contention of Dr. Lamwai that the petitioners will be prejudiced if the Dar es Salaam elections are conducted because the irregularities they complain of in the Petition have not been rectified. As well as that, it is the petitioners' contention that Parliamentary election results so far declared create prejudices in the electorate in favour of the winning political party. Dr. Lamwai has ruled out the possibility of the electorate being sympathetic with the political parties which appear not to have done well in the elections so far.

Mr. Salula has opposed this application very strongly. He raised several grounds in addition to the three preliminary

objections which are contained in the affidavit of Alex Banzi who swore it on behalf of the second respondent. Two of the preliminary objections were abandoned after Dr. Lamwai dropped his clients' prayer which related to an order which was intended to restrain the second respondent from declaring Parlimentary election results. We had, however, directed earlier on in these proceedings that what was brought as preliminary objections could be persued by Mr. Salula in his submissions when arguing the main application for injunction. Suffice it to say at the moment that Mr. Salula contends, on the basis of the remaining ground of what constituted the three preliminary objections, that the application is incompetent because the supporting affidavit does not conform to the provisions of Order XIX,rule 3 of the Civil Procedure Code. Secondly, he argues that the application should be dismissed because, on a balance of convenience, the second respondent would suffer greater injury than his adversaries. Thirdly, that the petitioners have not shown that they are likely to succeed in their Petition. We have decided to dispose of these issues one after another.

It is Mr. Salula's contention that Dr. Tenga's affidavit contains assertions of fact which are not in his personal knowledge. He submits that the matters Dr. Tenga deponed on could not have been in his personal knowledge because he was all the time around in Dar es Salaam. So that he could not, unless he was informed by someone else, have known that there was misconduct throughout the country and practically in every constituency as he asserts in paragraph 4(a) of his affidavit.

We agree with Dr. Lamwai that what is contained in Dr. Tenga's affidavit is evidence which cannot be assailed by learned counsel's statement from the Bar as Mr. Salula does. But that is far from saying that the credibility of a deponent, much the same position as applies to a witness, cannot be put under scrutiny. We know that like all human beings, Dr. Tenga is not omnipresent. He has not sworn that he visited every polling station, let alone every constituency, to see for himself and to acquire personal knowledge of the alleged misconducts. If he therefore came to know of any misconduct it must have been in his official capacity as Acting General Secretary of NCCR-MAGEUZI. He therefore acquired knowledge of what is contained in paragraph 4(a) of his affidavit from other people; from people who allege to have witnessed the misconduct, if any. We are satisfied that in those circumstances the affidavit does not conform to the clear provisions of Order XIX, rule 3(1) of the Civil Procedure Code which lays down a mandatory condition that:-

> "3...
>
> (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:
>
> Provided that grounds thereof are stated".

It is a statutory requirement that where an affidavit is based on the deponent's beliefs, grounds for such beliefs must be disclosed. So also, it is now settled law in this country that where an affidavit is based on information received from others, the source of that information must be disclosed. Decisions of the Court of Appeal and this Court on this issue abound, but the most recent authority is the Court of Appeal decision in **Salima Vuai Foum V. Registrar of Co-operative Societies & Three Others.** (CA) Civil Appeal No. 36 of 1994. Their Lordships had this to say at Page 4 of their typed judgment:-

> "The principle is that where an affidavit is made on (an) information, it should not be acted upon by any court unless the sources of the information are specified....".

Failure to disclose the source of information renders the affidavit defective. Since the affidavit which supports this application is incurably defective the application has been rendered incompetent. It would fail on that account alone.

In his second ground Mr. Salula submits that some of the applicants have not shown how they will be injured if their application for an injunction is refused. They are not vying for the Presidency, he contends. It is his view that even those who are contesting in the Presidential election cannot establish any injury. How do they know that they will lose in the election before the Electoral Commission declares the results? So on a balance of convenience who, between the litigants, will be

adversely affected? The second respondent contends that the Government has already suffered greatly in financial terms. Hence Mr. Salula submits that there is evidence from paragraphs 10 and 11 of Alex Banzi's counter affidavit which shows that so far the Government has spent some forty billion shillings for running the ongoing electoral process and that it has already spent another sum of over two billion shillings for the preparation of the Dar es Salaam re-run of general elections. We understand this plea as being a forbidding reason for another general election if the ones in progress are to be nullified and that, therefore, the second respond will suffer immense financial hardship were the electoral process to be reversed.

Dr. Lamwai does not believe that the government has spent all that money as claimed by the second respondent. Even if the money was spent, he argues, it is like a person who broadcasts grain seed on rocks; it will not germinate. He submitted, quite correctly, in our view, that democracy has a high price. We, however, do not agree with him on all the indicia of that price as regards our political circumstances. For he went on to make remarks which were loaded with veiled threats of violent repurcussions if a decision was not reached that will be acceptable to the followers of his clients. We have been alarmed by that remark but we will leave it rest there for the moment. We intend to declare our position on it at a later stage. We however agree with Dr. Lamwai that it will be a black day indeed for this proud country if a government will be thrust upon the nation through corrupt, fraudulent and rigged elections for fear

of nullifying electoral results by reason only of money spent to conduct proved sham elections. Of course the onus to prove that the elections have been rigged in favour of any of the participating parties is upon whoever alleges so. In fact, this application is not the right opportunity at which any alleged impropriety in the conduct of the general elections can be persued. It is our considered opinion, nonetheless, that democracy which is expressed through free and fair elections at regular intervals, cannot be compromised for fear of expenses. General elections are a noble and worthy cause on which public funds and resources must be put to use for the benefit of the public good. That is why it is absolutely necessary that money must be spent to prepare and conduct free and fair elections. It is for these reasons that we find Mr. Salula's contention in this behalf wholly untenable.

We have, earlier on in this ruling, observed that the Petitioners contend that they have a good case and that, therefore, their prayer for an injuction restraining the second respondent from declaring Presidential Election results and from conducting elections for the Dar es Salaam Region should be granted. In particular, they argue through their advocate that the court will cease to have jurisdiction in this matter as Article 41(7) of the Constitution ousts that jurisdiction. Mr. Salula concedes this constitutional limitation; he argued, however, that the petitioners can question the validity of Article 41 of the Constitution in Court. He concluded his submissions by inviting this court to consider decisions in other jurisdictions which are relevant to this case. He cited India as

one of those jurisdictions.

Mr. Kapinga submits that the applicants have a duty to adduce evidence in proof of their claims. The only evidence there is, he observes, is the affidavit of Dr. Tenga. We have no doubt Mr. Kapinga is correct in his submissions. For as he contends, paragraph 3 of that affidavit does no more than saying that:-

> ".... we are raising several grounds which go into showing the illegality of the whole electoral process and the fact that they were not free and fair".

These are mere allegations which afford no proof to the claims. What is more they are claims contained in an affidavit which has been found to be incurrably defective. We do not see anything in Dr. Lamwai's further submissions which tends to show an improvement in the evidential quality of that affidavit. Nevertheless it is imperative that whoever alleges the existence or the non-existence of a set of facts has a duty to lead evidence in proof of those facts. This rule of evidence is equally applicable to applications such as this one. More importantly, courts in this country have always been cautious in their approach in considering applications for restraining orders such as is the case here. We think this is a sound approach because as it was observed in the Indian case of **Lakshminarasmhiah and Others** V. **Yorakki Gowder,** AIR 1965 Mysore 310, at page 312 while quoting an excerpt from **28 American Jurisprudence,** page 217,

> "... The extraordinary character of the injunctive remedy and the danger that its use in improper

> cases may result in serious loss or inconvenience to an innocent party require that the power to issue it should not be lightly indulged in, but should be exercised sparingly and cautiously only after thoughtful deliberation, and with a full conviction on the part of the court of its urgent necessity. In other words the relief should be awarded only in clear cases, reasonably free from doubt, and, when necessary, to prevent great and irreparable injury. The Court should therefore be guided by the fact that the burden of proof rests upon the complaint (sic) to establish the material allegations entitling him to relief".

This is a sound proposition of law which we intend to apply to the facts in this application.

It has been argued for the applicants that there is justification for the injunctive remedy because their chances of success are overwhelming and that there is a serious question to be determined. Dr. Lamwai has pointed out several instances which he considers pertinent, namely, that elections were not conducted on one day; that up to now elections are going on. May be it is so, but these are statements which were made from the Bar. They do not constitute evidence and the issues they raise do not appear in the affidavit which supports the application. We are, after a careful consideration of the law and the application as whole, satisfied that the applicants have failed to show the existence of any serious question which is to be

determined in the Petition. And, in any case, we find it difficult to say affirmatively that the petitioners have a strong case in respect of which, on the facts, there is a probability of succeeding in their enterprise. We base this conclusion on the following grounds: Firstly, the petitioners have not shown how, individually or as a group, they are going to suffer any mischief or any hardship should the Presidential elections results be declared or should the Dar es Salaam Region elections be held. Secondly, no proof has been led to show that who, of the Presidential candidates, will win. Thirdly, as Dr. Lamwai correctly pointed out at some stage in his submissions while referring to **Marwa's** case, the applicants must show that on the facts alleged there is a serious question to be determined.

Finally we have to consider if we are vested with the necessary jurisdiction to issue the equitable remedy in the form of a restraining order which is sought. We are fully aware that jurisdiction is a creature of legislation. Dr. Lamwai referred us to section 2(2) of the Judicature and Application of Laws Ordinance which gives to this Court unfettered civil jurisdiction in cases where there are no specific provisions. We agree with him in principle generally, but we find specific provisions in the Elections Act, 1985 which confer jurisdiction on this Court in respect of specified electoral issues. On the other hand, however, Article 41(7) of the Constitution, is unambiguous language, ousts the jurisdiction of this Court to inquire

into the election of the President once the National Electoral Commission has declared the election results. It provides

"41...

(7) Iwapo mgombea ametangazwa na Tume ya Uchaguzi kwamba amechaguliwa kuwa Rais kwa Mujibu wa ibara hii, basi hakuna Mahàkama yeyote itakayokuwa na mamlaka ya kuchunguza kuchaguliwa kwake".

Whereas, therefore, Article 41 (1) to (7) of the Constitution makes provision for the election of the President, it does not grant jurisdiction to <u>any court</u> to inquire into the fact of that election. We are mindful of the fact that the duty of this Court is to interpret and to implement the law as we find it and not to question the validity of that law unless a petition has been lodged in the appropriate manner, the purpose of which is to challenge the validity of a particular piece of legislation. It is therefore open to the applicants to see how they can challenge Article 41 (7) of the Constitution. In the meantime, it is our view that if it was necessary to vest in this Court powers we are asked to exercise, then Parliament in its undoubted wisdom should have made it clear in the Constitution in relation to this very important matter.

Apart from the foregoing, reference was also made to the applicability of section 11 of the Government Proceedings Act. We have considered those provisions but we do not see, in view of the above observations, the relevance of that piece of

legislation to this application. We will not make any further comment on it.

There are three more issues we have to cover. One of them relates to Mr. Muccadam's affidavit. We rejected that affidavit but we reserved our reasons. The following are our reasons. It is undisputed that Mr. Muccadam is an advocate of this Court and courts subordinate to it. He is empowered by Order III, rule 1 of the Civil Procedure Code to appear and to act for litigants. In that connection he is empowered to swear affidavits in relation to matters which arise from the conduct of cases and on matters which are not in the personal knowledge of his clients. As we have seen Order XIX, rule 3 requires that affidavits should be confined to such facts as the deponent is able of his own knowledge to prove; the only exception being on interlocutory applications where statements of belief may be admitted subject to the condition that the grounds for such belief are given. In the instant case all matters on which Mr. Muccadam deponed are in the personal knowledge of the fourth respondent's trustees.

We therefore rejected that affidavit because it did not conform to the statutory requirements as laid down under Order XIX, rule 3 of the Civil Procedure Code.

Another matter we have found necessary to address is Dr. Lamwai's conduct in court. At one stage during his submissions a question was put to him and he gave a very unexpected answer.

He wanted the Court to tell him whether to answer that question in his capacity as a polititian or as an advocate. We did not expect that Dr. Lamwai, a distinguished Advocate of this Court, would have wanted to turn a session of the High Court into a political circus. We consider that attitude as being very discourteous to this Court and we do not expect him to behave in the manner he did.

What is more grave, however, is when he informed the Court during his submissions that followers of his clients will not accept a decision which will not be in their favour! We consider those remarks to constitute an act of intimidation on this Court and an interference in the due process of the law. Those remarks will not in any way influence our decision one way or the other; we reaffirm our resolve to dispense justice fairly, without fear or favour. In the same vein we decry and deprecate any act which, though unwittingly, will have the effect of inciting members of the public to disobey the constitutional authority of this Court. We are satisfied, however, that Tanzanians are a peaceful people who are sufficiently mature politically and who will not be influenced by those unfortunate remarks.

For the reasons we have given, the application for the two injunctive reliefs, which are:-

(1) an order to restrain the second respondent, the Director of Elections, from declaring the Presidential elections in the on-going general elections, and

(2) an order to restrain the same second respondent from conducting the elections for Dar es Salaam Region;

is dismissed with costs.

Delivered in the presence of the parties and their advocates at Dar es Salaam this thirteenth day of November, the year One Thousand Nine Hundred and Ninety-Five.

(SIGNED)

(W. J. Maina)
JUDGE
13\11\1995

(SIGNED)

(L. A. A. Kyando)
JUDGE
13\11\95

(SIGNED)

(J. M. Mackanja)
JUDGE
13\11\95

Appearances

Dr. Lamwai, Advocate: - For the Petitioners

Mr. Salula, Senior State Attorney) For First and

Mr. Mwidunda, State Attorney) Second Respondents

Mrs. Katinda, State Attorney)

Mr. Kapinga, Advocate: - For Third Respondent

Mr. Muccadam, Advocate: - For Fourth Respondent

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