

TANZANIA / JUDGMENT

augustin lyatonga mrema vs donati mathew mbwagai and 7 others 1998 tzca 12 10 december 1998

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10 December 1998

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IN THE COURT OF APPEAL OF TANZANIA AT PAR BS SALAAM (CORAM; LUBUVAJJ_ J,AM SAMATTA, J.A., And LUGAKINGIRA, J.A.) CIVIL APPEAL I'D. 29 OF 1998 BETWEEN AUGUSTIN LYATONGA KREMA ,,,,o -,o<, ..o ,, APPELLANT AND

- (1) DONATI MATHEW MBWAGAI 1ST RESPONDENT
- (2) JABIR ALI JABIR ,,,,.....«* 2ND RESPONDENT
- (3) MWINCHANDE ALI MPEMBENWE 3RD RESPONDENT (U) YUSUPH MASUDI JONGO *fTH RESPONDENT
- (5) STELLA MDOE SINGANO 5'TH RESPONDENT
- (6) IBRAHIM SAIDI PONERA 6TII RESPONDENT
- (7) KASSIM SAIDI KIAME 7TH RESPONDENT
- (8) HON. ATTORNEY GENERAL ,,,,o«*. ,,,, , - 8TH RESPONDENT (Appeal from the decision of the High Court of Tanzania at Dar es Salaam) (Katiti, J.) dated the 2nd day of December 1997 in Misc. Civil Case No. 139 of 1996 JUDGMENT OF THE COURT This appeal contests the decision of the High Court at Dar es Salaam (Katiti, J.) on a preliminary objection. The appellant was the successful candidate in a parliamentary by-election for the Temeke constituency held on 6.10.96. The first to seventh respondents were registered voters in the by-election and are challenging the appellant's election before the High Court in an election petition, Miscellaneous Civil Cause No. 139 of 1996. The Attorney General who is the eighth respondent in this appeal is cited as the first respondent in the petition. At the filing of the petition on 21.10.96, Exchequer Receipt No. 0355^725 for 4,5001= was issued by the High Court Registry. This receipt, however, did not particularise the items paid for but states merely; «IN RESPECT OF Misc. Civil Case No. 139 / 96 . On 19 . 8 . 97 the presiding judge fixed a date for hearing the petition but this kept changing for various reasons. When the petition came on for hearing on 1 . 12 . 97 * learned counsel for the appellant Mr. Nyange raised a preliminary objection to the effect that security for costs had not been paid as

required by rule 11 (1) of the Elections (Election Petitions) Rules, 1971. He submitted that the petition was therefore not properly before the court and prayed that it be dismissed. He should, of course, have prayed that it be struck out* In reply, Mr. Kisusi, learned counsel for the first to seventh respondents, resisted the prayer by demonstrating that security for costs and other items like filing fees were all comprised in the omnibus receipt. As a precaution also he had that morning paid a further sum of 1 , 0 0 0 / = . He was supported by Mr. Kamba, learned Senior State Attorney who appeared for the Attorney General. The court overruled the objection, hence this appeal. We were more or less treated to the same arguments and replies at the hearing of the appeal. Mr. Nyange's basic contentions were that security for costs has to be paid at the filing of the petition or within the time the petition may be presented, and that it was not paid in this case since the receipt did not spell it out. The relevance of Mr. Nyange's further contentions depend rather on whether the foregoing can be answered in his favour and need no particular mention. The answer to the first contention should be looked for in rule 11 (1) itself. It reads: The Registrar shall not fix a date of the hearing of any petition unless the petitioner has paid into the court as security for costs the sum of five hundred shillings.

- 3 - First of all, Mr. Nyange came up with the argument that ' "hearing of the petition" commenced with the hearing of all preliminary matters. He did so because on 17.4.97 the Senior Deputy Registrar of the High Court fixed a hearing date for an application to amend the petition. We are unable to agree with him. An application to amend, as distinct from a preliminary objection, is directed at the constitution or the making of the petition itself rather than its fate. In this case, for instance, after the ruling on the application to amend, there followed the amended petition, the respondents' replies to the amended petition and the petitioners' reply to those replies. Until that stage the petition cannot be said to have been ready for hearing and it is a curious argument which suggests that hearing of a petition commences with the steps intended to bring the petition about. In truth, therefore, the Registrar never fixed a hearing date of the petition on 17.4.97 or any time according to our appreciation of the record. Then, secondly, we can find nothing in the sub-rule to support the contention that payment of security for costs has to be made at the filing of the petition or within the time v/hen the petition may be presented, which is fifteen days from the announcement of the election results. The sub-rule makes payment of security for costs a necessary condition for the Registrar to fix a hearing date, and to that extent it operates compulsively, but it is not correct to say that a petitioner is obliged to pay security for costs at the time of filing his petition. If the Legislature had intended such a position it could easily have said so. According to rule 8 (1), for instance, a petition has to be lodged with the payment of the prescribed fee. Similarly, according to rule 114 (1) of the Court of Appeal Rules a civil appeal can be lodged in this Court only upon payment of 2,000/= as security for costs. It is therefore clear to us that under rule 11 (1) a petitioner is under no obligation to pay security for costs at the filing of a petition but may postpone payment until the pleadings are complete. Mr. Nyange's second basic contention was that security for costs was not paid in this case. The learned judge in the High Court appears to have been

ambivalent on the issue. He observed that "the amount /of ^,500/= 7 may well have comprised the security for costs /but7 there is no way of knowing by just looking at the ERV ...s* Generally he held that if security for costs was not in fact paid, it was an irregularity curable under rule 27 (1) of the Election Rules. We were fortunately spared the dilemma of the learned judge for we think the circumstances were such as to permit an unequivocal answer to the question. Mr. Kisusi's analysis of the ^,500/= payment shows an excess or balance of 1,000/= which not even Mr. Nyange could explain away. The filing fee was 500/= according to item 1 of the Second Schedule to the Election Rules; service charges for two respondents were 2,000/= according to item 12 of the schedule to the Court Fees (Amendment) Rules, 1996 (GN. 120/96)5 and fees for tendering- two exhibits come to 1,000/= according to item 17 of the same. The total is 3?500/= leaving a balance of 1,000/=. We find it difficult to accept Mr. Nyange's argument that this was not security for costs merely because the receipt did not state so. The rationale of conceding, as Mr. Nyange does, that filing fees were paid, but not security for costs, when neither item is spelt out on the receipt, hardly commends itself to reason. Either everything was paid or nothing was paid. We think, with respect, the balance of 1,000/= represents payment of security for costs at the rate of 500/= for each respondent. In reaching this view v/e should not be understood as condoning the perfunctory manner in which receipts are sometimes prepared but wish to deprecate it strongly. We think, however, that clerical errors in receipts is an irregularity which has no bearing on the form or substance of an election petition and cannot lead to a miscarriage of justice,. It is therefore of little moment. The appeal Is dismissed with costs. DATED at DAE ES SALAAM this 10th day of December, 1998 Do Z. LTJBUVA JUSTICE OF APPEAL B. A. SAMATTA JUSTICE OF APPEAL K.S.K. LUGAICINGIRA JUSTICE OF APPEAL I certify that this is a true copy of the original G,, MWARIJA) DEPUTY REGISTRAR

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