

TANZANIA / JUDGMENT

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,..., - IN THE HIGH COURT OF TANZANIA , {IN THE PAR ES SALA.AM MAIN REGISTRY) AT DAR ES SALAAM CIVIL CASE NO.3 OF 1997 MABERE NYAUCHO MARANDO 1ST PLAINTIFF . KASSIM H.AIDAR MAGUTTO 2ND PLAINTIFF ALLI SUMAYE 3RD PLAINTIFF VERSUS AUGUSTINE I.YA.TONGA MRKMA 1ST DEFENDANT PRINCE r{AHIN,JA BAGENDA 2ND DEFENDANT HAROLD ,JAFFU, 3RD DEFENDANT NDEMBWELA NGUNANGWA 4TH DEFENDANT HA.."iDUN MARCEL 5TH DEFENDANT KAMARA KUSUPA 6TH DEFENDANT WEDI KwASAKAFYUKA 7TH DEFEHDANT M.AHMOUD MADENGE 8TH DEFENDANT ,JUDGMENT KALEGEYA. \J: Following a split amongst Members~ and leaders of NCCR- Mageuzi (National Convention for Construction and Reform - Mageuzi) Political Party various meetings were held and resolutions flowing therefrom, among others, removed and installed various leaders. Mabere Nyauchio Marando~ Kassim Haidar Magutto and Alli Suma ye being among those affected decid.ed to file a suit leading to this judgement .. These were styled 1st, 2nd and 3rd Plaintiffs respectively. Just for record purposei, I should point out that during the filing of the suit the Plaintiffs were four, including one Yussuf Mperela, who however, withdrew shortly after. The suit is against 8 defendants - Augustine Lyatonga Mrema, Prince Mahinja Bagenda, Harold Jaffu, Ndembwela Ngunangwa, Hamdun Marcel, Kamara Kusupa, Weidi Mwasakafyuka and Mahmoud Madenge (also styled, 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th defendants respectively). r • .l 2 On 20th and 21st June, 1997, a meeting was held at Manzese, under th~ Chairmanship of Augustine Lyatonga Mrema at which various declarations, removals replacements and confirmation in various NCCR-Mageuzi Party leadership positions were made. The plaintiffs are challenging both the holding of the meeting and what was resolved in the following prayers as per plaint; "WHEREFORE the Plaintiffs pray for judgment and decree as follows:-

- (a) A declaration that the purported National Executive Committee meeting held on the 21st day of June, 1997 and the Central Committee meeting held the previous day was unconstitutional, null and void; {b) A derGlaration that the purported resolutions of the purported meeting dismissing the Plaintiffs from their offices and appointing the Defendants are null and void;

- (c) An order that the election calendar of the Party be adhered to so as to get proper delegates to the National Executive Committee and the National Conference; 3 • (cl) A declaration that the appointment of the purported new secretariat of the Party is void being unconstitutional; {e) A declaration that the 2nd Defendant is not a member of NCCR-Mageuzi Party;
- (f) The Defendants pay the costs of and incidental to the suit; (g) Any other relief(s) that this Honourable Court may deem fit," Regarding the alleged breach of the Constitution the Plaintiffs' contention can best be appreciated by going through the exact wording used in their pleading (para 8); "PARTICUT.,ARS OF THE UNCONSTITUTIONALITY OF THE MEETING
- (a) Being attended by people who were not members of the National Executive (detailed in para 13 as including several Regional Chairmen and Secretaries and those acting into those capacities);
- (b) Having been summoned as an extraordinary meeting without adhering to the minimum time 4 required for summoning such meeting and the fact that no agenda had been circulated to the members as required under the Party's Constitution;
- (c) Summoning the meeting without consulting the Secretary General who is the one supposed to summon it; 'd, \ .. j Shutting out the Secretary General;
- (e) Failure to serve notice for the meeting on members of the National Executive Committee;
- (f) Taking disciplinary measures against some of the members and leaders of the Party without giving them an opportunity to defend themselves against any allegations levelled against them;
- (g) Prematurely purporting to disband the Registered Trustees without giving them an opportunity to be heard," On the other hand, while the Defendants totally dispute having breached the Party Constitution they counter-claim and pray as follows:- 5 . "16. The Defendants jointly and severally repeat paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of their Written Statement of Defence and state that the Defendants had violated the Party's Constitution where upon a NEC meeting held on 20th and 21st June, 1997 resolved for their removal as the Secretary General and Registered Trustees respectively,
- 17. The breach of the Party's Constitution was done in Dar es Salaam within the jurisdiction of this honourable Court. WHEREFORE the Defendants pray jointly and severally for judgement and decree against the Plaintiffs for: "(a) A declaration that the 1st Plaintiff is not the NCCR-Mageuzi Secretary General as he was Constitutionally removed by the Party's National Executive Committee.
- (b) A declaration that the 2nd and 3rd Plaintiffs are not the Registered Trustees of NCCR-Mageuzi as they were Constitutionally removed by the Party's National Executive Committee.

- (c) An order compelling the Defendants to return to the Party Headquarters all party documents and cheques they hold and hand them over to the 2nd Defendant.
- (d) Costs be awarded to the Defendants.
- (e) Any other or relief this Honourable Court may deem just and fit to grant." In their written statement of defence, as per paragraphs referred to in para 16, the Defendants disputed the plaintiffs' claims stating in the process that the NEC meeting of 20 - 21/6/1997 which, among others, removed the plaintiffs from their positions was lawfully and constitutionally valid; that due notice for its convening had been properly issued; that the 2nd Defendant was properly appointed to the position of Secretary General and is a member of the Party; that the Plaintiffs were constitutionally removed due to their indiscipline especially the 1st Plaintiff who unilaterally and unconstitutionally declared the ousting of the 1st Defendant at Tanga hence causing Commotion and havoc at Tanga, unilaterally and unlawfully moved party documents and set up unregistered headquarters at Lugoda Street, Kariakoo and later at Kisutu, seized and cashed the Party subsidy cheque worth Tshs.31.8 million. Dr Mvungi and Dr Lamwai, Advocate~prosecuted for Plaintiffs while Mr F.S. Mbuya, Advocate, defended all the 8 Defendants. The Plaintiffs called 12 witnesses including themselves (Marando, Magutto, Mbwilo, Mgeta Bakome, Chitanda, Joseph Mangana, Mwasomola, Nyakyoma, Nuru Shija, Mayage Ismail, Liundi, and Sumaye, PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9, PW10, PW11, PW12 respectively) while the Defendants called 10 witnesses J-... 7 (Harold Jaffu, Boniface Mgodazi, Andrew Kimbombo, Muhela Hezron, Sultani Ahmed Sultan, Mahmoud Madenge, Dr Hassan Chawapona, Cbimoto, Bagenda, and Best, DW1, DW2, DW3, DW4, DW5, DW6, DW7, DW8, DW9 and DW10, respectively). From now onward in this judgement where it necessitates making reference to them as witnesses they will be referred to by their respective number as indicated above unless otherwise expressed. Out of 8 Defendants only 3 gave evidence personally in defence (these are Bagenda, 2nd Defendant as (DW9), Jaffu, 3rd Defendant as DW1, and Madenge, 8th Defendant as (DW6). Regarding Exhibits, the Plaintiffs tendered 5 of them - the NCCR-Mageuzi Party Constitution {Exh. P"A"); Minutes of Extra- Ordinary National Congress of 17-18th April, 1995 held at Starlight Hotel (Exh.P"B"), Minutes of 'KIKAO MAALUM CHAKAJATI KUU YA HALM.ASP, AURI KUU YA TAIFA' {NCCR-rjf.AGEUZI) held at Raska.zone Hotel, Tanga, on Newspaper dated 22nd June, 1997, in which proceedings of the Manzeze 20th and 21st, June 1997 meeting are reported (Exh. P"D"), and a Certificate Extract from Documents filed with the Office of the Registrar of Political Parties, Tanzania (Exh, P"E"), while the Defendants tendered two Exhibits - minutes of "MKUTANO MAALUM WA HALMASHAURI KUU YA TAIFA YA NCCR-MAGEUZI ULIOFANYIKA MAKAO MAKUU YA CHAMA MANZESE ARGENTINA TAREHE 20-21/6/97" (Exh. D"1") and NCCR -MAGEUZI Membership Card No.359871 issued to PRINCE BAGE.NDA on 1-6-95 (Exh. D2). Now, let me first narrate what stand out undisputed. The 8 NCCR-MAGEUZI Party is one of the Political parties recognised under the law in Tanzania. The Constitution of this Party is the one adopted by its National Conference held at Starlight Hotel on 17/4/1995 and which replaced that of 1992. It was tendered as Exh~ P"A" ~ The National Party Chair-man is the 1st

Defer1clant ~ There was Party NEC meeting at Tanga which was scheduled to last from 9th to 15th May, 1997 and which witnessed a thunderous split between the National Party Chairman and the Secretary General of the Party (1st Plaintiff). Back in Dar es Salaam, the 1st Plaintiff moved his office from the Party's Headquarters to another place and carried with him various office documents of the Party. The party then found itself operating from two offices - at the Party Headquarters and at the 1st Plaintiff's office, and in like manner, members found themselves split in two camps - Marando's camp and Mrema's camp. Sometime in June, 1997, the 1st Defendant in his capacity as the chairman of the Party, through mass media, announced the convening of the Party's NEC meeting at the Party's Headquarter, Manzese Argentina and scheduled it for 20th and 21st same month. The meeting was indeed held although not without problem for it was ordered to be closed prematurely by the police on 21st June, 1997 and the venue moved to 1st Defendant's residence. It was attended by 85 people (as per Exh. D1) but the 1st and 2nd Plaintiffs, though supposed to attend, did not. At the 1st Defendant's residence it was announced that Plaintiffs had been removed from their posts - Marando from the post of Secretary General while Magutto and Sumaye were removed from the Board of Trustees. It was also announced that Prince Mahinja Bagenda (2nd Defendant) was taking over as the Secretary General. Meanwhile the Plaintiffs filed two cases (the present being one of them) before the High Court, and secured injunctive orders barring the convening of the National Congress, the NEC and CC Meetings. The order relating to the latter two was secured after the 20th - 21st June meeting had been held while the former was procured before. As to the background of the Party before this state of affairs set in, the following is also not disputed. NCCR-Mageuzi Party was officially formed on 15/2/92. While the 1st Plaintiff was its first Chairman, the 2nd Defendant was its first Secretary General. By then, the 1st Defendant was the Minister for Home Affairs. The 2nd Defendant's membership card was No.12 issued at the Party Branch situated in the head office of the Party. Sometime in 1994, Opposition Parties met and proposed the establishment of a unitary Party called UDETA (Umoja wa Demokrasia, Tanzania - Union for Democracy in Tanzania). The formation of UDETA would have meant that all opposition parties in existence then be disbanded. Being not in support of this idea of UDETA, at a NEC Party meeting held at Salvation Army Hall r. in., √. 1 . ./17.lf. :\\ at which meeting the UDETA issue was being discussed, the 2nd Defendant (Bagenda) resigned and walked out of the meeting followed by DWB (Chirnoto). A party . I. , , ' . 10 going by the title, MAGEUZI-ASILIA was then formed by some of the members who resigned from NCCR-Mageuzi and which secured provisional registration with DWB as its chairman. The said Party however extinguished itself as it was not fully registered. In 1995, the 1st Defendant joined NCCR-MAGEUZI Party and became its National Chairman while 1st Plaintiff who had relinquished that post became the Secretary General. It was then resolved that those who had defected to join Mageuzi - Asilia could rejoin the Party. ,_ •rf:\\ n ~ ~-•O duly applied to rejoin. w;::, ana. vwo Enough for the undisputed facts. At this point I should hasten to observe that a greater part of the evidence given by both parties dealt with exemplification of how the two camps are at logger heads with each other and quite unnecessary for the determination of issues in controversyfke... Let us now go into the substance of, _ issues.

Issue.!!It framed and agreed upon are as follows:- "1. Whether the National Executive meeting held on 20th and 21st June, 1997 and the resolutions thereof .are in accordance with NCCR-Mageuzi Constitution.

2. Whether the purported removal of 1st Plaintiff from his ~ office as a Secretary General 0- .L NCCR-Mageuzi was Constitutional.
3. Whether Prince Mahinja Bagenda is a member of the NCCR- Mageuzi.
4. Whether the purported removal of the 2nd and 3rd 11 Plaintiffs from the Board of Trustees of the NCCR- Mageuzi was Constitutional.
5. To what reliefs are the parties entitled." I will deal with issue 1, 2 and 4 together followed by issue 3 and 4. Before going into them, however, I should make an observation on the Plaintiffs' argument advanced in their joint final written submission. Therein, they implored the court to enter judgement against the 1st Defendant and all others who didn't give their defence. They insisted, and let their own words paint their clamour; "By stating their case fully and calling evidence in proof, the plaintiffs had discharged their burden of proof. Without any rebuttal with evidence on oath, the first defendant must be taken to have admitted the plaintiffs case as true. The same applies to the other defendants who did not appear in court to rebut the plaintiff's case." I have already indicated above that only three Defendants out of 8 gave their personal evidence. This notwithstanding however, I cannot buy the Plaintiffs' contention that failure by a party to a case to enter into a witness box and testify, even where he calls other witnesses or evidence automatically entitles the other party to a judgement. This is so because notwithstanding such situation, the court is duty bound to analyse the other party's evidence to see whether he {the party who went into the 12 witness box and testified) proved his case {in our case, the p __1 aJ_DLl1- , '- • ,C IS• r ' , a 1 iega t .ions •) ano~ ln . . 001ng ~ so tl,~e cour_t h,as t o ana l yse Q., ,.. form) given by the other also the other evidence (in whatver party. In this case, the five Defendants did not give evidence but they called witnesses. I have failed to land on the basis which !ea the counsel for th.e plaintiff into saying that all the 10 defence witnesses deposed only on behalf of the 3 defendants who testified! In any case, the Defendants' case is one and intertwined as they are all jointly and severally proceeded against. However, a party who personally decides to avoid entering a witness box to challenge the other party's allegations against him does so at his own peril, for, even though he may fiUd other witnesses, and front other evidence, these may not clearly bring out the desired picture as the one he would have presented if he had would automatically entitle the other party to a judgement. Even the legal material, Sarkar's law of Civil Procedure, 8th Edition at page 839, to which the Plaintiffs' counsel sought support, does not run with him, for, (as also quoted by him) the learned authors are very categorical, "That effect of a party not giving evidence in support of his pleading may be fatal. Such practice has been deprecated by the Privy Council." Indeed logic may fail to get an answer for the 5 defendants' 13 failure to testify, but that is that, - the court will decide on the basis of the evidence adduced. That settled, let me turn to issues 1,2 and 4 together. I will start by quoting and elaborating on Article 5.18 of the NCCR-Mageuzi Constitution relating to

calling of the NEC meeting. Under Article 5.18 appearing on page 39 of Ex.h. P"A", it is provided, "Halmashauri Kuu ya Taifa itakutana mara tatu kwa mwaka katika mikutano yake ya kawaida, inaweza kufanya mkutano usio wa kawaida ikiwa utaitishwa na Mwenyekiti baada ya kushauriana na kukubaliana na Makamu Wenyevidi na Katibu Mkuu au wajumbe wa Halmashauri Kuu wasiopungua nusu. Taarifa ya Mkutano itolewe na Kamati Kuu wiki tatu kabla ya vikao." This article is the one which provides for the convening of the NEC meeting of the Party. Ordinarily, NEC shall be convened three times a year an extra-ordinary meeting can also be convened. The latter can be convened by the chairman on consultations with the vice - chairmen and the Secretary General or with not less than half of NEC members. In either case, the notice of meeting should be issued by the Central Committee three weeks before the date of the proposed meeting. We should subject facts of this case to the above quoted article and ask ourselves whether the NEC meeting of 20th and '14 ' 21st June, 1997 was an Ordinary meeting or Extra-ordinary. Guided by the ample evidence on record, I should outrightly say that it could not have been an ordinary meeting because the chaotic situation existing in the Party then could not have allowed the same. We remain with the other mode: extra-ordinary. The Plaintiffs dispute the same having been either ordinary or extra-ordinary while the defendants urge that it was the latter and announced at Tanga. Indeed, from what transpired, the said meeting was assumed to be an extra-ordinary meeting. As already indicated, such meeting has to be called by the chairman in consultation with the vice chairman and the Secretary General or with not less than half HEC members. The first alternative could not have been followed because there was no Secretary General and in any case the defence did not suggest there having been any consultation with the vice chairmen. We remain with the last alternative, and it seems this is what is being fronted by the defence. Unfortunately, the very chairman (Defendant 1) who would have cleared the air by informing us as to how he came to call this meeting did not testify! We are only left to swim in evidence by other people not empowered to convene that meeting, and these leave a lot to be desired in the process. Let us go over that evidence one by one. DW1 (Jaffu), on how the meeting came to be called had only this to say, "Halmashauri Kuu members wanted the chairman to call meetings of Halmashauri Kuu and 15 Mkutano Mkuu on 20th and 21st June, 1997. The said meeting were held." He was making reference to Tanga meeting after the confrontation. DW2 (Mgodazi) never attended the Tanga meeting but deposed that he was informed by those who attended that meetings would be held on 20th June, 1997. His evidence does not assist on the issue for he simply states, "The decision to hold that meeting was made by members of Halmashauri Kuu who attended the meeting in Tanga." Apart from being wanting from various aspects it is pure hearsay. DW3 (Hezron) states, "At Tanga when others run away from us we went on with the meeting. The members in attendance agreed that there would be held a meeting in Dar es Salaam on 20th." DW5 (Sultan Ahmed Sultan) said nothing on this matter. DW6 (Madenge) testified on the matter as follows, "Between 10/5/97 and 15/5/97 there was a meeting at Tanga In that meeting, at the end there was chaos and some people left and the meeting was adjourned till the day following at Regional office, NCCR-Mageuzi. I can't recall the number of those who attended. One of the members became

the Secretary of the meeting . 16 and it was decided that we were to meet from 19th - 21st June, 1997. 20th was for Halmashauri Kuu while Mkutano Mkuu was to be :held on 21st". DW7 (Dr Chawapona) speaks almost what other witnesses stated, "At t11a_t. meeting it was decided that there was to be held another Halmashauri Kuu ya Taifa meeting in Dar es Salaam regard being had to what transpired. It was fixed for 20th and 21st. It was to discuss the Administrative issues and situation prevailing in the party then. The -said meeting was held and I attended." DW8 (Chimoto) made no mention of what transpired at Tanga. DW9 (Bagenda) had the following to say, "On 15/5/97 there was a meeting in the Regional offices after chaos had reigned in the previous meeting. The meeting decided to remove some of the leaders. In that meeting I acted as a member of Halmashauri Kuu appointed by chairman. Elections to fill up the post of Deputy Secretary General were made and I was elected. Some vacancies of members who had been removed were filled up. It was decided to continue another meeting in June, 20th and 21st. DW10 did not say a word about the Tanga meeting nor the 20th - 21st June, meeting. I have taken pains of touching the defence witnesses one after another to show that nowhere did the Defendants try to disapprove the Plaintiffs' contention that the convening of the meeting of 20 - 21st was not done in a manner required of an ordinary meeting or extra-ordinary meeting in terms of Act 5.18 (on page 39 of the Party's constitution). And, to me, this is a surprise because they had all opportunity at their disposal to effect a counter. It was not a question of simply saying that there was a meeting at the NCCR-Mageuzi Regional office at Tanga which decided on the convening of the 20th and 21st June meeting

- it was imperative to show that the scheduling of the extra-ordinary meeting was made by the chairman in consultation with not less than half of NEC members. Here we come face to face with a clear exposition of an example of perils to which parties who refuse to personally testify are susceptible. The situation could have easily been saved by the chairman himself stepping into the witness box and testifying on how he made the directions (some of the witnesses seem even not be sure which meeting was to take place at Dar es Salaam - whether Halmashauri Kuu, Mkutano Mkuu or both - DW9 himself talks of "continuing with the meeting" as if intending to say that the Tanga meeting was adjourned) tendering in the process a copy of meeting. Even giving an 18 allowance for that omission, DW9, who is on record as having been the Secretary could have tendered the minutes, but should have hurriedly added that they had been referred to as annexure to the written statement of defence and specifically pointed out in a notice that they were part of the evidence to be replied upon!) which would naturally have shown, first, the members of NEC who attended in order to prove that the chairman consulted with half of the numbers required, and secondly, the resolution itself. Now where does this lead us to? We close the defence case without production of any evidence to establish that this purported extra-ordinary meeting was lawfully convened as prescribed under Article 5.18! Unless specifically qualified, where an authority is required by law to consult, it is not a mere question of formality, nor can it be discretionary. The said authority must indeed consult if its decision has to have any legality, and where there are proceedings subsequent

to the decision which question its lawfulness or legality, the onus is on that authority to prove that it acted within the law. In our case, the 1st Defendant was supposed to establish that he called the extra-ordinary meeting and that he did so in terms of Article 5.18 of the Constitution - that either he consulted the Vice Chairman and the Secretary General or consulted with half of NEC members. He never ventured p<"Ov<1.. to,...consultation either way let alone establishing that those it,..e. present were half of NEC members, if we take Alatter avenue. Legally therefore, as one of the main conditions for the calling 19 of an extra-ordinary meeting was not met, the convening of the 20th - 21st June, 1997 meeting violated the NCCR-Hageuzi Constitution, Article 5.18, already quoted above and was therefore unlawful. With this finding I need not discuss the other question of whether or not the notice was issued and if so whether it was properly issued. In normal circumstances this would have brought issues 1,2 and 4 to an end, but considering the nature of the case, I shall discuss the other matters fully just for removal of doubts and benefit of the competing camps. And in doing that, even at the danger of making this judgement unnecessarily long, where I think 15" the actual witness wor&would clarify better, I will have them reproduced. Turning to what transpired at the meeting itself (20th and 21st), again, with greatest respect to Mr Mbuya who strenuously tried to save the boat, the evidence clearly shows that even if the meeting was lawfully held it displayed a lot of flaws. First, the Plaintiffs were condemned unheard. All the Plaintiffs was served with charges levelled against him nor given opportunity to defend himself. DW1 deposed, "No one among the three who were removed was afforded chance to defend himself because they run away." DW2, wr:io in most of his testimony seemed guis~ng his answers, for, he would sway forth and back under the defence of not being 20 sure, stated, "I can't tell why Marando was not in the meeting but he came there and had notice of the meeting. Marando was never interviewed by the meeting for he didn't attend. No letter or explanation was received from Marando and so was the case with Magutto. Sumaye came briefly and left". It should be noted that this witness is the Deputy Secretary General, Zanzibar, and who testified to have been the chief advisor to the chairman at the 20-21st meeting. DW3, deposed th.at the removal of the Secretary General could· be done by the NEC without calling upon him to defend himself. He had the audacity to say, "The question of removal of Secretary General is decided upon by Halmashauri Kuu and may not call upon him to defend himself". He went on, "On 20th there was a proposition that Marando should be called in to defend himself The Constitution provides for that. The response was that Marando's whereabouts were unknown. Marando's offices were unknown Another reason was advanced that Marando had already defended himself at Tanga. At Tanga I • 21 he had not been charged with complaints tabled in the meeting. No proposal was made to call upon Sumaye to come and defend himself nor was it said regarding Magutto. They were not called as they were no where to be seen." DW4 maintained that Marando had been given chance to defend himself at Tanga and could not recall any proposition made to call him in the 20th-21st meeting. D DW6 was very categorical - he does not know whether the plaintiffs were served with any notice to attend and defend themselves: in fact, he is not aware whether the Constitution provides for that, for he stated, "I don't know that the constitution requires that one has to be given notice to

defend himself before his removal from office." DW7 contradicted himself - at first he said, "the 20th meeting decided that Marando should be called to attend on 21st. On 21st it was said that Marando was down stairs and the chairman ordered that he be called to answer queries .." (the only witness to depose on this), but shortly thereafter, he said, "We didn't call Marando, sumaye and Magut to because they were no-where to be seen." 22 DW9 deposed that the Plaintiffs could not be called upon to defend themselves as their whereabouts were unknown and that the Mara delegate proposition to call Marando to defend himself was

turned down. The evidence summarised above shows that the Plaintiffs were not afforded chance to defend themselves. Under principles of natural justice, the right to be heard is an impregnable pillar that cannot be circumvented if a decision is to be taken against the fate of a person. Of course, if the defendant makes it impossible for him to be served with the charge or notice, he cannot turn around and hide behind the principle in order to challenge the decision. In that situation, the prosecuting party would have discharged its duty if it can show the charge and notice already prepared and effectively show that it was impossible to know the defendants' whereabouts. In the case hand, the witnesses state as one of the reasons, that the plaintiffs were not called upon to defend themselves because their whereabouts were unknown. But, from the look of things there were no charges documented at all. In any case the evidence shows that the Marando camp offices were known. Secondly, apart from the above the general principle of *JiA..rt.i.t.Q. natural~respected the world over, justice the NCCR-MAGEUZI Party Constitution* provides for removal of the Secretary General and *Wl-#! f7-<., orrcrf.u.11 ;-1::, to .l.t.fe.nJ* One...e.JJ the Board of Trustee members. ~ I will start with the removal of the Secretary General. Articles 12.6 and 12.7 (page 44 and 45 of

- 23 Exh. P"A") reads, "12.6. Anaweza kuondolewa au kusimamishwa utendaji kwenye nafasi hiyo kutokana na mapendekezo ya Kamati Kuu. Mapendekezo hayo yatachambuliwa na kuamliwa na Halmashauri Kuu. 12.7. Atapewa nafasi ya kujitetea dhidi ya tuhuma au madai ya aina yoyote." (emphasis mine). Also being a National leader, he can be removed by Mkutano Mkuu; Article 3.5 on page 35 of the Constitution provides, "Kumuondoa Madarakani kwa mapendekezo ya Halmashauri Kuu kiongozi yeyote. Hii itakapofanyika lazima muafaka uwe theluthi mbili ya wajumbe wote wa kikao hicho ambao wana haki ya kupj_ga kura." Again, Article 5.7 on page 38 of Exh. P"A" reiterates, (Powers of NEC) "Kumuondoa madarakani kiongozi yeyote wa chama ngazi ya mkoa na/au Taifa isipokuwa mwenyekiti na Makamu mwenyekiti, kwa ushauri wa Kamati Kuu au Halmashauri Kuu ya Mkoa, alimradj anayechukuliwa hatua hiyo anapewa kwanza nafasi ya kui i.eleza na kui itetea" (emphasis mine). • 24 As regards Trustees, the same Constitution provides for their suspension and removal. Article 20.7 (on page 51 of Exh. P"A") provides, "Halmashauri Kuu ya Taifa ina Mamlaka ya kumsimamisha Mdamini, Wadamini, au hata Baraza lote iwapo itadhihirika kuwa mjumbe wa Baraza, wajumbe au Baraza lote litakuwa limedhihirisha kuwa limeshindwa kutimiza wajibu wake, uamuzi wa aina hiyo utawasilishwa kwer1ye kika.o C!ha JviktrtariO iv1kUll wa Taifa kwa uamuzi wa mwisho." The above articles

therefore, among others, insist on the compliance with the natural principle of justice I referred to above: The right to be heard. This is clearly provided in Article 12.7 and Article 5.7 quoted above. The arguments presented by some witnesses that Marando had already been offered chance at Tanga to defend himself are not supported - none could specifically say on what charges was he proceeded against and what was the verdict. Suffice to say that it is uncontroverted that the relevant meeting ended in disarray. Evidentially therefore, it is very clear that the principle of being heard enshrined in the Party's Constitution was deplorably breached. Apart from failure to observe the above principle, in relation to 2nd and 3rd Plaintiffs (Trustees), the Constitution (Article 20.7), again quoted above speaks loud - the NEC usurped powers with which it is not clothed. NEC can only suspend Trustees but cannot remove them. It can only recommend for their removal to the National Congress. The removal of the 2nd and 3rd Plaintiffs was also unlawful being unconstitutional on this score. Going back to the removal of the Secretary General, as indicated above, NEC is empowered to remove him but recommendations have to be made by the Central Committee to the NEC, which has to analyse and decide (Article 12.6). Mr Mbuya has strenuously argued that apart from the fact that the then Central Committee led by Marando had gone into hiding, legally there was no Central Committee as such, for, the one that existed was acting illegally having been formed prior to 1995, when the Constitution existing then had not provided for the creation of such organ. This argument is not without velocity. It was agreed by both parties that indeed prior to the making of the current Constitution (Exh. P"A") there was no provision in the ruling Constitution then, allowing for the creation of an Organ in the title of Central Committee. The Registrar of Political Parties (PW11) was explicit on this, "There was no organ called Kamati Kuu in the Constitution in 1993 , , According to that Constitution there should not have been an organ called Kamati Kuu {CC}", This witness had to query the Party officials over this anomaly

- 26 . but his endevours by letter never materialised. DW1 also talked over the same, "Kamati Kuu issue was problematic as it was not in the Constitution but we thought it important to be formed". Explaining how the Central Committee created without the back up of the Constitution came to remain even after the 1995 Constitution; this witness (DW1)said, "Ir1. 1995 the k.arnati Kt111 rema ined as earlier composed since 1994"., However, DW2, contrary to all expectations had the audacity of stating the opposite of what all others were aware of, for, he said, "We (Zanzibar members) didn't know that NCCR- Mageuzi had an organ called "Kamati Kuu". DW3 deposed that in 1995 Elections members of :Cc were not elected and that he had advised Marando on this without success. "Almost all members of Kamati Kuu had not been voted in , The Kamati Kuu which we voted into power was illegal. I realised that we acted improperly." DW4 had the following to say, •. ") '7 L, I "There was no Kamati Kuu at the time and one of the discussions at Tanga was the disbanding of fake Kamati Kuu ... " The rest of the Defendants' witnesses do not say anything different from that so, it is a fact that prior to the coming into force of the 1995 Constitution, there was created an organ called Kamati Kuu whose existence was not backed up by the Constitution as there was no Article providing for the same, and that though not specifically

elected it continued to exist after the new Constitution though this time, there was an Article for its creation. Mr Mbuya says that this should make us conclude that, legally, there have never been i Kamati Kuu in existence and that therefore the requirement under Article 12.6 that the said Karnati Kuu should recommend to the NEC for the removal of the Secretary General should be disregarded. On the other hand the Counsel for the Plaintiffs argued that PW1 and former leaders of the Party (PWB inclusive) are estopped both by deed and conduct from saying that the 1992 Constitution had defects when they registered it (cited *Western Vs. Fair bridge* (1923) 1 KB 667, *Greenwood vs. Martin Banks* 9193) A.C 51 and *Spiro vs Lintern*

91973) 1 WLR 1002), adding in the alternative that whatever shortcoming that existed were corrected in the 1995 amendments. I should @utrightly state from the outset, with respect, that the authorities cited are not relevant, and again with respect, the Counsel for Plaintiffs misses the track here. The 28 an unassailable obvious is that the Kamati Kuu existed without being backed up by the Constitution. They cannot be estopped from saying this, for, for example at no time did PW11 approve this organ. In fact, he raised a query which was not answered! In any case, the issue at hand is whether, now that an organ is Articled in the current Constitution, and there having been no official election into power of the same under the new the old Kamati Kuu, sailed through into as.suMe.Jl the new era, it should officially be recognised and to have been /\ composed under the current Constitution. In my considered opinion, I cannot accept the Plaintiffs' counsel's argument that there was and there is a legally recognised Kamati Kuu in NCCR-Mageuzi Party. Under Article 6.1 (page 40) members of Kamati Kuu are

- The National Party Chairman , .:Z.
- '.j(\ti'. Vice Chairman (one from Zanzibar and another from Mainland)
- The Secretary General
- Deputy Secretary General - one from Zanzibar, and another / from Mainland
- 13 members elected by NEC, 10 of whom should be from mainland. Three members should be women. 3 members should come from Zanzibar one of whom should be a woman, and,
- 5 members to be appointed for a specific period by the Chairman in consultation with his Secretary General. The chairman is at liberty to revoke the appointment in case such member fails to discharge his duties even before the
- .t.: • : , , specLLC per1oa iapses. Both parties agree that under the 1995 Constitution no such composition has ever been dressed up. The Plaintiffs who are the proponents of the idea that the assumed Kamati Kuu is legally re~/nisable have not even bothered to establish whether the composition of the purported "CC" come near to the one detailed above. I have failed to see any colour of legalt!,with which the said "CC" is clothed. I agree with Mr Mbuya that there was no which could have recommended for the removal of the Secretary General in terms of Article 12.6 of the Constitution. However, that said, this is the only extent that we move together. I am far from agreeing to his argument, as he seems to put it in his final

submission, that as NEC is the one which finally decided on the fate of the Secretary General the procedure provided under Article 12.6 can be bent. The Article is so specific and needs no interpretation or interpolation. I do appreciate the dilemma in which Mr Mbuya, Advocate, finds himself, but that is the letter of the Constitution which binds his clients and plaintiffs alike. On this, again, I hold, that discussing removal by NEC of the Secretary General without the matter being tabled by cc is a violation of NCCR-Mageuzi Constitution. This takes us to another flaw in the procedure of the purported removal of the Secretary General. The Plaintiffs have asserted, especially in the evidence of PW1, that the delegates who attended the 20th and 21st meeting were composed of non-NEC members (those in Acting positions) and that voting involved people who were not eligible, including Regional Secretaries. PW1 deposed, pointing out on the list which forms part of Exh. D1, that the Regional Secretaries included, No.22 (on the list) Kissessa Mkangwa, Kigoma, No.25, A. Bana, Rukwa, No.27, Salum Msilim, Dodoma, No.30 S.A. Mwalukasa, Mbeya, No.31, Emmanuel Mwakasaka, Tabora, No.34, Yusuf Balozi, Mtwara, No.37, Emily Lwabyoma, Kagera, No.40. C. Kabewa, Kilimanjaro, No.43 Issa Nandule, Lindi, No.51, Makame Pandu, (Acting) Unguja Kaskazini, No.55, simon Kalimanzila, Singida, No.57, M.M. Ngwamasese, Shinyanga, No.60, Kalokola Bakuza, Mwanza, No.67, Joseph Bitulo, Iringa, No.70, Mknomwe Masambaji, Tan, _ga, No.73, Chrin Matembo (Acting) Morogoro, No.76, Nassoro D Msumi, Pwani, No.79, Kuboja Fredy (Acting) D'Salaam, No.81, Macherichery M. (Machericheri)J Mara. These are 19 in number. PW1 did not stop there. He referred to No.85, Dr Ngunangwa as not being an official of the Party. Regarding those who were allegedly acting Regional chairmen he referred to, No.12, Karawa Mushi, Ag. General Secretary, elders, No.19 Mgao Kombo, No.20 Haji s. Ambar, Unguja, No.24, M. Kitaya, Rukwa, No.46, 7 and 48, Amini Usi, Haji Hanani, Haji A. Seif respectively from Zanzibar, No.56, C.K. Njange, Shinyanga, No.72 David Mgessi (against whom PW1 also commented - 'had resigned~ long time before, in writing yet he called himself chairman from Morogoro'), No.78, Hashim 31 Madongo against whom PW1 commented "he called himself Ag. Chairman D'Salaam, when he had no official post", and No.7, Ally Fungameza against whom PW1 commented "he called himself Ag. Chairman Elders when he had already resigned". This last group total up to Lt. There is yet a third group reflected in Exh. D1 which PW1 insists was not supposed to attend NEC meeting. It is made up of 12 people. This included, No.2, Bagenda against whom he commented, "He was not supposed to be a member as his appointment was unlawful"; No.5 K Senyangwa, against whom he commented, "he is designated as Ag. Director. This L position had not yet been filed up and in any \ case Ag. members can't be NEC member", No.s. 15, 45, 49, 50, 53 and 63 Fatuma Makame, Abdallah Suleiman, Mohamed Sabehe, Hamad Rajabu, M. Abdallah, Yusufu Kombo respectively all said to be Zanzibar observers at NEC meetings but not members; No.58, Yusufu Malingira against whom he commented, "I am not sure where he comes from as he is appearing in the list for the 1st time"; Nos 64 and 71, D. Kadiwele and William Ole Maina allegedly simply brought from Ruvuma and Tanga respectively but who have never been NEC members and No.62 against whom he commented, "He is a NEC member but he did not attend the meeting. He is a member from Ruvuma but he was not present. His name has just been added". . , 32 PW1 stated further that under article 4 of the

Constitution the . NEC meeting is supposed to have 110 members and that "the quorum . is 55". The quorum is en article 18.1 page 48". Concluding on the alleged non-observance of the quorum, PW1 said, "Under Article 18(1) page 48 ... the quorum is half - the NEC members are 109 although Constitution wise Dr Lamwai was holding two positions Chairman of Dar es Salaam Region and a member of NEC. Thus out of 109 ... we remain with 43 which is below the quorum of 55. The lawful members who attended that meeting (43) were falling short of the quorum by 12 members". The only counter evidence to the above serious allegation was given by DW9, and even then. During cross examination. He "The Manzese meeting was attended by 85 delegates. It is not true that 51 delegates were not voting delegates. Indeed Regional Secretaries attended as non-voting delegates (witness looks at Exh. n" j J, J. As they are all indicated as wajumbe I can't identify the Regional Secretaries. If Kesesa is a Regional Secretary he is not entitled to vote. What we did was to call upon the Regional Secretaries to sit aside and who did not vote. I can't tell whether the Regional 33 Secretaries were 19 in number. A person in Acting capacity is not allowed to attend a meeting and vote. There is no post of Ag. head of section or Department in our Constitution. No one who attended was in acting capacity. Kuboja of Dar es Salaam was not acting - (shown a letter). This one is for /Mhy. It is not normal that a person acting would attend a meeting". In re-examination, PW9, pointed out those appearing on Exh. D1 and who voted. As was the case with the statement of PW1, let me put it the way it was uttered by this witness - Nos. 1 (Mrema), 2 (Bagenda), 3 (Mgedas), 4 (K~supa), 5 (Senyagwa), 6 (Chido), 7 (Fungameza), 9 (Msikula), 10 (Madenge), 11 (Kimbombo), 12 (Mushi), 12 (Mwasakafyuka}, 14 (Sheikh Mbarawa), 12 (Makame), 16 (Mtemvu), 18 (Hassan), 19 (Kombo), 20 (Amba), 21 (Rashid), 23 (Kajelelo), 24 (Kitaya), 26 (Hezron), 28 (Jaffu), 29 (Msamba), 32 (Abdallah), 33 (Pole), 34 (Balozi), 35 (Ntanzo) 36 (Mutta), 38 (Rutakyamirwa), 39 (Kugwakoma), 41 (Msechu), 42 (Chitanda), 43 (Ndandule), 44 (Makanzo), 45 (Suleiman), 46 (Ussi), 48 (Seifu), 49 (Salehe), 50 (Rajabu), 51 (Pandu), 52 (Makame), 53 (Abdallah), 54 (Shashi), 56 (Njange), 59 (Chanyenge), 61 (Marcel), 62 (Maheja), 65 (Fwime), 66 (Mhina), 69 (Kimaro), 71 (Olenaina), 72 (Mgesi), 74 (Mushendwa), 75 (Goga), 78 (Magongo) 82, (Habiasafu) and 85 (Nyarnangwa). DW9 concluded by saying, "I may have skipped a name but these are the ones entitled to vote." From the evidence adduced by both parties, as rightly submitted by the Plaintiffs' counsel, the Defendants close their . 34 case without shattering the Plaintiff's contention that the majority of 85 delegates as per Exh. D1 did not have the capacity to vote and as such the quorum as per Constitution which should be 55 NEC members was not realised. I have so concluded because of the following: PW1 having emunerated those he alleges to have incapacity (Regional Secretaries and those in acting capacities in the said meeting regarding attendance and votin0 the burden then shifted to the Defendants (who dispute the allegation) to disapprove. Unfortunately for the Defendants they did not. They could have only and easily done that by proving the actual positions of those emunerated by PW1 - showing that they were neither Regional Secretaries, Acting Chairmen or non-members i.e. observers. PW9 is on. record (quoted already) confessing that out T"\. of the list displayed in the very Exh. he tendered (Exh. .l/ J_ , being minutes whose preparation he supervised) he could not tell who was the Regional Secretary and who was not as they are all labelled as

"wajumbe"! It does not need a specialist to see the obvious that this kind of testimony does not even scratch the evidence offered by the Plaintiffs on the matter. To make things worse, when he was called upon by his advocate, to read out, from the list on Exh. D1, those who were entitled to vote out of 85, he enumerated 58 (as already indicated) and out of those 22 overlapped with those pointed out by PW1 as having had no capacity to attend or vote (those which over-lapped are delegates falling under Nos. 2, 5, 7, 12, 1.5, 19, 20, 24, 34, 43, 45, 46, 48, 49, 50, 51, 53, 56, 62, 71, 1&, and 85). This leaves 35 his delegates who are free of contest to only 36, a figure (even giving an allowance that he forgot other names as he stated) which cannot realise a quorum as provided under the Constitution, for, page 15 of Exh. D1, shows that delegates who were eligible to vote were 61. Assuming he forgot 3 names, if these are added to 58 he recalled, it would add up to 61, and if we add the 3 names to 36 it comes to just 39! If we add those which did not overlap and which were not touched by any party we total up to With the above finding coupled with the fact that PW9 maintained as did the Plaintiffs that Regional Secretaries and Ag. Chairmen could not vote in, and attend NEC respectively it becomes unnecessary to discuss whether or not there was any meeting at all which delegated powers to NEC to 'amend' the Constitution by prescribing that Regional Secretaries be members of NEC with no right to vote as contended by Defendants in their other argument. The Constitution (Exh. P"A"), as it stands, prescribes members of NEC to be as follows:

- The chairman
- Vice chairman
- Secretary General
- Deputy Secretary Generals
- Treasurer
- Regional chairmen
- One delegate from each Region 40 delegates elected by National Congress in compliance with Article 3.6
- 10 delegates appointed by the Chairman in Consultation with his Deputies, and Secretary General.
- Chairman of each of the wings of Youth, Women and Elders (Article 41 on page 36 and 37). Under Article 18(1) the quorum for any meeting is provided, "18.1 Idadi ya wajumbe wa:naotakiwa kuwepo ili Mkutano uanze (Akidi) itakuwa nusu ya wajumbe wanaostahili kuhudhuria kikao kinachohusika". From the above, and in view of the defendants' failure to shake the Plaintiff Contention that the 20th and 21st meetings was attended by less than 50 delegates, the convening of the same, under this score violated the Constitution as well. I indicated earlier on, after disposing the issue of whether the meeting was constitutionally convened, that I will deal with all the issues detailedly just for clarity. Treading on this, I

should point out that (still on assumption that the holding of that meeting was proper) there is yet another flop which would not have allowed the decisions purportedly made to stand. The Defendants vehemently argue that Marando was removed by the general consensus of the delegates and back it up with unanimous vote results in Exh. D1. They similarly state for the removal of 2nd and 3rd Plaintiffs, and so is the voting in of Defendant 2 (DW9) as a Secretary General. This is in response to plaintiffs attacks that no consensus was reached, no voting was done, and that if it was done it was against procedure. Let us look at what the evidence tells us. PT.Tr- .. W;) (Chitanda), a Regional Chairman of Lindi deposed to have attended the 20th meeting late, in that, he joined the meeting at about 1 pm. He insisted that on that date Regional reports were the only ones tabled and that there was no resolution made. On 21st, however, he said that there was a proposal to remove Marando for barring the National Conference by court orders and they decided to vote as there was no consensus; that after ballot papers had been distributed but before voting, the police intervened and they dispersed; that later as he was tracing his Region delegates he was told that delegates were needed at the Chairman's premises where upon arrival they were called upon to sign a document which he did only to be told later that they had voted out Marando; that DW9 announced what he called vote results although no vote was cast and that this surprised him hence his open misgivings at the meeting at what was transpiring which misgivings earned him a title of "Kijimarando". PW7 (Mwasomola) attended the 20th meeting. Unlike PW5, he deposed that on that day discussions were general, touching what would be discussed the day following and that one of the agenda was to expel Marando and vote in a replacement; that he duly advised Marando to attend the 21st meeting but that they were all barred and assaulted at the gate. This witness therefore cannot assist us on what transpired on 21st. However, we have 2 journalists - PW9 and 10. PW9 (Nuru), a journalist with Uhuru publication deposed to have covered the 20th and 21st meeting. He tendered Exh P"D", a Mzalendo Newspaper dated 22/6/97. He deposed that though he went to where the meeting was being held on 20th he was not allowed into the meeting as it was said to concern internal matters; that he however, together with other journalists, Mayage Mayage of Mtanzania, Hawa of Shaba, Asha of Sunday Observer, and Hilary Bujiku as a cameraman, covered the 21st proceedings; that when the meeting started at about 9.00 a.m, the Chairman addressed it, "Leo ni siku ya kutekeleza maazj_mio yetu ya jana." and went on to explain that it was the removal and replacement of Marando; that however, one Pole Ramadhani implored the Chairman to wait for others as some of those in attendance were not entitled to vote; that the chairman conceded and "Salaam za Miko" took over instead, through which some delegates castigated Marando, that as this was going on, information filtered into the meeting that Marando was down stairs but was barred, which prompted the chairman to state, "Si nilisema wale ambao hawakuja jana wasiingie?" which in turn led one Abas Mtemvu to react as follows, "Tusimwogope Marando. Mwache aingie, Nawe Mwenyekiti usiseme chochote. Tumhukumu naye akiwepo", 39 The witness narrating, went on to state that FFU was heard ordering people to disperse upon which the chairman said, "Hali imekwisha kuwa mbaya hivyo tufanye lile lililotuleta hapal!, and called upon members to propose names to fill in the post of the Secretary General; that Dr Ngungwana, Bagenda

and Mtemvu were proposed though the latter excused himself and ballot papers started being distributed; that as this exercise was going on, an order was heard outside, "Hii ni amri ya mwisho kwa walioko juu", followed by an abrupt entry by detectives into the Hall who started forcing people out. The witness concluded his evidence by saying that they all dispersed including Mrema, the Chairman, and that, while there was no attempt to verify the delegates before distributing ballot papers the meeting closed before the same (ballot papers) reached all concerned. I will come later to this evidence but now let us turn to what PW9's colleague, also journalist, (PW10 - Mayage) told the court. This witness (PW10) deposed to have attended both meetings. He said that on 20th, all speeches (except the one by a Mara delegate) by Regional delegates wanted Marando removed; that it closed at 6.00 pm and scheduled to start on 21st at 8.00 am; This witness's evidence does not differ with that of PW9 except possibly stressing the magnitude of chaos. He also said that 40 the distribution of ballot papers did not come to an end and they dispersed. on the other hand, the defences witnesses conceded the tabling of support by various delegates for removal of marando unanimously on 20th but add however that on 21st the delegates voted for his removal and also voted in Bagenda, as a new Secretary General. DW1 testified that 85 delegates attended, and 61 votes were cast in favour of Marando's removal; that though the voting was done at Manzese, the vote results were announced at the chairman's premises because marando had caused chaos. He also stated that votes were cast to elect in a new Secretary General before those of the outgoing had been announced. Responding to questions by court he said, "I-/e cast votes for removal of Marando and they were counted. Kilimba was one of those counting. The results were forwarded to the chairman who said that we should then proceed {,, t __, o vo-e f_or IJiing . e pos t orr teie J_n th O 0 +- r , •) Secretary General", DW2, the De~uty Secretary General of Zanzibar, deposed contradictorily, displaying all elements of not being sure with what he was saying as depicted in his testimony, "A new Secretary General was voted in. He Bagenda, It was by secret Ballot using J - 41 pieces of paper. The results were not announced but the votes were collected and the chairman said that they would be announced later at his home. There was a general consensus for Marando's removal which was enough (witness had been asked whether there was a vote for removal of Marando)". In cross examination he went further, "The decision to remove Marando was done on either 20th or 21st . I don't recall whether there was any vote made. The results which were announced at the chairman's place concerned Bagenda's election•.... I don't recall whether the votes had already been counted (the witness referring to the final entry into the Hall by police calling upon the chairman to close the meeting). I don't recall why the vote ~ results were reserved till at the chairmans house. The chairman is the one who decided that results would be announced at his home. It is possible to advised him. I advised him"~ DW3 deposed that he was one of the Assistants to Hamdan, a returning officer for the voting although he was also at the gate ••" 42 checking on who was entitled to attend the meeting; that after making sure that the quorum was complete he joined the delegates; that there were two exercises of casting votes - for removal of Marando and voting in Bagenda. He concluded, "Marando was removed before the voting as there was unanimous decision treading on Regional resolutions" DW4 deposed that Marando was

removed on general consensus and that they voted only as a formality to guard against possible challenges from the 'law literate group'. He stated, "The voting for Bagenda was done at Manzese. The results regarding Marando's removal were not yet announced when we voted for Bagenda The chairman had already announced that 61 votes had already removed Marando. At Masaki it was a formality of voting. There was no voting at the chairman's place." DW6 said, "The voting was done at the NCCR-Mageuzi headquarters, Argentina. The matters went on simultaneously - we voted for removal of Marando and voting for Secretary General. One followed the other because it was agreed that the delegates had already voted out Marando. As there was police chaos we 43 decided to go to Mrema's house to count the votes and announce results", DW7, on votes, also said that the voting was simply geared at confirming the previous day's decision. "We knew that these educated may disturb us later. We cast votes to put records straight. As to when they were counted and announced, he said, 11 After the casting of the vote had been done and votes counted announcements were made later at the chairman house" DW9's story is that the voting, the counting of votes, and announcement of results were made at the chairman's place and that he was appointed Secretary General by about 58 votes. "Marando's removal was made by consensus. We had to vote because people had to know the votes cast against him". The above evidence apart we have yet the Defendants' Exhibit

- D1, which are the minutes of the said meeting. This talks different from what the plaintiffs and Defendants' witnesses testified. First, Exh. D1 shows that although various resolutions were made and that the majority of the Regional delegates vouched for . 44 Marando's removal and the meeting was satisfied that his acts displayed indiscipline justifying his removal, on 20/6/97 (Min. 3.1.1 at page 10), the said meeting did not decide on his removal. It decided that a vote should be cast (min. 3.2.1) Min. 3.1.1. which is under a heading "MAAZIMIO YA HAI, f{A.SH.AiJRI K.Uli ..fA TAIFA" states; - "Baada ya kutafakari matendo ya Mhe. Mabere Marando ya ukosefu wa nidhamu, dharau, kutojali, kujichukulia madaraka ya kuhamisha ofisi, kuondosha mafaili ya chama, vitabu vya hundi kukimbia na hundi ya ruzuku ya chama, kuvuruga vikao vya Halmashauri Kuu ya Taifa; kusababisha fujo kwenye vikao, kuvunja katiba kwa kutangaza kuwa Mwenyekiti amevuliwa madaraka na kutoheshimu maamuzi ya vikao vya chama na kuita polisi kuwapiga wajumbe wa Mkutano Mkuu ambao walikuwa wamepumzika Halmashauri Kuu ya Taifa irneridhika kuwa Mhe. e Marando amekosa sifa ya uongozi na ya uanachama. Hata hivyo inaazimiwa aondolewe kwenye uongozi tu, ili apate muda wa kujirekebisha. Akiendelea na vitendo vya utovu wa nidhamu na utovu wa maadili ya chana, afukuzwe uanachama." Iii' 45 Under Min. 3.2.1 falling under the title, "UAMUZI WA HALMASPIAURI KOU YA TAIFA", the meetings' decision on vote is very vivid:- "Maazimio yote yalikubaliwa kwa kauli moja isipokuwa azimio la kumfukuza Mhe. Marando kwenye ukatibu mkuu liliamuliwa lipigiwe kura sik.u inayofuata tarehe 21/6/97. Waka.ti huo wasemaji wa mik.oa 24 walitaka Marando afukuzwe, Mkoa mmoja tu wa Mara ulipinga. Lakini kwa rnujibu wa taratibu, ilikuwa ni lazima zipigwe kura za mjumbe mmoja mmoja." (emphasis mine) Secondly, Exh. D1, contrary to all Defence

witnesses except DW7 (who said that the counting was done at Manzese and DW4 who went further than even Exh. D1 by saying that the chairman had announced at Manzese that Marando had been removed by 61 votes) asserts that the voting and counting were done at Manzese, and only results announcement was done at the chairman's place. At page 14 of Exh. D1, regarding removal of Marando, it is recorded, "Kura zikapigwa zika hesabiwa na matokeo 1laka.wasilist1wa kwa Mwenyekiti ti"~ In respect of votes for replacing the Secretary General, it is recorded, "Kwa hiyo wagombea wawili ndiyo waliopigiwa kura. Ambapo baada ya kura kuhesabiwa rnatokec> ya_liwasilis1wa kwa. lv1wer11rekiti ~" And finally, the record goes on, 46 " Hivyo wajumbe wote walitangaziwa kukutana nyumbani kwa Mwenyekiti kutangaza matokeo ya kura za kumwondosha katibu Mkuu na kuchagua Katibu Mkuu mpya na kumteua Kaimu Katibu Mkuu bara". Earlier on, I said that I would revert to PW9's evidence later - in Exh. P"D", a news coverage made by him, this witness details what took place on 21st at the Party's headquarters. Here I am not concerned with the details of the chaos that seems to have reigned (as displayed by details and pictures in this Exh P"D") but I am concerned with what PW9 reported regarding voting and what he testified upon while in the witness box. While in his oral testimony he categorically stated that no voting was done and that in fact ballot papers had not reached each voting delegate, his own written reports contradict him deplorably. On the front page of Exh. P"D" he reported, "Saa 4.22 asubuh.i, baada. ya Mwenyek.iti Mrema kuchungulia dirishani na kuona virungu ya FFU vinavyotembea aliwaamuru wajumbe wapige kura haraka haraka ya kumwondoa uongozi na uanachama. ndugu ma.rando na kuncH lake." Quoting Mrema, the said report goes on, "Sasa ndugu. wajumbe h.ali imekwisha ku.wa mbaya tupige kura haraka haraka ya kumwondoa uongozi na uanachama Marando uanacha.ma na uongozi haya haraka haraka wewe mjumbe pendekeza jina yasiwe mengi rnawili tu". The report goes on, "Ndugu Prince Bagenda, Dr Ndernbwela Ngunangwa na Ahas Mtemvu walipendekezwa kugombea ukatibu mkuu, lakini kabla ya kuanza kupiga kura ambavyo haikujali nani ana haki ya kupiga na nani hana, Mtemvu alisimama na kuondoa jina lake. Karatasj za kupiga kura ziljaawanywa ovyo ovyo na kushinikiza waiumbe wajaze haraka haraka huku mjumbe mmoja amesimama na kutoa wasifu wa Bagenda na Ngunangwa. Ghafla Nd. Mrema alimnyang'anya kipaza sauti kwa kumwambia azungumze bila kipaza sauti sababu polisi wanasikia wanachokifanya. Saa 4.27. wakati kura zinaen~elea kupiawa ndani ya ukumbi pnlisi wa kuzuia waliziba barabara saa 4.33 Ofisa Upelelezi wa mkoa Nd. Samari aliingia ndani ya ukumbi na kuamuru Nd. Mrema kusitisha mkutano kutokana na hali ya uvunjaji wa amani uliojionyesha. Nd. Mrema alibishana na ofisa upelelezi 48 huyo kwa takribini dakika nne ambapo saa 4.38 asubuhi kamanda wa kikosi cha kutuliza fujo aliserna" hii ni amri ya mwisho kwa walio ndani ya jengo" hali hiyo ilisababisha wajumbe wa NEC waanze kushuka kwa haraka ambapo Nd. Mrema aliamriwa kuondoka katika eneo hili kwa haraka na akatii amri hiyo." (emphasis mine) I have detailed this witnesses's report, first to show the contradiction inherent in his oral testimony and written report regarding voting, and secondly, to portray the chaotic nature in which the alleged// votes were made. Upon full analysis of the testimony of both parties as detailed above I am satisfied that voting was done though hurriedly regard being had to the prevailing situation then; that however, there

was no counting and that results were announced at the chairman's residence. Mr Mbuya prayed that PW9, :LO and 5 should not be believed branding PW9 and :LO as CCM fanatics. While I have no reason to call them names, on the clear contradictions displayed, I don't hesitate to agree with Mr Mbuya that their oral testimony, regarding voting having not taken place cannot be believed. Neither can PW7, a Regional chairman who simply signs a document whose contents he has not ascertained first. I am convinced that the report contained in Exh, P"D" is the more authentic, for, when it was being written there was no

- 49 knowledge that one day it would be used in a case. PW10 did not avail us his report, so we don't know what he reported. If indeed no voting was done Exh. P"D" could not have so indicated. At the sametime, comparatively with the other evidence at hand, the purported counting of votes at Manzese as per Exh. D1 cannot be true at all. First, if that were correct, all defence witnesses would have so stated - why not disclose this? Secondly, it is absurd that the votes could be so counted, handed over to the chairman and yet an exercise of announcing results which can hardly last a minute be pushed on to another time. With all the above we come to this - that it was improper to cast votes for the filling in of the post of the Secretary General without having it vacant first. It could not have been vacant when the votes for the removal of Marando had not been announced. The argument that he had already been removed by general consensus is neither here nor there as buttressed by the very defendants' Exh. D1 quoted above. The chairman was supposed to announce the votes for removal; declare the post vacant and then embark on another voting exercise for filling it in. This is incurable in itself. Secondly, there is no evidence that the results announced were indeed in consonance with the votes cast- none of the defence witnesses ventured to show how the ballot papers were preserved after voting. Indeed they are all silent 50 (except m·n who claimed unsupportedly that he was an assistant . returnJ.n.g o fficer to one Hamo.un ~ wh o never t es +-. ,_1,._~.1e0..") regarding who took custody of the ballot papers and who counted them. It is no wonder that the Plaintiffs' counsel intimated a possibility of forging results while cross examining DW4. Here, I should not be misunderstood. I am not saying that the results were forged but the whole procedure instigates one to harbour such feelings as what took place offended the basic principles of elections and voting and which could in no way leave the elections made as per Exh. D1 to survive. Mr Mbuya has implored this Court to find that the meeting and all that transpired were properly made. Let his compressed plea take the floor, !!In this connection we would urge your lordship to apply the principles laid down in the case of Dawklins V. Antrobus (1881) 1 ch. D G15 and in the case of Harlet Vs General municipal Boilermakers and allied Traders union (1998) 1 WLR 449. My Lord, in the case of Dawkins V. Antrobus (1881)1 ch. D.615 it was held that:- !!We h.a.v.e n.o r·igfJ_t. to sit a_s a co1J.~rt of appeal upon the decision of the members of a club duly assembled all we have to consider is whether the notice was or was not given according to the proper rules: whether the 51 meeting was properly convened; and whether the meeting if properly convened had come to the conclusion that this gentlemen ought to be expelled". Similarly 1n the case of Hawlet V. General municipal Boilermakers and allied traders union (1981) 1 WLR 449 it was held that "where a member of a union complained of a decision of

the union the court's function was not to review the decision but to ensure that the internal procedures of the union for resolving the dispute have been complied I am Gn all fours with Mr Mbuya as the principles of law referred to are concerned. That is a sound statement of the law. This ~ ~ t -J..i_Lt':> 1,- c~l·r'· \JL_ 1--.n·ev"~ L)11JW he~. Lnn V.L,J..J .~ ----,r,-, CtWo ___ ~ o.CL -'ha' L1J.i_. ~ ...L t has not (and could not) attempted to act as if it is an appellate court on NEC's decision. Instead, as clearly demonstrated above it has confined itself to scrutiny of the evidence offered and the law to see whether the procedure as provided under NCCR-Mageuzi constitution was complied with. I think, and I am convinced, that I have fully demonstrated th~t it did not. This seals issues 1, 2 and Lastly, I turn to issue 3 - of whether Bagenda is a member -tL.A: of NCCR-Mageuzi" It should be notedAhis membership was also queried at Tanga as conceded by him (2nd Defendant) and indicated in Exh. P"C". Both parties concede that UDETA issue created a fissure in NCCR-Mageuzi Party, in that, among others, it led to 2nd Defendant (Bagenda (DW9) and DWB (Chimoto) to leave the Party. By then the 2nd Defendant and DW8 were holding the posts of Secretary General and Deputy Secretary General respectively. The idea behind UDETA was to amalgamate opposition Parties to form one Party. DW8 and others therefore formed Mageuzi-Asilia. The Contention between the Plaintiffs and Defendants concerns what happened when Mrema joined the Party regarding M~i.' Asilia members. While the former argue that subsequent to the joining of the Party by Mrema in 1995 a resolution was passed to welcome back all former members who had defected to form Mageuzi Asilia; that the resolution allowed ordinary members to rejoin NCCR-Mageuzi without conditions, at the sametime requiring Mageuzi-Asilia leaders to make fresh applications through their branches as prescribed under the Constitution of the Party and

- ~I\I! t,ti.,:,1'. r1r•ht taking away +-J.-r,'" . --:j.i . 'JI ----y ~" I,.. dflJ appointive posts save contesting for elective positions; that following this, but in a dubious way, DW9 who is among the Asilia leaders channelled his application through Kongowe branch instead of the branch close to where he lives; that the Kongowe Party Branch instead of discussing and approving the application through the Kamati ya Utendaji, unlawfully used Halmashauri Kuu ya Tawi; that the approval though sent to the Kamati ya Utendaji ya Wilaya, Temeke, which had to give a full approval, it has never been approved todate as there 53 was no such Committee in existence then, for, restructuring of the Constituencies had dismantled it leaving a caretaker Committee which had no jurisdiction, and that therefore, legally, DW9 is not a member of the Party; the latter (Defendants), on the other hand, counter by saying that the resolution set no conditions for the come back of former NCCR-Mageuzi members (contradictorily though); that in any case Bagenda (DW9) was not a leader in Asilia Party; that Bagenda decided to apply for membership as per Constitution and was issued with another card (Exh. D2) on 1/6/97; that there was nothing wrong with the Halmashauri Kuu ya Tawi discussing and approving his application instead of Kamati ya Tawi; that thereafter the Kamati ya Utendaji, Temeka, under which Kongowe Branch fell then, approved his application, and that therefore he is a member of NCCR- Mageuzi Party. I should first clear whether the NCCR-Mageuzi Party resolution which allowed mageuzi - Asilia members to

rejoin set any conditions. On the evidence available I am satisfied that indeed that was the resolution. Apart from the evidence of PW1, PW2, PW4, PW7, PWB, which emphatically reflect this state of affairs, Exh. P"B", which are the minutes of the Starlight Hotel meeting, on page 19, under the 4th para of min. 2.5.2.2 entitled, "2.5.2.0 MSAMAHA KWA WAJiACH,t\J\A", it. Plt ver·y clea_rly, "-· "(1} Kwamba wafuate taratibu za kikatiba kuomba uanachama kwenye matawi yao. 54

- (2) Kwamba wawasilishe hati ya kufutwa Chama cha Mageuzi Asilia.
- (3) Kwamba watakuwa wanachama wa kawaida, wasitegemee kupewa nafasi za uongozi mpaka hapo watakapopata fursa ya kugombea nafasi yoyote na kuchaguliwa." Besides the above, although the defence differs and contradicts itself, the totality of it concede to what is quoted above. DW5 deposed and insisted that the Starlight Hotel meeting passed a resolution which simply accepted back Mageuzi-Asilia members without any conditions. In fact he goes to the extreme of saying that it was resolved that those who held positions before defecting should revert to their positions! DW6 goes to the opposite direction for he stated that there was indeed a discussion of allowing Asilia Members to come back and that Marando even cried while trying to convince others but he concluded that there was no resolution made at all at that meeting! These witnesses, however, can't be telling the truth, for, DW8 (Chimoto) who was the former member and chairman of Mageuzi Asilia has a different story. He testified and let his words speak for themselves, "I rejoined the NCCR-Mageuzi, I rejoin. eel according to the procedure announced at Starlight meeting. I went to Mrati Barafu Branch leaders and explained the directives of the Mkutano Mkuu that I should write a 55 letter, and have them discuss the application and give me a card if accepted. My application was accepted. I have a membership card." Again, the same witness, shortly after continued, "We appealed against the Starlight resolutions. We didn't forward it to any organ the resolution was that others remained members while leaders had to follow the normal application procedure." This witness's version should be correct as he was the most affected. "rot i, .. _ 0~ ,_ 1 v' 11.J.. 'ni·,,, .. Hi i~u+- ;,1 .1., ,;,-o -We have d.1.-, 7 " 1.. • -1-1," 1.,J.ic c"V'~c• ..., - ,,, .L lc,1'-c o"I ~... ,,, \2rc' VW:1 ~ i l Defendant); "The ordinary members of Mageuzi Asilia were admitted to rejoin without conditions. The leaders had to follow the procedure I handed in my application to rejoin NCCR- Mageuzi immediately after Starlight meeting." The above needs no additional support to confirm that - the resolutions were made and attached conditions to mageuzi Asilia leaders. l' 56 Next to consider is whether the resolution concerned 2nd Defendant in any way. The Plaintiffs' witnesses and Exh. P"B" clearly show that the heated debate about allowing Mageuzi-Asilia members to rejoin the Party were being spearheaded by Dr Lamwai. The debate was so hot that Marando had to cry trying to convince his colleagues to oblige. The Central figure named among leaders who should not be allowed seemB/ to have been Bagenda (DW9) although as per the evidence of PW11 (The Registrar of Political Parties) his name was not among the officially recognised founder leaders as per his register. On the evidence at hand I am satisfied that DVJ'9 was a leader, one way or another, of Mageuzi-Asilia although disputed by DW8 and (?w9) himself. I have so concluded

because, first, all the Plaintiffs' Witnesses testified that all those who defected from the Party due to UDETA issue joined the Mageuzi - Asilia. Secondly, PW1, was categorical in stating that although DW9's name did not appear in the list of leaders that was presented to him upon application for a provisional Registration, he knew him to be behind that party; and has further stated that not all leaders could appear on the application as only two are required. DW4 deposed, "At Starlight Hotel Bagenda (DW9) (2nd Defendant) was concluded to have been a leader of Mageuzi - Asilia for he was vocal for its establishment. Even in mass media Bagenda was always being heard regarding the formation of Mageuzi - Asilia". If, ... :) i Thirdly, and finally, is his own conduct. He (DW9) unreservedly stated that he knew well the substance of the resolutions of the Starlight Hotel meeting before submitting his application to Kongowe branch. If true that he did not fall in the category of 'I, -. Mageu.zi - Asilia leaders how could he waste illS energy and apply for membership again when ordinary members, the category from which he claim to belong, were simply accepted to rejoin en mass! It is not of less significance that at a certain stage in his testimony he casts some light on what the true picture is, " ... Marando announced that those who were in Mageuzi Asilia should return with their cards. They were not to follow the Party's prescribed procedure. It was also announced that it included those who resigned due to UDE TA. iss1..le ~ Y!hen. I t-ett1rriecl from Bt1kol)a_ I found the announcement that we had to apply through Branches. I had a safari as far Denmark. When I came back I found the Mkutano Mkuu's resolution hence I went to Kongowe" - can these be steps of an ordinary member, untouched by the conditionalities of the resolution? In the face of the contrary evidence available, DW9's contention that he applied for membership for the sake of it, is untenable. I conclude that he was one among the leaders of Mageuzi - Asilia hence covered under the conditions passed by the resolution. i:::o .J(J That concluded, let us surge ahead. What about his old membership? DW9, insistingly stated th.at he only resigned his posts but not NCCR-Mageuzi Party membership. "I did not resign from the membership but from the posts of Secretary - General and membership of Kamati Kuu. I :res.igned from membershin later. :r resianed on 28th ,June. 1994, three days after the Salvation Army +- • mee,~J nq. I rejo.ined the Party in 1995, June, 1st". (emphasis nine). This was in response to cross examination by Dr Lamwai. From the above DW9 cannot be heard to say that by the time he presented his application to Kongowe Branch he was still a member of NCCR- Mageuzj_. I hold that he was no longer a member. We now turn to the crux of the controversy. Whether DW9's application was legally accepted and rejoined the Party. The uncontroverted facts are that DW9 did submit his application for membership to Kongowe branch. Whether Kongowe Branch was the one closer to where he lives or whether circumstantially as a person who lives in the City centre he should have gone that far to present his application should not detain us here as it is not an issue before us. Undisputed f a.cts however show that upon receipt of the same, the Kongowe Branch Karnati ya Utendaji did not discuss it but instead tabled it before the Halmashauri Kuu ya Tawi. The latter discussed and approved it and sent it to the District Committee. Let the very witness produced by the r ,,, ti _, 59 Plaintiffs, (PW3), who was the Kongowe Branch Secretary), clarify through his own words, On 22/5/95 at about 8.00 a.m Bagenda brought a letter to our office and said that he was not a member of any

Party He didn't tell us that he was formerly NCCR - Member but we knew that earlier on he was and was Katibu Mkuu". As to why the Kamati ya Utendaji :, • o_1.o. :, noc discuss and approve the L application he had the following to say, "We noted that it was a sensitive matter involving a potential person. As we noted that the kamati ya Utendaji was not mandated to deal with this matter we decided that it should be resolved by the Halmashauri Kuu ya Tawi. No 6ne in the Kamati ya Utendaji objected to Bagenda's application. Members of Kamati ya Utendaji were the same members of Halmashauri Kuu ya Tawi. We sent out decision to the District Secretary". Earlier on he had deposed, "The letter regarding Bagenda's application was sent to Temeke District. The letter was calling upon the District party Secretary, Joseph Mangana, to approve Bagenda's ." 60 membership." There is evidence also, by the Plaintiffs that the letter referred to by PW3 reached its destination. This is PW6 who was the District Secretary at the time. PW6 deposed that after the UDETA issue some members resigned and that Kamati ya Utendaji ya Wilaya, of which he was a member, remained with only 3 members out of 7; that also as it was decided that Polling constituencies should form the Party's districts the// old Temeke District having been split into two (the other one being Kigamboni) there was no Kamati ya Utendaji or Halmashauri Kuu ya wilaya but task forces to help in the new re-organisation. He went on, "The Bagenda issue surfaced in one of the task forces meetings while discussing the new set up. This was the Temeke Task force. The issue was brought by Deogratus Mwanguya who brought a letter from Kongowe "B" ... , The letter contained a decision of Kongowe "B" Branch. The letter was saying that they had received and approved Bagenda's application to rejoin the party We simply received the letter and filed it. We discussed the matter but one delegate queried the legality of the task force to deal with the issue. We then decided to consult the Regional 61 Secretary who connected me to the Chairman, Dr Lamwai, who advised me that, in order to comply with the Constitution we should first form Electoral Constituencies after which we could forward the matter to the relevant Constituency. We have not been able to discuss this matter." It is on the basis of this that the Plaintiff's contend that Bagenda is not a member of the Party. On the other hand however DW9 says that he is a member, he produced as Exh. his card issued on 1/6/97. He then called in DW10 {Best) who testified to have received the Kongowe Branch recommendation in his capacity as the Temeke District Party Chairman; to have directed his Secretary, (PW6) to convene a meeting of Kama.ti ya Utendaji ya Tawi (w) where they discussed and approved Bagenda's application. He stated, "I instructed my secretary to convene a meeting of Kama.ti ya Utendaji, Temeke District, to discuss the matter. The meeting discussed Bagenda's application. After a long discussion and considering his character we decided to restore his membership I directed the Secretary to write minutes and a report to Bagenda that he has been admitted. The minutes were to ba523ent to the 62 Regional Chairman, Dr Lamwai. This was done. Since then Bagenda became a member, .. " Regarding the composition of the Kamati ya Utendaji ya Tawi and Halmashauri Kuu ya Tawi, he joined hands with PW3 that it j_s the same. I have carefully considered the set of facts which stand out undisputed regarding the Kongowe Branch decision and I have concluded that it cannot be faulted simply because it was decided upon by the Halmashauri Kuu ya Tawi instead of Kamati Kuu ya Tawi ~ I have so concluded

because, although I don't subscribe to PW3's or DW10's proposition that the composition of the two committees referred to above is the same as I will shortly after demonstrate, the general principle is that, where an inferior organ deals and decides on matters specifically provided to be decided upon by a superior organ the decision would be ultra vires because the said organ will have crossed the limits of powers. It will have clothed itself with powers it did not have. But where a superior organ, decides on matters which would otherwise have been decided upon by the inferior organ, and where there is no specific provision in law governing the issue which mandatorily require that the inferior organ/ shall give its views first and, more specifically, as is the case at hand, where almost all members forming the inferior organ are also members of the superior organ which made the decision, that decision cannot be faulted. In the matter at hand, the Kamati ya Utendaji ya Tawi is inferior to the Halmashauri Kuu ya Tawi. In the following circumstances, considering this and other guidelines indicated above I see nothing wrong in the decision reached. Just for clarity, the following is the composition of the two committees:- Article 4.1 (on page 16) provides the composition of Kamati ya Utendaji ya Tawi. "4.1 Wajumbe wa Kamati ya utendaji watakuwa wafuatao:-

- a) Mwenyekiti wa Tawi
- b) Katibu wa Tawi
- c) Mweka hazina
- d) Wajumbe watano waliochaguliwa na Halmashauri ya
- e) Mjumbe mmoja wa Viji. na ~ £) Mjumbe mmoja wa wana.wake.
- g) Mjumbe mmoja ,wa wazee
- h) D1.wan1 aliyechaguliwa kwa tiketi ya NCCR-MAGEUZI. Article 2.1 (page 14) provides that of the Halmashauri ya Tawi:- "2 .1 Wajumbe wa Halmashauri Kuu ya Tawi ni kama ifuatavyo:-
 - a) Mwenyekiti wa Tawi
 - b) Katibu wa Tawi
 - c) Mweka Hazina
 - d) Mwenyekiti na Makatibu wa mitaa/vitongoji wa NCCR- MAGEUZI, vilivyoko katika Tawi lile
 - e) Wajumbe watano waliochaguliwa na Mkutano Mkuu wa Ta_wi~ T
 - f) Diwani aliyechaguliwa katika tiketi ya NCCR- MAGEUZI katika Kata/Shehia inayohusika.
 - g) Wenyevitj_ wa vitengo vya vijana, wanawake, na wazee wa Tawi. Having so concluded on the Kongowe Branch decision my next question is whether the Branch recommendations were discussed by the Kamati ya Utendaji ya Wilaya. On this we have the word of PW6 who was the District Secretary against the Word of DW10 who was the chairman. They are both agreed however that the recommendations were duly received. The difference lies with what

happened next. I have paid due attention to the evidence as a whole and the circumstances of this case and I have concluded that the Defendant's evidence on this positively tilts the scale to the Plaintiff's side. Exh. D2 is a card issued by Kongowe Branch. It is dated 1/6/97. This was after the application by DW9 had been considered. If the Branch found it imperative to discuss the matter, and at much higher level (Halmashauri Kuu ya Tawi) for that matter could it be possible for the same Branch to have turned around and misbehave by issuing a card without the blessings of the District Authority? In any case, the said card (No.359871 - Exh. D2) is indicated to have been signed by one Alex Mbwilo, and it was issued just a few days after the application had been received by the Branch as per the Branch Secretary's testimony (PW3) and after the recommendations had been sent to the District Secretary. PW3 goes by the name of Alex Mbwilo. This is the same name appearing on the letter of the said card. I do appreciate the Plaintiffs' Counsel's observation when urging this Court in his submission that Exh. D2 should be disregarded for lack of an office stamp (which condition however does not surface anywhere in the Constitution in order to make the card authentic) but, with respect, vigilant as they vividly displayed, the two Dr Counsel could not have hesitated to marshal evidence to prove that the said card was a forgery and that the Alex Mbwilo appearing thereon not PW3. A fortiori, they cannot be said to have been taken by surprise by the tendering of the said card, for, the Defendants had given ample notice that it would be one of the documents to be relied upon (it was Annexure 14 to the Notice). If the Alex Mbwilo - (PW3) who was the Kongowe Branch Secretary by 22/5/95 vacated his office in between for any reason such that by 1/6/95 (within a span of just 9 days) where DV19 was issued a card there was already in office another Secretary going by the same name why didn't the plaintiff front that? All this convince me that the Kongowe Branch decision on Bagenda's application was duly dismissed by the relevant District Authority which gave the go ahead to the issuance of the card (Exh. D2) to applicant (Bagenda). On the whole, therefore, for reasons already discussed, I answer issue 3 positively - Bagenda is a member of NCCR-Mageuzi. We come to the last issue. What reliefs are parties entitled to: I find that, I ... - ..., 66 In view of the findings made above judgement is hereby entered in favour of the plaintiffs with the following declarations that:-

- a) The NEC meeting of 20th and 26th June, 1977 was unconstitutional
 - b) There could be no legally recognised meeting of the Central Committee, for, under the 1995 Party Constitution no such committee has ever been appointed
 - c) The resolutions, dismissals and appointments made at the meeting of 20th and 26th June, 1977 are null and void.
- The NEC meeting of 20th and 26th June, 1977 was unconstitutional
 - The resolutions, dismissals and appointments made at the meeting of 20th and 26th June, 1977 are null and void.
 - In view of the findings made above judgement is hereby entered in favour of the plaintiffs, and, as against the plaintiffs,

- d) The 2nd Defendant is a member of NCCR-Mageuzi. I make no order as regards prayers (c) and (d) in the plaint for they would naturally be governed by consequences flowing from 'the above declarations. In his final submissions, the Plaintiffs' Counsel urged this court, in his prayer of 'Any other reliefs' that (1. because the defendants had 'already along violated the party constitution, continuously and consistently and that we should go and embark on fresh election all levels guarded by the lawful leaders', and that that is the only way to defend
1. I should respectfully say that that cannot fall under 'any reliefs'. 'Any', other reliefs should be ancillary to the main C: .., \.JI prayers. The Plaintiffs' counsel's prayer crosses the boundary and in any case, the court would be giving a decision on matters which were never testified upon at all - no evidence was led on any other appointments at various levels of the Party machinery, if any, That prayer is refused. In the same vein the counter - claim by the Defendants is dismissed. As regards costs, the Plaintiffs' Counsel had prayed that they be ordered either jointly or severally and prayed also for a certificate of costs for 2 advocates. Considering the chaotic situation and circumstances in which this Party finds itself, and considering the fact that hitherto it is split in camps, ordering costs would be unleashing the burden to the innocent Party members the consequences of which will be the widening instead of bridging the gap between them. For this reason I make no order as to costs. L.B. Kalegeya JJUDGE. Delivered today the 27th January, 1999. L.B. Kalegeya .JUDGE.

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