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TRIAL AND MANAGEMENT OF ELECTION PETITIONS BY COURTS: A CASE OF TANZANIA

By Hon. Mr. Justice Robert V. Makaramba

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1.0 INTRODUCTION

Let me take this opportunity to present to you with greetings from Tanzania, the Land of Kilimanjaro, the highest snow capped mountain in Africa. Tanzania is a nation, although endowed with many tribal groupings, speaks one national language, the Kiswahili language. Tanzania is endowed with many tourist attractions including the mighty Serengeti National Park and Ngorongoro Crater. The latest addition to the tourist fame of Tanzania is the traditional herbalist, "***Babu wa Samunge***" of Loliondo with his miracle cure!

This paper however does not intend to discuss tourist attractions. It discusses the role of the Judiciary in Mainland Tanzania in resolving election disputes. Where appropriate, the Paper makes reference to Tanzania Zanzibar, the other constituent entity of the United Republic of Tanzania, famous for its variety of spices and spotless beaches. The Paper discusses the role of the courts in Tanzania Mainland in settling electoral disputes within a background of international and national legal principles, thus providing a rich learning and knowledge sharing experience with other judiciaries within East Africa gathered here today.

1.1 Why Elections?

Elections not only do allow for political competition, participation and legitimacy, but also permit peaceful change of power, thereby making it possible to assign accountability to those who govern. This is why it is often argued that elections facilitate communication between the government and the governed, and also have symbolic purposes by giving voice to the public.

Generally, elections give the mass of the people opportunities to have a say in who governs them and how and with which policies they are governed. As means of giving accountability to citizens, elections are a constant reminder to public office holders of the limited nature of modern government. Public elections allow the citizenry the opportunity to exercise their broadly constitutionally guaranteed right to take part in the governance of the country, either directly or through representatives freely elected by the people in conformity with procedures laid down by the law. Public elections therefore are the periodically manner in which citizen exercise their right and freedom to participate fully in the process leading to the decision on matters affecting them, their well-being or the nation. The right to vote is not however, enjoyable by every citizen. It is a reserve of only those who have attained the age of eighteen years (the age of majority), who according to our Constitution and the electoral laws are entitled to register and vote in any election held in Tanzania. The right to vote however is subject to the Constitution and the law in force in Tanzania in relation to public elections.

2.0 THE CONCEPTUAL FRAMEWORK

2.1 The Tanzania Electoral System

Tanzania adheres to a mix of the electoral system known as the "***first-past-the-post***", for members of parliament elected to represent constituencies and some semblance of "proportional representation" with respect to special member seats. Under the first-past-the-post electoral system, the winner is determined by a plurality, that is, majority vote. Members of Parliament representing constituencies are elected by the people, on the principle of only one Member of Parliament in a constituency**.**

Developments affecting the electoral system, method and rules of counting votes to determine the outcome of elections, winners may be determined by a plurality, a majority (more than 50% of the vote), an extraordinary majority (a percentage of the vote greater than 50%), or unanimity] of any country are therefore bound to reflect one way or the other on the party system, and vice versa.

Elections are primarily a contest among groups, mainly registered political parties. It is the existence of such groups, which Tanzania like our neighbours, is not short of, organized and operated along democratic traditions that give meaning to the electoral process as the cornerstone of liberal democratic politics. Electoral and party systems are hence, necessarily intertwined as both are designed to facilitate peaceful and orderly transfer of political power. Party politics within a democratic setting are, indeed, "*intrinsically electoral politics*." The judiciary ultimately is called upon to adjudicate on disputes arising from the electoral process.

2.2 International Election Dispute Resolution Standards

Resolving election disputes involves both national and some international standards that are found across the wider spectrum of election related rights and rules and those associated with due process of law requirements and judicial independence. Generally speaking however, there are no international election disputes standards per se. The right to challenge decisions, actions or failures to act in connection with an election, may be considered as part of the voting rights. The right to seek redress however, is of little value without, among other things, an impartial and independent judiciary that can enforce the laws equitably and efficiently. This also infers that the requirements of due process of law are met by fair procedures, including notice to the defendant and an open trial before a competent tribunal with the right to counsel.

Generally accepted international human rights standards, which have been developed based on international legal instruments such as the *Universal Declaration of Human Rights (1948),* the *International Covenant on Civil and Political Rights (ICCPR)(1966)*, and the *African Charter on Human and Peoples Rights* (ACHPR) find expression in our national law in the form of constitutional recognition under Article 9(f) of the Union Constitution, the upholding and preservation of human dignity in accordance with the spirit of the *Universal Declaration of Human Ri*ghts as well as the enforceable *Bill of Basic Rights and Duties* in Part III of Chapter One of the 1977 Constitution of the United Republic of Tanzania (as amended from time to time).

The United Republic of Tanzania is a member to and has ratified the ICCPR and a number of other global and regional human rights instruments. The main challenge Tanzania like most common law countries faces is to domesticate ratified international treaties. Tanzania is still salutary to the weak common law dualist theory that international law and domestic law are separate legal systems. If international law is not transformed into national law through legislation, that is, domesticated, national courts cannot therefore apply it to adjudicate on the rights of citizens. Our neighbours in Kenya, through the new 2010 Constitution of Kenya, which the People of Kenya "gave themselves" on 27 August 2010, innovatively has done away with the "*albatross around our necks*"[1] by declaring categorically that international treaties ratified by the Kenyan Government to be a source of law[2] and general principles of international law to form part of the law of Kenya.[3]

The 1977 Constitution of the United Republic of Tanzania incorporates a number of enforceable fundamental human rights in its Bill of Rights and Duties. Tanzanian courts have, on a number of occasions, refused to be held back by the dualist theory by holding that the Constitution incorporates the Universal Declaration of Human Rights as well as other global and regional human rights treaties, which courts should consult when interpreting provisions in the Bill of Rights and Duties.[4]

2.3 The Right to Participate in Governance and Democratic Legitimacy

There are international standards enshrined in international human rights instruments which now find expression in our Constitution particularly Article 21 which recognizes and gives force to the citizens' potential to participate in political outcomes and to elect officials who represent their interests or desires in representational bodies. Article 21 of the Constitution provides as follows:

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[1] M Ocran 'Access to global jurisprudence and problems in the domestic application of international legal norms', keynote address at the 2nd West African Judicial Colloquium, 8 October 2007, Accra, Ghana, http://www.brandeis.edu/ethics/pdfs/internationaljustice/WAfricaColloq.pdf.

[2] Article 2(6)

[3] Article 2(5)

[4] See **JOHN MWOMBEKI BYOMBALIRWA V REGIONAL COMMISSIONER AND REGIONAL POLICE COMMANDER, BUKOBA ANOTHER [1986] TLR 73, 84**; **LEGAL AND HUMAN RIGHTS, LAWYERS' ENVIRONMENT ACTION TEAM (LEAT) AND NATIONAL ORGANISATION FOR LEGAL ASSISTANCE V THE ATTORNEY GENERAL High Court of Tanzania, at Dar es Salaam (Main Registry), Misc Civil Cause No 77 of 2005 (unreported) 39**; **DIRECTOR OF PUBLIC PROSECUTIONS V DAUDI PETE [1993] TLR 22, 34-35; PASCHAL MAKOMBANYA RUFUTU V THE DIRECTOR OF PUBLIC PROSECUTIONS, Miscellaneous Civil Cause No 3 of 1990** (unreported); **N.I.N. MUNUO NG'UNI V JUDGE-IN-CHARGE AND THE ATTORNEY GENERAL [1998] TLR 464.; CHIKU LIDAH V ADAMU OMARI High Court of Tanzania, at Singida, Civil Appeal No 34 of 1991** (unreported) 8**; BAWATA AND 5 OTHERS V REGISTRAR OF SOCIETIES AND 2 OTHERS, High Court of Tanzania at Dar es Salaam, Misc Civil Cause No 27 of 1997**

"21.-(1) Subject to the provisions of Article 39, 47 and 67 of this Constitution and of the laws of the land in connection with the conditions for electing and being elected or for appointing and being appointed to take part in matters related to governance of the country, every citizen of the United Republic is entitled to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people, in conformity with the procedures laid down by, or in accordance with, the law.

(2) Every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation." (the emphasis is mine).

Article 21(1) of our Constitution domesticates Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR). Article 25 of the ICCPR provides as follows:

"25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) to take part in the conduct of public affairs, directly or through freely chosen representatives ;
(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors ;
(c) to have access, on general terms of equality, to public service in his country."

Furthermore, the right to vote is enshrined in Article 5(1) of the Constitution, which provides as follows:

"5.-(1) Every citizen of the Untied Republic who has attained the age of eighteen years is entitled to vote in any election held in Tanzania. This right shall be exercised in accordance with the sub article (2), and of the other provisions of this Constitution and the law for the time being in force in Tanzania in relation to public elections."

Article 5(1) of our Constitution which expressly recognises the right to vote however, falls in the unenforceable part of the Constitution. The right to vote under Article 5(1) of our Constitution and "the right to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by and to participate fully in the process leading to decision on matters affecting the citizen, the

citizen's well-being or the nation in Article 21 of our Constitution creates what can be termed as "***democratic legitimacy.***" Public elections are in my view the most direct expression and embodiment of democratic legitimacy which is an opportunity for the citizens periodically to have a say in who governs them and how and with which policies they are governed.

2.4 The Necessary Elections Elements

Generally there are certain elements which inform elections which find expression under Article 25(b) of the ICCPR on the right and opportunity, ***"to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."*** Article 25(b) of the ICCPR gives a binding force to Article 21 of the 1948 non binding Universal Declaration of Human Rights (UDHR) which stipulates as follows:

> ***"1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.***
> ***2. Everyone has the right to equal access to public service in his country.***
> ***3. The will of the people shall be the basis of the authority of government; this will, shall be expressed in periodic and genuine elections which shall be held by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."***

In my view, Article 25(b) of the ICCPR which recognizes the contents of Article 21 of the UDHR contains at least two distinct matters: firstly, **the necessary elements for elections**, and secondly, ***the idea of an electoral cycle or a time-span during which the various elements for elections shall be implemented***. The election elements/standards included in paragraph (b) of Article 25 of ICCPR can be organised in an order which is more or less chronological as follows:

- **Periodic elections:** Election of elective bodies of popular representation at state level and local government authorities' bodies; and elective offices to be held within the periods established by the constitution and laws. In our case, the presidential term is for two terms only. The life of parliament is five years with no limitation on re-election.

- **Genuine elections:** It means real political pluralism, ideological diversity and a multi-party system realized through the functioning of political parties whose lawful activity is under the legal protection of the state. In Tanzania only political parties with full registration can nominate and sponsor candidates for public elections. Political coalitions for purposes of election

such as was the case previously in Kenya are not legally permissible in Tanzania.

- **Universal suffrage**: Each citizen, who has attained to the age established by the constitution, laws, has the right to elect and be elected. In the case of Tanzania the statutory age for being eligible to vote is eighteen years and the legally permissible age for contesting the post of Member of Parliament is 21 years and for that of presidential post 40 years.

- **Equal suffrage**: Each voter has one vote or the same number of votes as other voters.

- **Direct suffrage:** Citizens directly vote for the candidate and/or list of candidates or against the candidate, candidates, list of candidates or against all candidates and/or lists of candidates.

- **Secret vote/ballot:** Exclusion of any control whatsoever over the expression of the will of voters, assurance of equal conditions for making a free choice.

- **Free expression of the will of the voters:** The supremacy of the constitution is the basis for holding free elections and for making it possible for citizens and other participants in the electoral process to choose, without any influence, coercion, threat of coercion or any other unlawful inducement, whether to participate or not to participate in elections in the forms allowed by law and by lawful methods, without fear of any punishment or mistreatment regardless of voting returns and election results, as well as the basis for the legal and other guarantees of strict observance of the principle of free elections in the course of the entire electoral process. The participation of a citizen in elections is supposed to be free and voluntary. Candidates, political parties and other participants in the electoral process must bear responsibility to the public and the government in accordance with the constitution and law.

- **Fair Elections:** There must be equal legal conditions to all participants in the electoral process. Fair elections guarantee:
  (a) universal and equal suffrage;
  (b) equal possibilities for participation of each candidate or each political party in an election campaign, including access to the mass information and telecommunications media;
  (c) fair and public funding of elections, election campaigns of candidates, political parties; (in Tanzania as per the Elections Expenses Act, political parties themselves shoulder the burden of funding for their election campaigns)

(d) honest voting and vote counting;
(e) rapid provision of full information about voting results and timely official publication of all election results;
(f) organization of the electoral process by impartial election bodies, working openly and publicly under effective public and international observation;
(g) prompt and effective adjudication of complaints about violation of electoral rights and freedoms of citizens, candidates, political parties to be performed by courts and other duly authorized bodies within the time frame of the appropriate stages of the electoral process.

2.5 The Electoral Cycle, Political Rights and Electoral Rights

On the basis of paragraph (a) of Article 25 of ICCPR, the right to participate in the conduct of public affairs is a continuous right. The attribution of a continuous character to the right to participate through elections strongly underlines the fact that the simple act of voting on "***Election Day***" does not exhaust elections nor consume this part of participation. Rather, the continuous character of elections implies that elections are an on-going process of a cyclical nature: ***when one election has been completed and those elected have assumed their seats, the process will start again from the beginning***.

The extension of elections far beyond the immediate act of voting also has wider implications. It makes it necessary to take into account a number of other human rights closely linked to the right to participation. The so-called political rights of freedom of association, freedom of assembly and freedom of speech are brought into the election context in a more substantive manner by a cyclical understanding of elections and through the requirement of the genuine nature of the elections. The human rights linked to the right to participate find expression in our Constitution and are enforceable as such.

I wish to point out here that there is a reference in Article 25(b) of the ICCPR to the right to be elected. However, in comparison with Article 21 of the UDHR, the provision is a novelty. In my view, Article 25(b) of the ICCPR does not however imply that citizens have a **subjective right** to become members of any elected body, but rather that all citizens qualifying under the provisions of the law should have not only the right but also the opportunity to stand as a candidate. The right to stand for election in my view also includes recognition of **the right to stand as an independent candidate, which is recognized in Kenya and Uganda but not in T**anzania where constitutionally it is mandatory for a candidate in presidential, parliamentary and local government elections not only to be a member of a political party but also to be nominated and sponsored by a political party. I shall revert to a brief discussion on the right to stand as an independent candidate in Tanzania at a later stage in this Paper.

3 THE MANAGEMENT OF ELECTIONS AND TRIAL OF ELECTION PETITIONS IN TANZANIA

3.1 Introduction

Constitutionally, the United Republic of Tanzania, which is among the five members of the revived East Africa Community (EAC), is a "**united sovereign state"** of two constituent entities, Tanzania Mainland and Tanzania Zanzibar.[5] Despite the seemingly unity nature of the union state structure, the management of elections and trial of election petitions in Tanzania however, is enmeshed in dualism. The National Electoral Commission (NEC) exercises overall management over union presidential and parliamentary elections and over Councilor elections for Mainland Tanzania. The Zanzibar Electoral Commission (ZEC), on the other hand is the body entrusted with the overall mandate over elections of members of the House of Representatives and local authority elections in Tanzania Zanzibar.[6]

The judicial architecture in Tanzania similarly shares in this dualism, with the judicial system in Tanzania Mainland being distinct and separate from that of Tanzania Zanzibar[7], with each constituent judiciary having its own Chief Justice, system of laws and courts, save however, for the Court of Appeal of Tanzania, which was established in 1979 following the breakup of the former East African Community, thus ending the mandate of the defunct East African Court of Appeal (EACA). The Court of Appeal of Tanzania (CAT) handles appeals in all types of cases from all types of courts and Tribunals in Tanzania Mainland and in Tanzania Zanzibar, except appeals in Islamic law matters originating from the High Court of Zanzibar.

The resultant dualism in Tanzania in the legislative, judicial and electoral management system, traces its origins in the "Union", which resulted from the merger of the two erstwhile international entities, Tanganyika and Zanzibar whose existence ceased on the 26th of April 1964, when their former leaders, the Late Mwalimu Julius Kambarage Nyerere and the Late Abeid Aman Karume, signed the "Articles of the Union" creating a new international legal person known as the United Republic of Tanzania (URT). It is as from that date that the former Republic of Zanzibar lost its international identity.[8]

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[5] As per Art.151(1) of the 1977 Union Constitution "Mainland Tanzania" means the whole of the territory of the United Republic which formerly was the territory of the Republic of Tanganyika

[6] Ibid. "Tanzania Zanzibar" means the whole of the territory of the United Republic which formerly was the territory of the People's Republic of Zanzibar and which was previously referred to as "Tanzania Visiwani"

[7] According to 4.-(1) of the 1977 Union Constitution, "All state authority in the United Republic shall be exercised and controlled by two organs vested with executive powers, two organs vested with judicial powers and two organs vested with legislative and supervisory powers over the conduct of public affairs"

[8] **SMZ V. MACHANO KHAMIS ALI AND 17 OTHERS [2002] TLR 338** (CA) – (Kisanga, Ramadhani and Lugakingira); **MTUMWA SAID HAJI AND OTHERS VS ATTORNEY GENERAL [2001] TLR 426** (HCT - (Mapigano, Mackanja and Bubeshi, JJJ); see also **HAJI V. NUNGU AND**

3.2 The Management of Elections in Tanzania

In Tanzania, the procedure for conduct of public elections and for resolving electoral disputes other than those concerning presidential election results is firmly embedded in legislation and its attendant rules. The legal framework for the electoral process provides a peaceful way of succession to power. It is in this regard that the 1977 Constitution of the United Republic of Tanzania as amended from time to time vests on Parliament, a representative body of people's power (sovereignty), with the legislative competence to ensure that laws are enacted to make public elections freely and fairly conducted.[9] Pursuant to this delegated legislative power, the Parliament of Tanzania has passed a set of electoral laws which make provisions for the management of the electoral process for the election of the president, members of parliament[10] and councillors in local government authorities.[11]

The electoral process is prone to disputes both pre, during and post elections. Courts play a vital role in resolving disputes arising from the electoral process. However, the role of courts in determining disputed elections is indeed very limited. This is so because courts have to carry out the role carved for them in the Constitution and electoral laws to determine whether the grounds for avoiding the election as set out in the petition have been established to the standard required in the law, which in an election petition as we shall later come to realize is much higher than in normal civil suits. Under our Constitution, it is for the judiciary to determine the meaning of the law enacted by Parliament. The courts in dispensation of electoral justice therefore do no more than to discharge these limited functions under the Constitution and the electoral laws.

In Tanzania, like in many commonwealth countries, Parliament has entrusted to a "reluctant judiciary", the rather limited task of determining disputed elections, a task carried out by the High Court and subordinate courts. The constitutionally assigned role of the judiciary as custodian and guardian of standards of legality and due process is to interpret and apply the law to resolve among other disputes, election petitions contesting results of parliamentary and local government elections without fear or favour and expeditiously. The function of a court in an election petition however, as I intimated to earlier is fairly a limited one. The court is required to determine the issues which have arisen on the election petition upon grounds and on consequences laid out

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ANOTHER, [1987] LRC (Const.) 224 (CA), as authority for the principle of exclusive jurisdiction of Zanzibar over "non-union matters" in Zanzibar.

[9] Article of the Constitution

[10] The National Elections Act, No.1 of 1985 [Cap.343 R.E. 2010] and the National Elections (Election Petitions) Rules, 2010 GN.No.447 published on 19/11/2010

[11] The Local Authorities (Elections) Act, No.4 of 1979 [Cap.292 R.E. 2010]; some provisions in the Local Government (Urban Authorities) Act, No.7 of 1982 [Cap.287 R.E. 2002] and the Local Government (District Authorities) Act, No.8 of 1982 [Cap.288 R.E. 2002] and the Local Authorities (Election Petitions) Rules, 2010 GN.No.448 published on 19/11/2010

in the electoral and petition laws and rules. A detailed discussion of the rules however, is beyond the reach of this Paper.

I should emphasize here however, that it is for the electorate to determine whom it wishes to elect in a free and fair election. This is entirely consistent with the constitutional principles derived from the doctrine of separation of powers and the rule of law, that it is for the courts to determine the meaning of the law enacted by Parliament and apply it to a set of given material facts. The discharge of its fact finding and law interpreting role in an election petition albeit limited as it is, this has to be consistent with the constitutional principle that it has always been the role of courts of law to determine the meaning of the law enacted by Parliament.

It is trite also to be emphasized here that the general principle underpinning trial of election petitions is that they must be determined with utmost urgency, which is why the amended electoral laws and the new 2010 Election Petition Rules contain very strict time lines for hearing and determining election petitions. Finality in the determination of an election petition is of great importance for the electors to have a representative in Parliament or in the local authority council, particularly where majorities are small, in which case the absence of a Member or a Councillor can be significant. Furthermore, we should not lose sight also of the fact that the decision of a court in an election petition declaring the status of the election is a judgment in rem, and in that sense it is final and binding on the whole world.

The most critical issue in a trial of an election petition is to consider whether the outcome of the election will be such that most "participants" (both voters and candidates) will perceive the officially announced results as reflecting the wishes and aspiration of the voters, and that where this was not the case, that there is a capable and honest judiciary to assuage the grievances of the losers. The 1977 Constitution of the United Republic of Tanzania actually contain provisions for judicial outlets for the resolution of electoral grievances. These judicial outlets have been complemented by institutional reforms aimed at insulating the judiciary and judges from politics and political influences particularly by prohibiting membership in political parties by judicial officers. This probation is now constitutionally provided for in Article 113A of the Constitution as follows:

> ***"113A. It is hereby prohibited for a Justice of Appeal, a Judge of the High Court, a Registrar of any grade or a magistrate of any grade to join any political party save only that he shall have the right to vote which is specified in Article 5 of this Constitution."*** *(the emphasis is mine).*

The above constitutional provision not only cements the constitutionally recognized principle of separation of powers but also that of the independence of the judiciary and judicial officers in their actions. The bar on active participation in politics by judicial officers however, does not affect the exercise of their right to vote. It is only through the ballot box judicial officers can express their political preference and since this is secret it is hard to tell who preferred which political party in the election.

3.3 The Jurisdiction of Courts in Resolving Electoral Disputes

The Constitution stipulates clearly under Article 83(1) that in election matters, all election complaints, except complaints pertaining to a presidential election, shall first be heard by the High Court in respect of parliamentary elections. Article 83 of the Constitution provides as follows:

> "***83.-(1) Every proceeding for the purposes of determining the question whether –***
> ***(a) the election or appointment of any person to be Member of Parliament was valid or not; or***
> ***(b) a Member of Parliament has ceased to be a Member of Parliament and his seat in the National Assembly is vacant, or not, shall, subject to the provisions of sub-article (2) of this Article, first be instituted and heard in the High Court of the United Republic."***

The jurisdictional basis for the High Court in conducting trial of election petitions not only is statutory but constitutionally stipulated. Article 83(4) of the Union Constitution provides further that a petitioner dissatisfied with the decision reached by the High Court can appeal to the Court of Appeal, which has the final say in all matters including election petitions, except presidential elections, which under the Constitution cannot be contested in any court of law.[12] Despite this limitation, the courts in Tanzania have worked relatively well to secure the neutrality, independence of and respect for the judiciary when it comes to dealing with election petitions.

In Tanzania perhaps different from England, there is no "Election Court" in the sense of a court specifically constituted to hear only an election petition whose task terminates with the finalization of the petition. Across the border in Kenya, the Chief Justice is empowered to constitute the court for hearing election petitions.

In Tanzania, the jurisdiction of courts for conducting the trial of election petitions is statutorily provided for in the electoral laws. Statutorily there are only two courts which are specifically designated and vested with original jurisdiction to hear and determine election petitions. These are the High Court of Tanzania for parliamentary election petitions and the courts of Resident Magistrates or designated District Courts for local authorities (Councillor) election petitions. Although these courts are not referred to specifically in the electoral laws as "election courts", for our purposes however, we can safely refer to the High Court as a "***parliamentary election petition court***" (***PEPC***) and a Resident Magistrates' Courts or District Court as "***local authorities election petition court***" (LAEPC) respectively. Both courts enjoy original jurisdiction in parliamentary and local government election petitions. They are the only courts in the

[12] Article 41((7) of the Constitution: "*When a candidate is declared by the Electoral Commission to have been duly elected in accordance with this Article, then* ***no court of law shall have any jurisdiction to enquire into the election of that candidate.****"*(the emphasis is mine

country specifically enjoined by law to declare void the election of a Member of Parliament or a Councillor upon stipulated grounds.

In Tanzania the only legally allowed procedure for challenging the election results of Member of Parliament or a Councillor is by way of an election petition presented either to the High Court or to the Resident Magistrate Court depending on what kind of election results a petitioner wishes to challenge. In the case of avoiding the election of a Member of Parliament, section 108(2) of the National Elections Act [Cap.343 R.E. 2010] provides as follows:

> ***"108(2) The election of a candidate as a Member of Parliament shall be declared void only on an election petition if the following grounds is proved to the satisfaction of the High Court and on no other ground, namely-"*** *(the emphasis is mine)*

In the case of election of a Councillor, section 107(1) and (2) of the Local Authorities (Elections) Act, [Cap.292 R.E. 2010] provides as follows:

> ***"107(1) The election of a candidate as a member shall not be questioned except on an election petition.***
> ***(2) The election of a candidate as a member shall be declared void on any of the following grounds which are proved to the satisfaction of the court."***

3.4 The Jurisdiction of Courts in NEC Functions

In Tanzania public elections are managed by two institutions, the National Electoral Commission (NEC) which is established under Article 74(1) of the 1977 Union Constitution comprising of members appointed by the President and the independent Zanzibar Electoral Commission (ZEC) established under the 1984 Constitution of Zanzibar as amended. NEC manages the conduct of presidential, parliamentary (both on the Mainland and in Zanzibar) and councillor elections (on the Mainland). ZEC on the other hand manages the conduct of presidential and union parliament members as well as members of the House of Representatives and local authorities (***shehias***) for Tanzania Zanzibar.

In terms of Article 74(12) of the Union Constitution, courts of law are barred from inquiring into ***"anything done by the Electoral Commission in the discharge of its functions in accordance with the provisions of this Constitution***." In order to give the National Electoral Commission some semblance of independence, Article 74(14) of the Constitution, categorically stipulates that "***persons concerned with the conduct of elections***" are prohibited from joining any political party, save only that each will have the right to vote. In Tanzania, the National Electoral Commission is the only institution with the mandate to announce election results for presidential, parliamentary and councillor elections. In **ATTORNEY-GENERAL AND**

TWO OTHERS v AMAN WALID KABOUROU[13] however, the Court of Appeal of Tanzania held among other things that:

> ***"The High Court of this country has a supervisory jurisdiction to inquire into the legality of anything done or made by a public authority, and this jurisdiction includes the power to inquire into the legality of an official proclamation by the Electoral Commission (tamko rasmi).***

In its reasons in support of the findings on ground number one in both memoranda of appeal concerning the validity of the ***Tamko Rasmi*** the Court naturally started by considering whether courts of law have jurisdiction to inquire into the validity of the "***Tamko Rasmi***" in view of the provisions of sub-article (12) of article 74 of the Constitution, which as amended by Act 4 of 1992 ousting the jurisdiction of the High Court "to inquire into anything done by the Electoral Commission in the exercise of its functions according to the provisions of this Constitution." The Court observed at **[1996] TLR p171** per NYALALI CJ (as he then was), that

> "***On the face of it, it appears that the Constitution expressly prohibits the courts from inquiring into the validity of such things like the Tamko Rasmi, but on a deeper consideration of the principles that underlie the Constitution, it is obvious that such an interpretation of the Constitution is wrong. One of the fundamental principles of any democratic constitution, including ours, is the Rule of Law, the Court noted. The Principle is so obvious and elementary in a democracy, that it does not have to be expressly stated in a democratic constitution."***

In that case the Court of Appeal of Tanzania was satisfied and made a finding that the High Court in this country, like the High Court in England, has a supervisory jurisdiction to inquire into the legality of anything done or made by public authority, such as the ***Tamko Rasmi.*** As a corollary, this Court has similar jurisdiction to do so in a matter properly before it, as in the present case, the Court further reiterated.

3.5The Jurisdiction of High Court in Presidential Election Results

The issue of jurisdiction of the High Court to enquire into election of President came up for consideration in **AUGUSTINE LYATONGA MREMA AND OTHERS v ATTORNEY-GENERAL AND OTHERS**[14] (Maina J, Kyando J, Mackanja J), where the Court stated categorically that the provision of Article 41(7) of the Constitution ousted the jurisdiction of the High Court to inquire into the election of the President

[13] [1996] TLR 156 (CA)

[14] [1996] T.L.R. 273 (HC) (Maina J, Kyando J, Mackanja J.)

once the National Electoral Commission had declared the election results. In that case, the petitioners sought declaratory orders in the High Court that the whole electoral process nationwide be nullified; that the electoral Commission be reconstituted after some condition was fulfilled; that fresh general elections be held nationwide; that the third and fourth respondents be barred from participating in any elections for five years; and for ancillary relief. The petitioners contended that the misconduct complained of had been made throughout the country and in almost every constituency; that the Presidential election was involved in the petition; and that once a Presidential candidate was declared elected, the jurisdiction of the Court was ousted.

The former Chief Justice, the late Francis Nyalali in **Kaborou Case [1996] TLR p.176** explained the omission in the amendment to Elections Act of procedures for invalidation of presidential elections as "***puzzling, since in multi-party Presidential Elections, such lacunae is an invitation to political chaos***." The former Chief Justice hoped that appropriate amendments of the relevant law would be made before the forthcoming multi-party presidential elections. This however did not happen and the last nail on the coffin of presidential election petition was put by the Court of Appeal of Tanzania in its recent decision in **THE HONOURABLE ATTORNEY GENERAL AND REVEREND CHRISTOPHER MTIKILA** (Dar Es Salaam) (unreported), a seven panel member decision handed down on the 17th day of June, 2010.[15]

3.6 The Issue of Independent Candidates in Tanzania

The nagging issue in Tanzania since the incorporation of the Bill of Rights and Duties in the Constitution in 1984 has always been whether constitutional provisions can be declared unconstitutional by the High Court, itself a creature of the very Constitution whose provisions it is sought to declare unconstitutional. This "*chicken and egg question*" recently received a judicial answer by the Court of Appeal of Tanzania in **THE HONOURABLE ATTORNEY GENERAL AND REVEREND CHRISTOPHER MTIKILA**[16] where the Court stated as follows:

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[15] See the decision dated 17th June 2010 of the Full Bench of the Court of Appeal of Tanzania in **Civil Appeal No.45 of 2009 between THE HONOURABLE ATTORNEY GENERAL AND REVEREND CHRISTOPHER MTIKILA** (Dar Es Salaam) (unreported) [Ramadhani, C. J.; Munuo, J. A.; Msoffe J. A.; Kimaro, J.A; Mbarouk, J.A.; Luanda, J. A.; and Mjasiri, J.A.], (Appeal from the Judgment of the High Court of Tanzania at Dar Es Salaam,) (Manento, J. K.; Massati, J. and Mihayo, J.) dated the 5th day of May, 2006 in **Misc. Civil Cause No. 10 of 2005**. For a critical review of the decision see a Public Lecture by the former Chief Justice of Tanzania, The Hon. Justice Barnabas Albert Samatta, titled "JUDICIAL PROTECTION OF DEMOCRATIC VALUES: THE JUDGMENT OF THE COURT OF APPEAL ON INDEPENDENT CANDIDATES", a Public Lecture His Lordship delivered at the Ruaha University College Campus in Iringa in November 25, 2010. The Lecture was reproduced in full in the Citizen Newspaper of Saturday, 18th December, 2010.

[16] Footnote 15 supra

"***In our case, we say that the issue of independent candidates has to be settled by Parliament which has the jurisdiction to amend the Constitution and not the Courts which, as we have found, do not have that jurisdiction. The decision on whether or not to introduce independent candidates depends on the social needs of each State based on its historical reality. Thus the issue of independent candidates is political and not legal***."

The Court of Appeal therefore elected to categorize the issue of independent candidate as being political rather than legal and therefore not fit for judicial determination but parliament. It is unfortunate that the Court does not give us the benefit of knowing why the issue of independent candidate is political and not legal. The decision has had some legal pundits crying foul that in deciding so technically the Court of Appeal abdicated from its constitutional role of administering justice.

Clearly, the decision of the Court of Appeal has reversed the progressive approach in **REV. CHRISTOPHER MTIKILA V ATTORNEY GENERAL**[17] by Lugakingira, J., the first landmark decision on independent candidacy for presidential post, which thirsty continued to be quenched by a Panel of three judges of the High Court (Manento, J.K.; Massati, J. and Mihayo, J.) in **Misc. Civil Cause No. 10 of 2005** in their decision dated 5th day of May, 2006 on independent candidate which gave rise to the appeal in **Civil Appeal No.45 of 2009,** which decision is now being contested in a "petition" lodged by a group of legal enthusiasts at the African Court on Human and Peoples Rights, yet to be determined. In the meantime, the fate of independent candidate for presidential elections remains as uncertain as ever.

3.7Access to Electoral Justice

3.7.1 Who may petition in an election petition

The electoral law in Tanzania give a very wide locus standi in electoral petitions. The provisions of the law regarding who is eligible to launch a petition after an election if dissatisfied with the result or the conduct of the election are stipulated under section 111(1)(a)-(d) of the NATIONAL ELECTIONS ACT [Cap.343 R.E. 2010] for parliamentary elections, and section 110(1)(a)-(d) of the LOCAL AUTHORITIES (ELECTIONS) ACT [Cap.292 R.E. 2010], for Councillor elections. In terms of these provisions of the law, an election petition may be presented to the High Court (in respect of for parliamentary elections results) or the Resident Magistrates' Court (in respect of for Councillor election results) by one or more of the following persons-

"(a) a person who lawfully voted or had a right to vote at the election to which the election petition relates;

[17] [1995] TLR 31

(b) a person claiming to have had a right to be nominated as a candidate or elected at the election to which the election petition relates;
(c) a person claiming to have been a candidate at the election to which the election petition relates;
(d) the Attorney-General."

The law by broadening the common law doctrine of locus standi may bring in what Lord Denning was famous of saying "meddlesome interlopers" who have no genuine interest who might be used by some troublesome persons bent on causing chaos in governance. It is mainly for this reason that the law also introduced higher rates for security for costs as safety valve and sieving mechanism to ensure that only serious minded people would approach courts to petition against election results.

3.7.2 Payment of Security for Costs

The law in Tanzania as is the case for Kenya make security for costs a condition precedent for courts to hear an election petition.

The constitutionality of security for costs has also received judicial determination in **JULIUS ISHENGOMA NDYANABO VS ATTORNEY GENERAL**, where the Court of Appeal of Tanzania struck down section 111(2) of the National Elections Act, 1985, for being unconstitutional. In that case the Court declared that the sum of money which a petitioner is required to pay as security for costs in a parliamentary election petition is still TZS 500,000 (five hundred shillings). The Government responded immediately by tabling a Bill in Parliament which finally got passed into law as the ***Written Laws (Miscellaneous Amendment) Act No.2 of 2002*** amending section 111 of the National Elections Act [Cap.343 R.E. 2010] putting even more stricter conditions for security for costs in election petitions. The amending law effected some amendments in the two principal elections legislation in section 111 of the National Elections Act, in my view has dealt a severe blow on would be petitioner who now have to dig even deeper into their pockets to cough up money for security for costs. Section 112(2) of the National Elections Act provides categorically that:

"111(2) The Registrar shall not fix a date for the hearing of any election petition unless the petitioner has paid into the court as security for costs, an amount not exceeding five million shillings in respect of each respondent."

Under the amended law, a petitioner in a parliamentary election petition now has to pay into court as security for costs a maximum amount of TZS 5,000,000/= "in respect of each respondent", and not "in respect of the election petition" as previously was the case before the amendment. A petitioner in an election petition to challenge the election results in councillor election is also now required to pay a maximum of TZS 500,000/= as security for costs in respect of each respondent, before the court can fix a date for hearing of the petition.

The 2010 Election Petition Rules made pursuant to the Election Petition Laws are to the effect that in every petition, the Attorney General must be must be made a party as the respondent except for a petition presented by the Attorney General, where the Attorney General may make all such persons parties to the petition as respondents who are "likely to be adversely affected in the event of the relief sought by the Attorney General being granted. Section 111 of the Act exempts the Attorney General from payment of security for costs. The Court of Appeal of Tanzania had opportunity in **JULIUS ISHENGOMA FRANCIS NDYANABO VS. THE ATTORNEY GENERAL Civil Appeal No. 64 of 2001** (unreported) (Samatta C.J.) at pp.17-18 now reported in **[2004] TLR 14** to state as follows:

(i) *In our view, the statutory provision is a class legislation. It is also arbitrary and the limitation it purports to impose on the fundamental right of access to justice is more than is reasonably necessary to achieve the objective of preventing abuse of the judicial process. Plainly, Parliament exceeded its powers by enacting the unconstitutional provision. Legislative competence is limited to making laws which are consistent with the Constitution. These conclusions are sufficient to dispose of the appeal, but we consider it useful to say a word or two on the arguments addressed to us concerning the exemption granted to the Attorney General by Section 111(3) of the Act."*

(iv) For the avoidance of doubt, it must be distinctly stated that, since the subsection has been so declared, the provisions of Rule 11(3) of the Elections (Elections Petitions) Rules, 1971, as amended, are still in force and, therefore, the powers conferred upon the High Court by those provisions may, in appropriate cases, be invoked by the Court in favour of petitioners. One of the results of Section 111(2) being struck down for being unconstitutional is that the sum of money which a petitioner is required to pay as security for costs in a parliamentary election petition is still five hundred shillings."

In PRINCE BAGENDA VS. WILSON MASILINGI AND ANOTHER [1997] T.L.R. 220 (HC) at page 224 the petition was allowed with costs to be taxed and the parliamentary elections held in Muleba South in November 1995 were declared null and void and set aside. The first respondent, Wilson Masilingi, was found not to have concerned with the irregularities and malpractices. It was ordered that he be paid costs by Attorney General, which costs were also to be taxed.

One possible interpretation of the phrase "*no further proceedings shall be heard on the application*" appearing in section 111(7) of the National Elections Act is that the phrase may mean that in the event the applicant fails to raise the determined amount of security for costs within the statutorily prescribed period of fourteen days following determination by court of the amount payable as security for costs, there will be no more proceedings for the applicant to be heard on the matter of security for costs.

In my considered view, despite the fact that the Government of Tanzania went forward and enacted law essentially killing the reach of the decision of the Court of

Appeal with respect to the amount payable as security for costs in an election petition, this does not however, prevent a further search and action on the issue as to whether under the current constitutional dispensation in Tanzania, it is the Constitution or Parliament which is supreme and specifically the role of the judiciary as an impartial arbiter. Perhaps these and other nagging constitutional issues will be tackled in the ongoing debate on new constitutional order.

3.7.3 Grounds for Avoiding Election Results

The relevant sections of the electoral laws on the grounds for avoiding elections are found under section 108 of the National Elections Act, [Cap.343 R.E. 2010], and section 107 of the Local Authorities (Elections) Act, [Cap.292 R.E. 2010].

There are two critical issues which arise from the above provisions of the law. The first one relates to the use of the phrase "...***and no other grounds***" in sub-section (2) of section 108 of the National Elections Act [Cap.343 R.E. 2010], which seems to be restrictive as compared to the phrase "***on any of the following grounds...***" appearing under subsection (2) of section 107 the Local Authorities (Elections) Act [Cap.292 R.E. 2010] which does not seem to restrict the grounds on which an election can be annulled.

The second issue relates to the legal position on corrupt or illegal practice as ground for avoiding an election. The law stipulates very clearly that the election of a candidate "shall not by reason of any corrupt or illegal practice be void but only for the court to certify to the Director of Elections or the returning officer as the case may be with the consequence of only deleting such person from the voters register. However, if a person is found guilty of corrupt or illegal practice he or she is disqualified to contest presidential, parliamentary, and councilor elections for a period not exceeding five years.

In **PRINCE BAGENDA VS. WILSON MASILINGI AND ANOTHER [1997] T.L.R. 220** (HC) at page 224, the Court stated that an election petition must be construed more strictly than a plaint in a civil suit. This is so because (1) the right to file an election petition is not a common law right but a statutory right; (2) one of the respondents is a person who has been declared by the Returning Officer to have the confidence of the electorate and the Courts are slow to interfere with such verdicts except when a clear case is made out; and (3) where the petitioner establishes corrupt practices, the successful candidate may not only be unseated but even disqualified to stand as a candidate in future elections ***Mogha's Law of Pleadings*** 14th Edition. Samatta J.K. (as he then was) endorses this view in **PHILIP ANANIA MASASI VS. RETURNING OFFICER NJOMBE NORTH CONSTITUENCY AND OTHERS Misc Civil Cause No 7 of 1995** (High Court - Songea) (unreported).

3.7.4 Standard and Burden of Proof in Election Petitions

The provisions of section 108(2) of the National Elections Act and 107(2) of the Local Authorities (Elections) provide the standard of proof in trial of election petition. It

is proving any or all of the grounds for avoiding the election to the "satisfaction of the court." The level of the standard of proof is more or less that which is applicable in trial of criminal cases, which is, beyond any reasonable doubt. This settled legal position find expression in **CHABANGA M. HASSAN DYAMWALE vs. ALHAJI MUSA SEFU MASOMO AND THE ATTORNEY GENERAL**[18] where Sisya J. (as he then was) observed that the term "proved to the satisfaction of the court" means that the standard of proof must be such that no reasonable doubt exists that one or more of the grounds set out in the relevant section have been established.

In the case of an election petition which is sui generis, the standard of proof is over and above the normal standard and it is beyond any reasonable doubt. This means that a petitioner in an election petition has tough burden of bringing cogent evidence which will enable the court to be satisfied beyond any reasonable doubt that an election is void. The rationale is that since the court in an election petition is being asked to annul the choice of the electorate and turn down their will while at the same time unseating a candidate. This should not therefore be taken lightly but with the seriousness it deserves. As it was stated in **LUTTER SYMPORIAN NELSON AND THE HON ATTORNEY GENERAL AND IBRAHIM MSABAHA**[19] the burden is heavy on him who assails on election which has been concluded – he must prove his case beyond any reasonable doubt. The standard of proof however depends upon the seriousness of the allegation made and what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case

3.7.5 The Outcome of Election Petition

In terms of section 113(1) of the National Elections Act and section 112 of the Local Authorities (Elections) Act, at the conclusion of the trial of an election petition or an appeal (in the case of the High Court or Court of Appeal) the court has to make the following determinations:

- Whether the member (MP or Councillor) whose nomination or election is complained of, or any other person; or
- Which person was duly nominated or elected or
- Whether the election was void.

After making such determination, the court then has to certify it to the Director of Elections in the case of parliamentary election or the Electoral Authority in the case of election in local authorities. Upon such Certificate being given, the determination becomes final and the election will either be confirmed or a new election will be held as the case may require in accordance with the certificate.

[18] [1982] TLR 69 (HC) (Tanga)(Sisya J.) (Misc. Civil Cause No.13 of 1980

[19] Civil Appeal No.24 of 1999 (unreported)

Under the existing electoral laws, it is not open for a court after trial of an election petition to declare any other candidate other than the one whose election has successfully been challenged as having been duly elected. The only recourse open is therefore for the electoral authority to call for and hold of a bye-election, which as we all know comes with a price on the economy. The issue is whether the law should be changed to empower the court to declare another candidate duly elected instead of only certifying and thereafter a bye-election is held.

4 Conclusion

As I stated in my opening statement, elections not only do allow for political competition, participation and legitimacy, but also permit peaceful change of power, thereby making it possible to assign accountability to those who govern. In the electoral process, disputes are bound to arise whose settlement is the province of the courts. The right to challenge decisions, actions or failures to act in connection with an election, may be considered as part of the voting rights. The right to seek redress however, is of little value without, among other things, an impartial and independent judiciary that can enforce the laws equitably and efficiently.