

A One of the reasons for the application for a stay of execution is that the applicant will suffer substantial damage if stay of execution is not ordered because the first two respondents are not residents of Tanzania and so, should the appeal succeed, execution will be difficult if not impossible. The learned single judge dismissed that argument because the third respondent, who is the employer of the two respondents as well as the applicant, is a company registered in Tanzania and that execution will be exacted on the company.

C Mr Mselem pointed out that Ingra was joined as the third respondent as prayed. He went further to point out that before Ingra filed a Written Statement of Defence two more prayers were granted. An order of injunction made against the respondents on 16 December 1997 was vacated and in its place an injunction was issued against the applicants, the learned advocate submitted that the main plank of the appeal pending before the court is challenging the identity of the third respondent. Mr Mselem alerted the court that property might be left in the wrong hands if stay of execution is not ordered.

F Mr Kesaria, on the other hand, said that the applicant claims to be protecting the property of Ingra but when Ingra wants to take hold of its property, the applicant is resisting. On the issue of the identity of Ingra, the learned counsel submitted that there are two separate companies: Ingra and Ingra M and G. He admitted that the first respondent is a director of both companies. However, Mr Kesaria conceded that if there is a dispute as to who is Ingra and so, the real owner, then the solution is to stay execution until the appeal is finalized.

H After hearing submissions of both learned advocates, our minds are left in serious doubt as to whom the real Ingra is, whose property is to be safeguarded, and who is the fictitious Ingra against whom the property is to be protected. Because of that nagging doubt, and as conceded by Mr Kesaria, we order a stay of execution. So, the reference is allowed. Costs to follow the event.

I

AUGUSTINE LYATONGA MREMA v. DONATI MATHEW MBWAGAI AND OTHERS

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(Lubuva, Samatta and Lugakingira, JJ.A.)

CIVIL APPEAL No. 29 OF 1998

(From the decision of the High Court of Tanzania at Dar es Salaam, Katiti, J., dated 2 December 1997 in Miscellaneous Civil Case No. 139 of 1996)

Elections – Security for costs – Whether failure to explicitly itemize security for costs in exchequer receipt renders an election petition incompetent – Rule 11 of the Elections (Election Petitions) Rules 1971.

The appellant was the successful candidate in a parliamentary by-election for the Temeke constituency. The respondents were registered voters in the by-election and challenged the appellant's election before the High Court. At the filing of the petition an exchequer receipt for TZS. 4 500 was issued by the High Court Registry which did not particularize the items paid for Counsel for the appellant raised a preliminary objection that security for costs had not been paid as required by rule 11(1) of the Elections (Election Petitions) Rules 1971, hence the petition should be "struck out." The court overruled the objection hence this appeal.

Held: A clerical error in receipts is an irregularity which has no bearing on the form or substance of an election petition and cannot lead to a miscarriage of justice.

Appeal dismissed

Mr Nyange, for the Appellant

Mr Kisusi, for the first to seven Respondents

Mr Komba, for the Attorney General

I

JUDGMENT

(Dated 10 December 1998)

LUGAKINGIRA, J.A.: This appeal contests the decision of the High Court at Dar es Salaam (Katiti, J.) on a preliminary objection. The appellant was the successful candidate in a parliamentary by-election for the Temeke Constituency held on 6 October 1999. The first to seventh respondents were registered voters in the by-election and are challenging the appellant's election before the High Court in an election petition, Miscellaneous Civil Cause Number 139 of 1996. The Attorney General who is the eighth respondent in this appeal is cited as the first respondent in the petition.

At the filing of the petition on 21 October 1996, Exchequer Receipt Number 04554725 for TZS. 4 500 was issued by the High Court Registry. This receipt, however, did not particularize the items paid for but states merely: "in respect of Miscellaneous Civil Case Number 139 of 1996". On 19 August 1997 the presiding judge fixed a date for hearing the petition but this kept changing for various reasons. When the petition came on for hearing on 1 December 1997, learned counsel for the appellant Mr Nyange raised a preliminary objection to the effect that security for costs had not been paid as required by rule 11(1) of the Elections (Election Petitions) Rules 1971. He submitted that the petition was therefore not properly before the court and prayed that it be dismissed. He should, of course, have prayed that it be struck out. In reply, Mr Kisusi, learned counsel for the first to seventh respondents, resisted the prayer by demonstrating that security for costs and other items like filing fees were all comprised in the omnibus receipt. As a precaution also he had that morning paid a further sum of TZS. 1 000. He was supported by Mr Kamba, learned Senior State Attorney who appeared for the Attorney General. The court overruled the objection, hence this appeal.

We were more or less treated to the same arguments and replies at the hearing of the appeal. Mr Nyange's basic contentions were

that security for costs has to be paid at the filing of the petition or within the time the petition may be presented, and that it was not paid in this case since the receipt did not spell it out. The relevance of Mr Nyange's further contentions depend rather on whether the foregoing can be answered in his favour and need no particular mention.

The answer to the first contention should be looked for in rule 11(1) itself. It reads:

The Registrar shall not fix a date of the hearing of any petition unless the petitioner has paid into the court as security for costs the sum of five hundred shillings.

First of all, Mr Nyange came up with the argument that "hearing of the petition" commenced with the hearing of all preliminary matters. He did so because on 17 April 1997, the Senior Deputy Registrar of the High Court fixed a hearing date for an application to amend the petition. We are unable to agree with him. An application to amend, as distinct from a preliminary objection, is directed at the constitution or the making of the petition itself rather than its fate. In this case, for instance, after the ruling on the application to amend, there followed the amended petition, the respondent's replies to the amended petition and the petitioners' reply to those replies. Until that stage, the petition cannot be said to have been ready for hearing and it is a curious argument which suggests that hearing of a petition commences with the steps intended to bring the petition about. In truth, therefore, the Registrar never fixed a hearing date of the petition on 17 April 1997 or at any time according to our appreciation of the record.

Then, secondly, we can find nothing in the sub-rule to support the contention that payment of security for costs has to be made at the filing of the petition or within the time when the petition may be presented, which is fifteen days from the announcement of the election results. The sub-rule makes payment of security for costs a necessary condition for the Registrar to fix a hearing date, and to that extent it operates compulsively, but it is not correct to say that a petitioner is obliged to pay security for costs at the time of filing

A his petition. If the Legislature had intended such a position it could easily have said so. According to rule 8(1), for instance, a petition has to be lodged with the payment of the prescribed fee. Similarly, according to rule 114(1) of the Court of Appeal Rules, a civil appeal
 B can be lodged in this court only upon payment of TZS. 2 000 as security for costs. It is therefore clear to us that under rule 11(1) a petitioner is under no obligation to pay security for costs at the filing of a petition but may postpone payment until the pleadings
 C are complete.

Mr Nyange's second basic contention was that security for costs was not paid in this case. The learned judge in the High Court appears to have been ambivalent on the issue. He observed that the amount
 D [of 4 500] may well have comprised the security for costs [but] there is no way of knowing by just looking at the ERV ... "Generally he held that if security for costs was not in fact paid, it was an irregularity curable under rule 27(1) of the Election Rules.

E We were fortunately spared the dilemma of the learned judge for we think the circumstances were such as to permit an unequivocal answer to the question. Mr Kisusi's analysis of the TZS. 4 500 payment shows an excess or balance of TZS. 1 000 which not even Mr Nyange
 F could explain away. The filing fee was TZS. 500 according to item 1 of the Second Schedule to the Election Rules; service charges for two respondents were TZS. 2 000 according to item 12 of the schedule to the Court Fees (Amendment) Rules 1996 (G.N. 120/96); and fees for tendering two exhibits come to TZS. 1 000 according
 G to item 17 of the same. The total is TZS. 3 500 leaving a balance of TZS. 1 000. We find it difficult to accept Mr Nyange's arguments that this was not security for costs merely because the receipt did not state so. The rationale of conceding, as Mr Nyange does, that
 H filing fees were paid, but not security for costs, when neither item is spelt out on the receipt, hardly commends itself to reason. Either everything was paid or nothing was paid.

I We think, with respect, the balance of TZS. 1 000 represents payment of security for costs at the rate of TZS. 500 for each respondent.

In reaching this view we should not be understood as condoning the
 A perfunctory manner in which receipts are sometimes prepared but wish to deprecate it strongly. We think, however, that clerical errors in receipts are an irregularity which has no bearing on the form or
 B substance of an election petition and cannot lead to a miscarriage of justice. It is therefore of little moment. The appeal is dismissed with costs.

AZIM SULEMAN PREMJI v. ATTORNEY GENERAL AND DR AMAN WALID KABOUROU (NUMBER 1)

COURT OF APPEAL OF TANZANIA
 AT DAR ES SALAAM

(Mfalila, Lubuva and Samatta, JJ.A.)

CIVIL APPEAL No. 63 OF 1998

(From the Judgment and Decree of the High Court of Tanzania at
 Tabora, Masanche, J., in Miscellaneous Civil Cause No. 3 of 1995)

Civil Practice and Procedure – Court of Appeal Rules – Rights and duties of parties to appeal relating to service of documents – Failure to comply with the Rules and effect thereof – Rules 76, 77, 79, 82, 89(1) 90, 92(1) and 106(b) of the Court of Appeal Rules.

Civil Practice and Procedure – Right to counsel – Right of a party to dismiss counsel – Duty of judge on an application by a party to dismiss advocate.

Appeal – Record of Appeal – Record of Appeal being incomplete – What steps a party may take.

During the trial in the High Court, the second respondent applied to the court to dismiss an advocate who had acted irresponsibly by abandoning him in midstream and allow him to engage another advocate. The trial court rejected the application. In