

A the same parties save where they fall within the exceptions listed in paragraph (a) – (f).

B This court is further compelled by section 9 of the same Decree, to presume, upon production of any document purporting to be a certified copy of a foreign judgment (Annexures A1 and A2 in the instant case) that such judgment was produced by a court of competent jurisdiction, unless the contrary appears on the records (and none so appears in this case).

C Importantly, this court believes that the applicant has satisfied the procedural requirement requisite for his application to succeed i.e. by fulfilling the provisions of Orders XVIII and XXIV of the enabling law, the Civil Procedure Decree Chapter 8, as regards notice and format of application.

D Section 38(1) of this Decree empowers this court to enforce the custody order of Judge Decker of the district family Court of Worms delivered on the 19 June 1999, which judgment is in itself consonant with our case law as embodied in the decision of the Court of Appeal of Tanzania in the case of *Ramesh Rajput v. Mrs. Sunanda Rajput* (1) at 97, where it was *inter alia* held that:

- E
- F (i) The most important factor in a custody proceeding is the welfare of the child.
 - (ii) An infant of two (2) should be with the mother unless there are very strong reasons to the contrary, and
 - G (iii) There is a rebuttable presumption that an infant below the age of 7 years should be with the mother.

H To me, enforcement of judgement basically translates to causing the decisions of a judicial tribunal to take effect or to compel obedience to it.

I Consequently, upon consideration of the applicants submissions and perusal of annexures AI and A2, I am of the firm opinions that this application succeeds.

AZIM SULEIMAN PREMJI v. ATTORNEY GENERAL AND ANOTHER A

B COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

C CIVIL APPEAL No. 63 OF 1998

(From the decision of the High Court of Tanzania at Tabora, Masanche, J., dated 11 June 1998, in Miscellaneous Civil Cause No. 3 of 1995)

D *Elections – Votes of registered voters who did not vote – Pro-rata apportionment of Elections – Free and fair elections – Chaos during elections – Whether elections can be said to be free and fair.*

E *Elections – Nullification of – Racist statements – Whether sufficient to nullify elections – Section 108(2)(a) Elections Act 1985.*

F The appellant was one of the contestants in the Kigoma Urban parliamentary constituency seat in the 1995 General Elections which was contested by twelve political parties. It was won by the second respondent. The appellant, aggrieved by the election results filed a petition challenging the results in the High Court against the first and the second respondent, Dr Aman Walid Kaborou, who was the winner, on grounds of non compliance with the requirements of Elections Act on the part of the returning officer and illegal campaigns and statements by the second respondent aimed at exploiting racial differences. While the trial judge found that there were some election irregularities he held that they did not affect the result of the election. He also held that the election was free and fair, and dismissed the petition with costs. The appellant dissatisfied with this decision appealed to the Court of Appeal.

H **Held:** (i) The correct approach in apportioning the estimated votes of registered voters who did not vote because of irregularities is to make a *pro rata* apportionment of the estimated votes between the contesting candidates. If the outcome of such exercise eliminates or considerably reduces the margin of victory the court may hold that election result is affected;

A (ii) Irrespective of whoever causes chaos during elections the acts causing chaos and confusion renders the election not free and fair;

B (iii) Once it is proved to the satisfaction of the court that statements were made with intent to exploit racial differences during campaign meetings that is sufficient ground for declaring the election void.

Appeal allowed

Cases referred to:

- C (1) *Sylvester K. Masinde v. Pius Msekwa and Another*, [1999] T.L.R. 42
 (2) *Gilliard Joseph Mlaseko and Two Others v. Corona Faída Busongo and another*, Civil Appeal Number 57 of 1996 (unreported)
 D (3) *Peter Msekalile v. Leonard Newe Derefa* Civil Appeal Number 32 of 1997 (unreported)
 (4) *Attorney General and Two Others v. Dr Aman Walid Kaborou*, [1996] T.L.R. 156

E Statutory provisions referred to:

- (i) Election Act 1985 section 108(2)(a), section 35(f)(1), section 4791), section 80(1), section 108(1)(b) and 108(1)(a)

F *Mr Mbezi*, for the Appellant

Mrs Sumari, for the first Respondent

Mr Mwengela, for the second Respondent

G **JUDGMENT**

(Dated 13 August 1999)

H **LUBUVA, J.A.:** This appeal arises from the General Elections held in the country on 29 October 1995. The appellant, Azim Suleiman Premji, contested the Kigoma Urban parliamentary constituency seat sponsored by Chama cha Mapinduzi political party, commonly known
 I by its acronym CCM. The election being held under multipartism, a

total of twelve political parties sponsored candidates to contest the A seat. The second respondent, Mr Aman Walid Kabourou, was among the candidates. He was sponsored by the political party, Chama cha B Demokrasia na Maendeleo commonly known by its acronym CHADEMA. At the close of the poll, the second respondent was declared to be B elected as the Member of Parliament for Kigoma Urban constituency. The appellant was aggrieved by the election result. Consequently, C an election petition was filed in the High Court at Tabora Registry against the Attorney-General and Mr Aman Walid Kabourou who, at the trial were respectively referred to as the first and second respondents. D The petition was based on thirteen grounds. When the trial commenced, eleven issues were drawn. From the grounds of the petition, it is E apparent that the essence of the challenge against the second respondent's declared election victory was based on two aspects. First, non-compliance with the requirements of the law under the Elections Act, 1985 on F the part of the Returning Officer. That is, inadequate provision of electoral material to some of the polling stations. Second, illegal G campaign and statements by the second respondent aimed at exploiting racial differences.

After what appears to us as a careful and detailed analysis of the evidence presented at the trial for both sides, the learned trial judge F answered issues 1, 2, 3, 4, 5, 6, 7 and 11 in the affirmative but went further to hold that that did not affect the result of the election in Kigoma Urban Constituency. It was further held that the election was free and fair. In the final result, the petition was dismissed with costs. The appellant was dissatisfied with the decision of the High G Court (Masanche, J.) and hence, this appeal.

In this appeal the appellant was represented by Mr Mbezi, learned H counsel who had also appeared for the appellant in the High Court at the hearing of the petition. On the other hand, Mrs. Sumari, learned Senior State Attorney, like she had done at the trial in the High Court, I appeared for the first respondent, the Attorney-General. The second respondent was advocated for by Mr Mwengela, learned counsel. The Memorandum of Appeal filed contained eleven grounds of appeal.

A However, in the course of hearing the appeal, Mr Mbezi, learned counsel for the appellant abandoned grounds 7 and 8 first and at a later stage, he also abandoned ground 10. In this appeal, we propose to deal with the rest of the grounds of appeal seriatim.

B We propose to deal first with ground one which reads as follows:

C That the learned trial judge erred in fact in holding that there was no shortage of ballot papers at the Mwanga Kaskazini G., Zahanati Gungu A, Ofisi ya Kata Gungu D and E and that the election results were not affected by reason thereof.

D In this ground, we need not labour much on the complaint regarding the discrepancy and shortage of ballot papers. It is apparent that the area and scope of contention is a narrow one. On one hand, Mr Mbezi strongly criticized the learned trial judge in addressing the issue of the shortage of ballot papers so casually that the effect and consequence of the failure by some people to vote as a result of the shortage of ballot papers was not considered. It was his submission that there was sufficient credible evidence to prove the fact that there was shortage of ballot papers at the polling stations indicated in ground one. That, as a result of the shortage, Mr Mbezi stated, a number of people who were supposed to vote at these stations did not vote. He referred to the evidence of Kessi Saidi (PW23), Felix Mwakasele (PW22), Hadija Sungura Kukonga (PW18) and Omari Selemani (PW15). From these stations, Mr Mbezi estimated a total of about 590 to 600 people did not vote. On the other hand, Mrs. Sumari, learned Senior State Attorney for the first respondent, the Attorney-General, strongly submitted that there was no problem of shortage of ballot papers because the Assistant Returning Officer Mrs Zamda Kanyogoto (RW2) acting on the instructions of the Returning Officer, Badru Bushaku (RW1) had visited the polling stations in respect of which reports of shortage of voting materials had been received. To these stations, she (RW2) supplied extra ballot papers. With the problem of shortage of ballot papers solved at the stations, Mrs. Sumari urged, voting continued in the normal manner in which case, the question of the shortage of ballot papers no longer persisted.

A We agree with Mrs. Sumari that the issue whether there was shortage of voting material is a question of fact which depends on the credibility of witnesses. In this case, Mr Mbezi has referred to the evidence of witnesses PW23, PW2, PW18 and PW15 among others which, according to him, indicate that there was shortage of ballot papers at the respective polling stations. The evidence also shows that until the time the polling papers got exhausted, there were still a number of voters waiting. These voters, according to the evidence, did not vote. In support of Mrs. Sumari's submission, the court was referred to the evidence of Badru Bushaku (RW1) the Returning Officer and the Assistant Returning Officer Mrs Zamda Kanyogoto (RW2). The evidence of these witnesses regarding the actual number of ballot papers, Mr Mbezi submitted, was unreliable, therefore not much weight should be attached to their evidence. In elaboration Mr Mbezi, contended, the figures given by the Returning Officer (RW1) regarding the ballot papers had discrepancies which were not considered by the learned trial judge. For instance, in accepting the evidence of RW2, the learned judge simply stated that RW2 impressed him as a truthful witness who had solved the problem at Mwanga. What is the discrepancy? From the record, both RW1 and RW2, the Returning Officer and the Assistant Returning Officer respectively, categorically stated that for each polling station, 300 ballot papers were distributed. For the Kigoma Urban Constituency, there was a total of 137 polling stations. That would mean a total of 41,100 ballot papers for the whole constituency. In that case, in mathematical terms, for the constituency of Kigoma Urban where there were 37,738 registered voters, there was a surplus of 3,362 ballot papers. But this is not supported by the evidence of the Returning Officer, Badru Bushaku (RW1), who categorically stated in his evidence, at page 271 line 28 of the record, that he received 40,800 ballot papers for the President and 40,800 for the Members of Parliament. If that was so, then with 40,800 ballot papers, it means he did not have enough papers to go round for the requirement of all the 137 polling stations. In such circumstances, it seems likely that both the Returning Officer and the Assistant Returning Officer cannot be correct on this point. One

A or the other, is either telling the truth or not. With respect, we agree with Mr Mbezi that the learned trial judge did not address his mind on the discrepancy pertaining to the evidence of RW.1 and RW.2 as regards the number of ballot papers.

B From this analysis, we agree that the Assistant Returning Officer (RW2) responded by complying with the instructions of RW1 to supply extra ballot papers to the stations where complaint had been raised. The crux of the complaint however, was that before the extra
C ballot papers were supplied, some people had left the voting stations without voting. This with respect, the learned trial judge did not consider. So, as the shortage of the ballot papers was an admitted fact by RW1 and RW2 whose evidence was heavily relied by the trial judge, the
D finding that there was no shortage of ballot papers is incompatible with the evidence. It seems the learned judge having been satisfied that RW2 had solved the problem he did not bother to consider the existence of the problem prior to the arrival of RW2 at the polling
E stations and its effect. Had the learned judge addressed this aspect, we think he would have come to the conclusion that there was shortage of ballot papers. In the event, we are satisfied that on a proper evaluation and analysis of the evidence an affirmative answer to the first part
F of issue one would be properly founded.

The next question that falls for consideration is whether the discrepancy and shortage of voting material did affect the result of the election. Apparently, in an attempt to address this issue Mrs. Sumari took the
G view that even if it is accepted that there was shortage of voting material, this would not affect the result of the election. In her view, the end result would still be same because each of the candidates would be affected by such number of people who did not vote due to
H the inadequacy of voting material. If we understood her correctly, it was her submission that if the estimated number of votes which were not cast during the polling day are apportioned on a *pro rata* basis between all the contesting candidates, the second respondent would
I still remain the winner. We agree with her in restating the correct legal principle under the multiparty political system regarding the

pro rata apportionment of the estimated votes of the registered voters who did not vote. In *Sylvester K. Kasinde v. Pius Msekwa and Attorney-General*, (1) we expressed the view that the rule applied in the cases that were decided before the introduction of multiparty political system of adjusting votes in favour of the losing candidate is no longer good
B law under the multiparty electoral system where more than two candidates contest the election. In part, the court stated:

We think the correct approach under the multiparty system is to make a
C *pro rata* apportionment of the estimated votes between the contesting candidates. If the outcome of such exercise eliminates or considerably reduces the margin of victory, the court may, in our view, hold that election result is affected.

Applying this principle to the instant case where, as already observed,
D the estimated number of people who did not vote was about 600, still we think the margin of victory by the second respondent would not be reduced so considerably as to affect the result of the election. There is yet another equally important reason. The estimated number
E of people who did not vote as a result of the inadequacy of voting materials is, in our considered opinion, too unreliable to justify the nullification of the election. It is, as indicated before, based on the
F evidence of the Returning Officer (RW1) and the Assistant Returning Officer (RW2) which does not give an accurate estimate of the number of people who did not vote. Nonetheless, we are satisfied that such an irregularity as found by the trial judge, did not affect the result
G of the election. We are respectfully in agreement with the learned trial judge on this finding. However, we do not agree with his reasoning that the irregularities did not affect the result of the election because
H allowance had to be made for the anxiety of the people in the first multiparty election. With respect, it hardly needs to be emphasized that the election process being a very serious and important matter in any democratic society, any irregularity pertaining to it must at all times be deprecated. In this case, as the short supply of voting
I materials did not affect the result of the election the complaint in ground one is dismissed.

A In ground 2, the appellant complained that the learned trial judge
 B erred in not holding that the result of the election was affected by
 C changing the list of voters assigned to named polling stations. In
 D the petition, one of the complaints raised was that the provisions of
 E the Elections Act, 1985 was not complied with in that on the election
 F day, the list of voters assigned to a number of polling stations was
 G changed without notice. As a result of this, it was claimed, many
 H voters were confused, they did not know at which polling station to
 I cast their votes. Because of the ensuing confusion, and failure of
 people to vote, the result of the election was affected. At the trial
 the learned judge came to the conclusion that the change of the list
 of voters having been effected after due notice was given, did not
 affect the result of the election.

D For the appellant Mr Mbezi, learned counsel strongly contended
 E that no sufficient notice had been given to the voters regarding the
 F change of polling stations. As a result, Mr Mbezi insisted, many
 G voters were confused not knowing at which polling stations they
 H were supposed to vote. Because of this, he went on in his submission,
 I many voters were unable to vote. This, he concluded, affected the
 result of the election.

F Mrs Sumari, learned Senior state attorney for the Attorney-General,
 G the first respondent, conceded that it was true that the notice about
 H the change of polling stations was given two days before the polling
 I day. She further stated that apart from the notice the voters were
 directed where to go to vote in which case, she argued, there was no
 cause for confusion. The change of polling stations did not affect
 the result of the election, she concluded.

H It is common ground that the notice regarding the change of polling
 I stations was given two days before the election day. This was done
 by the Returning Officer, Badru Bashaku (RW1). The appellant's complaint
 is that the notice was not only not enough, it was also in contravention
 of the Elections Act, 1985. Because of the short notice, Mr Mbezi
 contended, many people did not have the chance of seeing the notice.
 Consequently, he further stated, some of the voters got confused

A not knowing where to go to vote. We agree with Mr Mbezi that the
 B notice regarding the change of polling stations at Mwanga "A" to
 C Community Centre "G" (Mwanga) was given two days before the
 D election day. This is contrary to the mandatory requirement of 8
 E days under section 47(1) of the Elections Act 1985. The crucial
 F issue here is whether the non-compliance with this provision of the
 G law affected the result of the election. We do not think so. This is
 H so, because first, as the evidence of the Returning Officer (RW1)
 I shows, though at short notice, the voters were informed through
 the notice board where to go to vote. Secondly, RW1 stationed a
 person at the earlier designated polling station to direct the voters
 to which polling station they were supposed to go to vote. For these
 reasons, like the learned trial judge, we are satisfied that the change
 of polling stations did not cause many people not to vote. What is
 more, on the evidence, it was not shown that as a result of the change
 of polling stations, a specified and identified number of voters did
 not vote. As it is, it was not shown how many people were involved
 and to what extent as to affect the result of the election. We find no
 merit in this ground, it is dismissed.

F We will next deal with ground 3. The complaint in this ground
 G was that it was erroneous on the part of the learned trial judge in
 H holding that voters at Katubuka "D" polling station with Registration
 I Certificate Numbers 101 – 1200 had voted and that the results of
 the election was not affected by the absence of the voters' register.
 At the trial, this was issue number five (5) which the learned trial
 judge answered in the negative. Mr Mbezi vehemently contended
 that as a result of the missing register of voters at Katubuka "D"
 polling station, many voters estimated at about 200 were prevented
 from voting. This, he said, was a serious act of non-compliance.
 What was involved here was the misplacement of the voters' register.
 From the evidence of the Returning Officer (RW1) and the Assistant
 Returning Officer (RW2), it is clear that when the polling station at
 Katumbuka "D" was opened the voters register could not be traced
 due to misplacement. In order to ascertain the names of the registered

A voters, Form 1 was used. As voting went on at a rather slow pace, later in the day, when RW2 came to the polling station, the register was traced and thereafter, voting continued in the normal manner. In the circumstances, we do not accept Mr Mbezi's claim that the delay caused in voting as a result of the misplacement of the register was such as to affect the result of the election. After all, it has not been shown on the evidence how many voters did not vote as a result of the register being misplaced. This ground also fails.

C We shall next deal with ground 4. Essentially, the appellant in this ground is dissatisfied with the learned trial judge's holding that the Returning Officer was justified in refusing to resolve the disputed votes at the stage of adding up votes. In support of this ground, Mr Mbezi submitted that the Returning Officer (RW1) having been informed that there were 325 disputed votes, had a mandatory legal obligation to determine the validity of the disputed votes as required under section 35(f)(1) of the Elections Act, 1985. This was a serious act of non-compliance which affected the result of the election, Mr Mbezi emphasized. He added that 300 votes out of 325 disputed votes were, as reported by the appellant's agents in favour of the appellant. It was therefore necessary to determine the validity of these votes in order to establish how these votes affected the appellant's position particularly having regard to the winning margin of 273 votes, Mr Mbezi contended. Responding to these submissions, Mrs. Sumari submitted that the Returning Officer was justified in refusing to resolve the undisputed votes because the procedure for disputing votes was not followed. According to Mrs. Sumari, after the exercise of counting votes was completed at the polling stations, Form C.5 should have been filled. In this case, she said, it was not done. Alternatively, Mrs. Sumari took the view that in the circumstances of this case, the non-compliance did not affect the result of the election.

I We agree with Mr Mbezi that under the provisions of section 35(f)(1) of the Elections Act, 1985 it is a mandatory statutory requirement for the Returning Officer to determine the validity of disputed votes before embarking on the addition exercise. In this case, it is not

A disputed that the Returning Officer (RW1) when requested to do so refused on the following grounds: First that it would take too long to embark on the exercise, second, Forms RF.2 were not seen on the boxes containing the disputed votes and thirdly, that the Returning Officer does not deal with disputed votes. This, it must be pointed out was obviously a misconception of the law regarding the responsibility of the Returning Officer in resolving disputed votes. The law, as already indicated earlier is unambiguously clear. As correctly submitted by Mr Mbezi, the learned trial judge erred in holding that the Returning Officer was justified in refusing to resolve the disputed votes. With this non-compliance, the question arises whether it affected the result of the election. In the case of *Gilliard Joseph Mlaseko and two others v Corona Faida Busongo and another*, (2) a somewhat similar situation arose. Among other matters, it was contended that the Returning Officer had failed to determine the validity of disputed votes as required under section 35(f)(1). In that case where the number of disputed votes was known and ascertainable i.e. 141, this court held that though the Returning Officer did not resolve the disputed votes which was an act of non-compliance, nonetheless, the non-compliance did not affect the result of the election. The reason was that whatever was done with the 141 disputed votes, it would not affect the position of the winning candidate. In the case before us, unlike the situation in *Gilliard Joseph Mlaseko*, (2) it was not established how many disputed votes were involved in order to determine if they would affect the result of the election. Even if we accept Mr Mbezi's estimate of 325 disputed votes as a correct working figure, still, on the application of the *pro rata* principle in *Msekwa's case (supra)* to all the 12 candidates who contested the seat, the second respondent would still be the winner. For this reason which is different from that held by the trial judge, the complaint in ground 4 fails, it is dismissed.

H We now turn to ground 5. In this ground the appellant had complained that the learned trial judge erred in law in not directing himself to the incompleteness of the vote adding up exercise and the effect of the Returning Officer's compilation of Exhibit page 2 in the absence

A of the candidates and their agents. At the hearing of this appeal, Mr
 B Mbezi had started his submission in support of ground 5, Mrs Sumari
 raised objection against the inclusion of this ground at this stage on
 appeal. The reason she said was that the issue in this ground was not
 an issue at the trial in the High Court. We overruled the objection
 and allowed Mr Mbezi to make his submission on ground 5. In his
 submission Mr Mbezi stated that the complaint in this ground is
 closely linked with the issue raised in ground 4. He added that since
 C as shown in ground 4, the Returning Officer (RW1) had refused to
 resolve the disputed votes as required under section 35F(1) and 80(1)
 of the Elections Act, 1985, it was clear that the exercise of adding
 up the votes had not been completed. Furthermore, Mr Mbezi went
 D on, in spite of the incomplete adding up exercise, Exhibit P2 was
 compiled by the Returning Officer (RW1) in the absence of the candidates
 and their agents. This, Mr Mbezi urged, was a non-compliance on
 the part of the Returning Officer which the trial judge did not address.
 E With an incomplete adding up exercise in which 14 ballot boxes
 were not accounted for, Mr Mbezi charged that the result of the
 election was affected. For the first respondent, Mrs Sumari did not
 say much on this ground which she said had no merit. She repeated
 her argument that as the matter was not an issue at the trial, it was
 F not proper to raise it on appeal. The reason she said was that raising
 the issue at the appeal stage denied the respondents the opportunity
 of furnishing an appropriate response. Otherwise, she conceded that
 the Exhibit P2 was tendered and accepted at the trial without objection.

G We agree with Mrs Sumari, learned Senior State Attorney that it
 is settled principle that generally matters that were not in issue before
 the trial High Court should not be raised on appeal. The rationale
 behind this principle is that if that was allowed, the Court of Appeal
 H would, by so doing be engaging in matters which are appropriate for
 the trial court. However, the situation in this case is different. As
 correctly conceded by Mrs. Sumari, when Exhibit P2 was introduced
 at the trial, it was accepted without objection being raised by the
 I respondents who, incidentally, were represented by Mrs. Sumari and

Mr Boaz. The learned counsel for the respondent had the opportunity
 of cross examining the Returning Officer on this Exhibit P2. It was
 therefore part of good evidence before the trial court. What is more,
 from our perusal of the record, we note that in the course of the
 trial, Mr Mbezi had raised the matter. For these reasons we do not
 agree with Mrs Sumari that the matter would prejudice the respondents
 if it is raised at the appeal stage.

We will now briefly address on the merits of this ground. As
 already observed, we have made a finding to the effect that there is
 sufficient evidence on record in support of the complaint in ground
 4, that the Returning Officer refused to resolve the issue of the
 disputed votes. As a result, sections 35F(1) and 80(1) of the Elections
 Act, 1985 were not complied with. Mr Mbezi contended that such
 non-compliance affected the result of the election. We do not think
 that the incomplete adding up exercise of the votes which according
 to the evidence on record centred on the disputed votes affected
 the final result of the election. It has amply been demonstrated that
 the estimated number of the disputed votes was 325. This figure, if
 it is added on a *pro rata* basis to the votes of each of the twelve
 (12) contesting candidates, the end result would still be the same.
 As for the Exhibit P2 which was extracted from the RF.2 forms, we
 are also in agreement with Mr Mbezi that the Returning Officer (RW1)
 compiled it in the absence of the candidates and their agents. However,
 we do not agree with Mr Mbezi that the result of the election was
 affected by the fact that Exhibit P2 was prepared by the Returning
 Officer (RW1) in the absence of the candidates and their agents.
 Exhibit P2 being an extract of the RF.2 Forms, its compilation in
 the absence of the candidates and their agents could perhaps be such
 a non-compliance that could well affect the result of the election if
 there was cogent proof that it was incorrect. Such evidence could
 hardly be gleaned from the record. In the absence of such evidence,
 we are of the considered opinion that the non-compliance did not
 affect the result of the election. With regard to the complaint that
 the learned judge did not address on the effect of the incomplete

A adding up exercise of the votes and the absence of the candidates and their agents, we think the matter has been touched upon in ground 5. After all, at the trial in the High Court, the issue was not framed expressly in these terms. Consequently, the learned trial judge addressed
 B and answered the issues as framed and agreed upon. The issue which seems to have a close bearing to this was issue number six which is the subject matter of ground 1 of this appeal. In that way, and in fairness to the learned trial judge, we think it is an unjustified criticism
 C against him for not having answered an issue in terms that were not before him. Otherwise, as already demonstrated, we think the learned judge addressed the issue pertaining to the adding up exercise of the votes. As a matter of fact, having found that the incompleteness of the adding up exercise did not affect the result of the election, it is
 D our view that even if the learned trial judge had addressed the issue expressly in the terms set out in this ground, still we think he would have come to the same conclusion. That is, that the result of the election would not be affected. We find this ground unfounded. It is
 E dismissed as well.

In ground 6, the appellant complained:

F That having held that on the election day at the polling stations named in paragraph 8 of the petition voters were actually intimidated by organized groups of the second respondent's supporters or agents the learned trial judge erred in not holding that the election was not free and fair and that by reason thereof many voters could not vote for a person of their choice.
 G Under paragraph 8 of the petition the following polling stations were specified: Gungu Ofisi ya Kata A to F, Mwanga Ofisi ya Kata A to E, Buronge Shule ya Msingi A to E, Zahanati ya Gungu A to C, Buzebazeba Shule ya Msingi A to E, Muminu A to D, Ujiji Mahakamani A and B
 H and Buhando Businde. Mr Mbezi, learned counsel strongly criticized the learned trial judge in not holding that the election was not free and fair. He advanced the following reasons: Firstly, there was wide spread chaos and lawlessness at Mwanga, Gungu Zahanati, Buzebazeba
 I and Buronge polling stations. Secondly, as a result of the ensuing chaos and break down of law and order, many people did not vote.

Thirdly, because of the confusion and panic the logical conclusion was that the environment was not conducive to a free and fair election. He referred to the evidence of the appellant (PW.1) which shows that a group of people was moving from one polling station to another armed with either sticks, knives or pangas shouting and booing against the appellant. According to Mr Mbezi, the evidence of PW.1 shows that chaos, terror and fear reigned at Buhanda Businde, Buronge Primary School, Gungu Dispensary (*Zahanati*), Gungu kata, Mwanga Kata and Munimu polling stations. He added that the evidence of PW1, the appellant, was supported by PW2, PW4, PW7, PW20, PW27 and PW32. On this evidence, Mr Mbezi went on to submit, widespread chaos, intimidation and threat at these polling stations had been sufficiently proved. It was therefore erroneous on the part of the trial judge not to make a finding that the chaos at the polling stations did not cause many voters not to vote. On this evidence, Mr Mbezi stressed, the learned judge should have gone further to find that the election was not free and fair.

In reply Mr Mwengela forcefully submitted that the election was free and fair. Giving reasons he said, first, the evidence of the petitioner's witnesses such as PW13, PW18 and PW.16 proved that there was general chaos and not intimidation. Second, that no threat or intimidation was used to force any of the voters to vote for the second respondent or any particular candidate. Third, that chaos was caused by a group of hooligans who were not in any way connected with the second respondent. Fourthly, the evidence of Salum Abdalla (PW13) who defected from CHADEMA to CCM is not to be relied upon because he had an interest to serve i.e. to give evidence favourable to his colleague CCM candidate, the petitioner at the trial, that is, the appellant. In such circumstances, Mr Mwengela concluded, so long as the voters were not forced to vote in favour of or against a particular candidate, the trial judge was justified in his finding that the election was free and fair.

We have given anxious consideration to these submissions. It is apparent that from his submission, Mr Mwengela concedes that the evidence adduced at the trial established the existence of chaos at

A the polling stations named in paragraph 8 of the petition. What is seriously contended is that there was intimidation and that if there was any, it had nothing to do with the second respondent. At the trial, in part, the Seventh Issue read:

B Whether on the election day, at the polling stations named in paragraph 8 of the petition, registered voters were assaulted, threatened and or intimidated by agents of the second respondent to scare them from voting....

C In answer to this issue, the learned trial judge stated:

I do not want to labour much on this issue. It is true that such youths were there and did what the petitioner said they did. The ultimate issue arising there will be whether the election was so affected as to enable this court to say that the elections be declared null and void ... I agree with that issue just to the extent that organized groups were there to intimidate people. I do not, however, go further to say that it caused many voters not to vote for a person of their choice.

E The appellant strongly contends that the trial judge should have held that the assault, threats and intimidation scared the registered voters from voting and that as a result, the election was not free and fair. In order to satisfy ourselves of the propriety of the trial judge's finding on threat, assault, intimidation and chaos, we shall step into the shoes of the trial judge to briefly analyse, evaluate and assess the evidence on record. According to the appellant, Azim Suleiman Premji, (PW1) on the voting day, 19 October 1995, as the voting exercise was going on, he visited the various polling stations mentioned in paragraph 8 of the petition.

As to what he witnessed in these polling stations he stated:

H I had gone to Gungu Dispensary. When I arrived there I saw a lot of chaos. The boys were holding stones, sticks. They were threatening people. When I arrived they booed at me ... I arrived there at 10:00am I had been there at 7:00am. Then I came again the second time. The situation was bad ... There was no order at all. The boys belonged to the second respondent. They were wearing T-Shirts shouting doctor, doctor. The T-

Shirts had the picture of Mr Kabourou and the symbol of CHADEMA Party at the back ... I had to run away. I proceeded to Buronge Primary School polling Station ... There were a lot of boys. They were shouting, Mwizi, Ponjoro, doctor, doctor, doctor. At Gungu polling station, I found the same story ... at Mwanga Community Centre, as a result of the chaos done by agents of the second respondent the police had to use tear gas ... All people dispersed. They fled – all including my agents ...

The fact that on the polling day, there was a state of chaos with youths pushing others while shouting Doctor, Doctor, "mchagueni msomi Mr Kabourou ambaye atawasaidia" is also supported by Edward Mathias (PW2), the Officer In-charge of the Field Force Unit at Kigoma. In his evidence, he stated that at about 2:00pm. he visited again the polling station at Gungu; Ofisi ya Kata and the Community Centre – Mwanga where he found the youths still causing a lot of chaos. Describing the state of affairs PW2 said:

It was all chaotic. I went around. I shouted to those who were creating havoc to stop it... Then they started to throw stones at us. They were throwing the stones to the voters and ourselves. It was this time when I gave orders. It was too much. I gave orders ... It was not easy to separate voters and rioters. So all got affected with tear gas. Yes we threw tear gas bombs to those who were creating havoc...

So, as regards chaos and the prevailing atmosphere at these polling stations on the polling day, we agree with the learned trial judge that the evidence of PW2, a police officer incharge of the Field Force Unit at Kigoma vividly gave a clear picture of the circumstances leading to the use of tear gas. What is more, the evidence of PW1 and PW2 is amply supported by many other independent witnesses that the group was threatening by sharpening of pangas (PW7), threat to cut the breasts of women (PW20 and PW13), throwing of stones (PW23), assault (PW25) and breaking of motor vehicle windscreen (PW26). We do not agree with Mr Mwengela that as PW13, was a defector from CHADEMA to CCM his evidence was unreliable. His (PW13) evidence was amply supported by the other independent witnesses including PW2. If the appellant's case was based entirely on the

- A evidence of PW13 a defector, the situation would be different. Therefore taking into account the evidence as a whole, we are of the considered opinion that there was sufficient evidence upon which the learned judge arrived at the conclusion that at the time of voting there was
- B wide spread chaos as a result of which tear gas was used.

C With chaos reigning at the specified polling stations and tear gas used, was the election free and fair? The learned trial judge was of the settled view that in spite of the chaos and tear gas, the election was free and fair. Mr Mwengela maintained that the voters were still free to choose candidates of their choice because inside the polling booths there was no chaos and that the voters were not forced to vote for a particular candidate.

- D We agree that there was no physical force involved inside the polling booths. From the evidence, the chaotic group of youths was moving around the polling stations up to the door way leading to the polling booths. It is not disputed that the polling booths were not
- E far from the surrounding areas where the trouble making youths were milling around shouting. Voting was taking place in such an environment characterized by sharpening pangas, threats of cutting breasts of women, throwing of stones and shouts of "doctor, doctor" "mchagueni msomi
- F Mr Kabourou" "msipigie kura Azim Premji, Ponjoro". With such incitement, heckling, pushing of women and old men who had come to vote, and the resulting use of tear gas it is our view that the prevailing condition at the time was hardly conducive to a free and fair election.
- G Under such a frenzic atmosphere and panic near the polling booths it is most unlikely that a voter under such circumstances would cast his vote freely without any restraint of fear for a candidate of his choice. To our minds it would not make any difference if the second
- H respondent did not have anything to do with the youths creating chaos as Mr Mwengela urged us to accept. It is elementary that for a free and fair election, the pre-requisite condition is that the environment under which the election takes place should be such that the voters are assured of their security physically and mentally free to make a
- I choice of their own candidate. The absence of such an environment

as a result of chaos and break down of law and order could well have been caused by a default on the part of state agencies or the second respondent. Which ever may be the case, the end result is the same i.e. the voters being deprived of their basic constitutional right to a free and fair election. Thus, even if, as urged by Mr Mwengela it is accepted that the second respondent did not have anything to do with the group of youths causing chaos, it would not make any difference. The voters at the various polling stations visited by the riotous youths were subjected to an environment in which they could not exercise their right to vote freely and fairly. It would be absurd in the extreme to hold as Mr Mwengela contended, that though the election was characterized by widespread acts of hooliganism and chaos, such an election should still be regarded as free and fair because the second respondent was not a party to the chaos. We say it would be absurd to hold so because what is important is the effect upon the voters. We think the linkage with the second respondent would be relevant in a situation involving, say, a complaint based on corrupt practices. In that case, as a matter of principle, it would be necessary to establish that the corrupt practices or acts complained of were connected or linked to the respondent. For it is quite possible for third parties to perpetrate acts of corrupt practices without the knowledge of the respondent. In that case, there would be no basis upon which to hold against the respondent. In this case, the situation is different irrespective of whoever caused the chaos, the acts causing chaos and confusion rendered the election not free and fair.

G The fundamental and constitutional importance of the two pre-requisites in a democratic election viz to be free and fair was underscored by this court in the first Premji case *supra*. The Court emphasized:

H Second, taking into account the principle which underlines the Constitution and the Elections Act, 1985 that elections shall be free and fair, we are of the considered opinion that an election which is generally unfree and unfair is not an election at all as envisaged by the Constitution and the Elections Act, and generally anything which renders the election unfree or, and unfair is in law valid ground for nullification of such purported election.

A Because of such basic importance attached to these constitutional requirements, it hardly needs to be emphasized that all times during elections, state and other agencies involved including political parties are duty bound to ensure that peace and tranquility is maintained to the maximum standard. Hooliganism and any acts causing chaos that result in the denial of a free and fair election should be condemned. They do not serve the interests of the voters in the constituency or the nation as a whole. Accordingly, we allow the complaint in this ground.

C We now revert to ground 9. The complaint in this ground is that having held that the statements made by the second respondent during his election campaigns were in fact racial and capable of raising incitement and riot among the voters in Kigoma, the learned trial judge erred in failing to address himself to and answer in the affirmative issue number 11. The essence of issue number 11 was whether the second respondent made the statements with intent to exploit racial differences. The learned trial judge answered the issue in the affirmative stating:

I would therefore answer the issue of speeches by saying this, that, indeed ... defamatory, but the defamation ...

F In support of this ground Mr Mbezi stated that the issue to be addressed in this ground is whether the statements were aimed at exploiting racial differences. For his part, he was firmly of the view that the statements, which, it is common knowledge are not disputed by the second respondent sparked of nothing but racialism in character. From the record, Mr Mbezi stated that the second respondent's defence in the trial court was that in the various statements during the campaign, he was merely expounding the policy of CHADEMA, without singling out any particular candidate. This, Mr Mbezi countered, is not correct because, according to him, if the aim was to expound the policy of his political party, CHADEMA, this could neutrally be stated in general terms without any reference to the appellant's racial groupage. Mr Mbezi referred to extracts of various statements which were tendered at the trial including Exhibits P5, at Kigoma Railway Station on 19

October 1995. In this statement, Mr Mbezi referred to the following portions:

Demokrasi inapokuwa demokrasi kweli kweli maana yake ni kuweza *kumprotect* au kuweza kulinda hata mtu moja hata kama ni kichaa ana mawazo yake muyaheshimu ... linda hawa Wahindi kuliko raia wengine wowote. [emphasis supplied]

In another portion of the speech, it is further stated:

Lakini inapobidi biashara maana yake ni mtaji mzuri na Wahindi peke yao wanaruhusiwa kuingia benki na kuchukua overdraft na mapesa mengi wakati wewe Mwafrika hupewi chochote. [emphasis supplied]

On the same day, at Gungu, the second respondent is recorded at page 547 of the record in part as saying:

... si mtu mwingine ni Ponjoro Azim Premji ... Azim ana hela kuwadanganya mama zetu na dada zetu wamesaga miguu hapa kwenda Kigoma usiku na mchana, Mhindi, Ponjoro hela atatoa wapi, hela zetu sisi Wa-Tanzania.

At Mshilampamba on 5 October 1995, part of another speech reads:

Sisi siyo akina Premji Bwana; Hawajui ni nani anayeishi hapa na ni nani aliyepatwa na maafa...

Yet in another part of the speech the second respondent continues:

Sasa ni mtu gani wa vama atakayempa kura yake Azim Premji anayeahidi eti (kwa sauti ya Kihindi) ukichagua mimi mbunge mimi nitahakikisha kuwa kila sehemu inapata zamu yake ya umeme ...

On 5 May 1995, the second respondent made another statement at kwa noti. He said among others:

Nauliza Serikali ya Tanzania kwa nini Wahindi hawakwenda Vijiji vya Ujamaa, na kwa nini ninyi mnakuwa na kazi mbili tu biashara mmewaachia Wahindi na tangu tumepata Uhuru mpaka Nyerere anajiuzulu Ameir Jamal na Alnoor Kassam ndiyo pekee Mawaziri wa Viwanda na Biashara kwa nini?

In yet another speech at Lubengele, on 12 October 1995, the second respondent said:

A Wao mabwana miraba minne wanatembea ndani ya magari ya milioni arobaini,
lakini wanakuja kukusanya kodi kwako wewe unayeza mtaji wa elfu
tatu...

Then the speech is concluded:

B Atakayempigia kura Azim Premji Mungu amfanye nini? (Amlaani) ... kwa
sababu hatutakii mema...

C On the basis of these statements, Mr Mbezi charged, it should be
inferred that the second respondent intended to incite racial differences
between the Asian community and the Africans. Otherwise Mr Mbezi
went on, it was neither necessary nor relevant to make references
D in the statements to the Indian Community as a whole and not specifically
to Azim Premji as an individual. Taking into account the statements
in their context, Mr Mbezi was of the settled view that the second
respondent had contravened section 108(1)(a) of the Elections Act,
1985. Furthermore, Mr Mbezi submitted, the learned trial judge erred
E in law in applying section 108(1)(b) instead of section 108(1)(a).
As a result, Mr Mbezi contended, the trial judge left the issue (number
11) on whether the statements were intended to exploit racial differences
unanswered.

F For the second respondent, Mr Mwengela conceded that the second
respondent made these statements. His strong point was that the
statements were not meant to exploit racial differences in any way.
That in the speeches, reference was made to Premji as a political
G rival and not on a racial basis. On this Mr Mwengela was supported
by Mrs. Sumari learned Senior State Attorney for the Attorney General.
The speeches were made during the election campaign and so, Mr
Mwengela further maintained, the aim of the second respondent's
H speeches was to expound the policy of the political party, CHADEMA.
He added that parts of the second respondent's statements were in
response to the appellant's speeches made at earlier campaign meeting.
Finally, Mr Mwengela said that the speeches by the second respondent
I were capable of exciting racial differences.

A Upon a close fresh re-evaluation of the evidence, we are satisfied,
like the trial judge that the extracted statements by the second respondent
were racial in character. We think, these statements when read within
the whole context, were aimed at exploiting the racial differences
B between the appellant and the second respondent. It is common ground
that the appellant is a Tanzanian of Asian origin and the second respondent,
is a Tanzanian of African origin. Mr Mwengela's contention that the
statements were not aimed at exploiting racial differences, that they
C were aimed at the second respondent's exposition of the party
(CHADEMA) policy is attractive. However, we are, with respect not
convinced. It is common knowledge that if, as urged by Mr Mwengela
that was the purpose of the statements, it was hardly necessary for
D the second respondent to make such scurrilous and derogatory references
covering the Asian community. It would suffice if reference was
made to Azim Premji as an individual candidate without evoking the
racial stigma. As can be seen from the extracts of the speeches, it is
E apparent that the speeches were couched in such pejorative terms
as "akina Premji", "Ponjoro", "Mhindi", "Wahindi kuliko raia wengine"
etc. are used. From the totality of the evidence the statements are
such that when they are taken and considered within the context of
the election campaign, the logical conclusion is that they were made
F with the intention to exploit the racial differences by evoking the
sympathies of the African community against the appellant. Mr Mwengela
had advanced the argument that the second respondent was responding
to the speeches that the appellant had made during the previous campaign
G meetings. We find this submission interesting but we cannot accept
it. Statements which incite racial differences are in contravention
of section 108(1)(a) of the Elections Act, 1985. In that section, we
can hardly glean any proviso under which retaliatory speeches of
this nature are allowed. On the whole therefore, we are satisfied
H that the learned judge erred in failing to make a finding that the
speeches were aimed at exploiting racial differences.

However, in dealing further with the matter it is apparent that
the learned trial judge got mixed up in the application of I

A sections 108(2)(a) and 108(2)(b) of the Elections Act, 1985. As a result, he went to great lengths addressing an issue which was not before the court, it was not raised in the pleadings. It seems to us that by applying section 108(1)(b) instead of section 108(1)(a) the trial judge addressed the issue whether the non-compliance affected the result of the section. This, with respect, was an error on the part of the learned judge. The issue falling for consideration was whether ground for declaring the election void had been established in terms of section 108(2)(a). Section 108 of the Elections Act, 1985 provides:

108(1) ...

(2) The Election of a candidate as a member of parliament shall be declared void if any of the following grounds are proved to the satisfaction of the court and on no other ground, namely:

(a) that, during the election campaign statements were made by the candidate, or on his behalf and with his knowledge and consent or approval, with intent to exploit tribal, racial or religious issues or differences pertinent to the ... are not of the same sex, with intent to exploit such difference;

(b) non-compliance with the provisions of this Act relating to election if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election;[emphasis supplied]

G Directing his mind to these provisions of the Act, the learned trial judge expressed his finding as follows:

After considerable thought, I have come to the conclusion that all the extracts I have pointed out, spoken by Mr Kabourou, were defamatory of Azim Premji. They were racial and they were capable of raising incitement and riot among the voters of Kigoma...

I Then the learned trial judge extensively analysed decisions of this court in *Peter Msekale v. Leonard Newe Delefa*, (3) and *1. The Attorney-General, 2. Radio Tanzania Dar es Salaam, 3. Azim Suleiman*

Premji v. Dr Aman Walid Kabourou, (4). In his conclusion, the learned trial judge said:

I therefore answer the issue of speeches by saying this that, indeed they were defamatory, but the defamation is not inexcusable or indefensible. It therefore cannot avoid the election.

In this finding, we are respectfully in agreement with Mr Mbezi that the learned trial judge misapplied the law. Consequently, he made an erroneous finding with an affirmative answer to the question pertaining to defamation which was not raised in the pleadings. The final result was that the relevant issue whether the statements were intended to exploit racial differences was left unanswered. With respect, and as already observed, this was clearly wrong. In the process, the learned judge fell into the trap of his own making as it were, expending considerable amount of time analyzing cases on defamation which were irrelevant to this case. In the event, he came to an erroneous finding and conclusion. We need not say more on defamation and related cases.

On our part, upon a close and fresh re-evaluation of the evidence pertaining to the statements of the second respondent as extracted, and a proper construction and application of section 108(2)(a), we are satisfied that sufficient credible evidence had been adduced to prove to the satisfaction of the court that the statements by the second respondent, Mr Aman Walid Kabourou were made with the intention to exploit racial differences pertinent to the election. This, it is common ground, was in contravention to section 108(2)(a) of the Elections Act, 1985. It hardly needs to be emphasized that unlike section 108(2)(b), section 108(2)(a) is absolute. Once it is proved to the satisfaction of the court that in fact statements were made with intent to exploit racial differences during the campaign meetings, that is sufficient ground for declaring the election void. The rationale behind this provision is not far to seek. That is, it was a deliberate provision aimed at dealing with racialism in the country which, left unchecked, would have far reaching consequences on the national unity. In this case, once it was proved that such racial statements were made, it was, as already observed erroneous for the trial judge

A to go further in enquiring whether the result of the election was affected. The law does not provide to that effect. As for the intention to exploit racial differences, this, it is elementary can be inferred from the nature of the statements and the surrounding circumstances
 B in which they were made. Here, the statements were made during the campaign meetings, so in our opinion the inference is that they were made with the intention of exploiting racial differences in order to win votes. We think, with respect, that if the learned trial judge
 C had correctly addressed on the applicable section of the law and the issue before him, he would have come to this conclusion. Therefore we find merit in ground 9.

D Ground ten pertains to defamation. It was abandoned in the course of hearing the appeal. As for ground eleven, the complaint was that the learned trial judge erred in not holding that the non-compliances did not affect the result of the election. However, it may well be
 E observed at this juncture that it was superfluous to include this as a ground as it is consequential upon the other relevant grounds. Be that as it may, we have already held that the non-compliances did not affect the result of the election.

F Consequently, for the foregoing reasons the complaints in grounds one, two, three, four and five are dismissed. Grounds seven, eight and ten which were abandoned are as well dismissed. The complaints in grounds 6 and 9 are allowed. In the event, as grounds 6 and 9 are, as a matter of law sufficient grounds for voiding an election, the
 G end result is that we allow the appeal and declare the Kigoma Urban Constituency Parliamentary Election null and void. We also make an order for costs in favour of the appellant both in this court and the court below.

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BUNDA DISTRICT COUNCIL v. VIRIAN TANZANIA LTD.

HIGH COURT OF TANZANIA
 AT MWANZA
 (Nsekela, J.)

CIVIL CASE No. 21 OF 1997

Civil Practice and Procedure – Leave to defend a summary suit – Oral application to file a supplementary affidavit made by an advocate recently instructed – Order XXXV, rule 3 and Order XII, rule 2 of the Civil Procedure Code and sections 68(e) and 95 of the Civil Procedure Code.

Civil practice and procedure – Inherent jurisdiction – Statute containing specific provision under which the court may be moved to take a particular action – Inherent powers of the court should not be invoked for such action.

The plaintiff filed a summary suit under Order XXXV of the Civil Procedure Code for the payment of money. The defendant filed a chamber application under Order XXXV, rule 3 of the Code seeking, *inter alia*, leave to defend the suit. The application was supported by an affidavit of the applicant's first advocate. The plaintiff's advocate filed a counter-affidavit opposing the application for leave. When the application was called on for hearing, an advocate of the applicant who had recently been instructed prayed for time to file a supplementary affidavit. The plaintiff's advocate strongly opposed the prayer and prayed for the case to be heard.

Held: (i) Inherent jurisdiction must be exercised subject to the rule that if the Code does contain specific provisions which will meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked; it is only when there is no clear provision in the Civil Procedure Code that inherent jurisdiction can be invoked.

(ii) Since in this case there was a specific provision governing the making of applications before the High Court, the inherent powers of the court could not be exercised under section 95 of the Code.