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RULING

(Dated 27 May 1998)

B **RAMADHANI, J.A.:** This application involves intricate points of procedure of this court. One of the parties in the Lower Courts, Abdi Farrah Guled, is now deceased. But before he died he had filed in time, a Notice of Appeal challenging the opinion of Msoffe, J. C That was on 6 October 1994, the day the judgment complained of was delivered. Unfortunately a copy of that Notice of Appeal was not served on the respondents until 23 February 1998, that is, after close to four years. That in itself is a violation of rules. However, as the respondents received a copy despite the inordinate delay, then D they could be taken to have connived at the delay.

E Mr Mpoki, learned counsel for the respondent, pointed out another violation. He submitted that the appeal ought to have been instituted by 6 December 1994, that is sixty days after the Notice of Appeal was filed. The applicant in his sworn Certificate of Urgency claim that the deceased had applied for a copy of records as far back as October 1994 but without success.

F However, Mr Mpoki submitted that they have not been given a copy of that letter, so the exemption under rule 83 cannot be claimed by the appellant in this case. So, Mr Mpoki submitted, that the Notice of Appeal ought to be struck out for failure to take an essential step. G Mr Mpoki pointed out further that there is an application to strike out the Notice of Appeal filed since 12 March 1998 but that no date has been set down for hearing.

H As already said, the appellant is dead. This application has been filed by the son of the deceased. He is praying for a stay of execution. But the application is incompetent as the applicant has never been a party to the proceedings. He ought to have filed an application to be substituted for his deceased father. The applicant has already been I granted letters of administration, a prerequisite for an application to be made a party under rule 98. However, there is no such application.

A The applicant has indicated that he would want to engage the services of an advocate to help him go through the procedural maze.

B I think that for the sake of advancing justice, the applicant be given an opportunity to apply to be made a party under rule 98. It is doubtful whether the application to strike out the Notice of Appeal can proceed *ex-parte*. So, it is for benefit of the respondent, too, that the applicant be made a party. In order to facilitate an application under rule 98 I give temporary stay of execution until such time an application to be made a party is filed together with an application C for stay of execution. The respondent may also apply for his application to strike out the notice of appeal to be heard then.

D The applicant is given twenty-one days to file his applications.

Costs to follow event.

WILBROAD PETER SLAA v. ARUSHA KALWA AND FIVE OTHERS

**COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(Nyalali, CJ, Lubuva and Samatta, JJ.A.)

CIVIL APPEAL No. 28 OF 1998

(From the ruling and order of the High Court of Tanzania at Arusha, Nchalla, J., dated 27 March 1998, in Miscellaneous Civil Cause No. 9 of 1995)

H *Election Petition – Limitation of time within which High Court should hear and determine election petition – Statute prescribing a definite period for hearing and determination of election petitions – Whether computation of time should exclude Sundays and public holidays – Section 115(2) of the* I

A *Elections Act 1985 and section 43(d) of the Interpretation of Laws and General Clauses Act Chapter 1.*

B *Election Petition – Limitation of time for the hearing and determination of election petitions – Statute prescribing a two-year period – Whether the prescribed period takes account of the time taken up by appeals from preliminary rulings and orders – Section 115(2) of the Elections Act 1985.*

C *Election Petition – Time prescribed for the hearing and determination of election petitions – Extension of the prescribed time by the Minister – Whether the Minister may extend that time after it has expired – Section 115(3) of the Elections Act 1985.*

D Following the October 1995 General Elections, an election petition was filed in the High Court on 14 November 1995, challenging the parliamentary election results for Karatu Constituency. Section 115(2) of the Elections Act 1985 requires the High Court to hear and determine every election petition within two years from the date of its presentation in court. Two years after filing this petition, hearing had not commenced because it was held up by an appeal on some preliminary issues raised and ruled upon by the High Court. Meanwhile, sometime in December 1997, the Act was amended by adding sub-section (3) to section 115, empowering the Minister to extend the prescribed period. Accordingly, the Minister issued a notice, published on 12 December 1997 as Government Notice 772 of 1997, extending the period prescribed under section 115(2) by six months. When the petition was finally called up for resumption of hearing on 23 March 1998, a preliminary objection was raised challenging the competence of the High Court to hear the petition on the ground that two years had already passed after its filing and that the Minister's notice was legally ineffective. The objection was dismissed by the High Court. From that dismissal came this appeal.

G **Held:**(i) The period prescribed for the hearing and determination of election petitions is more does not exclude Sundays and public holidays;

H (ii) According to section 115(2) of the Elections Act 1985, the obligation of the High Court to hear and determine an election petition within two years operates only when the election petition is before that court and not when it is lawfully before another court; the two-year period, therefore, excludes the time when the petition goes to the Court of Appeal on appeal from preliminary rulings and orders;

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A (iii) Although the two-year prescribed period for the hearing and determination of the Karatu election petition was bound to expire on 15 November 1997, by that date the petition had ten more months to run because of the time that had been taken up by an intervening appellate process from preliminary rulings;

B (iv) **Obiter:** Section 115(3) of the Elections Act 1985, which empowers the Minister to extend the prescribed period by six months, does not empower the Minister to extend the prescribed period after it has expired; the Minister can only extend that period while it is still subsisting; the power of the Minister to extend the prescribed period under section 115(3) of the Elections Act 1985 does not include a power to revive an expired period or to create a new one.

C *Appeal dismissed*

D Cases referred to:

- (1) *National Industrial Corporation Ltd v. Registrar of Companies*, A.I.R. (1963) Punj.239
- (2) *Abdul Gaffar v. State of U.P.*, 1B and ALD 396

E Statutory provisions referred to:

- (1) Elections Act 1985, section 115
- (2) Interpretation of Laws and General Clauses Act, section 43(d)

F Mr *Maira*, for the Appellant

Mr *Musei*, for the Respondent

G Mrs *Macha*, Senior State Attorney as *amicus curiae*

G **JUDGMENT**

(Dated 2 June 1998)

H **NYALALI, C.J.:** This matter concerns an election petition instituted in the High Court at Arusha on the 14 November 1995, challenging the Parliamentary election results for the Karatu Constituency, and which by virtue of the provisions of section 11(2) of the Elections Act 1985, the High Court is required to, "... hear and determine ...

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A within two years from the date of presentation of the election petition before it". About two and a half years after the presentation of the petition, hearing of that petition has not commenced because of preliminary issues raised and decided upon in the High Court and consequential appeals to this court. The first Notice of Appeal to this court concerning such preliminary issues was lodged in the High Court at Arusha on 27 November 1996. On the 26 September 1997, that is about ten months later, the Court of Appeal dismissed the appeal and directed the proceedings in the High Court to continue from the stage reached before the appeal.

According to court correspondence and the case records both in this court and the High Court, the original High Court case file was sent back to Arusha by the Deputy Registrar under cover letter Ref. Number Civil Appeal Number 29 of 1927 of 26 September 1997. In a ruling delivered by the High Court on 5 December 1997, that fact is noted but it is also stated therein that, "However, the record reached this court on 11 November 1997 and on 14 November, exactly two years after the petition was filed in this court, the record was brought to me, and I fixed it for mention on 20 November 1997 with an order that the parties be notified ..." In this ruling, the High Court, *inter alia*, suspended further proceedings to await a Presidential Assent to a Bill which had been passed by the Parliament amending the provisions of section 115 of the Elections Act 1985 by providing for extension of time to hear and determine election petitions.

G According to the proceedings both in this court and the High Court, it is common ground between the parties that the President assented to the Bill on 11 December 1997 and it became law as Act Number 31 of 1997. The Act added a sub-section (3) to section 115 of the Elections Act 1985 which reads as follows:

- (3) Where the election case is unlikely to be determined within the period of two years the Minister responsible for legal affairs may after consultation with the Chief Justice by Notice published in the Gazette extend the period for a further period not exceeding six months as he shall determine.

A day after the Bill had received the Presidential Assent, that is on the 12 December 1997, a Notice was published in the Gazette as Number 772 of 1997 stating as follows:

Whereas the provisions of section 115(2) provides that each election petition case shall be determined within a period of two years from the date of presentation of the election before the court:

and whereas there are election petition cases which are pending in the High Court of Tanzania and which could not be finalized within the specified period of two years:

and WHEREAS section 115(3) of the Elections Act 1985 empowers the Minister responsible for legal affairs to extend the period for hearing and determining election cases:

Now therefore I, Harith Bakari Mwapachu, the Minister for Justice and Constitutional Affairs, in exercise of powers conferred upon me by section 115(3) of the Election Act 1985, do hereby notify as follows:

1. This Notice may be cited as the Elections (Extension of the period of Determination of Election Petition) Notice 1997, and shall come into operation on the 12 December.
2. Notice is hereby given that the period for the hearing and determination of election petitions presented after the General Election 1995, is hereby extended for a further period of six months.

Thereafter the case came up for mention before the District Registrar several times, apparently because the trial judge had been transferred from Arusha to Mwanza. On the 23 March 1998, when the petition came up for resumption of hearing, a preliminary issue was raised by Mr Maira, learned advocate for the Honourable Wilbroad Peter Slaa, M.P., who is the first respondent to the petition, objecting in effect to the competency of the High Court to hear the petition at that stage, on the ground that the Notice of the Minister extending the period of hearing was legally ineffective. The learned trial judge, Nchalla, J, after considering the submissions made by all the parties

A to the petition, dismissed the objection. The objector was aggrieved by that decision, hence this appeal to this court.

B Mr Maira, learned advocate, appears for the appellant in this appeal, while Mr Musei, learned advocate, appears for the respondents, that is Arusha Kalwa and five others. We allowed Mrs Macha, learned Senior State Attorney from the Attorney General's Chambers to appear as *amicus curiae* (a friend of the court) since the issues involved in this appeal obviously concern the Government. We note that, unlike C in the High Court, the law does not require the Attorney General to be joined as a party to appellate election proceedings if he does not wish to take sides in the appeal.

D When this appeal came up for hearing a week ago, there was a preliminary Notice of Motion filed by Mr Musei of an intention to object to the hearing of the appeal on the ground of invalidity of the Notice of Appeal. However, as a result of discussions between the bench and Mr Musei, the Notice of Motion was withdrawn.

E The Memorandum of Appeal before us contains three grounds of Appeal as follows:

- F 1. That the learned trial judge erred in law and in fact holding that section 11(2) of the Elections Act 1985 as amended being temporary enactment having lapsed on 15 November 1997 in so far as this petition could legally be extended by G.N. 772 of 1997 which took effect on 12 December 1997.
- G 2. That the learned trial judge erred in law in holding that G.N. 772 of 1997 which was made on the 10 day of December 1997 a day before Act Number 31 of 1997 which conferred the powers of extending the period was assented to by his Excellency the President of the United Republic of Tanzania. The same was assented to and became H law on 11 December 1997.
- I 3. The learned trial judge erred in law in holding that there was a defect in the drafting of G.N. 772 of 1997 and that such defect was

curable by section 30 of the Interpretation of Laws and General Clauses Act Number 30 of 1972.

We allowed Mr Maira under rule 106(a) of the Tanzania Court of Appeal Rules to address us on a point not covered by the three grounds of appeal, and this concerns a finding by the learned trial judge where he stated, *inter alia*, that:

Lastly, but not least, I quite agree with Mr Musei, learned advocate that in construing section 115(2) of the Act, the period of two years mentioned therein must be two years when the court is all the while seized of the petition. In computing the said two year period, the time when the court was not seized of the petition as was the case here when the record was before the Court of Appeal, has to be excluded. In my considered view, this is a salutary interpretation of section 115(2) of the Act which will cure or save the provision from uncertainty or inherent absurdity. I so find.

The appellant's case both in this court and the High Court is to the effect that the provisions of sub-section (2) of section 115 of the Elections Act 1985, which prescribe a period of two years for hearing and determination of election petitions is temporary in nature and was intended to expire two years after election petitions were presented in the High Court. It is part of the appellant's case that the provisions of Act Number 31 of 1997 which provide for extension of the period of two years, have no effect since the Bill passed by Parliament was not assented to until after the expiry of the prescribed period of two years. Similarly, it is part of the appellant's case that the Notice given by the Minister responsible for legal affairs under G.N. 772 of 1997 was ineffective since it was based on a non-effective legislation.

Finally, the appellant contends to the effect that in computing the period of two years within which the High Court is required to conclude the trial, the time when the election petition was not before that court but was on appeal before the Court of Appeal has to be included, since there is no express provision to the contrary under section 115 of the Act.

- A The respondents' case on the other hand is to the effect that the provisions of sub-section (2) of section 115 are of a permanent nature and are in force until repealed or amended by Parliament.
- B The respondents also contend to the effect that on a proper interpretation of the provisions of sub-section (2) of section 115 of the Act, the prescribed period of two years relates only to the time when the election petition is before the High Court and does not include the time covered by any appellate process. Furthermore, according to
- C the respondents, the prescribed period of two years excludes any time when proceedings in the High Court are stayed or suspended by order of the trial court, as it was done on two occasions in this case, pending the appellate process.
- D The first important issue for consideration and decision in this appeal is whether the provisions of sub-section (2) of section 115, which prescribe the period of two years, are temporary. Mr Maira, learned advocate cited **Halsbury's Statutes of England**, (2 ed), Volume
- E 24 pages 171, 173 and 174. It is stated therein at page 171 that, "An Act may be either temporary or perpetual. A temporary Act may be expressed to remain in force for a fixed period (subject in certain instances to extension by Order in Council). At page 173 it is stated,
- F "A temporary Act expires (unless provision is made for its continuance as to which, ... at the end of the period for which it is expressed to remain in force, or, if it is to remain in force until a date fixed by order in Council, on such date as is fixed". We find nothing relevant on page 174. It is however apparent, from what Mr Maira cited to
- G us, that an Act of Parliament or a provision within such Act is of a temporary nature only if it is expressly stated therein to that effect. We have closely examined the provisions of section 115 of the Elections Act 1985 and we find no express statement to the effect that sub-section(2) is for a limited period. What we find is an express statement prescribing a specific period within which the election petition is to be determined by the trial court. For all these reasons we are satisfied that sub-section (2) is not temporary but perpetual, and
- I we so find.

A The next important issue for consideration and decision is whether the election petition challenging the parliamentary election results for Karatu Constituency falls within the scope of sub-section (3) of section 115 of the Elections Act, 1985 which empowers the Minister responsible for legal affairs to extend the prescribed period for a

B further six months. In considering this issue, the question arises whether in computing the prescribed period, account has to be taken of public holidays. Mrs Macha, learned Senior State Attorney from the Attorney-General's Chambers, in her capacity as a friend of the

C court, has drawn our attention to the provisions of section 43 of the Interpretation of Laws and General Clauses Act 1972, Chapter 1 of the Revised Laws of Tanzania. That section states under paragraph (d):

D When an act or proceeding is directed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

E It is Mrs Macha's submission that since public holidays are 'excluded days' in terms of section 43, and since excluded days are not reckoned only where the period to be computed does not exceed six days, it follows that public holidays are included in computing the prescribed period of two years. We note that Mrs Macha's submission is supportable

F at Common Law. Under paragraph 1140 of **Halsbury's Laws of England** Volume 45 (4 ed) it is stated as a general rule "Where a period is fixed within which some act must be done, Sundays and holidays in general count like other days...." Neither Mr Musei nor Mr Maira expressed a view contrary to that of Mrs Macha. We are satisfied that in computing the period of two years prescribed under sub-section (2) of section 115 of the Elections Act, 1985 public holidays are to be included, and we so find.

H The second question which has to be answered before we decide the issue concerning the applicability of sub-section (3) to the Karatu election petition, is whether the prescribed period of two years relates only to the time when the High Court is seized of the election petition and excludes the time when the proceedings are removed from the

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- A High Court by appellate process. In answering this question, we have had to closely examine the relevant provisions of sub-section(2). It is provided therein that the election petition has to be heard and decided "within two years from the date of presentation of the election petition before it." We have underlined the words "before it" because we think they provide the clue to the answer. It is our considered opinion that the obligation of the High Court to hear and determine the election petition within two years operates only when the election petition is before that court, and not when, according to law, it is before another court, such as the Court of Appeal.

- D The third question which we must answer before dealing with the issue of the applicability of sub-section (3) of section 115 to the Karatu election petition, is whether, bearing in mind the appellate process, the period of two years prescribed under sub-section (2) has already expired, and if not, when is it expected to expire?

- E Obviously, the answer to this question is a matter of mathematical calculation. It is common ground that the Karatu election petition was presented to the High Court on 14 November 1995. It must follow that, in the absence of intervention by the appellate process, we have to conclude that the prescribed period of two years was bound to expire on 15 November 1997. But we have to exclude the period covered by the appellate process, that is from the time the first Notice of Appeal was lodged on 27 November 1996 to the day when the first appeal was decided on 26 September 1997, which is a period of about ten months. This means by the 15 November 1997, the Karatu election petition had been before the High Court for two years less ten months – that is – for one year and two months. To put it differently, it can be said that as on the 15 November 1997 the prescribed period for the Karatu election petition still had ten more months to run, expiring on 15 September 1998, unless there was another intervention by the appellate process, as indeed it occurred.

- I As already mentioned, the resumption of trial of the petition before the High Court was interrupted a second time, that is by the

present appeal. This means the time covered by this appeal, from 27 March 1998 to the time we deliver this judgement, must also be excluded.

We are aware that an understanding of the law as we have explained it, will help a great deal in discouraging preliminary appeals made as delaying tactics for getting an election petition time-barred. It is also our view that such delaying tactics ought to be discouraged by the courts by ordering advocates involved in obvious delaying tactics, to personally pay the costs occasioned by such tactics.

In the light of the answers we have found on this aspect of the matter, it is apparent that when the Presidential Assent was given to the Bill in question on 11 December 1997, and the Notice of the Minister was published on 12 December 1997, the prescribed period of two years had not expired in respect of the Karatu election petition. It is also apparent that as matters stand at present, where the prescribed period still has more than ten months to run, it cannot be said in terms of the provisions of sub-section (3) of section 115, that "the election case is unlikely to be determined within the period of two years".

What this means is that it is not yet time for the Minister responsible for legal affairs to exercise his powers of extension in respect of the Karatu election petition. Undoubtedly, there may be other election petition cases where GN. 772 of 1997 is of relevancy. In the case before us, the conduct of the parties in appealing on preliminary issues, has kept the prescribed period well and alive for months to come. It must be clear by now that, this appeal cannot succeed. But before we make our final decision, there is another issue which, though not necessary for decision of this appeal, has to be resolved because advocates on both sides made submissions on it at length. The issue is whether under the provisions of sub-section(3) of section 115, the Minister responsible for legal affairs is empowered to extend the prescribed period after it has expired.

We are satisfied that the answer must be in the negative. It is clear under the provisions of sub-section(3) of section 115 that the

- A Minister exercises these powers only under circumstances where there are election cases which are "unlikely to be determined within the period of two years." This provision presupposes that the prescribed period has not expired but the remaining time of the period is insufficient
- B for the conclusion of the case or cases concerned. Furthermore, we do not think that the power to extend, means or includes the power to revive an expired period or to create a new period. We are supported in this view by judicial opinion of the courts in India.
- C This can be seen in the case of *National Industrial, Corporation Ltd. v. Registrar of Companies* (1) and Case of *Abdul Gaffar v. State of U.P.* (2). These cases are cited in **Mitra's Legal and Commercial Dictionary**, (5 ed) page 296. The learned author states that, "the word 'extension' imports continuance of an existing thing and effect must be given to the word where it occurs".
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As to the point discussed in the course of hearing this appeal concerning the power of the High Court to suspend or stay proceedings before it, we do not think that the High Court is empowered to suspend the running of the prescribed period in respect of an election petition which is before it. In our view, the orders made in this case suspending the proceedings pending the appeals, were superfluous since the proceedings ceased to be before the High Court by virtue of the appellate process.

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Finally, as a matter practice under the law as it is at present, we need to state that where an appeal on preliminary issue is made in an election petition, the registries of the High Court and the Court of Appeal have to expedite the preparation of the Record of Appeal and facilitate an early hearing of the intended appeal. In appropriate cases, the Court of Appeal may even re-arrange its cause lists so that election appeals are dealt with dispatch.

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In conclusion we now dismiss this appeal. Since it is not obvious in this case that delaying tactics have been employed by any advocate, we make the normal order that costs be paid by the appellant.

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INSTITUTE OF DEVELOPMENT MANAGEMENT, MZUMBE v. DAVID MWAKIKUNGA

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COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

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(Kisanga, J.A.)

CIVIL APPLICATION No. 6 OF 1998

C

(From the decision of A. R. Manento, Esq., Principal Resident Magistrate, Extended Jurisdiction, dated 25 November 1997, in Civil Appeal No. 22 of 1997)

Civil Practice and Procedure – Tanzania Court of Appeal Rules – Application to strike out Notice of Appeal – Letter to the Registrar applying for a copy of the record of proceedings for appeal purposes not served on the respondent – Effect thereof – Rule 83(1) and (2) of the Tanzania Court of Appeal Rules 1979.

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Civil Practice and Procedure – Tanzania Court of Appeal Rules – Copies of letter applying for record of proceedings left with the court – Whether the court is bound to serve copies of the said letter on the respondent.

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The respondent in this application filed a Notice of Appeal in time, on 1 December 1997, wishing to appeal against the decision of the Principal Resident Magistrate, Extended Jurisdiction dated 25 November 1997. His letter to the Registrar applying for a copy of the proceedings was also delivered in time on 5 December 1997, but the letter was neither copied nor sent the other party. And he did not lodge his appeal within 60 days from the date he filed the Notice of Appeal. The applicant then brought this application to strike out the Notice of Appeal on the ground that the respondent had failed to institute his intended appeal within the period prescribed by rule 83(1) of the Court of Appeal Rules. The respondent admitted that it was an oversight on his part not to have copied the letter in question to the applicant but blamed the court for not sending a copy to the applicant.

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Held: (i) The expression "... sent to the respondent" in rule 83(2) of the Rules cannot be understood to mean that the copy of the letter was sent to the respondent by the court; it must mean that the copy was sent by the applicant;

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