IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(MAIN REGISTRY)

(CORAM: KIMARO, J. MASSATI, J. AND MIHAYO, J.)

MISCELLANEOUS CIVIL CAUSE NO.77 OF 2005

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977

AND

IN THE MATTER OF A PETITION TO ENFORCE A CONSTITUTIONAL BASIC RIGHT UNDER THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, 1994

AND

IN THE MATTER OF THE ELECTIONS ACT, NO.1 OF 1995

AND

IN THE MATTER OF A PETITION TO CHALLENGE AS UNCOSNSTITUTIONAL SECTIONS 98 (2) AND 9893) OF THE ELECTORAL LAW (MISCELLANEOUS AMENDEMEND)

ACT 4/2000

BETWEEN

LEGAL AND HUMAN RIGHTS CENTRE (LHRC) – 1st PETITIONER

LAWYERS' ENVIRONMENTANTAL
ACTION TEAM (LEAT) -2nd PETITIONER

NATIONAL ORGANIZATION FOR
LEGAL ASSISTANCE (NOLA) - 3rd PETITIONER

VERSUS

THE ATTORNEY GENERAL -RESPONDENT

JUDGMENT OF MIHAYO, J:

I have read the judgment of Kimaro, J. in draft and I am positive that I concur with her findings. I have also read the judgment of Massati, J. in draft, and likewise I concur. I agree that the two preliminary objections on points of law should be dismissed.

It makes sense to define the word ***"person"*** in accordance with the Interpretation of Laws Act [Cap I R.E. 2002]. Article 13(3) of the Constitution has this to say:-

> *"Haki za raia, wajibu na maslahi ya* ***kila mtu na jumuia ya watu*** *yatalindwa na kuamuliwa na mamlaka na vyombo vinginevyo vya Mamlaka ya Nchi vilivyowekwa na sheria au kwa mujibu wa sheria (emphasise mine)*

The sub article enforces the view taken by Kimaro and Massati JJ that the word ***"person"*** cannot be confined to natural persons only. The approach and decision adopted by this court (Lugakingira, J. as he then was) in ***Rev. Christopher Mtikila vs. Attorney General [1995] TLR 31*** in dealing with the principle of locus standi is sound and correct. The first ground of preliminary objection should therefore be dismissed.

The second point of preliminary objection, that the petition does not disclose a cause of action is, likewise not meritorious. The court will look at

the impugned law and how it may affect society. It will look at the nature of the provisions themselves and not the manner in which the power under the provision is exercised. I would therefore also dismiss this ground of preliminary objection.

The ***"takrima"*** provisions are discriminatory. They seek to legalise an action in relation to one group of the society which would be illegal if done by another group of the same society. African hospitality has been known for ages. It does not need codification. It is priceless, humble and timeless. It does not resurface with the advent of elections. If this happens, it ceases being african hospitality. It becomes business. In pure african hospitality, it is the host who entertains, mostly relatives and friends, not the guest. Part of section 130 of the National Elections Act (the Act) dealt adequately with situations which go out of tradition. The section says:

> *"130. When it appears to High Court either on application or upon an election petition –*
>
> *(a) that an act or omission of a candidate at any election or of his agent or of another person, which but for this section, would be corrupt or illegal practice has been done or made in good faith through inadvertence or*

accidental miscalculation or some other reasonable cause of that nature;

(b) that an act of a candidate, his agent or another person was done in good faith as of normal or traditional hospitality;

(c) that normal or ordinary expenses were spent in good faith by a candidate, his agent or another person in furthering the candidate's election campaign; and

(d) that upon taking into account all the relevant circumstances it would be just that the candidate or his agent or that other person, or any of them, should not be subject to any of the consequences under this Act for such act or omission,

the High Court may make an order allowing the act or *omission to be an exception from those provisions of this Act which would otherwise make the act or omission corrupt or illegal practice, and the candidate, agent or person shall not be subject to any of the consequences under this Act for the act or omission and the election of a candidate shall not by reason only of such act or omission be void."*

As can be seen sub-sections (b) and (c) are a repetition of the impugned provisions herein. These two provisions are, likewise undesirable. I would, likewise, order that they be struck out, under *"any"* other reliefs. The introduction of the **'takrima'** provisions was unnecessary and created classes on the playing field favouring the financially well to do. This is what is called discrimination within the meaning of Article 13 (5) of the constitution.

I also agree that the **"takrima"** provisions are not saved by the proportionality test because as said by advocates for applicants, the mischief created is more serious than the object sought to be achieved. Moreover, as stated above, the provisions were unnecessary in view of part of section 130 of the Act. The provisions are also too widely woven as to render useless the spirit of the Act vis a vis the serious offence of treating.

Finally, I agree that the **"takrima"** provisions are violative of Articles 13 (1) 13 (2) and 21 (1) and (2) of the Constitution and are therefore null and void. They should accordingly be struck out of the National Elections Act. I also agree that each party should bear their own costs. It is so ordered.

T.B. Mihayo

JUDGE

I certify that this is a true copy of the original.

P.A. Lyimo

DISTRICT REGISTRAR