

**IN THE HIGH COURT OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**CIVIL APPEAL No. 17/2020**

*(Originating from the decision of the District Court of Nyamagana in DC. Civil Case No. 05/2018)*

**UMOJA WA CHAMA CHA WAENDESHA**

**PIKIPIKI & 21 OTHER ----- APPELLANTS**

**VERSUS**

**LEVINSON LEVELIAN & 2 OTHERS ----- RESPONDENTS**

**JUDGMENT**

***22<sup>nd</sup> June & 28<sup>th</sup> August, 2020***

**TIGANGA, J**

This appeal originates from Civil Case No. 5/2018 filed before Nyamagana District Court in Mwanza Region where the three respondents namely Levinson Levelian, Josephati Mugaya and Alexander Lucas sued Umoja wa Chama Cha Waendesha Pilipiki Mkoa wa Mwanza and 21 others for the following reliefs,

- a. A declaration that the election results which declared the Defendants as winners was invalid.
- b. A declaration that election be repeated in accordance with the constitution and regulation of Umoja wa Chama cha Waendesha Pikipiki (Boda Boda) Mwanza Region.

1 

- c. Any other order and or relief that the honorable court may deem fit and just to grant.

After full hearing, the trial District Court held that the election was not conducted in accordance with the procedure, for that reason the election was a nullity. It was also held that the plaintiff obviously have suffered loss among other things to be denied the fair and free election hence detrimental to their expectations of being elected.

In the end it was held and declared that, the election conducted on 25<sup>th</sup> November 2017 was a nullity, and the re-election was ordered to be conducted in accordance with the KANUNI ZA MWONGOZO within two months from the date of the Judgment.

The defendant before the trial District Court were aggrieved by the decision of the trial court, they decided to appeal before this court. In their petition of appeal they advanced nine grounds of appeal, which for easy reference they are hereby reproduced as follows;

1. That the trial court erred in law and facts for entertaining the matter while the plaintiff (now respondents) failed to sue the election supervisor.
2. That the trial court erred in law and fact for admitting the documents adduced by the appellants as evidence during trial.
3. That the trial court erred in law and facts by admitting and relying its decision on PW1, PW2 and PW3 without any document to show how text message announced the results.

4. That the trial court erred in law and facts for delivering judgment on the appellant without sufficient evidence.
5. That the judgment of the trial court is defective for ordering re - election in two months and failure to direct how the said re - election order being and who will be responsible for that re - election.
6. That the trial court erred in law by basing its decision on the hearsay evidence without sufficient evidence from the plaintiffs (now the respondent)
7. That the trial court erred in law and facts for delivering judgment with no findings on the issues framed.
8. That the trial court erred in law and facts for delivering judgment without appellants closing its witness (without hearing the remaining two appellant witness).
9. That the trial court erred in law and facts for determining the matter without considering that the plaintiffs now respondents failed to sue important party (election supervisor)

The ground of appeal were counted by the respondent reply to the petition of appeal, in which they are averred that the election was purportedly held without an election supervisor the fact which in itself made the said election to be illegal and a nullity, then the trial court decision was proper, as neither the constitution nor the regulations by the 1<sup>st</sup> Appellant do provide the suing on election supervisor.

They also avers that the appellant cannot complaint to have denied opportunity to file any document as they did not annex the same in their

defence and did not file additional list and ask the same to form part of pleading.

Last he averred that, the judgment is proper and has met the entire legal requirement otherwise the rest of the allegation in the grounds were disputed and the appellants have been put to strict proof thereof.

With the leave of the court the appeal was argued by way of written submissions. The submissions were filed by the respective parties as scheduled.

The appellant through the representation of Felan Kweka Advocate argued the 1<sup>st</sup> and 9<sup>th</sup> grounds of appeal together. He submitted that the election supervisor is not a strange phenomenon as even the respondents in their paragraph 8 of the plaint mentioned the election supervisor. They submitted that as the claim was irregularities of the election which allegedly tainted the results then it was important that the election supervision be joined as one of the defendant before the trial court who would have been a defence witness giving evidence of such allegation.

Mr. Kweka insisted that the election supervisor was an important party to the case who would have accounted on the irregularities (illegality and nullity) complained on this ground.

He submitted on the 2<sup>nd</sup> ground that, every document they tried to tender during trial was rejected without enough reason, but on the other hand, the documents from the petitioners even after strong objection from the defendant side they were admitted.

Submitting on the 3<sup>rd</sup> and 6<sup>th</sup> grounds of appeal, which he argued together, this was on the issue of how the election results were announced through the text message without tendering the document to prove that they were so released. He submitted that the plaintiff, failed to prove the claim on the balance of probability, and therefore there was no sufficient ground to nullify the election, the arguments also touches ground No. 4.

With regard to ground No. 5, the counsel submitted that the court was wrong for ordering re - election without directing the person responsible bearing in mind that the court itself held *inter alia* that there was no election supervisor.

With regard to ground number 7 the complaint was that there was no findings on the issues framed, while in ground number 8, the complaint was that the appellant were not allowed to call two witnesses who were on the list of witness, without the defendant case being closed. He in the end asked the appeal to be allowed.

Replying to the ground number 1 and 9 the respondent submitted that, as conceded by the appellant that neither the constitution nor the regulation provides for the joining of the election supervisor as a necessary party.

He insisted that the election was not supervised by the election supervisor. He also called upon the court to rely on Order I Rule 9 and section 73 of the Civil Procedure Code (Cap 33 R.E 2019) which does not call for reversing the court decree and judgment.

Regarding the ground No. 2, the counsel for respondent submitted that the written statement of defence had no documentary exhibits attached, and even later at trial there was no list of additional exhibits, which would have been tendered, it is the law that the appellant could not have tendered the un attached exhibits, he cannot say that he was denied opportunity to tender them.

With regard to ground No. 3 and 6, he complained that the election was improperly held and the result was held by Mr. Abubakari instead of the election commission. He submitted in respect of ground No.4, that the suit was proved at the required standard as per section 110 (1) and (2) 111 and 112, of the Evidence Act, [Cap.6 R.E 2019] besides tendering documentary evidence the respondents oral evidence was not controverted.

He submitted that the judgment was in conformity with Order XX Rule 3 and 4 of the Civil Procedure Code (supra) as all frame issues were determined accordingly. Regarding the complaint that, the appellants were not afforded the right to be heard as the defendant's case was closed before the defendant has finished calling his witnesses, he submitted that he was accorded an opportunity but did not call them

The rejoinder almost repeated what was supporting the petition of appeal and the submission in chief. For purpose of brevity I will not reiterate. The appellants through Mr. Kweka prayed that the appeal be allowed with costs.

Now from the records and the submissions before this court the following issues are factually established, that the 1<sup>st</sup> appellant is a registered group under the law of Tanzania with the views of regulating the affairs of its members while the rest of the parties of both side are members of the said group.

The group has its constitution which creates the structure of leadership. The leaders are elected and remain in office for three years. The power shift or change is by election, and the procedure of how the election must be conducted is provided under **Kanuni namba mbili** of the group regulations.

The election is conducted by members, after the group chairman has led the members of General Assembly called for election to appoint the chairman and secretary of "Chombo cha kusimamia uchaguzi" literally meaning a body of supervising and conducting election, as well as three other members of the body. It is this "chombo cha kusimamia uchaguzi" which will be an overall in charge of the election processes and will be under the "mlezi" (patreri) who will be the chief election supervisor.

Now, from the provision of "Kanuni namba mbili", the "chombo cha kusimamia uchaguzi" is not a permanent body, it is always formed during election, and its members are elected on the election day by the members of General Assembly called for election.

This means, all elections by this group must be conducted in accordance with the constitution and the regulations made therefrom. The record shows that on 25/11/2017 the 1<sup>st</sup> appellant held its leaders election

which involved the parties in this case. It was that election which the current respondent challenged before the District Court of Nyamagana in DC Civil Case No. 05/2018, which is the subject of this appeal.

As earlier on pointed out, the election was nullified on the ground that, it did not follow the requisite election procedures, and it is that decision which is challenged in this appeal.

The first and nine grounds is a complaint that the suit was bad in law for respondent failure to sue the election supervisor. On that the respondent reply was that the election supervisor was not appointed, therefore was not there, the appellant said he was there and he was mentioned in paragraph 8 of the plaint.

The respondent in paragraph 8 of the plaint before the trial court was raising a complaint that the election was not supervised by the election supervisor, but the District Executive Officer who was appointed by the District commissioner to supervise the election which facts led to the election being not free and fair.

That fact was not seriously disputed, that means the person who supervised election was the District Executive Officer appointed by the District commissioner. Now the issue is whether that was the election supervision provided by "Kanuni namba mbili" of the regulations?

Definitely, the answer is no, as according to that regulation, the said "chombo cha kusimamia uchaguzi" is not an individual, it is a committee appointed under the patron of the group who becomes the chief election

supervisor, chairman, secretary and three members of the committee, appointed by the members of the general assembly called for election, from among themselves.

That being the position of the regulation, there is no way we can say that the person who supervised the election was a "chombo cha kusimamia uchaguzi" provided under "Kanuni namba mbili" in paragraph 2 and 3 of the regulation.

Now, what should be the effect of the election not being supervised by the constitution or regulatory body? It is a celebrated principle that all groups of people establish themselves under their Constitution and Regulation must conduct their affairs according to what they actually agreed in their constitution and regulation, any shift from the regulation must follow the procedure and must be vividly seen to have involved the members (majority or all of them)

In this matter there is no evidence to prove that the requirement under regulation "Kanuni namba mbili" was followed, to depart from what the regulation was providing. For that reason it was proper for the trial magistrate to hold that the election did not follow procedures, and since there was no election supervisor appointed in accordance with the regulations, the respondent could not have joined the persons who were not there.

Regarding the 2<sup>nd</sup> ground of appeal, as submitted by the appellant that a number of documentary exhibits which were tendered by the appellant during trial, were rejected by the court, while those tendered by

the respondents were admitted even where the same were seriously objected by the appellants. As rightly submitted by the counsel for the respondent that, it is only the exhibits which were pleaded, and attached to the pleadings can be tendered at trial. If it was not pleaded and attached then, it may only be admitted if it was brought to the record by way of lists of additional documents.

I have passed through the record, I did not find any document pleaded in the joint written statement of defence filed on 27/03/2018 on behalf of the defendants (now the appellants), neither was any attached to it nor was any listed as one of the additional documents.

For that reason, there was no ground upon which the same could have been admitted by the court without following procedures. For that reason, the second ground of appeal is devoid of merit, it is hereby dismissed.

In grounds number 4 and 7 which are that, the judgment was delivered against the appellants without sufficient evidence, these grounds have not been substantiated, this is because, the Respondents who were the plaintiff tendered a number of documents, and gave an account almost on every aspect. It is also evident that issues which were framed were all deliberated upon and the trial Senior Resident Magistrate arrived at the conclusion after considering all the evidence on record. These two grounds also lack merits they are dismissed for the reasons given.

Regarding ground number 5 which raises a complaint that, the trial court erred in ordering re - election without directing who was to supervise

the election, in my considered view, it is not the duty of the court to say who was to supervise the election. The constitution and the regulation are very clear, as to who is mandated to supervise election. It is a "chombo cha kusimamia uchaguzi" which is in the constitution and regulations. That needs not the magistrate or court to say. This ground also is devoid of merits, it suffers dismissal well.

With regard to ground number 8 which in essence raises a complaint that, the appellant were not sufficiently heard on the grounds that the trial court closed the case without hearing two witnesses of the defence. It is true that the trial magistrate closed the case after it has been so requested by Mr. Kassim Gilla, Advocate respondents, after the appellants have defaulted appearance for two times, but after three defence witnesses had testified for the defence. The case was closed under order XVII Rule 3 of the Civil Procedure Code [Cap 33 R.E 2019], which provides that;

*"where any party to a suit to whom time has been granted fail to produce his evidence or to cause the attendance of his witness or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may notwithstanding such default proceed to decide the suit forthwith".*

From the record, it is evident that on 18/10/2019, the plaintiff case was closed, the order for defence hearing was entered and the case was scheduled for defence hearing on 01/11/2019, DW3 was the last defence witness according to the record, before the defence case was closed,

testified on 28/01/2020, when the matter was adjourned for further defence hearing on 12/02/2020, when the defendants were absent, consequence of which it was once again adjourned up to 02/03/2020, when the defendants once again did not appear, before the defence case was closed under Order XVII Rule 3 of the Civil Procedure Code (Cap 33 RE 2019).

The records show that the defendants were given time to adduce evidence, they did not appear for two times to give their evidence in court without notice and reasons, the facts which justifies the court to invoke its powers under cited law. That being the case, I find this ground to have no merit and it suffers dismissal. All these said and done ground 3 and 6 die naturally.

It is so ordered.

**DATED** at **MWANZA** on this 28<sup>th</sup> day of August 2020



**J. C. Tiganga**

**Judge**

**28/08/2020**

Judgment delivered in open chambers in the presence of Mr. Fellan Kweka learned Advocate for the appellants and the respondents in persons. Right of second appeal explained and guaranteed.



**J. C. Tiganga**

**Judge**

**28/08/2020**



ORIGINAL