IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: SAMATTA, C.J., KISANGA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 64 OF 2001

B E T W E E N

JULIUS ISHENGOMA FRANCIS NDYANABO . . . APPELLANT

A N D

THE ATTORNEY GENERAL. . . . . RESPONDENT

(Appeal from the majority decision of the
High Court of Tanzania at Dar es Salaam)

(Hon. Kyando, Ihema, JJ and Kimaro, J.)

dated the 29th day of June, 2001

in

Miscellaneous Civil Cause No. 2 of 2001

JUDGMENT OF THE COURT

SAMATTA, C.J.:

This is an appeal from a decision of the High Court (Kyando and Ihema, JJ, Kimaro, J., dissenting) dismissing a petition filed by the appellant for a declaration that Section 111 (2), (3) and (4) of the elections Act, 1985 (the Act), is unconstitutional for being violative of Article 13 (1), (2) and 6 (a) of the Constitution of the United Republic of Tanzania (hereinafter referred to as the Constitution). Essentially, the appeal is about access to justice.

The background to the appeal may, we think, be stated as follows. In the general election held in this country in October 2000 the appellant, an advocate by profession, entered into a contest for the parliamentary seat in Nkenge Constituency. According to the results of the contest announced by the Returning Officer, the appellant lost the election. He was aggrieved by those results. As he was entitled under section 111 (1) of the Act,

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he filed an alection petition before the High Court, questioning the validity of the declared victory of one of his opponents in the election. The Registrar of the Court has not, in compliance with the provisions of Section 111 (2) of the Act, fixed a date for the hearing of the petition. The subsection, as amended by the Electoral Laws (Miscellaneous Amendments) Act, 2001, reads.

> "(2) The Registrar shall not fix a date for the hearing of any election petition unless the petitioner has paid into the court, as security for costs, a sum of five million shillings in respect of the proposed election petition."

The appellant, who has not paid the required deposit, decided to file, under Article 30 (3) of the Constitution and Section 4 of the Basic Rights and Enforcement Act, 1994, a petition questioning the constitutionality of the subsection and praying for a declaration that the said statutory provision is unconstitutional. It is the decision of the High Court on that petition which has given rise to the appeal now before us. Before the High Court it was the appellant's contention that the requirement in the subsection is unconstitutional, on the ground that it is arbitrary, discriminatory and unreasonable and therefore it constitutes an unjustified restriction on the right of a citizen to be heard by the Court on his complaint against illegalities or irregularities in the conduct of a parliamentary election. The learned Attorney General's response to the petition was a fairly simple one: the requirement to deposit Shs. 5 million as security for costs was "consistent with the avoidance of unnecessary and unreasonable costs to the Government, as well as individuals involved which can be caused by unreasonable and vexatious petitioners who might bring petitions without any

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reasonable cause." The learned Attorney General urged the learned Judges of the High Court to hold that the appellant had taken a wrong step in law in challenging the constitutionality of the requirement of depositing Shs. 5 million as security for costs; what he should have done was to file an application under Rule 11 (3) of the Elections (Elections Petitions) Rules, 1971 as amended (for short "the Rules") for a direction that he gives such other form of security as the court would consider fit, or that he be exempted from payment of any form of security for costs. The learned Attorney General also rested his defence to the petition on the provisions of Article 30 (2) (a) and (f) of the Constitution, asserting that those clawback clauses save the statutory requirement of depositing Shs. 5 million as security for costs complained against by the appellant from the vice of unconstitutionality. It was his case that the provisions of Section 111 meet the test of constitutionality laid down by this Court in Kukutia Ole Pumbun and Another v Attorney General and Another [1993] T.L.R. 159. Kyando and Ihema, JJ., who examined the issues raised before the Court at a great length, entertained no doubt whatsoever that the statutory provision under attack does not suffer from unconstitutionality. In the course of their ruling they said:

> "We have carefully considered the parties' pleadings and their lucid submissions thereto and we are of the firm view that the petition has been filed without any colour of merit. It is bound to fail."

Accepting, as they did, the contention of counsel for the learned Attorney General that the impugned statutory provision was aimed at protecting respondents in election petitions on the question of costs, the learned Judges said:

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"As a general principle payment of security for costs is intended to secure "the payment of costs if such person does not prevail." And as correctly submitted by Mr. Mwidunda, learned Senior State Attorney, for the respondent the provision for costs puts a just and fair obligation on the part of the petitioner to secure the costs of those he drags to Court and as such the provision is legally necessary to protect a respondent in the costs to be incurred in the litigation. We agree and hold that the provisions of Section 111 (2) of the Elections Act, 1985, as amended, are in tandem with Article 30 (1) and 2 (a) and (f) of the Constitution of the United Republic of Tanzania, imposing limitations upon, and enforcement and preservation of basic rights, freedoms and duties."

Article 30 (1) and (2) (a) and (f) of the Constitution provides:

"30. - (1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest. (2) It is hereby declared that the provisions contained in this Part of this Constitution which set out the basic human rights, freedoms and duties, do not invalidate any existing legislation or prohibit the enactment of any legislation or the doing of any lawful act in accordance with such legislation for the purpose of -

(a) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals;

(b) ...

(c) ...

(d) ...

(e) ...

(f) enabling any other thing to be done which promotes or preserves the national interest in general."

The learned Judges dismissed as untenable the contention of the appellant that the provisions of Section 111 (2) and (3) of the Act are discriminatory on the ground that they deny equal access to the High Court because they place a private election petitioner and the Attorney General on unequal footing on the matter of depositing a sum of money as security for costs. They said:

"The Petitioner supports his proposition by contending that adherence to the rule of law demands equal treatment before the law in terms of Article 13 (1) of the Constitution and the extent that a legal provision which is discriminatory in itself or its effect is prohibited by Article 13 (2) of the Constitution. We quite agree that is a correct proposition of the law but we hasten to say that litigation, including election petitions involving the Government, are governed and or regulated by a specific legislation, the Government Proceedings Act

> 1967 as amended whereas, as correctly submitted by the learned Senior State Attorney, litigants' costs against the Government are more than secured under Section 15 of that Act. We are of the considered view that such a practice is more of an exception than outright discrimination as alluded to by the petitioner. There is therefore no violence done to Article 13 (1) and (2) of the Constitution which basically guarantees equality before the law."

A little later, the learned Judges concluded their consideration of the arguments of counsel. They said:

> "We agree that the spirit behind the amendment to Section 111 of the Elections Act 1985 was intended to ensure that respondents in election petitions are protected in terms of costs which they are forced to incur in defending their cases. We are not persuaded that the amendment was either intended to introduce a new aspect unknown to law or a precondition to curtail the right to fair hearing and equality before the law. For we reiterate that the legal requirement for payment of security for costs is well established and accepted in many jurisdictions where the rule of law is vigorously followed. We on the other hand find it desirable to introduce such adequate safeguards for a petitioner (sic) who is not able to give the prescribed security for costs. Essentially this is what is provided for in Rule 11 (3) of the Election (Elections Petitions) Rules 1971 which we believe is still in force and

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applicable. For the avoidance of doubt we advise that the wording of Rule 11 (3) of the election (Elections Petitions) Rules, 1971, be also uplifted and introduced in the provisions of Section 111 of the Elections Act 1985."

As already indicated, Kimaro, J., found herself unable to share her brethren's views on the constitutional status of the challenged statutory provision. She held that the provisions of Section 111 (2) and (3) of the Act are violative of the Constitution. In the course of her dissenting ruling, she said:

"By any standard the provisions of Section 111 (2) and (3) have been made arbitrarily and the limitations imposed in the law cannot be said to be reasonably necessary for achieving a legitimate objective. The impression created by the provisions is that they are safeguards of interests of few people."

Dealing with the argument of counsel for the Attorney General that the amount of money required to be deposited as security for costs is not excessive, the learned Judge said:

"My views are that the amount being required to be deposited as security for costs being excessive, it is only few people who can afford to pay. This means that the right to sue though given by the Constitution and the law concerned, will be curtailed. Accessibility to justice will be open to only those who can afford to pay security for costs."

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The appellant now says that Kyando and Ihema, JJ., misdirected themselves in law in finding no merit in his petition, and Kimaro, J., was right in dissenting from that view. Before us he was represented by Prof. Shivji, who was assisted by Messrs Maira, Rweyongeza and Magafu. The High Court's decision is impugned on the following six grounds of appeal:

1. The trial Judges erred in law and in fact in holding that the right to access to Court as provided under Article 13 (1) of the Constitution of the United Republic of Tanzania is fulfilled by simply filing the pleadings and payment of requisite Court fees.

2. The trial Judges erred in law and in fact in not holding that the principle of equality before the law as contained in Article 13 (1) and 13 (6) (a) of the Constitution of the United Republic of Tanzania means that all persons must have free access to Court and must be equally protected from discriminatory pre-conditions which curtail the right to be heard.

3. The trial Judges erred in law and in fact in holding that the mandatory pre-condition of payment of Tshs. 5,000,000 as per section 111 (2) of the Elections Act, 1985, is realistic, reasonable and necessary to achieve legitimate purpose of securing Respondent's costs in a Petition without taking into account that the majority of Tanzanians are poor.

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4. The trial Judges erred in law and in fact in not holding that implementation of Section 111 (3) of the Elections Act, 1985, is discriminatory in nature rather than an exception as natural persons are mandated to deposit security amounting to TShs. 5,000,000/= for costs unlike the Attorney General.

5. The trial Judges erred in law and in fact in not holding that section 111 (2) and (3) of the Elections Act, 1985, have been made arbitrarily and the limitations therein are unreasonable and unfair to the citizens of Tanzania.

6. The trial Judges erred in law and in fact in not holding that the mandatory pre-condition for security for costs as provided under section 111 (2) of the Elections Act, 1985, operates as to stultify or curtail the right to fair hearing /of/ an ordinary citizen who cast his vote.

Prof. Shivji argued 1st, 2nd, 3rd and 6th Grounds of Appeal together, and the remaining two grounds also together. Mr. Mwidunda, Senior State Attorney, who appeared, together with Mr. Salula, for the respondent Attorney General, adopted the same method of presentation of his arguments. We hope we are not misrepresenting or failing to do justice to counsel if we seek to summarise their submissions.

Dealing with Grounds of Appeal 1, 2, 3 and 6, and citing Article 13 (1) and (6) of the Constitution; Farooque v Secretary of the Ministry of Irrigation, Water Resources & Food Control (Bangladesh) and other /2000/ 1 LRC 1; Sugumar Balakrishnan v

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Pengarah Imigresen Negeri Sabah and Another [2000] 1 LRC 301, among other authorities, the learned advocate for the appellant pressed us to attach special importance to the right of unimpeded access to justice. In this connection, he called our attention to a number of passages from some judgments from various cases, including Balakrishnan's case supra in which, speaking for the Court of Appeal of Malaysia, Gopal Sri Ram, JCA, said:

> "... We are of the view that the liberty of an aggrieved person to go to court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by art 5 (1) of the Federal Constitution. Were it otherwise, the protection afforded by arts 5 (1) and 8 (1) of the Federal Constitution will be illusory and the language of the supreme law no more than high sounding words of no practical significance."

Prof. Shivji challenged the constitutionality of Section 111 (2) of the Act with great force. He submitted that the statutory provision creates almost an insurmountable obstacle to the exercise of the right of access to justice because a trial of an election petition is made contingent upon paying the deposit. According to counsel, the requirement, which leaves no discretion in the court, is a violation of Article 13 (1) and (6) of the Constitution. Relying on a passage in the judgment of the High Court of Hong Kong in Harvest Sheen Ltd. & Another v Collector of Stamp Revenue, 2CHRLD246,

the learned advocate submitted that "if a litigant is entitled to a fair trial, it must be implicit that the litigant gets to trial in the first place." He went on to contend that a petitioner in an election petition cannot ask the High Court to summon the aid of the provisions of Rule 11 (3) of the Rules in his favour. The sub-rule provides:

> "(3) Where on application made by the petitioner, the court is satisfied that compliance with the provisions of paragraph (1) or paragraph (2) of this rule will cause considerable hardship to the petitioner, the court may direct that -
>
> (a) the petitioner give such other form of security as the court may consider fit; or
>
> (b) the petitioner be exempted from payment of any form of security for costs:
>
> Provided that no order shall be made under this paragraph unless an opportunity had been given to the respondent, or, where there are two or more respondents, to each of the respondents to make representations in that behalf."

Prof. Shivji contended that a petitioner cannot now make an application referred to in the sub-rule because, as the learned advocate put it, the sub-rule has, by necessary implication, been repealed by Section 111 (2) of the Act. Mr. Mwidunda's response to these arguments was an uncompromising one. He sought to combat

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the arguments by contending that Section 111 (2) of the Act does not in any way constitute an impediment to access to justice; what its provisions do is to balance rights and duties of litigants in election petitions. Treating Article 30 (2) (a) and (f) of the Constitution as the sheet-anchor of his response, the learned Senior State Attorney went on to submit that Section 111 (2) and (3) was enacted to ensure that the rights and freedoms of petitioners in election petitions are not used to the prejudice of respondents in those proceedings as far as costs are concerned. According to the learned Senior State Attorney, the provisions of Section 111 (2) of the Act meet the test of reasonableness of a restriction on a fundamental right, laid down by this Court in Pumbun's case supra. Very fairly, however, he conceded that the Hansard does not disclose the criterion which was used in fixing five million shillings as the amount of deposit to be made. Mr. Mwidunda further submitted that, contrary to Prof. Shivji's contention, Section 111 (2) has not abolished the discretionary power of the High Court under Rule 11 of the Rules to direct that a petitioner provide some other form of security or to waive the requirement to deposit Shs. 500/= as security for costs. According to the learned Senior State Attorney, the requirement of depositing five million shillings does not limit the right of access to justice in election petitions.

Making his submissions on the 4th Ground of Appeal, Prof. Shivji contended that Section 111 (3) of the Act is discriminatory against a private petitioner because the Attorney General is exempted from being required to make a deposit for security for costs. According to the learned advocate, whether the Government Proceedings Act is applicable to election petitions or not, the

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private petitioner is discriminated against because an award for costs against the Government is most unsecure. Mr. Mwidunda's response to this argument was that s. 15 of the Government Proceedings Act protects the interests of a decree-holder in a case against the Attorney General; the costs of such a litigant are more than secure. The learned Senior State Attorney also sought to meet Prof. Shivji's challenge of the constitutional validity of Section 111 (3) of the Act by submitting that the discrimination envisaged under Article 13 (5) of the Constitution does not include the alleged discrimination in that Section because the vice frowned upon by the constitutional provision is one relating to natural persons.

In support of the 5th Ground of Appeal, Prof. Chivji submitted that the requirement in Section 111 (2) of the Act, complained against by the appellant, is arbitrary in two respects; (1) it does not leave any discretion in the Court; (2) the amount was fixed arbitrarily. Putting it interrogatively, the learned advocate asked: Why was not the amount fixed at 10 million shillings or at 50 million shillings? He reminded us that costs of litigation cannot reasonably be fixed before trial. He then went on to submit, citing Director of Public Prosecutions v. Daudi Pete [1993] T.L.R. 22, that a restriction on a fundamental right must serve legitimate purpose and has to be proportionate. According to the learned advocate, the net in Section 111 (2) has been cast too widely, and the statutory provision should, therefore, be struck down as being unconstitutional. Mr. Mwidunda, calling our attention to the fact that litigation costs have been on the rise in this country, valiantly contended that the sum of five

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million shillings cannot, in the circumstances, be said to be arbitrary. If the appellant finds it impossible to raise that amount it is open to him, the learned Senior State Attorney went on to submit, to ask the High Court to invoke its discretionary power under Rule 11 (3) of the Rules in his favour. It will be recalled that the learned Senior State Attorney had earlier contended that the provisions of that sub-rule are still in force.

We propose, before commencing to examine the correctness or otherwise of counsel's arguments, to allude to general principles governing constitutional interpretation which, in our opinion, are relevant to the determination of the issues raised by counsel in this appeal. These principles may, in the interests of brevity, be stated as follows. First, the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law. As was correctly stated by Mr. Justice E.O. Ayoola, a former Chief Justice of The Gambia, in his paper presented at a seminar on the Independence of the Judiciary, in Port Louis Mauritius, in October 1998:

> "A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the constitution a stale and sterile document."

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Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed. Thirdly, until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative. Fourthly, since, as stated a short while ago, there is a presumption of constitutionality of a legislation, save where a clawback or exclusion clause is relied upon as a basis for constitutionality of the legislation, the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption. Fifthly, where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them; they have to justify the restriction.

With the above principles, among others, in mind, we proceed to deal with the arguments addressed to us. Convenience, we think, requires that we commence with Mr. Mwidunda's argument on the true application of Article 13 (5) of the Constitution. It will be recalled that it was the learned Senior State Attorney's submission that the provisions of the sub-article have nothing to do with discrimination against juristic persons. Who, we ask, are the intended beneficiaries of the principle of equality before the law, embodied in Article 13 of the Constitution? Mr. Mwidunda's answer would be: Natural persons only. According to the learned

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Senior State Attorney's submission, the principle does not relate to juristic persons or collective bodies. We have given anxious and careful consideration to this submission and in the upshot we are of the settled opinion that, though not lacking in attractiveness, it is without merit. But, first, let us quote the sub-article. Correctly and literally translated the provision should read (we think the official translation of it is not entirely correct):

> "(5) For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or station in life such that certain categories of people are regarded as weak or inferior and being subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary conditions, provided that the expression "discriminate" shall not be so construed as to prevent the Government from taking deliberate steps aimed at solving problems in society." (the underlining is supplied)

The language in this provision has exercised our minds considerably, but in the end we are satisfied that the use of the word "and" immediately after the word "inferior" could not have been intended, for, so read, the provision would not make much sense. The framers of the Constitution, it seems to us, bearing in mind the wording of the provision, intended the provision to comprise two limbs. They

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must, therefore, have intended to use the word "or" immediately after the word "inferior". If that word is taken to be used there, it cannot be doubted, in our opinion, that the definition of the expression "discriminate" in the provision also embraces juristic persons and collective bodies. We are emboldened in the view that the definition was not intended to relate to natural persons only by the fact that, while in Article 12 of the Constitution the framers used the expression "human beings", in Article 13 (4) and (5) they chose to use the expression "person/s". The use of those two different expressions strongly suggests to us that the framers intended to make a distinction between the beneficiaries of the principles underlying the two Articles. It appears unlikely that they would have been indifferent to discrimination which juristic persons or collective bodies might be subjected to. While we recognise that the wording of a relevant constitutional provision is important in determining whether the Constitution treats juristic persons and collective bodies as beneficiaries of the principle of equality before the law, we wish to draw attention to a footnote in the book, The Irish Constitution, 3rd ed., by J.M. Kelly and Gerry Whyte, in which the learned authors disclose, at p. 722, the way the courts in Germany and Italy have applied the principle on the aspect of beneficiaries. The footnote, No. 53, reads:

> "The position reached in Ireland, on the mere strength of a narrow interpretation of the phrase "as human persons", should be contrasted with that reached in Germany and Italy in respect of the "equality before the law" guarantee in the Constitutions of those countries. In both jurisdictions

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> it has been for many years clear that juristic as well as natural persons are entitled to the benefit of the rule: and (in Germany) that even groups with no legal personality, such as political parties, may rely on it. The concise reasoning of the Italian Constitutional Court in a case about associations for the assistance of disabled persons may be cited: "An unjustified discrimination between the different associations must inevitably have repercussions on the legal sphere of the members, and so must amount, even if only indirectly, to a violation of the equality of the citizen" (Corte costituzionale 1966/25). It is true that this conclusion is facilitated by Article 2 of the Constitution, which guarantees the inviolable right of man "whether as an individual, or in the social formations in which his personality unfolds": but this is simply a handsome pleonasm. The very word "citizen" carries within it the recognition that the subjects of the legal system exist within a society."

In an appropriate case a juristic person may, in our opinion, complain before the High Court of a violation of the principle of equality before the law.

We observed at the beginning of this judgment that, essentially, this appeal is about access to justice. That right has, for a very long time and in many jurisdictions, been regarded as one of the most important rights a person is entitled to enjoy in a democratic society. Even in England, where, consistent with the doctrine of

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Parliamentary sovereignty, legislative powers of Parliament have been regarded by courts to be unlimited, the right of access to justice has been jealously guarded by the courts. More than eighty years ago, in In Re Boaler /1915/ 1K.B.21, Scrutton, J., emphasised the importance of that right. He said, at p. 26:

> "One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least erroneous meaning unless clear words are used to justify such extension."

The importance of the right has also been emphasized in many other English cases, including Chester v bateson /1920/ 1K.B.829; R. & W. Paul Ltd. V The Wheat Commission /1937/ A.C. 139; Pyx Granite Co. Ltd. V Ministry of Housing and Local Government and Others /1960/ A.C. 260, and Raymond v Honey /1983/ A.C.I. In Pyx Granite Co.'s case (supra), Viscount Simonds expressed the emphasis in the following celebrated words at p. 286:

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> "It is a principle not by any means to whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as Mc Nair, J., called it in Francis v Yiewsley and West Drayton Urban District Council /1957/ 2Q.B.136, 138: /1957/ 1 AII E.R.825, a "fundamental rule" from which I would not for my part sanction any departure."

While in England a person's right to unimpeded access to courts can be limited by mere express enactment, in Tanzania that right can be limited only by a legislation which is not only clear but which is also not violative of the provisions of the Constitution. Having considered the importance of access to courts in the context of circumstances prevailing in Bangladesh, Rahman, J., in Farooque's case supra, said, at p. 31:

> "Effective access to justice can thus be seen as the most basic requirement, the most basic 'human rights' of a system which purports to guarantee legal rights."

We agree with Prof. Shivji (we did not hear Mr. Mwidunda expressing a view contrary to that submission) that the Constitution rests on three fundamental pillars namely, (1) rule of law; (2) fundamental rights; and (3) independent, impartial and accessible judicature. These three pillars of the constitutional order are linked together by the fundamental right of access to justice. As submitted by Prof. Shivji, it is access to justice which gives life to the three pillars. Without that right, the pillars would become

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meaningless, and injustice and oppression would become the order of the day. About two years ago, delivering his judgment in Chief Direko Lesapo v (1) North West Agricultural Bank (2) Messenger of the Court, Ditsobotla, Case CCT 23/99, with which the rest of the members of the Constitutional Court of South Africa agreed, Makgoro, J., said, at p. 15:

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."

Access to courts is, undoubtely, a cardinal safeguard against violations of one's rights, whether those rights are fundamental or not. Without that right, there can be no rule of law and, therefore, no democracy. A court of law is the "last resort of the oppressed and the bewildered." Anyone seeking a legal remedy should be able to knock on the doors of justice and be heard.

We deem it logical, before examining the question whether Section 111 (2) of the Act is violative of Article 13 (2) of the Constitution, to deal first with the issue whether, as was very manfully contended by Mr. Mwidunda, Rule 11 (3) of the Rules, as

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amended by the Elections (Election Petitions) (Amendment) Rules, 1[illegible], and the Elections (Election Petitions) (Amendment) Rules, [illegible], is still in force. Prior to the enactment of the Section, the High Court had a discretionary power to direct either that a petitioner in a parliamentary election petition give such form of security it considered fit, or that the petitioner be exempted from payment of any form of security for costs. We propose, in the interests of clarity and for the sake of completeness, to quote the Rule in extenso. It reads:

> 11. - (1) The Registrar shall not fix a date of the hearing of any petition unless the petitioner has paid into the court, as security for costs, a sum of five hundred shillings in respect of each respondent.
> (2) Where any person is made a respondent pursuant to an order of the court, the petitioner shall within such time as the court may direct or if the court has not given any direction in that behalf, within seven days of the date on which the order directing a person to be joined as a respondent is made, pay into the court a further sum of five hundred shillings in respect of such person.
> (3) Where on application made by the petitioner, the court is satisfied that compliance with the provisions of paragraph (1) or paragraph (2) of this rule will cause considerable hardship to the petitioner, the court may direct that -

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(a) the petitioner give such other form of security as the court may consider fit; or

(b) the petitioner be exempted from payment of any form of security for costs:

Provided that no order shall be made under this paragraph unless an opportunity had been given to the respondent, or, where there are two or more respondents, to each of the respondents to make representations in that behalf.

(4) No security for costs shall be payable by a petitioner who has been granted legal aid under the Legal Aid Scheme of either the Faculty of Law, University of Dar es Salaam, the Tanganyika Law Society or the Tanzania Women Lawyers' Association."

Drawing our attention to the fact that the Rules were saved by s. 129 (b) of the Act when the legislation under which they were made was repealed, Mr. Mwidunda strenuously argued that subrule (3) was not repealed or amended by the Electoral Laws (Miscellaneous Amendments) Act, 2000, and is therefore, still in force. By that Act, Parliament enacted, among other things, Section 111 (2) and (3), the constitutionality of which the appellant challenged before the High Court. As already pointed out, Prof. Shivji pressed us to hold that the sub-rule was, by necessary implication, repealed by the Section.

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In spite of the soldierly courage which he dèmonstrated while arguing this point, Mr. Mwidunda has not succeeded to persuade us that Rule 11 (3) of the Rules is still in force. We entertain no doubt that Prof. Shivji's contention that the sub-rule is no longer in force is incontrovertible. Why do we hold that view? That we will tell. It is an established principle of common law that rules must be read together with their relevant Act: see A.G v De Keyser's Royal Hotel [1920] A.C. 508, 551, per Lord Moulton. Rules cannot repeal or contradict express provisions in the Act from which they derive authority: see Ex p. Davis (1872) L.R.7 Ch. 526. Dealing with that point in that case, James, L.J., said, at p. 529:

> "If the Act is plain, the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the plain terms of the Act." (the emphasis is ours)

It is also a well-established principle of law that where an Act passed subsequently to the making of the rules is inconsistent with them, the Act must prevail unless it was plainly passed with a different object and then the two will stand together: Britt v Buckingham CC [1964] 1 Q.B.77, 78. In their book, Interpretation of Statutes and Legislation, 7th ed, at p.157, Mahesh Prasad Tandon and Rajesh Tandon make the same point by saying:

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> "Where a later enactment or a subordinate legislation is so inconsistent with or repugnant to an earlier enactment or subordinate legislation that the two cannot co-exist, then the latter one would effect repeal of the former by implication."

A later Act can, by implication, restrict the scope of a regulation which has been brought into force under an earlier Act: Kruse v Johnson [1898] 91, 94, per Lord Russell of Killowen, CJ. We readily agree with Prof. Shivji that Section 111 (2) of the Act has, by necessary implication, repealed Rule 11 (3) of the Rules. If Parliament had intended that the High Court continue having the power it had under the sub-rule, it could easily have added a provision in the section identical with or similar to the sub-rule or one saving the sub-rule. It seems clear that the law - making authority wanted to abolish the power and make it a rule without exception that each petitioner, regardless of his financial standing, must deposit the sum of five million shillings as security for costs before his petition can be fixed for hearing. We have no doubt that the subsection and the sub-rule are inconsistent with each other, and, therefore, they cannot co-exist or stand together.

For the reasons we have given, we have reached the unhesitating conclusion that, contrary to the views expressed by Kyando and Ihema, JJ., on the point in their ruling, Section 111 (2) of the Act has, by necessary implication, repealed Rule 11 (3) of the Rules, and, therefore, the High Court no longer has the power to prevent or mitigate the rigours of the subsection by directing

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either that a petitioner give such form of security as it considers fit, or that the petitioner be exempted from payment of any form of security for costs. Therefore, unless we are satisfied that the subsection is not, as submitted by Mr. Mwidunda, violative of the Constitution, a parliamentary election petition cannot, under any circumstances, be heard or tried before the petitioner pays into the High Court, as security for costs, a sum of five million shillings in respect of his petition. It must also be correct to say, as we do, that the provisions of sub-rule (4) of Rule 11 of the Rules have also, by necessary implication, been repealed by Section 111 (2) of the Act. It will be recalled that sub-rule (4) exempted a petitioner who was granted legal aid under the Legal Aid Scheme of the Faculty of Law, University of Dar es Salaam, the Tanganyika Law Society or the Women Lawyers' Association from paying security for costs in respect of his petition. It means that now even such petitioners must deposit a sum of five million shillings as security for costs. Having arrived at these conclusions, we must now turn our attention to the question whether subsections (2) and (3) of Section 111 of the Act are unconstitutional.

Keeping in view the principles of constitutional interpretation we alluded to earlier, can it be said that those statutory provisions are violative of Article 13 of the Constitution? Prof. Shivji valiantly attacked Kyando and Ihema, JJ's conception of the right of access to justice. Referring to the requirements for paying or depositing security for costs under Order 25 Rule 1 (1) of the Civil Procedure Code and Section 111 (2) of the Act, the learned Judges said:

> "It is pertinent to note that in both situations the party required to pay or deposit security for costs will have already accessed to the Court by filing his/her pleadings and paid the necessary court fees."

With great respect to the learned Judges, we cannot agree that access to justice constitutes mere filing of pleadings and paying the required court-fees. The right to have recourse or access to courts means more than that. It includes the right to present one's case or defence before the courts. It cannot, therefore, be correct to say that once he files his petition a petitioner in an election petition has enjoyed the whole of his right of access to justice. Access to justice is not merely knocking on the door of a court. It is more than that.

Fundamental rights are not illimitable. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the limitations must not be arbitrary, unreasonable and disproportionate to any claim of State interest: see Pumbun's case supra. Under the Constitution, an individual's fundamental right may have to yield to the common weal of the society. What is observed by Dr. Durga Das Basu in his book, Shorter Constitution of India, 12th ed., at p. 104, in connection with the Constitution of India is entirely applicable to our own Constitution. The learned author states:

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> "There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and moral of the community. Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control."

Personal freedoms and rights must necessarily have limits, for, as Learned Hand also rightly remarked in his eloquent speech on The Apirit of Liberty, cited by Khanna, J., in his judgment in His Holiness Kesavananda Bharati Sripadanagalavaru v State of Kerala and Another /1973/ Supp. S.C.R.1:

> "A society in which men recognise no check upon their freedom soon becomes a society where freedom is the possession of only a savage few..."

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Prof. Shivji submitted, as will be recalled, that Section 111 (2) of the Act is arbitrary and violates the principle of equality because it unreasonably classifies petitioners into two groups: those who can cause the Registrar of the High Court, by paying a deposit of the sum of five million shillings as security for costs, to fix the hearing dates of their petitions, and those who can only sit by as they watch the files of their petitions accumulate dust because they cannot pay the deposits and there are no statutory provisions which empower the Court to waive the requirement to make the deposits. While he appeared to concede that Section 111 (2) of the Act Constitutes a restriction on the right of access to courts, Mr. Mwidunda contended that, having been passed to protect respondents from frivolous or vexations petitions, and to ensure that those litigants recovered their expenses incurred while defending themselves if eventually the petitions are dismissed, the statutory provision cannot be said to be arbitrary or unreasonable. What is the test of reasonableness in this context? We find the observations of the Supreme Court of India in State of Madras v V.G. Row [1952] SCR 597 very helpful, if may we respectfully say so, in answering that question. Speaking by Patanjali Sastri, CJ., the Court said, at p. 607:

> "The test of reasonableness ... should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the

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> disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

We also find very useful the following passage from the judgment of Barnett, J., in Harvest Shean Ltd.'s case supra, at p. 13:

> "... the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access /to the courts/ left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved..."

Applying the test stated in these two passages, we are of the settled opinion that Section 111 (2) of the Act is arbitrary. According to subsection (1) of the Section, an election petition may be presented by, among others, a person who lawfully voted or had a right to vote at the election to which the petition relates. Many of such voters would be persons who cannot possibly raise even one-tenth of the required five million shillings as security for costs or for any other purpose. Bearing in mind the minimum wage in the Civil Service, which we can take judicial notice of under Section 58 of the Evidence Act, 1967, a minimum wage-earner will require literally more than all his eight years' wages to pay five million shillings. When this fact is borne in mind, it cannot in our opinion, be disputed that it is utterly impossible for an indigent voter to pay five million shillings as required by Section 111 (2) of the Act. The statutory provision, therefore,

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effectively denies access to justice to indigent petitioners. Is the infliction of this extreme disability on an indigent voter or candidate justified? We have no hesitation in answering that question in the negative. Mr. Mwidunda strenuously contended that the provisions of the statutory provision are justified on the ground that they prevent the filing of frivolous or vexatious petitions and also they ensure that respondents in election petitions recover their litigation expenses in the event the petitions are unsuccessful. We find no merit in this argument. First, fundamental rights and costs of litigation should not be weighed in the scales against each other. Secondly, we think that the answer to the learned Senior State Attorney's argument is partly to be found in a statement by Lord Macaulay in his criticism of a preamble of a Bengal Regulation of 1795 which purported to justify court fees on the ground of discouraging frivolous variety of litigation. The statement, quoted by C.B. Srinivasan in his book, Towering Justice, at p. 380, reads:

> "... It is undoubtedly a great evil that frivolous and vexatious suits should be instituted. But it is an evil for which the Government has only itself and its agents to blame, and for which it has the power of proving a most efficient remedy. The real way to prevent unjust suits is to take care that there shall be just decision. No man goes to law except in the hope of succeeding. No man hopes to succeed in a bad cause unless he has reason to believe that it will be determined according to bad laws or bad judges. Dishonest suits will never be common unless the public entertains an unfavourable opinion of the administration of Justice."

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Thirdly, as was pointed out by Mr. Justice (ret'd) Chandrachud in his article, Fundamental Rights in Their Economic Social and Cultural Context, published in the journal of Developing Human Rights Jurisprudence, at p. 142:

> "The fact that a forum for justice is misused does not justify the closing of the doors of justice."

Abolishing the right of an indigent petitioner to apply to the High Court for a direction that either he give some other form of security, or he be exempted from payment of any form of security for costs, and repealing the provisions of Rule 11 (4) of the Rules which provided that no security for costs were payable by a petitioner who had been granted legal aid under the Legal Aid Scheme of the Faculty of Law, University of Dar es Salaam, the Tanganyika Law Society or the Tanzania Women Lawyers' Association amount, in practical terms, to closing the doors of justice to such seekers of legal remedies. To such petitioners, the right of access to justice becomes meaningless. Be that as it may, there appears to be no explanation why the so-called protection of respondents is not made available to respondents in litigation not arising from elections.

The repeal of Rule 11 (3) and (4) of the Rules has, as we have endeavoured to demonstrate, effectively classified those who are aggrieved by the results of a parliamentary election and have a right to file a petition before the High Court into two distinct groups, namely, those who, because they can afford to pay a deposit of five million shillings, will be able to have their petitions

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heard by the Court, and those who, as a result of their poverty, the doors of justice will be firmly shut against them. It is not a principle of the law that all laws must be of universal application or that the state has no power of distinguishing or classifying persons or things for the purpose of legislation. What the law demands is that any classification or differentiation must have a rational nexus to the object sought to be achieved by the legislation in question. What is forbidden by Article 13 of the Constitution is class legislation and not reasonable classification. The legislative power to make differentiation or classification is important, for, as Prof. M.P. Jain states in his book, Indian Constitutional Law, 4th Ed., at p. 472:

> "All persons are not equal by nature, attainment, or circumstances. The varying needs of different classes or sections of people require differential and separate treatment. The Legislature is required to deal with diverse problems arising of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate."

It is, of course, for the courts to decide whether a classification adopted by a law is reasonable or not. The judicial antennae must be sensitive to any classification with a view to ensuring that the classification is rational. To be assured of a bright future a country must have its foundations of justice and equality truly and firmly laid. It is salutary to remember - and here we gratefully

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adopt the words of Rahman, J., in Farooque's case supra, at p. 28, as our own:

> "If justice is not easily and equally accessible to every citizen there then can hardly be a rule of law. If access to justice is limited to the rich, the more advantaged and more powerful sections of society, then the poor and the deprived will have no stake in the rule of law and they will be more readily available to turn against it. Ready and equal access to justice is a sine qua non for the maintenance of the rule of law. Where there is a written Constitution and an independent judiciary and the wrongs suffered by any section of the people are capable of being raised and ventilated publicly in a court of law there is bound to be greater respect for the rule of law."

Frivolous or vexatious litigation is, undoubtedly, a detestable thing. But the right way to deal with that evil is not to close the doors of justice, but to depend upon courts invoking their inherent or statutory jurisdictions to strike out actions of that nature. The doors of justice must always be left open even to the poorest man or woman in the country. Section 111 (2) of the Act is likely to stultify bona fide petitions from indigent persons.

Having paid due attention to counsel's arguments, we are satisfied, for the reasons we have endeavoured to give, that Kyando and Ihema, JJ., erred in holding, as they did, that Section 111 (2) of the Act is not unconstitutional. In our view, the statutory provision is a class legislation. It is also arbitrary and the limitation it purports to impose on the fundamental right

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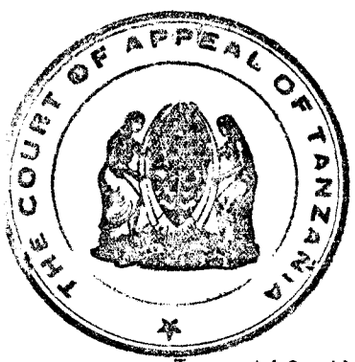
of access to justice is more than is reasonably necessary to achieve the objective of preventing abuse of the judicial process. Plainly, Parliament exceeded its powers by enacting the unconstitutional provision. Legislative competence is limited to making laws which are consistent with the Constitution. These conclusions are sufficient to dispose of the appeal, but we consider it useful to say a word or two on the arguments addressed to us concerning the exemption granted to the Attorney General by Section 111 (3) of the Act.

The importance of the role of the Attorney General in his capacity as the guardian of public interest cannot in our opinion, be over-emphasized. But the problem arising from Section 111 of the Act is not that the statutory provision purports to exempt the Law Officer from giving security for costs, but, by repealing Rule 11 (3) of the Rules, that it purports to deprive a petitioner of his right, under the sub-rule, to apply for an exemption. As far as legislative discrimination is concerned, what is decisive is not the phraseology of the statute but the effect of the legislation. However, since we have held that subsection (2) of the Section is unconstitutional, it follows, as day follows night, that Rule 11 (3) is still in force, and, therefore, a petitioner still has a right to apply for an exemption. In practical terms, therefore, an ordinary petitioner cannot be said to be subjected to discrimination by Section 111 (3) of the Act. In the circumstances, we agree with Kyando and Ihema, JJ., though for different reasons, that the subsection is not violative of the provisions of Article 13 (2) of the Constitution.

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For the foregoing reasons, in our opinion, this appeal must succeed. Allowing the same with costs, we reverse the decision of the High Court and declare that Section 111 (2) of the Elections Act, 1985, is unconstitutional and, therefore, devoid of any legal force ab initio, that is to say, from the date of its enactment. For the avoidance of doubt, it must be distinctly stated that, since the subsection has been so declared, the provisions of Rule 11 (3) of the Elections (Elections Petitions) Rules, 1971, as amended, are still in force and, therefore, the powers conferred upon the High Court by those provisions may, in appropriate cases, be invoked by the Court in favour of petitioners. One of the results of Section 111 (2) being struck down for being unconstitutional is that the sum of money which a petitioner is required to pay as security for costs in a parliamentary election petition is still five hundred shillings. Bearing in mind the decline of the value of the shilling which has taken place since 1971, when the Rules were made, it cannot be disputed that that sum is now too little to serve any useful or practical purpose in terms of providing security for costs, but it is not within the competence of this Court or any other court, for that matter, to amend the Rule.

DATED at DAR-ES-SALAAM this 14th day of February, 2002.



B.A. SAMATTA
CHIEF JUSTICE

R.H. KISANGA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

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

(F.L.K. WAMBALI)
DEPUTY REGISTRAR