A For the above reasons I am satisfied that the judgment debtor has shown sufficient cause why execution should not issue against it. The application for execution is dismissed with costs.

B

SYLVESTER K. MASINDE *v.* PIUS C. MSEKWA AND THE ATTORNEY GENERAL

C

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

D (Nyalali, C.J., Kisanga and Mfalila, JJ.A.)

CIVIL APPEAL No. 57 OF 1997

E (From the judgment and decree of the High Court of Tanzania at Mwanza, Mwaikasu, J, dated 22 June 1996, in Miscellaneous Cause No.17 of 1995)

Elections – Campaigns for election – Legality of election campaign – Election campaign at a function organized by a religious body or institution –
F *Whether the campaign is lawful.*

Parliament – Membership of Parliament – Tenure of office of Members of Parliament and the campaign period – Whether members and the Speaker of the National Assembly still hold their respective offices during the period
G *of election campaigns.*

Elections – Election campaigns – Legality of public and private campaigns – Campaigns conducted outside the scheduled programme – Whether the campaigns are lawful.

H

Elections – Election campaigns – Duration of election campaign period

Elections – Election Petition – Corrupt practices – Electoral corrupt practices – Incumbent candidate disclosing existence of a fund for construction of
I *wells he established well before the election campaign period – Whether the disclosure was corruptly motivated.*

This is an appeal against the judgment and decree of the High Court dismissing an election petition that sought to nullify the parliamentary election results for Ukerewe Constituency. It was common ground that during the campaign period, which ran from 30 August 1995 to 28 October 1995, the election campaigns for the contestants were organized and managed by and through their respective political parties. Meanwhile, during that same period there were celebrations held between the 4 and the 10 of September 1995 by the Catholic Church at various places in the constituency to mark the centenary of that Church in Ukerewe District. The first respondent attended the centenary celebrations at several places and he was introduced at these functions as a Member of Parliament and Speaker of the National Assembly and he was invited to speak, and he did speak. The appellant contended in court that the manner in which the first respondent was treated at those functions and the manner in which he utilized that opportunity amounted to an illegal campaign in that he was treated as an incumbent Member of Parliament and Speaker of the National Assembly, while he was not, and that he used religious occasions to ask for votes while no other candidate was given a similar opportunity. The appellant has also alleged, among other things, some further unlawful election campaigning and corrupt practices. In this appeal, he raised some ten grounds of appeal.

Held: (i) An election campaign that involves a religious body or religious institution in organizing it violates the fundamental principle and value of secularism and national unity which are among the principles and values upon which the state in Tanzania is founded and, therefore, such campaign is unlawful;

(ii) Where an election campaign involves the making of statements that exploit religious differences, the election results would be voided under the provisions of section 108(2)(a) of the Elections Act 1985;

(iii) Election campaigns should not contravene the provisions of section 51(1) of the Elections Act 1985 which require an election campaign to be organized by the candidate or the candidate's agent or the candidate's political party; if contravened, depending on the circumstances of the case, such contravention is capable of affecting the results of the election within the meaning of section 108(2) of the Act;

(iv) Under normal circumstances, a Member of Parliament holds office as such a member until Parliament is dissolved to allow for new General Elections to be held; it follows that during the election campaign period, defined under section 87 of the

Elections Act 1985, the country does not have any Members of Parliament whatsoever and the provisions of article 90(4) of the Constitution, which provide for recall of the dissolved Parliament in emergency, do not change that position;

(v) Once elected to be Speaker of the National Assembly, a person continues under normal circumstances to be the Speaker, not only throughout the life of Parliament but also until a new Parliament meets after General Elections;

(vi) In accordance with the spirit of the provisions of section 51 of the Elections Act 1985 it is prohibited to conduct an election campaign in public outside the programme notified to the Returning Officer;

(vii) Although the provisions of sub-section (1) of section 51 of the Elections Act 1985 concerning organizers of election campaigns apply to all election campaigns, whether conducted in public or in private, the provisions of sub-sections (2), (3) and (4) of that section concerning schedules of campaign programmes apply only to election campaigns in public; they do not apply to house to house campaigns;

(viii) The election campaign period for purposes of organizing election campaigns in accordance with section 51 of the Elections Act 1985, is that period determined by the Electoral Commission and terminating on the day preceding election day;

(ix) Disclosing the existence of a fund for construction of water wells, which was established by the first respondent long before the election period, is exempt from being treated as a corrupt practice by virtue of the provisions of section 97(4) of the Elections Act 1985;

(x) The rule in the precedents from decisions made in election petitions under the one-party state system, which would permit an adjustment of votes in favour of the losing candidate in deciding whether the number of voters prevented from voting would have made a difference in the election results, is no longer good law under the multi-party electoral system with more than two candidates sponsored by more than one political party do contest elections; the correct approach now would be to make a *pro-rata* apportionment of the estimated votes among the contesting candidates.

Appeal dismissed

Cases referred to:

(1) *Ngweshemi v. Attorney General* [1971] HCD n. 251

(2) *Bura v. Sarwatt* [1967] EA 234

Mr Bob Makani, for the Appellant

Proffessor Msanga, for the first Respondent

Mr S.M. Sengwaji, for the second Respondent

JUDGMENT

(Dated 12 May 1998)

NYALALI, C.J.: This is an appeal by one Sylvester K. Masinde, hereinafter known as the appellant, against the judgment and decree of the High Court at Mwanza where he had instituted an election petition seeking the nullification of Parliamentary election results for Ukerewe constituency. The respondents to this appeal are one Pius C. Msekwa and the Attorney-General, hereinafter known as the first respondent and second respondent respectively. Both held similar status in the High Court proceedings. The High Court, Mwaikasu, J., dismissed the petition with costs. The appellant was aggrieved by the decision, hence this appeal to this court

Mr Bob Makani, learned advocate who had represented the appellant in the High Court, represents the appellant before us, whereas Professor Msanga, learned advocate, and Mr S.M. Sengwaji, learned Principal State Attorney, represent the first respondent and second respondent respectively as was the position in the High Court proceedings.

The Memorandum of Appeal contains ten grounds of appeal as follows:

(1) That the Honourable Judge erred in fact and law in rejecting or not considering and evaluating the evidence of the appellant's polling agents, second respondent's witnesses and the tendered documents on the issues of under supply of ballot papers and notice on creation of new polling stations or change of polling stations and specimen ballot papers.

(2) That the Honourable Judge erred in fact and law in holding that it had not been proved that non-compliance with section section 479(b) and (c) of the Election Act 1985 as amended prevented from voting an ascertainable number of voters at the polling stations in question.

(3) That the Honourable Judge erred in law and fact in holding that it had not been proved that the irregularity of under supplying ballot papers to 15 polling stations without replenishment and to other polling stations which got replenishment prevented from voting an ascertainable number of registered voters. He further erred in fact when he held that even if the figures *(sic)* polling agents in the polling stations were taken and added to the votes of the appellant, the first respondent would still have won.

(4) That the Honourable Judge erred in fact and law in holding that it had not been proved that non-posting of "*mfano wa karatasi*"(ballot paper specimen) within the statutory period did result in some ascertainable number of voters not voting for the candidate of their choice.

(5) That the Honourable Judge erred in law and fact in holding that it was not proved that the first respondent campaigned at religious fora during the 100 years anniversary celebrations and the making of campaign statements at such fora was not prohibited under the Elections Act 198 nor under the instructions of the National Electoral Commission.

(6) That the Honourable Judge erred in law and fact in holding that the promise by the first respondent to assist in building a small chapel at Hamuyebe was not made with corrupt intention to induce voters to vote for him.

(7) That the Honourable Judge erred in law and fact in holding that the money contribution made towards Ukara wells is exempt as corruption under section 97(4) of the Elections Act.

(8) That the Honourable Judge erred in law and fact in dismissing the issue of illegal campaigns made by the First respondent at Murutunguru TTC without evaluating the evidence.

(9) That the Honourable Judge erred in law and fact in holding that road construction at Nansio during the campaign period was not executed with corrupt motive of influencing voters to vote for the first respondent. A

(10) That the Honourable Judge erred in fact and law in failing to nullify the election results of Ukerewe Parliamentary constituency against the weight of the evidence. B

According to the proceedings both in this court and trial High Court, there is no dispute but common ground between the parties that on the 29 October 1995, General Parliamentary and Presidential Elections took place in Ukerewe Constituency as they did in other constituencies in the rest of Tanzania. These were the first multi-party elections since the country transformed itself from a one-party state into a multi-party state in 1992. Six political parties contested the elections in Ukerewe constituency. Each of the contesting political parties sponsored one parliamentary candidate. The first respondent was sponsored by CCM, whereas the appellant was sponsored by CHADEMA. When the parliamentary election results were declared by the Returning Officer, the first respondent secured 18 606 votes, followed by the appellant who obtained 16 324 votes. The other four candidates followed far behind. C D E F

It is common ground also that polling day was the culmination of a period which had been declared to be a campaign period by the National Electoral Commission. The period commenced on 30 August 1995 and ended on the eve of polling day – that is – the 28 October 1995. Unlike under the one party system, when election campaigns were organized and managed by the established single political party, this time, under the multi-party system, the election campaigns were organized and managed by the contesting political parties. G H

Furthermore it is undisputed between the parties that as a result of the campaigns by the political parties and their candidates 50 451 persons registered themselves as voters in Ukerewe constituency exceeding by far the projected number of 40 000 potential voters I

originally estimated by the National Electoral Commission. Similarly on polling day, 39 544 registered voters turned out and voted, representing 78.4% of all registered voters. This compared very favourably with the position in the last elections in 1990 under the one party system when 67.4% of the registered voters in Ukerewe constituency voted.

It is also common ground that during the period declared by the National Electoral Commission to be the campaign period, there were celebrations held between 4 September 1995 to 10 September 1995 by the Catholic Church at various places in Ukerewe constituency to mark the centenary of the Catholic Church in Ukerewe District. The first respondent attended the centenary functions at Hamuyebe, Nyamanga Parish, Murutunguru Parish and Kagunguli. At Hamuyebe, Nyamanga and Kagunguli he was introduced as a Member of Parliament and Speaker of the National Assembly and was invited to speak, which he did. None of these places were listed or scheduled in his election campaign programme.

It is common ground too, that during the same campaign period the first respondent visited and spoke at Murutunguru Teachers Training College about the subject of a book he had recently authored titled *Essays on the Transition to Multipartism in Tanzania.* This event was not part of his scheduled campaign programme. There is common ground also that at a campaign rally held at Bwisya in Ukara ward, the appellant was asked a question by one Misana Mwichagala (the thirteenth witness for the petitioner) as to what he had done for Ukara ward during his tenure as a Member of Parliament. In reply, the appellant spoke about his contribution to the development of Ukara Ward, including the establishment of a fund in 1993 to finance the digging of water wells and for which he had deposited money in a bank account, of which passbook he produced and displayed to the assembled crowd as evidence.

There is common ground again that since 1994 there had been a road construction project in Ukerewe, initiated by the first respondent as incumbent Member of Parliament, adopted by the Ukerewe District Council and financed by the Central Government.

Similarly, there is no dispute but common ground that initially 148 polling stations were envisaged but some were subsequently sub-divided and thus increased to 212 polling stations for the constituency. Specimen ballot papers were not posted at polling stations at least 8 days before polling day as required by section 47(1) of the elections Act, 1985. It is common ground also that 50 polling stations initially designated as registration centres located under trees were shifted to buildings but no notification of such change was given at least 8 days before polling day as required by section 47(1) of the Elections Act, 1985. The other matter which is common ground between the parties is that there were shortages of ballot papers at 11 polling stations and the shortage was made good by additional supplies some hours later. There was another shortage of ballot papers at 15 other polling stations but no additional supply of ballot papers was made.

We now turn to the matters that are in dispute between the parties, and which concern the grounds of appeal. It is the appellant's case both in this court and in the High Court that the manner in which the first respondent was treated at the centenary celebrations of the Catholic Church, and the manner in which he utilized that opportunity, amounted to an illegal campaign in that he was treated as an incumbent Member of Parliament and a Speaker of the National Assembly, when he was not; and in that he used the religious occasions to ask for votes when no other candidate was given a similar opportunity.

Moreover, it is the appellant's case that at Hamuyebe, the first respondent offered to build a chapel with the corrupt purpose of inducing the faithful to vote for him on polling day. It is part of the appellant's case that these illegal and corrupt campaigns affected the results because the religious functions were attended by very many people.

Furthermore, it is the appellant's contention that the talk given by the first respondent at Murutunguru Teachers Training College was an election campaign as it was favourable to CCM but was illegal because it was not in the first respondent's official campaign programme.

According to the appellant, this illegal campaign affected the results of the election in view of the large number of people who attended the talk.

It is also the appellant's contention that the road construction project in Nansio was speeded up by or on behalf of the first respondent during the election campaign period for the corrupt purpose of inducing the electorate to vote for the first respondent. According to the appellant this corrupt practice affected the results.

With regard to the election campaign rally at Bwisya it is the appellant's contention that the first respondent corruptly disclosed the existence of the fund for water wells and in furtherance of that corrupt purpose, displayed the bank passbook containing the account of the fund in order to induce the electorate to vote for him.

Moreover, it is the appellant's case that the failure to notify the electorate within the period prescribed by law about the change of location of 50 polling stations, and the failure to supply sufficient ballot papers at a number of polling stations, had the effect of depriving many registered voters of their right to vote. Finally, it is the appellant's contention that the failure to post specimen ballot papers early at polling stations had the effect of confusing many voters as to the identity of the candidate of their choice. According to the appellant, the totality of these non-compliances with the law affected the results of the election.

The case for the first respondent relating to the centenary celebrations consists of a denial of using the occasions for political purposes and an assertion to the effect that the only places where he was requested to speak was at Hamuyebe, Nyamanga and Kagunguli and that his speech at Nyamanga and Kagunguli was confined to congratulating and greeting his fellow Catholic believers for a well organized centenary celebration. At Hamuyebe he spoke only in response to a request by a Catholic Youth Organization and the Archbishop to have a chapel built at Hamuyebe hill to which he offered to cooperate with his fellow catholic believers of the area to have such a chapel built. It is the contention of the

first respondent that it was correct for the church leaders at the celebrations which he attended to treat him as an incumbent Member of Parliament and as the Speaker of the National Assembly as according to the law he held such positions until polling day.

Furthermore with regard to the election campaign in general, it is part of the case for the first respondent that in a multi-party political system, there are no restrictions as to venue and audience of an election campaign, including campaigning from house to house and door to door.

As to the talk at Murutunguru Teachers Training College, the contention of the first respondent is that he was invited by the Principal of the College to speak for educational purposes about the contents of his recently published book and that at no stage did he attempt to persuade his listeners to vote for him. As to the road construction project, the case for the first respondent is to the effect that no special effort was made to speed up the construction work during the election campaign period but to the contrary the construction work which had been interrupted by the rainy season early in the year, suffered from a shortage of funds and eventually ground to a halt towards the end of 1995. As to the election rally at Bwisya, it is the first respondent" case that the disclosure of the existence of the fund for construction of wells in Ukara ward was made in good faith while answering questions raised at the rally and not for corrupt motives. Finally it is the case for both the first respondent and the second respondent that the failure to notify the electorate about the change of venue for 50 polling stations and to post specimen ballot papers within the period prescribed by law could not have affected the results, firstly, because the conditions applied equally to all candidates, and secondly, because efforts were made by officials of the National Electoral Commission to disseminate information about the change of venue and to ensure that specimen ballot papers were posted at polling stations before polling commenced. Moreover all candidates fully utilized the election campaigns to make themselves known to the electorate before polling day. As to the supply of insufficient ballot papers to some polling stations, it is

the contention of both the first and second respondents that such failure could not have affected the results because conditions applied equally to all candidates and nobody complained about being unable to vote as a result of the shortage of ballot papers.

The first issue for consideration and decision in this case is very important not only to the parties in this case, but for the continued stability and peace of Tanzania. The issue is whether under the multi-party system recently adopted in this country, it is lawful to conduct a political election campaign at a religious function. We are of the considered opinion that the correct answer to this issue is to be found in the law relevant to election campaigns and the principles and values which underlie that law. The relevant law is to be found under Part V of the Elections Act, 1985, particularly section 51. Because of the gravity of the issue, we need to reproduce the entire section here:

> 51 (1) Where there is a contested election in a constituency the election campaign shall be organised by the candidate, the candidate's political party or by his agent.
>
> (2) The candidate, his agent or the candidate's political party, as the case may be, indicating the proposed programme for the public meetings of the candidate's campaign specifying the tie and places of those meetings.
>
> (3) A candidate or his agent or a political party acting with the approval or consent of the candidate may convene or address any public meeting in the constituency held pursuant to subsection (2), for the purpose of furthering the candidate's election or the programme of his political party.
>
> (4) A Returning Officer may call a meeting of all the candidates or their agents for the purposes of coordinating the campaign programme of the candidates.
>
> (5) Every Returning Officer shall cause a copy of the coordinated programme to be submitted to the District Commissioner and the police officer commanding the police within the constituency and such programme

shall constitute a notice of the proposed meetings for the purposes of the Political Parties Act, 1992 and the Police Force Ordinance."

On a close examination of the provisions of section 51, the following matters are apparent. First, section 5 has to be read in conjunction with relevant provisions of the Political Parties Act 1992 and the Police Force Ordinance Chapter 322; [see sub-section (5)]. Second, every election campaign must be organized either by the candidate or the candidate's political party or by his agent. [see sub-section (1)]. Third, a schedule of the election campaign programme, specifying time and places must be submitted to the Returning Officer by the organizers. The question that arises at this juncture is whether an election campaign, which is held at a religious function, can be construed as being organized by a candidate or a candidate's agent or a candidate's political party as required by law. We think not.

Such an election campaign has in common sense to be construed as being organized either exclusively by the religious body or institution concerned or jointly by such religious body or institution on the one hand, and the candidate or his agent or political party on the other. Such an election campaign is therefore bound to be in contravention of the provisions of sub-section (1) of section 51 which requires an election campaign to be organized by the candidate or the candidate's agent or the candidate's political party. Such contravention, depending on the circumstances of a case, is capable of affecting the results of the election within the meaning of section 108(2)(b) of the Elections Act. Moreover, where such election campaign involves the making of statements which exploit religious differences, the election results would be voided under the provisions of sub-section (2)(a) of section 108.

There is another point which needs to be emphasized here. An election campaign which involves a religious body or religious institution in organizing it, is violative of the fundamental principle and value of secularism and national unity, which are among the principles and values upon which the Tanzanian state is founded, and therefore, such campaign is unlawful. That being the position, the forces of law and order, particularly the Police Force, would not only be justified

but duty bound to prevent such an election campaign from taking place on the ground of being prejudicial to the maintenance of public order under section 41 of the Police Force Ordinance.

Let us now see whether the first respondent conducted any election campaign at the centenary religious functions which he attended a Hamuyebe, Nyamanga Parish, Murutunguru Parish and Kagunguli Parish. The only relevant evidence even on the petitioner's side on the Hamuyebe events, is that of Christopher Mutesighwa Masini, the twentieth witness for the petitioner (hereinafter referred to as PW20). On the first respondent's side, the only relevant evidence is that of the first respondent himself and that of Rev. Ferdinand Mwalimu, the second witness for the respondents' side (hereinafter referred to as DW2). We have closely examined the testimony of these witnesses. It is common ground that the first respondent spoke at a small function at which a cross was erected at the top Hamuyebe hill. There was no loudspeaker at the hill. PW20 and the majority of the assemblage waited at the foot of the hill – at least 100 meters below. Bearing in mind the distance at which PW20 waited and the absence of a loudspeaker at the cross-erection ceremony, it is our view that PW20 cannot safely be relied upon as to what he claims to have heard the first respondent speak at that function. On the other hand the testimony of the first respondent is supported by DW2 in asserting to the effect that the first respondent spoke only in response to a request made by a Catholic Youth to have a small chapel built there and he offered to cooperate with fellow believers to fulfill that request.

Undoubtedly DW2 is a personal friend of the first respondent but in law the burden of proving the allegation is upon the petitioner. The first respondent has no obligation to disprove that allegation. The trial judge was therefore correct in finding this allegation not proved.

As to the events at Nyamanga Parish, the evidence given on the petitioner's side is that of Protas Clavery Dalo – the thirty ninth witness for the petitioner (hereinafter referred to as PW39). On the other side, evidence was given by the first respondent and DW2. PW39 told the trial High Court *inter alia:*

> ... When we got at our parish, the ceremony started with a Mass in Church. The church was full and some people stood outside. There were about 1000/2000 people. In the course of the Mass, the Archbishop preached. After that he told the faithful that accompanying was our Speaker and MP who wanted to say a few words to us. Thereafter the Honourable Msekwa was called to stand and was introduced by the Archbishop. When he greeted us, Hon. Msekwa began explaining to us a short history as to how the Catholic Church got established in Ukerewe District. After that he told us to remember him. Thereafter we continued with our Mass ceremony. By his statement that we should remember him, as it was an election period, in my view that was a prayer to vote for him. Such statement had no connection with our church ceremony...

The testimony of the first respondent and DW2 contradicts that of PW39 in material particulars in asserting that the first respondent spoke after the Mass had ended and not in the middle of the Mass ceremony. Furthermore DW2 testified that:

> According to the Catholic liturgical order, after reading the Gospel, then follows a preaching over such Bible reading by the one who conducts the Mass, but nobody else is allowed to make another speech soon after that ...

In the light of the testimony of DW2 regarding the liturgical order of the Mass ceremony, testimony which was not challenged under cross-examination, we are satisfied that PW39 was lying when he said that the first respondent was invited to speak immediately after the Archbishop had preached at the Mass. Consequently we find PW39 unreliable, and since the petitioner's allegations on this issue are denied by the other side, we are satisfied that the trial judge was correct in holding that the petitioner had failed to prove those allegations.

Next, we move to the events at Murutunguru Parish, the relevant evidence on this issue was given by Sebastian Magele Flela, the fortieth witness for the petitioner (hereinafter referred to as PW40) and by the first respondent. There is common ground that the events concerned the opening of a secondary school. PW40 testified, *inter alia*, that:

> ... After that the Archbishop introduced Hon. Msekwa, our M.P., Speaker and son, adding that we should not think that to be a campaign ...When Hon. Msekwa stood up to speak he told us that, through the Archbishop had said that was not a campaigner yet we believed that he had already *(sic)* elected as our M.P. adding that for those who did not know him he was the one leading the prayer in the National Assembly. He further added that he was the one who has made possible the opening of Murutunguru Secondary School. In my view I took that as Hon. Msekwa's endeavours to have our votes...

The testimony of the first respondent is to the effect that he was neither invited to speak nor did he speak at the opening of Murutunguru Secondary School. We have closely examined the evidence on both sides and we find it difficult to accept that the first respondent talked about his election as a Member of Parliament inspite of the clear warning by the Archbishop against campaigning at that occasion. In the light of this kind of evidence, we agree with the view of the learned trial judge that the allegation in question was not proved to the standard required by law.

As to the events at Kagunguli Parish, the relevant evidence on the petitioner's side was given by the petitioner himself and by one Stephen Anselemi, the forty first witness for the petitioner (hereinafter referred to as PW41). The first respondent gave the only evidence relevant to the events at Kagunguli Parish. After closely examining the evidence on both sides, it is apparent to us that the testimony of the petitioner and PW41 is inconsistent in material particulars. According to PW41's recollection, after the first respondent had been introduced by the Archbishop, the first respondent stated:

> My fellow Christians we are today celebrating 100 years anniversary of the Catholic Church. However, it is good that we rejoice, this Church for the first time has an MP who is also the Speaker. I have made my contribution in the Church. I have contributed TZS. 100 000 for the rehabilitation of the Church. I have contributed solar energy equipment. My brothers and sisters, I will continue to be good. Remember me as you remember the prayer "Our Father" and "Hail Mary" on the polling day.

The petitioner himself however in his testimony simply stated: A

> Before addressing the faithful the first respondent was favourably introduced by the Archbishop as their M.P., Speaker and fruit of Kagunguli Parish. At such gathering among other things the first respondent began by talking about 1995 General Elections whereby he made it known that he was one of the candidates through CCM ticket. When the people heard him say that was the year of General Elections people began murmuring "Mmm!" The first respondent was seated at the high table together with the Bishop. When one of the priests saw me he called me to such place and I also got seated at the high table but I was not as well introduced by the Archbishop as he had done for the first respondent neither did I get the opportunity to speak there. I believe such opportunity given to the first respondent by the Archbishop greatly affected my prospects as against the first respondent. B C D

It is apparent that the testimony of the petitioner differs in material particulars from that of PW41, especially about the first respondent's contribution to the rehabilitation of the church and procurement of solar energy equipment for the same church. Since the petitioner and PW41 were present when the first respondent spoke, it is inconceivable that the petitioner would not mention in his testimony the church contributions of the first respondent, if indeed they were mentioned. It seems to us that one of these two witnesses is unreliable, and since it is impossible to say which one, we are bound to agree with the trial Judge's view that the allegations concerning the events at Kagunguli were not proved to the standard required by law. E F

The third issue for consideration and decision in the case is purely a matter of law, and it is whether the first respondent was still a Member of Parliament and the Speaker of the National Assembly during the period of the election campaign. The answer to this issue is to be found in the relevant provisions of the Constitution of the United Republic of Tanzania and the Elections Act 1985. The learned trial judge, after considering the relevant law concluded in his judgment: G H

> I therefore hold that the tenure of office of an MP unless earlier terminated for any of the reasons specified under section 71(1) of the Constitution I

> ends on the day immediately before the day of commencement of the campaign period, following dissolution of Parliament. It follows, therefore, as day follows night, that during the campaign period, the first respondent was not, in law, an MP and was not therefore entitled to so introduce himself during the campaigns. He did however, so introduce himself out of a *bona fide* belief that he was, in law, still holding such office of an MP....

The relevant provisions of the Constitution and the Elections Act 1985 considered by the learned trial judge are articles 65 and 71(1) of the Constitution and section 87 of the Elections Act 1985. For purposes of completeness, the provisions of articles 84(7) and 90(4) of the Constitution ought to have been considered also.

We start with article 71(1) of the Constitution which prescribes the tenure of a Member of Parliament. Paragraph (g) has a proviso to the effect that if a member of Parliament does not cease to be such a member under the circumstances stated therein, then, if he or she does not resign or die, then he or she continues to hold office as a Member of Parliament until the time of the next General Election. Sub-paragraph (g) states in Kiswahili:

> Kwa Mbunge ambaye anatakiwa kutoa taarifa rasmi ya mali kwa mujibu wa masharti ya ibara ya 70, ikiwa atashindwa kutoa hilo tamko rasmi kwa mujibu wa masharti ya ibara ya 70 katika muda uliowekwa mahususi kwa ajili hiyo kwa mujibu wa sheria iliyotungwa na Bunge, *lakini iwapo Mbunge hatakoma kuwa Mbunge kwa mujibu wa jambo lolote kati ya mambo hayo yaliyotajwa na kama hatajiuzulu au kufariki mapema zaidi basi Mbunge ataendelea kushika madaraka yake kama Mbunge mpaka wakati wa Uchaguzi Mkuu unaofuata.*

It seems clear up to this stage that under normal circumstances, a Member of Parliament holds office until the time of the next General Election. The answer is to be found under article 65 which provides for the normal lifespan of Parliament as being five years, commencing from the date when a new Parliament is summoned to meet for the first time following a General Election, and ending on the date when

Parliament is dissolved for the purpose of holding another General Election in the normal way. That article states:

> (1) Bila ya kuathiri masharti mengineyo ya Katiba hii, maisha ya kila Bunge yatakuwa ni muda wa miaka mitano.
>
> (2) Kwa madhumuni ya Katiba hii maneno Maisha ya Bunge maana yake ni ule muda wote unaoanzia tarehe ambapo Bunge jipya limeitishwa kukutana kwa mara ya kwanza baada ya Uchaguzi mkuu na kuishia tarehe ya kuvunjwa kwa Bunge kwa ajili ya kuwezesha Uchaguzi Mkuu mwingine wa kawaida kufanyika.

On a proper interpretation of these provisions – that is articles 71(1) and 65(1) and (2), we are satisfied that a Member of Parliament under normal circumstances holds office as such a member until Parliament is dissolved to allow for new General Elections to be held. It follows therefore that during the election campaign period, which is defined under section 87 of the Elections Act 1985 as being, "...the whole of the period immediately following after dissolution of Parliament or the occurrence of a vacancy in the House declared by the Speaker by notice published in the gazette up to the day immediately preceding election day", the country does not have any members of parliament whatsoever. There was thus no Member of Parliament for Ukerewe Constituency during the election campaign period and it was wrong for the first respondent to be described or to describe himself as a Member of Parliament at the centenary religious functions of the Catholic Church. The provisions of sub-article (4) of Article 90 of the Constitution, which provide for recall of the dissolved Parliament in a period of emergency, do not change the legal position. That sub-article explicitly refers in the past tense to people who had been Members of the Parliament before its dissolution. It states *inter alia* in Kiswahili:

> ...Rais aweza kutoa Taarifa Maalum ya kuitisha Mkutano wa Bunge nakuagiza kwamba Spika na watu wote *walikuwa* Wabunge mara tu kabla Bunge halijavunjwa wahudhiria Mkutano huo wa Bunge...

We have underlined the relevant part. It is significant however that the Speaker, unlike the Members of Parliament, is not referred to in the past tense under sub-article (4). Why is the Speaker not referred to as "aliyekuwa Spika" (who was the Speaker)? We think that this is deliberate because under sub-Article (1) of Article 84, a Speaker need not be an incumbent Member of Parliament. That sub-article states: "Kutakuwa na Spika wa Bunge ambaye atachaguliwa na Wabunge kutoka miongoni mwa watu ambao ni Wabunge *au wenye sifa za kuwa Wabunge...* " we have underlined the relevant part. Furthermore under sub-article (7) of Article 84 the tenure of office of the Speaker is different from that of a Member of Parliament. This is clearly so under the provisions of paragraphs (a) to (h) of sub-Article (7) of Article 84 which states in Kiwahili:

> Spika atakoma kuwa Spika na ataacha kiti cha Spika litokeapo lolote kati ya mambo yafuatayo:
>
> (1) Iwapo mtu huyo alichaguliwa kutoka miongoni mwa Wabunge, basi ikiwa atakoma kuwa Mbunge kwa sababu yoyote ambayo haihusiki na kuvunjwa Bunge, au
>
> (2) Ikiwa kutatokea jambo lolote ambalo kama asingekuwa Spika lingemfanya mtu huyo asiwe na sifa za uchaguzi au apoteze sifa za uchaguzi wa Spika; au
>
> (3) Bunge litakapokutana kwa mara ya kwanza baada ya Uchaguzi Mkuu uliofanywa baada ya Bunge kuvunjwa, lakini masharti ya ayah ii yatatumika bila ya kuathiri masharti ya ibara ndogo ya (4) ya ibara ya 90 ya Katiba hiii; au
>
> (4) Ikiwa mtu huyo ataondolewa kwenye madaraka ya Spika kwa azimio la Bunge lililoungwa mkono na Wabunge ambao idadi yao haipungui theluthi mbili ya Wabunge wote; au
>
> (5) Ikiwa mtu huyo atashindwa kuwasilisha kwa Rais tamko kwa mujibu wa masharti ya ibara ndogo ya (3) ya ibara hii; au
>
> (6) Ikiwa mtu huyo atapatikana na hatia kwa kosa la kutoa habari za uongo, kwa kiapo kinyume cha Sheria ya Kanuni ya Jinai, kuhusu

tamko rasmi lolote lililotolewa kwa mujibu wa masharti ya ibara ndogo ya (3) ya ibara hii; au

(7) Ikiwa mtu huyo atashindwa kuwasilisha kwa Rais taarifa ya mali kwa mujibu wa masharti ya ibara ndogo ya (5) ya ibara hii kabla ya kumalizika muda uliowekwa kwa ajili hiyo kwa mujibu wa Sheria iliyotungwa na Bunge; au

(8) Ikiwa itathibitika kuwa mtuhuyo amevunja masharti ya Sheria ya Maadili ya Viongozi wa Umma.

It is apparent from the facts of this case that with the exception of the circumstances mentioned under paragraph (c), none of the other circumstances stated under paragraph (a) to (h) were applicable at the time of the election campaign. The first respondent therefore continued to be the Speaker under the Constitution until the first meeting of the new Parliament to be constituted after the General Elections. In other words, a person once elected to be a Speaker continues under normal circumstances to be the Speaker not only throughout the life of Parliament but until a new Parliament meets after General Elections. This being the legal position, we are satisfied and we find that it was correct for the first respondent to be described and to describe himself as the Speaker at the centenary religious functions which he attended during the period of the election campaign.

The fourth issue for consideration and decision is a consequence of our findings on the third issue, and it is whether the false representation made by and for the first respondent that he was a Member of Parliament affected the results. Undoubtedly, one of the principles which underlie a democratic election is that the electorate are entitled to make an informed choice of candidate and it is towards that end that the election campaign is all about. We have therefore seriously asked ourselves whether the misinformation, about the first respondent being a Member of Parliament, did affect the ability of the electorate in Ukerewe constituency to make an informed choice of the first respondent as their new Member of Parliament. We think not for two reasons. Firstly, there was no evidence adduced at the trial to suggest that the electorate

A in Ukerewe Constituency were made to believe that they had no choice but to re-elect the first respondent for another term of five years. We think that the circumstances that prevailed under the multi-party election campaign were unconducive to crystallization of such a belief.

B This is clearly reflected in the margin of victory between the first respondent and the petitioner, a margin which cannot be described as overwhelming. The second reason arises from indisputable evidence given by the first respondent himself to the effect that prior to 1995 C he had been a well known public figure in Ukerewe Constituency not only by virtue of having been a Member of Parliament for Ukerewe Constituency since 1990 but also by virtue of various public positions which he had held at various times at the national level, including D that of being a Speaker of the National Assembly, Director of National Elections from 1961 to 1970 and Vice-Chairman of the Election Commission from 1970 to 1980. The evidence also shows that he has authored many books both in Kiswahili and English. He has been E Executive Secretary of both TANU and CCM and at the time of giving his testimony, he was still Chairman of the Board of Directors of the Dodoma Capital Development Authority and Chairman of the Board of Directors of the Co-opeative College, Moshi. In short, the evidence F concerning his status may be summarized to the effect that he was at the time of the election campaign a very well known public figure. That being the position, it is highly unlikely that the misinformation in question affected the extent and manner in which the electorate G in Ukerewe Constituency knew the first respondent. What is more likely is that the electorate knew the first respondent better than they were informed during this particular election campaign period.

The fifth issue for consideration and decision before us concerns H also the election campaign of the first respondent, and it is whether the first respondent's talk at Murutunguru Teacher Training College amounted to an illegal campaign. The evidence given for the petitioner on this point, that is the testimony of Elias Chamba and Tenesi Mpanduji I (that is the fifth and sixth witnesses for the petitioner) was entirely supportive of the side for the respondent to the effect that the talk

by the first respondent was purely educational and not in any way an election campaign. It follows therefore that there is no basis for faulting the finding of the learned trial judge on this point.

The sixth issue in this case is an issue of law, and it is whether it is prohibited to conduct an election campaign outside the scheduled programme as notified to the Returning Officer in accordance with the provisions of section 51 of the Elections Act 1985. It seems to us that so far as election campaigns in public are concerned, the provisions of sub-sections (2) and (3) of section 51 cast an obligation upon the organizers of election campaigns to prepare and submit to the Returning Officer an election campaign programme specifying the times and venues of such campaigns. The underlying objective of this exercise is apparent under sub-section (4) which empowers a Returning Officer to call a meeting of all the candidates or their agents for purposes of coordinating the campaign programme of the candidates. In accordance with the spirit of these provisions, we are satisfied that it is prohibited to conduct an election campaign in public outside the programme notified to the Returning Officer. We make this finding for future guidance only since it has not been proved in this case that there was an election campaign outside the notified programme. For purposes of clarity, we need to point out that, although the provisions of sub-section (1) of section 51, concerning organizers of election campaigns, apply to all election campaigns whether in public or in private, the provisions of sub-sections (2), (3) and (4), concerning schedules of campaign programmes, apply only to election campaigns in public. They do not apply to house to house campaigns, for example.

The seventh issue is also one of law, and it concerns the duration of the election campaign period. Although there is no specific allegation of campaigning outside the prescribed period in this case, we have to address this issue because the parties in this case are uncertain about the campaign period. Section 87 of the Elections Act 1985 states:

> For purposes of the provisions of Chapter VI and Chapter VIII, the term 'campaign period' in relation to a Parliamentary Election, means, except

A for section 97, the whole period immediately following after dissolution of Parliament or the occurrence of a vacancy in the House declared by the Speaker by notice published in the Gazette up to the day immediately preceding election day.

B It is apparent that this definition under section 87 relates only to the provisions of Chapter VI (concerning election offences) and Chapter VII (concerning avoidance of elections by election petition). It must be obvious to anyone that election campaigns cannot commence C until after the process of nomination of candidates to stand for election has been completed under Parts II and III of Chapter IV of the Act. Moreover, section 46 states, *inter alia*:

D Where candidates are nominated for election in a constituency, the Commission shall, by notice published in the Gazette, appoint a day not less than sixty days and not more than ninety days after the day they have been nominated to stand as candidates for election in the constituency.

E It is apparent that the Elections Act envisages a period of not less than sixty days and not more than ninety days to elapse between nominations of candidates and the election day. It is our considered opinion that this period is for no other purpose but for what may be described as the official campaign, organized and conducted under F the provisions of section 51, which we have discussed earlier. This period is declared by the National Electoral Commission normally at the time when it appoints the election day, as it is the only body with competency to determine the conclusion of the nomination G process. The answer therefore on this issue is that the election campaign period for purposes of organizing election campaigns in accordance with section 51, is that period determined by the Electoral Commission terminating on the day preceding election day.

H The eight issue before us relates to the allegation of corrupt practice at the Bwisye election campaign rally. There is no controversy on the evidence regarding what transpired at the rally. The controversy concerns the meaning of what occurred. According to Mr Bob Makani, I learned advocate for the appellant, the conduct of the first respondent

in disclosing the existence of a fund he had established in 1993 for the construction of water wells in Ukara Ward was corruptly motivated, otherwise the First respondent would have made the disclosure before the election campaign. With due respect to Mr Makani, we agree with the submission made by Professor Msanga to the effect that the disclosure was made *bona fide*. It seems to us that the disclosure would not have been made at Bwisye had the first respondent not been challenged to tell what he had done for Ukara Ward during his incumbency as a Member of Parliament. Furthermore, we agree with the view of the learned trial judge that this fund, which was established long before the election period, is exempt from being treated as a corrupt practice by virtue of the provisions of section 97(4) of the Elections Act 1985 which states:

> (4) For the purposes of this section an act or transaction shall not be deemed to constitute bribery if it is proved to have been designed to advance the interests of community fund raising, self-help, self-reliance or social welfare projects within the constituency and to have been done before the campaign period.

The ninth issue before us concerns another allegation of corrupt practice on the part of the first respondent, and it is whether the road construction work for Nansio was corruptly speeded up during the election campaign period. The relevant evidence on the petitioner's side was given by the petitioner himself, and by one Jovinus Nakilangwa Nagabona, who was the twenty sixth witness for the petitioner, hereinafter referred to as PW.26. On the other side, the relevant evidence was given by the first respondent, one Godwin Samweli Mpinzile (the third witness for the respondent's side, hereinafter referred to as DW3) and one Deonist Kishenyi (the eight witness for the respondent's side – hereinafter referred to as SW.8). We have closely examined the evidence on both sides and it seems to us that the evidence of the first respondent, supported as it is by DW3 and DW8 is more convicting. DW3 was the resident engineer of MECCO, the company which had contracted to construct the road in question, and DW8 was the District Development Director for Ukerewe District and

responsible for making payments to MECCO. We think DW3 and DW8 were in a better position to know what happened to the Nansio road construction work than either the petitioner or PW26, who had no dealings with the road construction project. The evidence of DW3 and DW8 supports that of the first respondent in showing that there was no speeding up of the road construction work during the election campaign period. We therefore find that the allegation of corrupt practice on this point was not proved to the standard required by law.

The tenth issue for us in this case concerns the effect of the failure to notify the electorate of the change of venue for some 50 polling stations, failure to supply sufficient number of ballot papers and failure to post specimen ballot papers at polling stations within the prescribed period. In dealing with this issue, the learned trial judge stated, *inter alia:*

> ... I do not find them substantial and to have affected the results of the election. I have come to such conclusion upon being satisfied that the petitioner has failed to establish with some precision or certainty as to how many electors at each of the polling stations alleged to have been issued with notices of change of polling stations, together with specimen ballot papers, outside the prescribed period were prevented to exercise their right to vote on account of such non-compliance complained of. For apart from the evidence of polling agents, none of the victims, the electors concerned, has been called to testify before this court. In fact, except for three polling agents, none of the other polling agents raised any complaint in the prescribed complaint forms they were supposed to register such complaint but instead have endorsed satisfaction with the conduct of elections at their respective polling stations. And while PW15, PW16 and PW27, had the temerity to tell the court that each had filled complaint form CF7 about the alleged shortages, the complaint forms they filled (Exhibits D7K D7 (i) and D7 respectively) have proved them false. They are all shown to have endorsed their satisfaction with the conduct of the election at their respective polling stations. Neither is there any complaint Form C.F. 4, filled by any of the voters who might have been so prevented to vote

on account of shortage of ballot papers. As it has been pointed out earlier the essence of complaint here is not that there were shortages of ballot papers, rather that there were persons of an ascertainable number entitled to vote who, having turned up at a polling station to vote, were prevented from exercising such right by any of the alleged non-compliances and or irregularities. This, in my view, has not been proved at all. Most of the polling agents having signed the complaint forms, their respective polling stations, endorsing that they were satisfied with the conduct of the elections, they cannot now in terms of sections 100(1) and 101 of the Evidence Act 1976, be heard to come out with new stories to the contrary.

Mr Bob Makani has complained about certain aspects of the views of the learned trial judge. The first complaint relates to the view that the petitioner had to prove a definite number of voters as being prevented by the non-compliances from exercising their right to vote. Mr Makani submits that it is impossible to call all the people who did not vote to give evidence in court. While we agree with Mr makani to a certain extent, we do not think that the learned trial judge meant that there was need to prove with mathematical certainty the number of voters who had been prevented from voting by the non-compliances. What the learned trial judge meant is that there are always people who fail to turn at polling stations for their own reasons and there was need for cogent evidence to exclude such people in the estimate of voters who could have been affected by the non-compliances. Such evidence could be obtained by contacting some registered voters, who did not vote, to find out why they, and others whom they knew, did not vote. Such evidence could provide proof beyond reasonable doubt concerning the number of voters affected. This is the kind of evidence which the learned trial judge had in mind and he rightly found it lacking.

We have asked ourselves whether it would have made any difference if there was cogent evidence to enable the court to make a reasonable estimate of the number of voters prevented from voting by the non-compliance. According to the precedents decided under the one party electoral system, in which only two candidates sponsored by the

same party contested a parliamentary seat, it was considered appropriate to consider the margin of victory between the two contesting candidates, and to pose the question whether the results would be different if the estimated votes were given to the losing candidate. If the answer was in the affirmative, the election results would be held to be affected. See the cases of *Ngweshemi v. Attorny General* (1) and *Bura v. Sarwat* (2). We are of the considered opinion that the rule in these cases decided by the High Court, permitting adjustment of votes in favour of the losing candidate, is no longer good law under the newly adopted multi-party electoral system, where more than two candidates, sponsored by more than one political party, do contest elections. We think the correct approach under the multi-party system is to make a *pro rata* apportionment of the estimated votes between the contesting candidates. If the outcome of such exercise eliminates or considerably reduce the margin of victory, the court may, in our view, hold that the election result is affected.

The other complaint by Mr Makani relates to the views of the learned trial judge in respect of the status of the various forms prescribed for recording complaints in the electoral process, such as CF7 and CF4. We think there is merit in Mr Makani's complaint. The learned trial judge's view is more clearly expressed in another part of his judgement that:

> Where such prescribed complaint form is signed by both the pesiding officer on one hand and the polling agent or the candidate, on the other, the form so signed constitutes a written agreement between the Electoral Commission and the candidate, on the contents of such complaint form. And where any party entitled to so register a complaint about the conduct of election is made aware of the existence of such complaint forms but deliberately ignores to register his complaint in the prescribed forms at the relevant stage of the electoral process, he does so at his own peril as that would be violation of the law, and his complaints would rightly betaken to have been an afterthought or frame-up complaints. For such provisions under the Elections Act, do, clearly fall under the provisions of section 100(1) and section 101 of the Evidence Act 1967 at amended....

These views of the learned trial judge to the effect that the prescribed complaints forms, once utilized by the persons concerned, constituted a contract, the contents of which could not be contradicted by oral evidence, is with respect, a clear misdirection on the law. The correct legal position is that the prescribed forms are intended to serve only as material for testing the credibility of complaints made in respect of the electoral process. This means that the evidence of a witness who could have recorded his or her complaint in a prescribed form but fails to do so would not be relied upon unless he or she explains the failure to record the complaint at the appropriate stage of the electoral process.

This misdirection however does not detract from the main finding of the learned trial judge to the effect that the petitioner had failed to prove to the standard required by law that there were voters who were prevented from voting by the non-compliances in question.

In the final analysis therefore there is no ground upon which this appeal can succeed and we are bound to dismiss it in its entirety with costs, and we order accordingly.

JUMANNE RAJABU *alias* NGALAMGONGO AND ANOTHER *v.* REPUBLIC

HIGH COURT OF TANZANIA
AT TABORA

(Mchome, J.)

CRIMINAL APPEALS Nos. 195 AND 249 OF 1991

(From the decision of the District Court of Tabora District, at Tabora, GW Mirumbe, Esq, RM, in Criminal Case No. 36 of 1990)

Criminal Practice and Procedure – Judges Rules – Statement of accused before the Police – Failure to comply with Judges Rules – Effect of non-compliance.