IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
MISCELLANEOUS CIVIL APPLICATION NO 98 of 2010

In the matter of Election Petition under the National Elections Act (Cap. 343) and the National Elections (Election Petitions) Rules, GN No. 447 of 2010

FRED TUNGU MPENDAZOE **PETITIONER**

VS.

1. THE ATTORNEY GENERAL **1ST RESPONDENT**

2. DR. MILTON MAKONGORO MAHANGA... **2ND RESPONDENT**

3. THE RETURNING OFFICER, SEGEREA CONSTITUENCY... **3RD RESPONDENT**

JUDGMENT

Date of last Order: 05/04/2012
Date of Judgment: 02/05/2012

JUMA, J.:

The National Electoral Commission (hereinafter referred to as the Commission) specified 31st October 2010 as the Election Day. This was the day when the Presidential, Parliamentary and Councillors' elections were held in Tanzania. A total of eleven candidates contested the Segerea Constituency seat. Mr. Fred Tungu Mpendazoe (the Petitioner) also contested the same election for Member of Parliament for Segerea constituency as a *Chama Cha Demokrasia na Maendeleo*

(*Chadema*) candidate. Mr. Mpendazoe obtained a total of 39,639 votes. Dr. Milton Makongoro Mahanga (the 2nd respondent) was sponsored by *Chama Cha Mapinduzi* (CCM) to contest the Segerea Parliamentary seat. Dr. Mahanga obtained a total of 43,839 votes and was on early morning of 3rd November 2010 declared by the Returning Officer (3rd Respondent) as the Member of Parliament for Segerea constituency.

The electoral map of Segerea Constituency during the 2010 General Elections had a total of 749 polling stations, which were spread out in eight (8) administrative Wards of- Segerea Ward, Kipawa Ward, Kimanga Ward, Tabata Ward, Kiwalani Ward, Buguruni Ward, Kinyerezi Ward and Vingunguti Ward. The Returning Officer was assisted by two categories of Assistant Returning Officers. The two Assistant Returning Officers who were based in each administrative Ward of the Constituency constituted the first category. I shall hereinafter refer to these Assistant Returning Officers at the Wards as **AROs-Ward**. The second category was the Assistant Returning Officers at constituency level (hereinafter referred to as **AROs-Constituency**). AROs-Constituency were each assigned to specific administrative Wards to coordinated, and they additionally assisted the Returning Officer at Segerea Constituency headquarters at Arnautoglu Hall.

By an Amended Petition he filed on 17 December 2010, Mr. Mpendazoe (the Petitioner) challenged the outcome of the Segerea Constituency election. Mr. Mpendazoe alleges that the

election results which the Returning Officer for Segerea Constituency (3rd Respondent) declared on 3rd November 2010, were fundamentally flawed. The Petitioner claims that votes' figures were incorrect; vote tallying, counting and results declaration process was fraught irregularities. All these, according to the Petitioner amounted to non-compliance with not only the provisions of the **National Elections Act Cap 343** (hereinafter referred to as the Act), but were also not in compliance with the Directives which the Commission had issued. The Petitioner also claims that the principles of free, transparent and fair elections were not complied with. The Petitioner made the Attorney General his 1st respondent because Rule 6-(1) of the **National Elections (Election Petitions) Rules, GN No. 447 of 2010** (hereinafter referred to as the Election Petition Rules) prescribes that in every petition the Attorney-General shall be made a party to the petition as the respondent.

The Petitioner gave several examples of incidents of non-compliance with the electoral law. The Petitioner claims that the Returning Officer declared the results without taking into account the results from 120 polling stations in Kiwalani Ward and another 129 results from polling stations in Vingunguti Ward. Late distribution and lack of prescribed forms for recording of polling station results (**hereinafter referred to as Forms No. 21B**) are other examples of non-compliance with the law the Petitioner pleaded. The Petitioner alleges that late distribution and lack of Form No. 21B prevented vote tallying

to be conducted in respect of results from 120 polling stations in Kiwalani Ward and another 129 polling stations from Vingunguti Ward. The Petitioner pleaded that the problem of lack of Forms No. 21B was so acute that polling station results had to be recorded in ordinary sheets of papers. Petitioner believes that writing of Parliamentary election results on sheets of ordinary papers instead of using the prescribed **Forms No. 21B** raised the spectre of distortions and rigging of Parliamentary election.

The Petitioner supported his allegation of lack of Forms No. 21B by annexing two ordinary pieces of paper **(annexure FM-2)** to Paragraph 7.5 of the Amended Petition which his own polling agents had to use to enter results because of lack of **Forms No. 21B**. I should point out here that these pieces of papers **(annexure FM-2)** mentioned in Paragraph 7.5 were never exhibited by the Petitioner as his documentary evidence.

The Petitioner has included the arrest of Ms Imelda Kafanabo amongst the examples of incidents of non-compliance with the law governing elections in Tanzania. According to paragraph 7.6 of the Amended Petition, Ms Kafanabo was arrested for possessing fake and doctored **Forms No. 21B**. She was allegedly charged at the Central Police Station Dar es Salaam. In the same paragraph 7.6, the Petitioner also made reference to a copy of a video tape recording which he claims that it shows the arrest, initial questioning and subsequent hand-over of Ms Imelda Kafanabo to the Central Police Station. I should pause and point out that

although the Petitioner shows that he had annexed the video recording of the incident as **Annexture FM-3** to his petition, the Petitioner neither annexed the video tape recording nor did he exhibit it later as his documentary evidence.

In his Amended Petition, the petitioner also revisited an incident which was allegedly captured in yet another video tape recording where an individual was arrested at Arnautoglu for unlawful possession of **Forms No. 21B** as well as Commission official stamps. Although this video recording was shown as **Annexture FM-4** to the petition, it was neither annexed by the Petitioner nor was it exhibited by the Petitioner as his documentary evidence.

Petitioner has also laid his claim over possible tampering with ballot boxes. The Petitioner alleges that Buguruni Ward Ballot Boxes No. **15134**, **151305**, **151083**, **15144**, **15109**, **15129**, **151302** had no seals, and this incident of non-compliance with the law affected the integrity of votes and the integrity of the final results which the Returning Officer declared.

Petitioner also claims that he and candidates sponsored by two other political parties, the *Civic United Front* (hereinafter referred to as *CUF*) and *Sauti ya Umma* (hereinafter referred to as *SAU*) who were also contesting the Segerea Parliamentary seat raised their verbal objections that the Returning Officer should not declare results without first taking into account the missing polling station results **Forms No. 21B** from Vingunguti, Buguruni and Kiwalani Wards. According to the

Petitioner, the Returning Officer ignored their objections, refused to allow them to lodge formal complaints and went ahead and declared the results.Page 6 of 79

The Petitioner believes that the final results which the Returning Officer declared and his own chances to win the election were adversely affected by all these flaws, irregularities and non-compliances. The petitioner illustrated his belief that he ought to have been declared the winner by referring to his polling agents' tally of votes projecting that he had obtained **56,962** votes against the Dr. Mahanga's **44,904** votes. The petitioner would like this court to avoid the election of Dr. Mahanga as Member of Parliament for Segerea Constituency and to either order a by-election or in the alternative this court should be pleased to declare him, Fred Tungu Mpendazoe as a lawfully elected Member of Parliament for Segerea Constituency.

In their respective replies to the Amended Petition, all three respondents pleaded that the claim by the petitioner seeking the avoidance of the election results of the Segerea Constituency has no basis. As far as the respondents are concerned, the Parliamentary election results which saw Dr. Mahanga being elected was conducted in compliance with the Act, Regulations and Directives of the Commission.

This petition was heard in open court at Dar es Salaam as required by Rule 15 (2) of the **Election Petition Rules**. The Petitioner was represented by Mr. Peter Kibatala, learned

Advocate. The Attorney General and the Returning Officer for Segerea Constituency (1st and 3rd Respondents) were represented by Mr. David Zacharia Kakwaya, the learned Senior State Attorney; assisted by Mr. Seth Mkemwa, the learned Senior State Attorney. Two learned Advocates, Mr. Jerome Msemwa, assisted by Mr. Aliko Mwamanenge represented the Dr. Mahanga (2nd Respondent). In support of his Amended Petition, the Petitioner called a total of thirteen witnesses. A total of fifteen witnesses including the 3rd respondent testified for the 1st and 3rd respondents. Dr. Milton Makongoro Mahanga testified on his own behalf. This Judgment has greatly been enriched by the industry and commitment shown by the five learned Counsel. I am similarly indebted to the very detailed written submissions which these learned Counsel filed on 19th April 2012 to support their respective positions.

The following eleven issues were agreed upon by the learned Counsel and endorsed by this court:

1. *Whether the exercise of votes counting, addition of votes and announcing of election results for Segerea Constituency were respectively conducted in accordance with the law, regulations and directives set forth by the law;*
2. *Whether the entire election exercise in Segerea Constituency was free, fair and in line with the law regulating general elections;*
3. *Whether, with respect to 120 polling stations in Kiwalani Ward and 129 polling stations in Vingunguti Ward; the tallying of votes and the use of polling station election results form number 21B complied with the law;*

4. *Whether the election results for a Member of Parliament for Segerea were declared by the Returning Officer without taking into account polling results for 120 polling stations in Kiwalani Ward and 129 polling stations in Vingunguti Ward;*
5. *Whether Imelda Kafanabo, the Tabata Ward Executive Officer responsible for Tabata Ward, was apprehended whilst in possession of fake and doctored election results form number 21B, subsequent to which she was charged at Dar es Salaam Central Police Station;*
6. *Whether an individual was arrested at Arnautoglu Vote Counting and Results Declaration Station for unlawful possession of election results Forms number 21B, NEC Official stamps, and subsequent to which he was questioned and charged by the police;*
7. *Whether ballot boxes number* ***15134***, ***151305***, ***151083***, ***15144***, ***15109***, ***15129*** *and* ***151303*** *were found without seals thereby affecting the integrity of votes therein;*
8. *Whether the petitioner's polling agents and other candidates of CUF and SAU political parties requested but were denied election official forms to lodge their complaints over the missing votes from Vingunguti, Buguruni and Kiwalani Wards;*
9. *If the answer to issues 1 to 8 or any one of the issues is in affirmative, whether it amounts to non-compliance within the meaning ascribed by the Act, and if so, whether these non-compliances affected the results of election;*
10. *Whether the Petitioner had a majority of votes as alleged in paragraph 9 of the Amended Petition;*
11. *Which candidate, on the basis of valid votes, was entitled to be declared a Member of Parliament for Segerea Constituency?*

It is perhaps pertinent to begin by expressing my full agreement with the five learned Counsel who prefaced their

respective written submissions by identifying some of the salient principles of law which they suggest should guide this court when determining this election petition. Mr. Zacharia Kakwaya and Seth Mkemwa have submitted that this court should bear in mind that election petitions emanate from election processes. It is through elections where the citizens express their choice of their leaders. Courts have a duty to respect the choice which the citizens have made through free and fair elections.

Another salient principle is the recognition that election petitions are no ordinary suits. Mr. Jerome Msemwa and Mr. Aliko Mwamanenge the learned Counsel representing Dr. Mahanga agree with the two learned State Attorneys in submitting that election petitions are not ordinary suits. Election petitions should not be taken lightly since they are disputes of great public importance with economic, financial and social ramifications to the constituents and the Tanzania at large. The four learned Counsel for respondents also submitted on the duty of the petitioner to prove the alleged incidences of non-compliances to the satisfaction of the court. This satisfaction of the court has been interpreted in several Court of Appeal decisions to mean proving the alleged non-compliances beyond reasonable doubt.

As urged by the Learned Counsel, I shall seek the guidance of salient principles of law as set forth by Constitution, the Act, and the general principles governing the conduct of elections in Tanzania which this court and the

Court of Appeal of Tanzania, have articulated through a number of case law. The first guiding principle which the five leaned Counsel are all in agreement with, arises from the essence of our Republican Constitution of United Republic of Tanzania. In any Republic, it is the citizens through regular elections who elect their President, their Members of Parliament and their Councilors. The role of this court comes into prominent play to ensure that the will of the people is properly expressed through the procedure prescribed by the Constitution, the Act and its Regulations. The Act has through section 108 specify when High Court can avoid an election of a duly elected Member of Parliament. An election petition filed under section 108 of the Act is the only avenue through which a petitioner may come to court and seek to avoid an election of a Member of Parliament. Section 108 states:

> *108.-(1) Pursuant to the limitation imposed by sub-article (7) of Article 41 of the Constitution, the provisions of this section shall apply only in relation to the election of a candidate as a Member of Parliament.*
>
> *(2) The election of a candidate as a Member of Parliament shall be declared void only on an election petition if the following grounds is proved to the satisfaction of the High Court and on no other ground, namely-*
>
> *(a) that, during the election campaign, statements were made by the candidate, or on his behalf and with his knowledge and consent or approval, with intent to exploit tribal, racial or religious issues or differences pertinent to the election or relating to*

any of the candidates, or, where the candidates are not of the same sex, with intent to exploit such difference;

(b)-non-compliance with the provisions of this Act relating to election, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election.

(c) that the candidate was at that time of his election, a person not qualified for election as a Member of Parliament.

An important principle arising from section 108 of the Act is to the effect that the grounds for overturning the election of a Member of Parliament are not open ended. That is, the choice of the citizens as expressed in an election cannot be overturned by courts that easily. Section 108 of the Act provides the circumstances where an election petition court may be petitioned to overturn the choice of a Member of Parliament which citizens expressed in an election. It is therefore important for this Court at the very outset, to situate and specify under which of the paragraphs of subsection (2) of section 108 of the Act Mr. Mpendazoe (the Petitioner) has grounded his present petition.

It is clear from its pleadings, this petition is not grounded on any complaints arising from election campaigns. This petition is also not concerned with complaints over any statements exploiting tribal, racial or religious issues or differences envisaged under paragraph (a) of subsection (2).

This present petition does not have any complaint that at the time of his election as a Member of Parliament for Segerea Constituency, Dr. Mahanga was not qualified for election as a Member of Parliament. This present petition seeks to avoid the election of Dr. Mahanga through the avenue that is provided by paragraph (b) under subsection (2) of section 108 alleging that there was non-compliance with the provisions of this Act, its Regulations and Principles relating to election:

> *108.- (2) (b)-non-compliance with the provisions of this Act relating to election, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election.*

Having situated this petition under section 108 (2) (b) of the Act, it is important to set out what is expected of a petitioner who grounds his petition on the issue of non-compliance with the Act. The law under section 108 (2) (b) of the Act requires the petitioner who pegs his grounds of complaint on non-compliances to show to the satisfaction of this court two things. First, he must satisfy this Court that the election was not conducted in accordance with the Act, Regulations and any Directives issued under the Act. Secondly, the Petitioner must show such non-compliance affected the result of the election of Dr. Mahanga as a Member of Parliament. It seems to me that the law in Tanzania through section 108 (2) (b) of the Act recognizes the fact that no electoral system in the world is 100 percent perfect for there

are certain incidents of non-compliance which do not necessarily lead to the avoidance of an election of a Member of Parliament if in the final analysis the election petition court is satisfied that the incidents of non-compliance which the petitioner has proved, did not in fact affect the result of the election. The words ***"such non-compliance affected the result of the election"*** in section 108 (2) (b) of the Act recognizes that no election can be conducted without some minor incidents of non-compliance with the law. What is important is the electoral process to substantially conform to the Act, Regulations and directives issued by the Commission. Since Mr. Mpendazoe has based his petition on section 108 (2) (b) of the Act, he must prove both that there were non-compliances and also the effect of such non-compliances on the election result that was declared by the Returning Officer on 3rd November 2010.

Section 108 (2) (b) of the Act which the Petitioner has based his petition also underscores the principle that the burden of proof in election petitions lies on the petitioner to prove to the satisfaction of this court that there those incidents of non-compliance and also that these non-compliances affected the results of the election. The Court of Appeal of Tanzania sitting at Mwanza in **Manju Salum Msambya vs. The Attorney General and Kifu Gulamhussein Kifu, Civil Appeal Number 2 of 2002**, has described this burden of proof on the shoulder of the petitioner to be a heavy one:

> *".....the burden of proof placed on a petitioner is a heavy one: he is required to prove his allegations to the satisfaction of the court, which has been interpreted as proof beyond reasonable doubt...."-* ***page 3***

Similar sentiments on heavy burden placed on the Petitioner was expressed in the case of **Lutter Symphorian Nelson vs. AG and Ibrahim Said Msabaha [2002] TLR. 419** where the Court of Appeal restated that the burden is heavy on him who assails an election which has been concluded. Such a Petitioner must prove his case beyond reasonable doubt. The Court of Appeal in **Manju Salum Msambya vs. The Attorney General and Kifu Gulamhussein Kifu (supra)** underscored the legal principle that the choice the citizens have made on who should be their member of Parliament should not be overturned by courts so easily. The Court of Appeal reasoned why the law should place such a heavy burden on the petitioner:

> *".....The reason for putting the standard that high is not far to seek. An election is the exercise of a constitutional right and the fulfilment of an obligation by the citizenry. It is perhaps the only occasion when the people are enabled directly to participate in running the affairs of their country. The courts, therefore, have a duty to respect the people's conscience and not to interfere in their choice except in the most compelling circumstances."-* ***page 4.***

In my evaluation of evidence on record I shall always bear in mind the settled principles of law that I have outlined.

Third Issue:

Having set forth some of the salient legal principles which shall guide my evaluation of evidence that was presented by both sides, I will now begin with the third issue, which revolves around paragraph **7.5** of the amended petition. The petitioner has through this paragraph made two distinct claims. The first claim centres on alleged lack of election results **Forms No. 21B** in the 249 polling stations of Kiwalani and Vingunguti. The second claim revolves around the complaint that the tallying (addition) of votes in 120 polling stations in Kiwalani Ward and in 129 polling stations in Vingunguti Ward did not comply with the law. I will restrict myself to the lack of election results Forms **21B**. I will address the complaint over complaint tallying (addition) of votes in 120 polling stations in Kiwalani Ward and in 129 polling stations in Vingunguti Ward when dealing with the fourth issue.

In the pleading which gave rise to the third issue, the petitioner claims that in the whole of 120 Kiwalani Ward Polling Stations and the whole of the 129 Vingunguti Ward Polling Stations did not conduct votes tallying at the voting stations because there was a lack of NEC election results **Forms No. 21B** which made Petitioner's polling agents to write polling station results on ordinary pieces of paper.

There is no doubt in my mind that lack of election materials in 249 polling stations of Vingunguti and Kiwalani if proved, has the potential to substantially interfere with the correct choice by voters of their Member of Parliament. By

alleging lack of election results **Forms No. 21B** the petitioner implied that polling stations in 249 polling stations of Kiwalani and Vingunguti Wards were not sufficiently prepared for the voting and counting of votes on the Election Day. To appreciate the seriousness of this allegation one only needs to look at mandatory provisions of the law directing the distribution of election materials to polling stations should be done well before voting begins, and the recording of parliamentary polling station results in prescribed **Forms No. 21B**. Mr. Mpendazoe the petitioner (PW1) told this court that he was informed through his network of polling agents and Ward Coordinator that Election Results **Forms No. 21B** were brought late. This occasioned delay, forcing his polling agents had to fill yellow forms (of disputes) instead of prescribed election results **Form No. 21B**.

It is significant to note that Mr. Mpendazoe has in his evidence conceded that the basis of this claim over lack of **Forms No. 21B** is information he received from his network of polling agents and coordinating agents who were stationed in the two Wards of Kiwalani and Vingunguti. The Court of Appeal of Tanzania sitting at Mwanza in the case of **Manju Salum Msambya vs. The Attorney General and Kifu Gulamhussein Kifu, (supra)** has furnished guidance on role of a petitioner testifying in his support of his own election petition:-

> *".. A petitioner in an election petition merely introduces his case; he states the grounds upon*

*which his case is based and calls his witnesses to prove those grounds. He is not required to name his sources of information in advance and to specify the nature of their evidence, for to do so would be engaging in hearsay."- **page 8**.*

From this guidance of the Court of Appeal in the above-cited case of **Manju Salum Msambya**, after the Petitioner had introduced his claim over the lack of election results **Forms No. 21B** in the 249 polling stations in the two Wards of Kiwalani and Vingunguti; this court should expect his witnesses to testify and prove these claims to the prescribed standard of proof. Witnesses who were brought by the 1st and 3rd respondents vehemently denied the allegation that there was lack of election results **Forms No. 21B** at Kiwalani and Vingunguti Wards. Yunus Cleophas Ndado (RW1) was an **ARO-Ward** responsible for Kiwalani Ward during the 2010 General Elections. There were no such shortages of election results **Forms No. 21B** at Kiwalani, according to Mr. Ndado. And if there were any such shortages, he added then the polling agents would have filled Complaint Forms No. 14 and 16.

To show that there were no such shortages; Mr. Ndado elaborated how he collected election materials before the Election Day. Mr. Ndado related how on 29th October 2010 he and other election officials were summoned by the Returning Officer to go to a warehouse at an area he described as "Karume". It took them the whole morning of 30th October 2010 to collect the election materials from that warehouse. The Returning Officer handed over ballot boxes, rubber stamps,

election results, and other forms like Forms No. 14 and Forms No. 16.

The evidence of Mr. Ndado with regard to election materials was supported in material particulars by the evidence of Charles Mang'ombo Kimario (RW2). Mr. Kimario testified how as a Presiding Officer he attended pre-election seminars where he was reminded of his duty to take care of his Polling Stations and polling materials. Mr. Kimario testified that he took up his assignment on the night of 30th October 2010 when took his consignment of three ballot boxes, Forms, envelopes, lamps, rubber stamps and other election materials.

Mr. Ndado and Mr. Kimario made no mention about shortages of election results **Forms No. 21B** in the 249 polling stations of Kiwalani. These two witnesses were similarly never cross examined on the lack of election materials at Kiwalani.

Protas Paul Tarimo (RW5) was as an **ARO-Ward** of Vingunguti Ward. On 29th October 2010 Mr. Tarimo received a call from Returning Officer inviting him and other **AROs-Wards** to go to the warehouse to collect the election materials for polling stations in his Vingunguti Ward. Each **ARO-Ward** verified if all their equipment were all in order. Transporting of election materials began on the morning of 30th October 2010 to take materials from the warehouse to the office of the Ward Executive Officer and then from 03.00 a.m. (31st October 2010) transporting of materials to polling stations begun.

On Election Day Mr. Tarimo visited all polling stations. No polling station reported any shortage of election materials. The

only concession Mr. Tarimo made during cross examination was that distribution of election materials went on till dawn of the Election Day (31st October 2010). He further conceded that it was true that the Act directs the distribution of materials should be made one day before Election Day.

Evelyn Mgonja (RW 9) was a Presiding Officer of Kombo A2 Polling Station in Vingunguti Ward. According to Ms Mgonja (RW 9), she not only gave all the polling agents at Kombo A2 Polling Station their respective copies of election results forms number 21B, but she also posted a copy of the results outside her polling station.

The Learned State Attorneys are with due respect correct in pointing out that the Petitioner did not exhibit the ordinary sheets of paper **(Annexture FM-2)** wherein his polling agents were forced to record polling station results because of lack of election **Forms No. 21B**. The Petitioner brought no polling agents to testify on shortages of election materials in any of the polling stations in Kiwalani and Vingunguti Wards. The evidence of articulate Gervas Barandaje (PW2) is not helpful in so far as proof of lack of election results **Forms No. 21B** in Kiwalani and Vingunguti Wards is concerned. Mr. Barandaje (PW2) was not a polling agent at any polling station. The evidence of Mr. Ndado (RW1), Mr. Kimario (RW2) and Ms Evelyn Mgonja suggesting adequate voting materials for both Kiwalani and Vingunguti Wards' polling stations was not contradicted by the witnesses who testified on behalf of the Petitioner.

Although Mr. Barandaje (PW2) described himself as the Chief Coordinator of CHADEMA's polling agents and as a vote-tallying coordinator at Kiwalani Ward; in my opinion, only the polling agents at polling stations, or presiding officers in Kiwalani and Vingunguti who are better placed to testify on lack of election results **Forms No. 21B**.

Jackson Adam Ndahani (PW3) described himself as an alternate agent of Chadema at Kiwalani. Mr. Ndahani (PW3) acted as a polling agent for brief spell of less than two hours at Kilagila B Polling station. If indeed the election results **Forms No. 21B** were missing at Kilagila B, at very least Mr. Ndahani (PW 3) would have mentioned it in his evidence. He did not.

It is also important to note in my evaluation that the claim by the Petitioner that there were shortage of election results **Forms No. 21B** in Kiwalani and Vingunguti Polling Stations was not supported by James Haule (PW11) who like the petitioner also contested the Segerea Parliamentary seat on the TLP ticket. In his examination in chief, Mr. Haule (PW11) testified that visited polling stations during the Election Day and he also had polling agents at polling stations who updated him on regular basis what transpired at polling stations. According to Mr. Haule, after the counting of votes, election results **Forms No. 21B** were posted on the notice boards outside each polling station. In my opinion, if in fact polling station results **Forms No. 21B** were posted at notice boards, the question of shortage of these forms should not have been raised by the Petitioner.

Edwin Mwakatobe (PW13) was a *Chadema* counting agent. He was stationed at Arnautoglu where the addition of polling station results for Presidential and Parliamentary was carried out. From his vantage position, Mr. Mwakatabe was best placed to testify whether Chadema's polling agents give him their copies of election results **Forms No 21B**. But upon his cross examination by Mr. Kakwaya, Mr. Mwakatobe candidly told this court that he did not receive any information from polling agents complaining about lack of election results **Form No. 21B**.

I cannot but agree with the submissions of the Learned State Attorneys contending that the petitioner has brought no evidence satisfying this court that there were shortages of election materials including election results **Forms No. 21B** at any of the polling stations of Kiwalani and Vingunguti Wards.

I should also say a few words on question whether election results of a polling station in Tanzania can be proved by tendering ordinary pieces of paper like **Annexture FM-2** as an alternative to election results **Forms No. 21B. Forms No. 21B** have been prescribed by Regulation 60 (1) of the **Elections (Presidential and Parliamentary Elections) Regulations, 2010 GN No. 279 of 2010** (hereinafter described as **Elections Regulations**). Regulation 60 states:

> *60.-(1) The Presiding officer at the polling station shall, after counting all votes under this regulation, record election results for the polling station in respect of Presidential election and Parliamentary election in*

Forms Nos. 21A and 21B as set out in the First Schedule to these Regulations, respectively.

The Act and the above cited Regulations has an in-built system of recording important electoral stages in prescribed Forms. These forms are invariably completed, signed and affirmed by primary witnesses to various electoral stages. Election Results **Forms No. 21** has been prescribed by the Act as primary evidence on the state of facts stated in that form. This means, for Parliamentary election, **Form No. 21B** provides the best evidence regarding the results of a polling stations, names of candidates in that election, total number of voters registered at that polling station, total number of voters who actually turned up to vote, total number of valid votes and total number of rejected votes. I cannot but express my deep surprise why the Petitioner did not at very least bring his own polling agents from Kiwalani and Vingunguti to specifically testify on what has been claimed under Paragraph 7.5 of the Amended Petition. Presiding officers, polling assistants, and polling agents of political parties are best placed persons to testify on what actually happened inside the polling stations and highlight the alleged shortage of election results forms **No. 21B**. The Forms prescribed by the Act and its Regulations embody the 'best evidence' rule - that best evidence ought to be placed before this Court to prove a fact.

The petitioner has clearly failed to shake the evidence of Mr. Ndado (RW1) and Mr. Kimario (RW2) (**AROs-Wards** for Kiwalani and Vingunguti respectively) who testified how they

received their voting materials from a warehouse at Karume. The evidence of these two witnesses in my opinion preponderates over the tenuous evidence of the Petitioner complaining over shortages of election results Form No. 21B in Kiwalani and Vingunguti Wards. The Court of Appeal on an occasion provided in the case of **Lutter Symphorian Nelson vs. AG & Ibrahim Said Msabaha [2002] TLR. 419** stated that the burden is heavy on him who assails an election which has been concluded. The petitioner must prove his case beyond reasonable doubt.

With regard to the third issue, my conclusion is that the Petitioner has not satisfied this court that there were the alleged lack of polling station results **Forms No. 21B** at Kiwalani and Vingunguti Wards to constitute a non-compliance with the Act.

Fourth Issue:

Having disposed of the third issue, let me now turn my attention to the fourth issue which relates to the question as to whether or not the election results for a Member of Parliament for Segerea were declared by the Returning Officer without taking into account polling results from 120 polling stations in Kiwalani Ward and another 129 in Vingunguti Ward. While dealing with the third issue I left the determination of the question whether the tallying of votes in the 120 polling stations in Kiwalani Ward and 129 polling stations in Vingunguti Ward complied with the law be determined together

with this fourth issue. The Petitioner; in paragraph 7.3 of his Amended Petition, has correctly observed that the law requires that election results should include all the votes from each and every polling station from each and every Ward. Through paragraph 7.4 of the Amended Petition, the Petitioner claims that contrary to what the law requires, the Returning Officer declared the results without including results from 120 polling stations that were in Kiwalani Ward and another 129 polling stations that were in Vingunguti Ward.

In their evidence, the witnesses who were brought by the Petitioner told this court that there was non-compliance with the procedure for tallying of polling station results both at the Kiwalani and Vingunguti Wards and also at the Constituency headquarters at Arnautoglu Hall. The witnesses who testified on behalf of the first and third respondents insisted that no tallying or addition of election results from polling stations took place at the Wards before these additions/tallies were forwarded to the constituency headquarters at Arnautoglu Hall.

Mr. Mpendazoe (PW1) testified that the tallying of votes from polling stations situated in the Kiwalani Ward was supervised by AROs-Ward and in presence of his counting agent who was based at the Ward Executive Officer's Office (WEO) at Kiwalani. Mr. Mpendazoe testified that with regard to the polling stations' results from Vingunguti, this tallying exercise was initially supposed to be at Vingunguti Primary School but was later transferred to the office of the Ward

Executive Officer. The Petitioner believes that after the tallying of the polling station results at the level of the Wards, the next step was, to decide on disputed votes after discussions amongst the agents and election officials.

According to Mr. Mpendazoe, it is after the completion of tallying at the Ward when the constituency polling station results are to be forwarded to the constituency-tallying level. Mr. Mpendazoe also testified that the interests of transparency demanded that candidates' polling agents should accompany ballot boxes and polling station results that had been tallied at Ward level to the Constituency-addition station. In his evidence Mr. Mpendazoe believed that the problems which faced the addition of polling station results at the Kiwalani Ward tallying centre which prevented the **AROs-Ward** from carrying out the addition of all the 120 polling stations results of Kiwalani Ward. These problems were disturbances by polling assistants who were agitating over unpaid allowances. This, according to the petitioner weakened the supervision of the addition of polling station results. The petitioner in other words would like this court to find that the disturbances over allowances created so much confusion that twenty-three election results **Forms No. 21B** could not be traced and addition of votes at Kiwalani Ward could not be done.

When asked by David Kakwaya to identify polling stations whose results were missing Mr. Mpendazoe could only state that he saw no need to memorize the names of the polling stations whose results **Forms No. 21B** were missing.

Mr. Gervas Barandaje (PW2) was the Chief Coordinator of *Chadema*'s polling agents in Kiwalani Ward. It was Mr. Barandaje who received the *Chadema* polling agents' copies of election results **Forms No. 21A, 21B** and **21C** from 120 polling stations. Mr. Barandaje in turn forwarded these copies of polling station results to Mr. Mwakatobe at Constituency headquarters. Mr. Barandaje also testified on dispute over allowance which took place when polling station results were being forwarded to the Ward headquarters. He described it all as a misunderstanding between the polling assistants and **ARO-Ward** over allowances which affected the addition of results at the Ward headquarters. Mr. Barandaje also testified on how the **ARO-Ward** (Kiwalani Ward) found that election results **Forms No. 21A, No. 21B**, and **No. 21C** from twenty-three polling stations were missing when the process of tallying was about to start. It was until 16:00 hrs on 2nd November, 2010 when the **ARO-Ward** managed to get 16 of the 23 polling stations results which were missing. In other words 7 polling stations' results remained missing.

In so far as results from polling stations of Vingunguti Ward are concerned, Mr. Mpendazoe regards as a non-compliance with the law the decision to move the tallying centre from Vingunguti Primary School to office of the Ward Executive Officer. And there was the complaint by the petitioner and his witnesses that at the office of the Ward Executive where they moved to, tallying could not proceed because nine election polling station results forms number

21B were missing. Mr. Mpendazoe told this court that he did not know how the Returning Officer obtained the missing polling stations' results which he included in the final total Constituency Election Results Form Number 24B.

The version evidence of Mr. Mpendazoe is supported by Bazil Ng'oholope (PW4). Mr. Ng'oholope was a Chadema Councillor Election Candidate who contested the Vingunguti Ward's Councillor Election. Mr. Ng'oholope claims that tallying of parliamentary votes was suspended when they arrived at the office of the Ward Executive Officer because the Returning Officer discovered some election results forms from polling stations were missing. Because the problem of the missing results had not been solved by 2nd November 2010, Mr. Ng'oholope testified that the **ARO-Ward** contacted the Returning Officer who directed them all to go to Arnautoglu Hall where the final decision would be made. According to Mr. Ng'oholope, they did not identify the name of the nine polling stations whose results were missing at the Vingunguti Ward tallying. It is the evidence of Mr. Ng'oholope that all the 129 polling stations results from Vingunguti polling stations were not added in total constituency results.

Evidence on behalf of the Petitioner suggesting that the addition of Parliamentary election results took place at Ward headquarters was disputed by the witnesses who testified on behalf of respondents. Protas Paul Tarimo (RW 5) was as an **ARO-Ward** of Vingunguti Ward during the 2010 General Elections. Mr. Tarimo insisted that he took to Arnautoglu a

total of 129 Parliamentary Election Results **Forms No. 21B** from Vingunguti Ward. A total of 128 of these forms were originals and one was a photocopy Mr. Tarimo made from agents' copy he obtained from Mr. Gerald Shayo.

Mr. Tarimo explained the administrative role of the **AROs-Wards** stationed at the Wards was merely to assemble of election materials and polling station results before forwarding these to the Returning Officer at Constituency Headquarters. According to Mr. Tarimo, by 22:00 p.m. and before 23:00 p.m. on the Election Day all materials and election results forms from far off polling stations of Vingunguti Ward had been brought by the Presiding Officers to the assembling point at Vingunguti Primary School.

Expounding the scope of the administrative role of **AROs-Ward** responsible for Vingunguti Ward, Mr. Tarimo testified that the next role of Assistant Returning Officers (Wards) after assembling of election materials was to receive Election Results Forms Numbers 21A, 21B and 21C from the Presiding Officers. This role began from 03.00 a.m. till few minutes 5 a.m. of 1st November 2010. Mr. Tarimo and his team took some time off to rest till 08:00 a.m. of 1st November 2010 when he and other officers arranged Election Results **Forms No. 21A** and **21B** from all the 129 polling stations in Vingunguti Ward. It was after the arrangement of the election results forms No. 21B when Mr. Tarimo realized that there were only 128 election results **Forms No. 21B** instead of 129 forms. He took the list of polling stations and discovered that the missing election

result **Form No. 21B** was from Zahanati polling station. There were several polling stations under the names Zahanati **As**, Zahanati **Bs** etc. Election result form from Zahanati A2 Polling Station was missing. From his list, Mr. Tarimo found the Presiding Officer of Zahanati A2 Polling Station was Ms. Josephine Hassan.

Mr. Tarimo phoned Ms. Josephine Hassan. Ms. Josephine Hassan explained that she had handed over the election results form and that Mr. Tarimo had signed to have received this form. Mr. Tarimo decided to contact the Returning Officer over the missing **Form No. 21B**. According to Mr. Tarimo, it was Mr. Gerald Shayo (a Chadema Counting Agent) who gave him polling agent's copy of the missing election result **Form No. 21B** of Zahanati **A2** polling station. Gerald Shayo prepared a photocopy which Mr. Tarimo compared and verified Mr. Gerald Shayo's copy with a photocopy he had made out of that agents' copy. After verifying that the two documents compared, Mr. Tarimo used that photocopy results form from Zahanati A2 Polling Station as 129th polling station results from polling stations situated in Vingunguti Ward. Mr. Tarimo insisted that he took to Arnautoglu a total of 129 Parliamentary Election Results Forms from Vingunguti Ward. According to Mr. Tarimo, a total of 128 of these forms were originals and one was a photocopy he made from agents' copy he obtained from Gerald Shayo.

In their submissions, the Learned State Attorneys urged this court to look at the evidence of Mr. Mpendazoe claiming

that twenty-three (23) election results **Forms 21B** were missing in Kiwalani Ward and another nine (9) results **Forms 21B** which were missing from Vingunguti Ward. The Learned State Attorneys submitted on the discrepancy on the count from Mr. Haule (PW11) the TLP Parliamentary candidate who testified that more than 20 election results **Form No. 21B** were missing at Kiwalani and 11 from Vingunguti Ward. And under cross examination, Mr. Haule testified that 12 election results **Forms No. 21B** were missing from Vingunguti. Of more significance to the State Attorneys' submission was that none of the witnesses who testified for the petitioner could identify the names of polling stations whose **Forms 21B** were missing.

In his submissions, Mr. Kibatala urged this court to find that the witnesses who testified on behalf of the petitioner proved to the satisfaction of this court that no tallying of Forms No. 21B (Parliamentary results for Segerea Constituency) were carried out.

From evidence and submissions by the learned Counsel it seems to me that there are two versions of evidence. One version is one advocated by the petitioner and his witnesses contending that addition or tallying of polling station results was not properly concluded at tallying centres at Vingunguti and Kiwalani because of missing election **Forms No. 21B** and other interferences on electoral process. The first version further contends that the addition of election results at Constituency headquarters did not include results from Kiwalani and Vingunguti Wards.

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The second version of evidence is advocated by Mr. Ndado and Mr. Tarimo the AROs-Wards responsible for polling stations in the two Wards of Kiwalani and Vingunguti respectively. The two witnesses suggest that no tallying or addition of parliamentary results was scheduled to take place at the Wards' headquarters. They contended that addition of polling station results took place at Constituency Headquarters (Arnautoglu Hall) and their role at their respective Wards was merely to assemble the Parliamentary and Presidential results together with election materials like ballot boxes and to forward these to the Returning Officer at constituency addition hall.

Tallying or addition of parliamentary results from polling stations is a distinct electoral process which is not left to the discretion of election officials. It, therefore, goes without saying that only the law can prescribe what electoral activity takes place at the Ward headquarters and also what electoral activities take place at the Constituency headquarters. Tallying or addition of polling station results is an electoral process that is governed by specific statutory provision. I am obviously anxious to determine the provision of the Act which the Petitioner and his witnesses have relied to contend that the process of addition was supposed to take place at the Wards and that this process was not completed at the Wards as law directs.

It is therefore prudent to find out first what the law says about where and how the addition of Parliamentary results

from polling stations takes place. I can state without fear of contradiction that in Tanzania, Parliamentary results from polling stations as reflected in Election Results **Forms No. 21B**, constitute the statutory basis of final election results which the Returning Officer ascertains and declares under section 81 of the Act. I propose to look into the provisions of the Act to determine at what stage addition of **Forms 21B** takes place and who are supposed to be present at that stage.

In terms of sections 79A, 80 and 81 of the Act, Parliamentary election results **Forms No. 21B** pass through four stages from the moment the presiding officers conclude the counting of votes at polling stations to the moment when the Returning Officer declares the results under section 81. The four main stages leading towards the declaration of parliamentary election results are specifically provided for by section 80 (3) of the Act:

> *(3) After all the reports of the results and ballot boxes containing ballot papers relating to the Parliamentary election have been received from the polling stations in the constituency, the Returning Officer shall, after determining the validity of any disputed votes and before the addition of the votes, announce aloud the results of each polling station in the constituency seriatim.*

In terms of the above-cited provision, receiving by the Returning Officer at constituency headquarters of all **Forms No. 21B** and ballot boxes containing ballot papers relating to the Parliamentary election is the first stage leading to the declaration of the results. This is the stage where the

Returning Officer ascertains that Parliamentary election results **Forms No. 21B** and ballot boxes from all the 749 polling stations of Segerea have been received at constituency headquarters at Arnautoglu. The plain meaning of the word *"ascertains"* in my opinion implies that it is the Returning Officer and not the AROs-Wards who at this stage bears the ultimate responsibility to find out whether there any polling station results from any polling station that are missing. The Returning Officer may receive these results and ballot boxes either in person or through his **AROs-Constituency**.

The second stage is for the Returning Officer to determine the validity of disputed votes if any. The third stage towards the declaration of results is to announce aloud the election results (**Forms No. 21B**) of each polling station in the constituency seriatim i.e. "one polling station after another as in series." The law through subsection (3) of section 80 obliges the Returning Officer to cause the loud announcement of the result of each polling station in series.

The fourth stage is the addition, getting the final totals of election results of all polling stations in the constituency and the filling of Form 24B. Addition can be simultaneously done together with loud pronouncements of the results. The Returning Officer, his AROs-Constituency, candidates and their counting agents are all allowed under section 80 (2) of the Act, to be present at determination of the validity of disputed votes, loud announcements of polling station results seriatim and the addition of votes.

In my understanding, the four stages of ascertainment of the Parliamentary results, determination of the validity of disputed votes, loud announcements of polling station results seriatim and addition of the results are clearly designed to take place at Constituency headquarters. In my opinion the activities of **AROs-Ward** performed at the Wards were to all intents and purposes performed on behalf of the Returning Officer of the Constituency. While it is possible for the **AROs-Wards** to ascertain that no election results **Form No. 21B** is missing from any polling station in his administrative Ward, this ascertainment is nothing but part of the duties of the **AROs-Ward** performed on behalf of the Returning Officer who bears the ultimate responsibility over any missing results rests on the Returning Officer.

Evidence of Herick Aza Foya (RW 13) and Samwel Bubegwa (RW14) confirm the position of the law that ascertainment of any missing results and addition of Parliamentary polling station results were done at Constituency headquarters level but not at the headquarters of the administrative Wards. Mr. Foya was an **ARO-Constituency** of Segerea who also coordinated the two Wards of Segerea and Kimanga to alongside **AROs-Ward** responsible for these two Wards of Segerea Constituency. Mr. Foya confirmed that addition of Parliamentary polling station results took place at Arnautoglu Hall but not at the administrative headquarters of the Wards as alleged by the Petitioner.

The failure of the Petitioner to specifically identify the names of the polling stations whose election results Forms No. 21B were missing confirms that no Parliamentary polling station results was announced loudly seriatim at the Wards Headquarters. Had the addition of Parliamentary election results from polling stations been carried out at the headquarters of a Ward, the Petitioners would have identified the missing polling station results at the time of seriatim announcement of every polling station's results.

I am prepared also to find that the Segerea Constituency headquarter at Arnautoglu Hall was the only place where all Parliamentary results from all polling stations could be ascertained to determine whether any polling station result was missing for inclusion into final results. The disturbances by Polling Assistants who were agitating over unpaid allowances had nothing to do with addition of Parliamentary results which by the terms of section 80 (3) of the Act takes place at Constituency headquarters. The Petitioner has not established to the satisfaction of this Court that the disturbances over allowances affected the Parliamentary results from polling stations. And this court cannot question the merit of the decision of the **ARO-Ward** responsible for Vingunguti Ward to move the tallying centre of Councilor election results Forms No. 21C from Vingunguti Primary School to the office of the Ward Executive Officer.

Having reached the conclusion that the addition of Parliamentary results Forms No. 21B can only take place at

constituency headquarters in terms of section 80 (3) of the Act; there are remaining two inter-related questions I should address my attention to under the fourth issue.

The first question is whether the Returning Officer declared the Parliamentary results of Segerea Constituency under section 81 of the Act without including 120 polling station results from Kiwalani Ward and another 129 polling station results from Vingunguti Ward. The second question is whether the Petitioner and his counting agent- Mr. Edwin Mwakatobe (PW13) exercised their statutory right to be present at important statutory stages of determination of the validity of disputed votes, loud announcements of polling station results seriatim and at the addition of votes taking place at Arnautoglu Hall.

Mr. Fred Mpendazoe testified how around 23.30 p.m. of 2nd November 2010 he returned back to Arnautoglu Hall from the Central Police Station and he found the addition of Parliamentary results already underway. He went looking up for the Returning Officer. According to Mr. Mpendazoe, around midnight the Returning Officer told him that they should get ready for declaration of results. This information surprised him because Mr. Mpendazoe believed that the results from polling stations of Kiwalani Ward had just arrived. Mr. Mpendazoe gave his own reasons why he thought that the Returning Officer failed to comply with four stages towards declaration of results shown under section 80 (3) of the Act. According to Mr. Mpendazoe the Returning Officer did not report to the

candidates on any incidents that had occurred and did not resolve the issue of disputed votes. Mr. Mpendazoe claimed that polling station results from 749 polling stations were not read aloud seriatim.

Mr. Mpendazoe' allegations were supported by Mr. James Haule (PW11) who like Mpendazoe, was a Parliamentary candidate sponsored by the TLP. Mr. Haule claimed that results from Kiwalani and Vingunguti were not added in the final results because he was at the addition round table and he witnessed what happened step by step. During cross examination by Mr. Kakwaya, Mr. Haule insisted that he was present when the results and ballot boxes from Vingunguti arrived at Arnautoglu at 22:00 on 2nd November 2010. Mr. Haule claimed that he witnessed the ballot boxes arriving without election results forms.

Edwin Mwakatobe (PW13) a *Chadema* counting agent stationed at Arnautoglu testified that the ballot boxes from Kiwalani arrived at Arnautoglu at around 22:00 p.m. on 2nd November 2010. According to Mr. Mwakatobe, when the ballot boxes from Vingunguti arrived at 22:00 Mr. Mpendazoe was also present. Mr. Mwakatobe and Mr. Mpendazoe after consulting agreed that Mr. Mwakatobe should attend the addition of Councilor election results scheduled to take place at Arnautoglu. Mr. Mwakatobe was present during the addition of the Kiwalani Ward Councilor election results at Arnautoglu. Mr. Mwakatobe further testified that Parliamentary election results forms from Kiwalani polling stations were missing.

According to Mr. Mwakatobe the addition of councilors votes begun at Arnautoglu around 23:00 p.m. The CCM agent was also in attendance during that addition. Mr. Mwakatobe alleged that all polling station results from Segerea Constituency were not added at all to reach the results that were declared by the Returning Officer.

On respondents' side, Ndado (RW1) testified that Parliamentary election results forms from polling stations of Kiwalani arrived at Arnautoglu some around 20:00 p.m. on 2nd November 2010 where he was met by one Erasto Njooka. Mr. Ndado handed the Parliamentary election results Forms No. 21B to Mr. Bernard Kisayi. Mr. Ndado insisted that Parliamentary election results **Forms No. 21B** were all duly handed over to the Returning Officer at Arnautoglu and these results were included in the final election results. Election Results Forms from Kiwalani were admitted as **EXHIBIT D1**.

Mr. Ndado (RW1) also explained what made the addition and declaration of Councillors election results from Kiwalani to be carried out at Arnautoglu but not at Kiwalani Ward headquarters. According to Mr. Ndado, there was a large group of people who had gathered around WEO's office at Kiwalani before the declaration of Councillor Election results. There were two big groups of people; each was demanding that its candidates had won Councillors election. After Mr. Ndado had consulted the Returning Officer, a decision was made to move to Arnautoglu Hall to complete the tallying of Councillors Election results.

Dr. Mahanga (RW16) confirmed that the addition of Parliamentary results from the 749 polling stations in Segerea Constituency took place at Arnautoglu Hall. Dr. Mahanga testified that he exercised his right as a candidate and attended the addition of parliamentary results at Arnautoglu Hall. Dr. Mahanga testified that he had earlier arrived at Arnautoglu at 15:00 on 2nd November 2010 and found many people already present. Mr. Ubaya Chuma his agent had already been there for two days. Dr. Mahanga testified that all candidates had been invited to witness the addition of polling station results. And that it was around 21:00 p.m. on 2nd November 2010 when the Returning Officer came out to invite Dr. Mahanga and others. Once inside the addition hall, Dr. Mahanga and his agent (Mr. Ubaya Chuma) found the agent of CUF, the AROs-Constituency already seated at round table. All present, including the Returning Officer were introduced. According to Dr. Mahanga the Mr. Mpendazoe (the Petitioner) and his agent were not at the addition table. Dr. Mahanga told this court that the addition of polling station results for Ilala Constituency and Ukonga Constituency also took place at different round table in the same hall with Segerea Constituency.

In his evidence, Dr. Mahanga further explained how the addition was conducted by the AROs-Constituency taking turns to read loudly polling stations seriatim with those at the roundtable witnessing. The long addition exercise went up to around 2 a.m. of 3rd November 2010 when all the 749 polling

stations were covered. Dr. Mahanga claimed that he was in the addition hall from the beginning to the end. Dr. Mahanga believes that what the facts shown **Form No. 24B** are the final total results for Parliamentary election which his agent signed. The CUF agent, who was present, did not sign this **Form No. 24B**. After signing, the Returning Officer asked all present to go out to declare results.

Gabriel Fuime (RW 15) was the Returning Officer for three constituencies of Ilala, Ukonga and Segerea all in Ilala Municipality. Directly working under him were a total of five **AROs-Constituency** for each of the three constituencies of Ilala, Segerea and Ukonga. Mr. Fuime was basically an overall coordinator of all election matters in Segerea Constituency. Mr. Fuime testified that all Parliamentary candidates were notified beforehand through letters about the designation of Arnautoglu as place where addition of Parliamentary polling station election results would take place.

Further, Mr. Fuime explained that before the addition of Parliamentary election results for Segerea Constituency began at 21:00 on 2nd November 2010, he went out of the addition Hall to invite the candidate and agents to come in. Mr. Fuime found *CUF*, *CCM* and *Chadema* candidates and agents. In the words of Mr. Fuime, *Chadema* people refused to participate in the addition of results. Fred Mpendazoe had a team of six or seven people who asked Mr. Fuime to stop the addition. Following their refusal, regulations allowed him to proceed with the addition, which he did. The *CCM* Candidate

(Makongoro Mahanga) and his agent, and an agent of *CUF* entered the addition Hall. Mr. Fuime testified that all those present in the addition room introduced themselves. The AROs-Constituency present were Ms Christina Changwala, Mashauri Msimu, Samwel Bubegwa (RW14), Herrick Foya (RW13) and Barnabas Kisayi. Under cross examination Mr. Fuime maintained that he personally went out to invite Mr. Mpendazoe.

In my evaluation of evidence from both sides, I shall always bear in mind that respondents have at least tendered **Exhibit D1** (Kiwalani Ward's polling station results) and **Exhibit D2** (Vingunguti Ward's polling station results) as their documentary evidence. The burden is heavy on the Petitioner to satisfy this court that **Exhibits D1** and **D2** were not added to the election results which the Returning Officer declared. It seems to me that the witnesses who testified on behalf of the respondents have maintained that Parliamentary election results for Segerea Constituency included results from all the polling stations of Kiwalani Ward and Vingunguti Ward.

James Haule (PW11) claimed that results from Kiwalani and Vingunguti were not added in the final results because he was at the addition round table and he witnessed what happened step by step. Mr. Haule has unfortunately failed to elaborate what is included in his words "step by step". The Returning Officer and his **AROs-Constituency** gave a more detailed account on what was done including the invitation of Mr. Mpendazoe to attend and how he declined that invitation.

Mr. Haule's account is also different from the evidence of Mr. Mwakatobe (PW13) who testified that ballot boxes from Vingunguti arrived at Arnautoglu around 13:00 on 2nd November 2010 whereas Mr. Haule claims that the materials arrived much later at 22:00 p.m. Under cross examination by Mr. Kakwaya Mr. Haule conceded that he was told by others about the information on the missing election results **Forms No. 21B** from Kiwalani and Vingunguti.

I will not regard as credible the evidence of Mr. Haule that the salient stages leading to the declaration of the results were not complied with. He was simply not present at the round-table where addition of Parliamentary results from all polling station of Segerea Constituency was taking place.

It is not clear to this court why Mr. Mwakatobe chose to attend the addition of Kiwalani Councillor Election results in another room at Arnautoglu instead of taking his place as a counting agent at the round table where the addition of Parliamentary results was taking place. According to Mr. Mwakatobe, he and Mr. Mpendazoe after consulting agreed that Mr. Mwakatobe should attend the addition of Councillor Election results scheduled to take place at Arnautoglu. In his own evidence, Mr. Edwin Mwakatobe was clearly not at the parliamentary addition round table. He was busy with the addition of the Kiwalani Councillor Election results which was also taking place at Arnautoglu.

According to Mr. Mwakatobe the addition of Kiwalani Councillor Results began at 23:00 p.m. This was the time

when the addition of Parliamentary election results was already well under way in the absence of Mr. Mpendazoe's counting agent. The decision to concentrate on addition of Councillors Election results was a big miscalculation which a constituency-level counting agent can make. Mr. Mwakatobe should have been at the addition Hall where the result of each polling station in constituency was being announced aloud seriatim. The claim by Mr. Mwakatobe that Parliamentary results from Polling Stations were not added at all is not borne out by his own evidence.

Again, the decision of Mr. Mpendazoe to leave the precincts of Arnautoglu Hall where addition of Parliamentary results was taking place to pursue another incident involving Ms Imelda Kafanabo was in my opinion another great miscalculation. In his own evidence, Mr. Mpendazoe concedes that he returned back at Arnautoglu from the Central Police station around 23.30 p.m. Assuming that the addition of polling station results began at around 21:00 and Mr. Mpendazoe returned at 23:30 p.m., in two and half hour he was absent those at the round-table must have covered a large number of polling stations' results. It is plausible to suppose that upon his return he realized that the addition of Parliamentary results was well in advance and he could not reverse back the process to accommodate the period he was away at the Central Police Station.

From the foregoing, the Petitioner and his counting agent have not to the satisfaction of this Court shown that they were

present at the addition round-table to be able to rebut the presumption that the statutory election results forms from 749 polling stations in Segerea Constituency were not added at the round-table before the Returning Officer declared the results.

Similarly the absence of Mr. Mpendazoe and Mr. Mwakatobe at the addition round-table means that their claim that the salient stages leading to the declaration of the results were not complied with by the Returning Officer has not been proved to the satisfaction of this Court.

In the upshot, I will answer the fourth issue for my determination, by expressing my satisfaction that election results for a Member of Parliament for Segerea were declared in compliance with the law after the Returning Officer had carried out the addition of all the 749 polling station results including results for the 120 polling stations in Kiwalani Ward and 129 polling stations in Vingunguti Ward.

Fifth Issue:

The fifth issue which we need to deal with is whether Imelda Kafanabo, the Tabata Ward Executive Officer responsible for Tabata Ward, was apprehended whilst in possession of fake and doctored election results **Form No. 21B** and what impact this incident had on the election and the results. According to the pleading, Ms Kafanabo was apprehended, subsequent to which she was charged at Dar es Salaam Central Police Station. In so far as evidence surrounding the complaint against Ms Kafanabo is concerned,

Mr. Mpendazoe testified in chief that at around 22.45 p.m. of 2nd November, 2010 he went out of Arnautoglu Hall and saw a policeman who told him that Ms Kafanabo had been found with Election Results Forms in a plastic bag (Rambo) and she was under police guard. According to Mr. Mpendazoe, the policeman showed him the plastic bag containing election results **Forms No. 21A** and **21B** from Tabata JICA polling Station. The policeman allegedly asked Mr. Mpendazoe to accompany the accused and three police officers to the police station. Mr. Mpendazoe travelled in a Police defender car. According to Mr. Mpendazoe the Ms Kafanabo was detained by the police. Mpendazoe asked to write a statement but the officer on duty told him to wait for his senior officer. Later, the police told Mr. Mpendazoe that the police were only concerned with the security during electoral process. Election matters were not police matters but for the Commission to handle.

Under cross examination by Mr. Msemwa, Mr. Mpendazoe maintained that it is up to the police to explain how the police ultimately dealt with the arrest of Ms Kafanabo. During his re-examination by Mr. Kibatala, Mr. Mpendazoe stated that his allegation about Imelda is with regard to being found with "election forms." The essence of Mr. Mpendazoe's claim is Ms Kafanabo being found with "forms" which she was not supposed to have.

Ms Christina Kefa Kanani who testified as PW 5 was an Election Observer accredited by the Commission. She observed the 2010 General Election in Ilala Constituency under the

auspices of an NGO going by the name *Leadership Forum.* Ms Kanani could not witness the incident of Imelda Kafanabo which had occurred between 22:00 p.m. and 23:00 p.m. because she was prevailed upon by the police to remain inside. When she later ventured out, she talked to a group of six people who told her that a woman had earlier been apprehended carrying election materials. Ms Kanani relayed this second hand information to both the *Legal and Human Rights Centre* (hereinafter referred to in its acronym *LHRC*) and to her own director of her own NGO, the *Leadership Forum.* According to Ms Kanani, she included this incident in her report to the *LHRC* who in turn included this incident in their final Election Observation Report to the Commission.

Mr. Azuri Mwambagi (PW8) also testified on the incident of Ms Kafanabo. Mr. Mwambagi stood as a Chadema candidate in Councillors Election for Segerea Ward which he won. According to Mr. Mwambagi, the election Results Form with which Ms Kafanabo was carrying was white in colour. Mr. Mwambagi was sure that it was an election results Form No. 21B for Parliamentary elections from JICA polling station. But, during cross examination by Mr. Msemwa, Mr. Mwambagi claims that he actually read the forms and they were for parliamentary election. Later during the course of his re-examination Mr. Mwambagi changed his story and claimed that Election Result Form from JICA polling station was read out aloud by the police.

Mr. Edwin Mwakatobe (PW 13) testified on how he learnt about the arrest of Imelda Kafanabo around 22:00 on 2nd November 2010. It was Mr. Mpendazoe who told him that a Ward Executive Officer of Tabata (Ms Kafanabo) had been arrested outside. Under cross examination by Mr. Msemwa, Mr. Mwakatobe conceded that he did not see the incident of Imelda Kafanabo when Mpendazoe called him outside, and the incident occurred outside the gate.

For the respondents, Ms Imelda Peter Kafanabo (RW7) stated that she participated in the 2010 General Election as one of the two **AROs-Ward** posted at Tabata Ward which had 91 polling stations. Mr. Munuo was the other **ARO-Ward** at Tabata Ward. After completing the addition and declaration of the Councillor Election results from the 91 polling stations of Tabata Ward, Ms Kafanabo and her team left Tabata Ward and arrived at Arnautoglu Hall at 11:00 a.m. They took to Arnautoglu Hall the Election Results **Forms No. 21A** (Presidential results) and **21B** (Parliamentary results) from Tabata Ward. After handing over **Forms No. 21A** and **21B** Ms Kafanabo left for home. She returned back at Arnautoglu around 16:30 p.m. It was later around 18:00 when Ms Kafanabo was told that Councillors Results **Form No. 24C** from her Tabata Ward was missing. She sent a driver with a fellow **ARO-Ward** back to Tabata Ward Executive Officer's office to retrieve Form No. 24C from one of the office cabinets.

According to Ms Kafanabo, the missing Councillors Results **Form No. 24C** was located and brought to Arnautoglu for

scanning. It was after the driver had handed her Form No. 21C when the crowd outside the Arnautoglu gate set upon her accusing her that she was about to fabricate the results.

Ms Kafanabo's version of evidence was supported by the Returning Officer-Mr. Gabriel Fuime (RW15). Mr. Fuime explained that Ms Kafanabo had forgotten to bring Councillors Election Result **Form No. 24C** when she handed over other forms and election materials from her Tabata ward. **Form No. 24C** was supposed to been scanned and sent to the Commission. When Ms Kafanabo later returned to Arnautoglu with this missing **Form No. 24C**; the crowd of people outside thought that she wanted to take some forged results into the hall where election results were being added.

On this claim levelled against Ms Kafanabo, the learned State Attorneys submitted that in Paragraph 7.6 of the Amended Petition the Petitioner accuses Ms Kafanabo that she was apprehended in possession of fake and doctored election results forms **(Form No. 21B)** but in his evidence, Mr. Mpendazoe testified added Presidential election result **Forms No. 21A**. Learned State Attorneys submitted that this addition of **Form No. 21A** in the claim, amount to canvassing matters that were not pleaded. It was also submitted that the Petitioner brought no evidence to show that Ms Kafanabo was subsequently charged before any court of law. The learned State Attorneys urged this court accept the explanation which Ms Kafanabo offered that she was carrying Councillor Election Results **Form No. 21C**, which was needed for scanning.

Before evaluating evidence from both sides, I should perhaps first point out that an allegation that an **ARO-Ward** was in possession of a forged or fake election results **Forms No. 21B** is a very serious allegation of misconduct. The law, through sections 89A, 89B and 89C of the Act takes a very serious view against misconduct committed by election officers. Section 89C defines these election officers as including the Regional Election Coordinator, Returning Officer, AROs-Ward, AROs-Constituency, Presiding Officer and Polling Assistant. If proved to the satisfaction of this court, misconduct like tampering with election results forms can lead to certification to the Attorney General that an election officer concerned has mishandled an electoral process within the meaning ascribed by section 89A (2) and (3) of the Act which state:

> *"(2)- Where in an election petition the Court determines that an election officer has done or omitted to do anything in relation to the election process which amounts to mishandling the election process, it shall certify such determination to the Attorney General.*
>
> *(3) Where a prosecution is commenced for an offence under this section, a certificate issued under subsection (2) of this section shall be conclusive proof of what is contained therein."*

Similarly, section 89B leaves the Government with an option to recover any loss, costs or damages it incurred as a result of misconduct by an election officer:

89B. Notwithstanding the provisions of section 89A, the provisions of the Public (Recovery of Debts) Act, shall apply mutatis mutandis to an election officer who occasions the Government to incur loss, costs or damages as a result of his acts or omission in relation to the election process.

Where a pleading in an election petition accuses an election officer of misconduct during an electoral process; the pleading Petitioner must prove the alleged misconduct beyond reasonable doubt. There is another settled principle of law that it is not enough to allege that an incident has been reported to police. The burden is on the Petitioner to substantiate the allegation by offering probative evidence beyond reporting the incident to Police. With regard to the incident of Ms Kafanabo, the Act requires the Petitioner to show to the satisfaction of this court two things. First, that the incident of Ms Kafanabo was a non-compliance with any provisions of the Act, or Regulations or any principles provided under the Act. Secondly, how such non-compliance affected the results that led to the election of the Dr. Mahanga as a Member of Parliament.

Both this Court and the Court of Appeal have emphasized this burden of proof which the law of Tanzania has imposed on a Petitioner who relies on the ground of non-compliance with the Act. Mussa, J. in **Choya Anatory Kasazi vs. 1. Kashemeza Phares Kabuye, 2. The Attorney General, Misc. Civil Cause No. 10 of 2005 at Biharamulo (Bukoba Registry)** restated this duty:

"...It seems to me that on each case where the issue of non-compliance with the provisions of the Act is raised, such non-compliance must be shown to have reference to the results of the election."- page 27.

According to Mussa, J., this position was restated by the Court of Appeal of Tanzania in **1. Attorney General, 2. Radio Tanzania Dar es Salaam, 3. Azim Suleman Premji vs. Dr. Aman Walid Kabourou, Civil Appeal Nos 32 and 42 of 1994 at Dar es Salaam** where the Court of Appeal stated:

"...Not every non-compliance which affects the results of an election necessarily makes an election unfree and unfair. A case in point is where a significant number of unregistered persons are allowed to vote in an election but not for any particular candidate.... A non-compliance of this nature may affect the results but does not necessarily make the election unfree and unfair."- ***page 23.***

Although Mr. Mpendazoe indicated in his petition that he had included as his Annexure **FM-3** and **FM-4** the video recorded discs showing Ms Kafanabo being arrested, interrogated and handed over to the Police, he neither in fact annexed the documents nor did he tender these documents as his exhibits. So much so, the Learned State Attorneys on behalf of the 1st and 3rd Respondents employed Order XI Rule 13 of **CPC** to seek an inspection of documents which the Petitioner referred to in Paragraphs 7.6 and 7.7 of the Amended Petition. By 31st October 2011 the Petitioner had received this request for inspection of video recording discs.

The Petitioner neither granted the inspection of the video recordings nor did he comply with Regulation 18 of the **Election Petition Rules** requiring parties to file their documents before the first date set for hearing of this petition, which was 2nd March 2012.

As submitted by the learned State Attorneys, Mr. Mpendazoe has in Paragraph 7.6 of his Amended Petition employed the words ***fake and doctored election results forms (Forms No 21B), and subsequently being charged at Central Police Station.*** Apart from allegations, there is no probative evidence proving how the forms found on Ms Kafanabo were doctored or faked for purposes of the Parliamentary election results. There is evidence on record that by the 2nd November 2010 the crowd outside Arnautoglu was agitated, suspicious, and was anxiously waiting for declaration of results. Rumours fly high in such a tense and agitated environment outside the gates of Arnautoglu hall. I therefore find it hard to believe that under the prevailing tense and suspicious environment, the police officers could be so accommodating as to allow Mr. Mpendazoe the chance to see the contents of the plastic bag containing election results **Forms No. 21A** and **21B** (For Presidential and Parliamentary Elections) from Tabata JICA polling Station.

It is also incredible to believe that the police would extend such liberty to Mr. Azuri Mwambagi (PW8) as to read aloud the contents of election results forms. I do not similarly agree that the police would read aloud the contents of the election results

forms to an agitated and restless crowd. Mr. Azuri Mwambagi changed his version of the events on several occasions. At one point in his evidence in chief he suggested that he actually read the forms which Ms Kafanabo had. A moment later, Mr. Mwambagi changed his version to claim that it was the police who read out the contents of the Forms.

Ms Kanani (PW5), an election observer was only informed later about the incident. Ms Kanani went further to concede under cross examination that all what she testified in this court is contained in her report to the *LHRC* which she did not tender as documentary evidence. And if this court reads that report it would know the truth of what she was testifying on. This report was not tendered as evidence. The evidence of Ms Kanani and that of Mr. Edwin Mwakatobe (Mr. Mpendazoe's counting agent) have no probative value inasmuch as both offered hearsay evidence based on what other persons told them. There is also no evidence to even indicate how the papers which Ms Kafanabo had affected the results of Segerea Parliamentary election.

In so far as the fifth issue for my determination is concerned, the Petitioner has failed to prove the allegation under Paragraph 7.6 his Amended Petition. The Petitioner has failed to prove not only the alleged arrest of Ms Kafanabo whilst in possession of fake and doctored election results **Form No. 21B**, but also failed to prove that the alleged possession of the forms which Ms Kafanabo had, was non-compliance with any effect on the Parliamentary results.

Sixth Issue:

The sixth issue for my determination is grounded under paragraph 7.7 of the Amended Petition wherein the Petitioner alleges that an individual was arrested at Arnautoglu Vote Counting and Results Declaration Station. This individual the claim goes; was in unlawful possession of election results **Forms No. 21B** and official stamps of the Commission. According to the pleading, this individual subsequent to his arrest was charged by the police. The Petitioner claims that the dramatic incident was caught on video record and the petitioner indicated that he had annexed to Paragraph 7.7 of his Amended Petition a copy of the video recorded arrest as **Annexure FM-4.** It is appropriate to point out here that this video recording which the petitioner indicated to have been annexed as Annexure **FM-4** was neither so annexed nor was it exhibited as evidence.

During his cross examination by Mr. Msemwa, Mr. Mpendazoe (PW1) told this court that he did not know the name of the individual he mentions in Paragraph 7.7 of the Amended Petition, but promised to bring witnesses to confirm that incident. Among these witnesses Mr. Mpendazoe brought to prove this allegation was Ms Kanani (PW5) the Election Observer. Ms Kanani readily conceded that she was not an eye witness to the arrest of this individual. She only heard about it from other people.

Livingston Nyaligere Rugema (PW6) also testified on the arrest of an individual caught with election rubber stamps. Mr. Rugema, a Chadema agent for Councillor Election at Segerea Ward gave his own eye-witness account of the arrest of the individual. Mr. Rugema testified that on 2nd November 2010 he was outside the Arnautoglu hall amongst the huge crowd of people which had gathered outside the hall to wait for the Returning Officer of Segerea Constituency to declare the results. Between 20.00 and 21.00 there was a sense of pressure, mistrust and agitation amongst members of the crowd. According to Mr. Rugema, the youth who was arrested had been in the crowd for sometime before he was arrested carrying a small bag.

Mr. Rugema asked the police to allow him to have a closer look at the rubber stamp and was allowed to pick one of the rubber stamps. It was a stamp of the Commission. A police officer took the young man into his vehicle and moved away with him. Mr. Rugema claimed that the existence of rubber stamps affected the election. The existence of rubber stamp created a spectre of an election not being free and fair. Mr. Rugema believed that there was a link between the rubber stamp and the declaration of Dr. Makongoro Mahanga as the ultimate winner.

During the 2010 General Elections Mr. Merick Enock Luvinga-(PW7) from was one of the internal observers of the General Election. He headed the Election Desk at *LHRC*. The evidence of Mr. Luvinga is of no probative value because he

was not an eye witness to the incident which saw the arrest of the youth with election stamps. Like the evidence of Mr. Luvinga, the evidence of Mr. Mwakatobe (PW13) has no probative value because he also did not witness the arrest but was told by Mr. Mpendazoe to the effect that while Mr. Mpendazoe was following up on Ms Kafanabo's arrest at Central Police station he had found the youth already in the custody of police. Ms Kafanabo (RW7) who was with the Petitioner at the Central Police Station, denied that she saw a youth in the custody of police during the time the petitioner suggested to Mr. Mwakatobe.

Unfortunately for the Petitioner, the evidence of Ms Kanani, Mr. Luvinga (PW7), and Mr. Mwakatobe (PW13) are based on what these witnesses were told by others who did not come to testify. To that extent, their evidence is hearsay with no probative value. As an election observer, Ms Kanani (PW5) testified that she compiled her report which she sent to the *LHRC*. Ms Kanani did not bring this report yet she had the audacity to give an oral account on what is alleged to be in her report. During her cross examination by Mr. Msemwa, Ms Kanani readily conceded that she came to testify on what she was told by others. Although the Ilala Constituency was the constituency which was under the election observation of Ms Kanani; she was unfortunately brought by the Petitioner to testify on what she heard about Segerea.

I find it hard to believe that Mr. Rugema (PW6) despite the restless crowd and tight police presence at Arnautoglu he

could still get the leverage with the police to check the rubber stamp, and verify that it was a Commission rubber stamp. There is evidence on record that Arnautoglu was a headquarters for addition of polling stations' results for three constituencies of Ilala, Ukonga and Segerea. It is not clear why the paragraph 7.7 of the Petition should speculate that the youth and the rubber stamp were only linked to Segerea Constituency but not Ilala Constituency or Ukonga Constituency. In my opinion, the petitioner has not satisfied this court that the alleged arrest of a youth had any link to the Parliamentary Results of Segerea. By making such a serious allegation about an individual who was found with rubber stamp of the Commission, the Petitioner is bound by the law to substantiate the allegation by offering probative evidence but not rumours or hearsay lifted from the crowd gathered at Arnautoglu. It is not sufficient for the Petitioner to merely line up witnesses and election observers to amplify the hearsay evidence.

From the foregoing, I can safely conclude that the petitioner has not advanced any probative evidence to satisfy this court that an individual who was accosted by the restless crowd outside the Arnautoglu Hall had anything to do with election results Forms 21B and NEC official stamps affecting the Segerea Parliamentary election.

Seventh Issue:

The seventh issue for my determination is derived from the claim the Petitioner made under from paragraph 7.8 of the Amended Petition that ballot boxes number 15134, 151305, 151083, 15144, 15109, 15129 and 151303 were found by his counting agent at Arnautoglu without their seals; and the unsealed ballot boxes affected the integrity of votes contained in those ballot boxes. During his examination in chief, Mr. Mpendazoe testified that these boxes were supposed to be sealed to ensure integrity of votes. During his cross examination by Mr. Jerome Msemwa, Mr. Mpendazoe stated that boxes at Arnautoglu had no seals, and one Presidential box had no votes. Mr. Mwakatobe (PW13) testified that on the morning of 2nd November 2010 ballot boxes arrived at Arnautoglu from Buguruni. Mr. Mwakatobe insisted that it was himself, Mr. Stanley Manyi and Mr. Twalaha Yusufu inspected the ballot boxes and found seven ballot boxes that were opened. One presidential ballot box did not have any vote. Mr. Mwakatobe further testified that he recorded the number of these boxes and, a Parliamentary candidate of APPT – MAENDELEO even took photographs.

Mr. Fiume (RW15), the Returning Officer denies the claim that there were unsealed ballot boxes from polling stations of Buguruni Ward. According to Mr. Fiume, even if the ballot boxes were not sealed, this would have had no adverse effect because the ballot boxes contain Parliamentary votes that had already been counted and their results were already recorded

in **Forms No. 21B**. According to Mr. Fuime what is important is the election results **Form No. 21B** not ballot boxes.

While paragraph 7.8 of the Petition specifically identified the specific number of ballot boxes, no witness who testified in support of this claim could even recall the numbers of the ballot boxes and polling stations from Buguruni Ward where these ballot boxes originated. Mr. Mwakatobe confidently testified that he recorded the number of these ballot boxes but failed to recall the specific numbers of the seven ballot boxes when he was asked to identify them to this court. Mr. Mwakatobe also told this court that another Parliamentary candidate of *APPT-Maendeleo* had even taken photographs of the event, yet this candidate neither came forward to testify nor were the photographs tendered as documentary evidence.

In my opinion, the finding of unsealed ballot boxes cannot be considered in abstract. For purposes of an election petition it is not enough to merely allege that seven unsealed ballot boxes were seen at Arnautoglu hall without moving on to prove how the ballot boxes affected the results which the Returning Officer declared. It is not possible for this court to determine if in fact these ballot boxes were from Buguruni as alleged or they originated from any other polling station outside Segerea Constituency. We should always bear in mind that Mr. Fuime (RW7) was also a Returning Officer for three constituencies of Ukonga, Ilala and Segerea. He received ballot boxes from presiding officers in all these three constituencies. The possibility of these ballot boxes could also have originated from

another constituency other than Segerea Constituency cannot therefore be ruled out for purpose of proof.

My final determination of the seventh issue shall be guided by the principle of law settled by the Court of Appeal directing that where the issue of non-compliance with the provisions of the Act is raised; such non-compliance must be shown to have reference to the results of the election. The Petitioner must in other words satisfy this court beyond reasonable doubt that the seven unsealed ballot boxes amounted to non-compliance with provisions of the Act, and the ballot boxes concerned affected the election results Forms No. 21B which the Returning Officer used to declare the final results under section 81 of the Act. The Petitioner has failed to satisfy this court that the seven unsealed ballot boxes Mr. Mwakatobe allegedly saw at Arnautoglu Hall originated from polling stations in Buguruni Ward of Segerea Constituency.

Eighth Issue:

The focus of the Petitioner's complaints under the eighth issue and paragraph 7.9 of the Amended Petition centres on the contention that Mr. Mpendazoe's agents and other Parliamentary candidates of *CUF* and *SAU* political parties had requested but were denied election official forms to lodge their complaints over the missing votes from Vingunguti, Buguruni and Kiwalani Wards. The Petitioner did not bring the Parliamentary candidates sponsored by *CUF* and *SAU* political parties to testify on this allegation. I made a finding earlier that

there is no credible evidence which places Mr. Mpendazoe and his counting agent at the round-table carrying out the addition of results from all the polling stations of Segerea Constituency. The Learned State Attorneys have correctly submitted that the Petitioner has marshalled no direct evidence on this eighth issue to assist my determination of this eighth issue.

In so far as the eighth issue for my determination is concerned, my conclusion is that the ground of complaint under Paragraph 7.9 of the Amended Petition was not proved by evidence and this paragraph of the pleading is deemed abandoned for purposes of my determination.

First Issue:

I propose to revert back to the first issue the parties left for my determination which asks whether counting, addition of votes and announcing of election results were conducted in accordance with the law, regulations and directives set forth by the law. There is no doubt in my mind that this issue arises from Paragraph 6 of the Amended Petition.

Having earlier addressed the counting, addition of votes and declaration of results, I shall restrict myself to the issues relating to disputed votes and the issues arising from the failure of some presiding officers to sign some of the Parliamentary election results **Form No. 21B** and how these outstanding issues affected the final results the Returning Officer declared.

Mr. Kibatala, through cross examination of respondents' witnesses, tried to test the veracity of election results **Forms No. 21B** on account that some forms were not signed by presiding officers, and some alterations were made on some of these **Forms No. 21B**. Mr. Kibatala has also questioned why the Returning Officer did not determine the fate of disputed votes that are manifested in some of the Parliamentary election results **Forms No. 21B**.

Witnesses who were at addition round-table at Arnautoglu like Herick Aza Foya (RW13) who was ARO (Constituency), testified that there were no disputed votes from polling stations that were supposed to be determined first before the addition of polling stations results at Arnautoglu. Mr. Fuime (RW15), the Returning Officer also maintained that no disputed votes were brought to his attention. According to Mr. Fuime, it is possible that these disputes were solved at polling station levels. If these disputes were in fact solved by the Presiding Officers, the presiding officers made mistakes by leaving the figure of disputed votes on **Form 21B**.

The learned State Attorneys submitted that the disputed votes should have been solved at polling stations as provided for by section 79 of the Act, and the presiding officers must have inadvertently displayed the disputed number of votes on election results **Form No. 21B**. There is no evidence showing that Mr. Fuime- the Returning Officer (RW15) received separate packets of disputed votes from polling stations and he

deliberately declined to resolve the disputed votes, the Learned State Attorneys submitted.

In my opinion the submission of the learned State Attorneys on section 79 of the Act is correct. This provision expects the questions regarding disputed votes to be handled first by presiding officers at the level of polling stations before the question over any disputed votes is referred for review by the Returning Officer. It is only after that review by the Returning Officer when the petitioner can subject the issue of disputed votes to this election petition court. The section states:

> *79. The presiding officer shall, after consultations with the polling assistants, the polling agents or if present, the candidates, decide on any question arising in respect of any ballot paper and if disputed, the decision shall be subject to review by the Returning Officer, during the addition of votes from all the polling stations in the constituency and the decision of the Returning Officer shall be final and subject only to review by an election petition pursuant to Chapter VII of this Act.*

With due respect to Mr. Kibatala, by raising the issue of disputed votes at an election petition court through cross examination of witnesses; the Petitioner has not complied with the procedure prescribed by section 79 of the Act.

My own analysis of disputed votes in Kiwalani Ward (**Exhibit D1**) shows that there were only two disputed votes in election results Form No. 21B of *Hali ya Hewa A6* polling station. The two votes were not counted to any candidate. The

other polling stations in Kiwalani Ward whose disputed votes shown in bracket, were not counted to any candidate: *Yombo A3* polling station (4); Hali ya Hewa C4 polling station (2); WEO A5 polling station (2); Hali ya Hewa D4 Polling Station (4); Hali ya Hewa C3 Polling Station (2); Walemavu B5 Polling Station (5); Hali ya Hewa F1 polling station (1 disputed); Nursery 3 Polling Station (4); Hali ya Hewa F5 (5); Hali ya Hewa E2 (1).

Analysis of disputed votes in the polling stations in Vingunguti Ward (**Exhibit D2**) similarly show that disputed votes (shown in bracket) were not counted to any candidate: *WEO G7* (6); *Kombo A2* polling station (1); *Kombo C3* (7); *WEO A4* (2); *Kombo C2* Polling Station (2); *Kombo B6* (3); *WEO B2* (6); *Miembeni B-5* (4); *WEO A2* (7); *Kwa Simba Sokoni No. 8* Polling Station (1); *Soko la Kwa Simba* Polling Station (1); and *Mtakuja C4* (5). In the *WEO C8* polling station the presiding Officer has wrongly shown the figure as 127 disputed votes. The facts from this Form 21B of *WEO C8* polling station shows that only 130 voters out of the 446 who had registered to vote turned up to vote on 31st October 2010. The correct position is that the candidates shared out 123 valid votes. A total of 7 votes were rejected. Therefore, although the presiding officer had inadvertently indicated that there were 127 disputed votes, there were in fact only 7 rejected votes and there were no disputed votes.

The picture emerging from election results forms number 21B from polling stations in Vingunguti and Kiwalani Wards is that no candidate amongst the eleven candidates who

contested the Segerea Parliamentary seat benefitted or suffered from the disputed votes which appear on some of **Forms No. 21B**. I can therefore conclude that the election results **Forms No. 21B** which display disputed votes had no effect on the final result which the Returning Officer declared.

I have also evaluated the few election results **Forms No. 21B** which had minor mistakes. Four presiding officers in charge of Vingunguti Ward's polling stations of *Kombo A2*, *Miembeni B2*, *Kombo 4A* and *WEO C7* did not sign the Election Results **Forms No. 21B**. Similarly, the presiding officers in charge of Kiwalani Ward's polling stations of *Hali ya Hewa F2*, *Hali ya Hewa C2*, *Hali ya Hewa C3* and *Hali ya Hewa C5* did not sign the Election Results *Form No. 21B*. Despite these non-compliances with the Act, all the eight polling station results **Forms 21B** were duly signed by polling agents signifying their acceptance of the polling stations' results. The votes from all the eight polling station results were included in the final results which the Returning Officer declared. I am prepared to accept the explanation that the failure to sign was an inadvertent mistake which did not affect the Parliamentary results which the Returning Officer declared on 3rd November 2010.

Therefore, my answer to the first issue is that the counting exercise, addition of votes and announcing of election results for Segerea Constituency were respectively conducted in accordance with the Act, regulations and directives set forth by the law.

Tenth and Eleventh Issues:

Tenth and eleventh issue can be conveniently determined together. This court is called upon to determine whether Mr. Mpendazoe in fact had a majority of votes and which candidate between Mr. Mpendazoe and Dr. Mahanga, on the basis of valid votes, was entitled to be declared a Member of Parliament for Segerea Constituency. Mr. Mpendazoe has in Paragraph nine (9) of his Amended Petition relied on votes his polling agents gave him to project himself to be the winner by **56,962** votes to Dr. Mahanga's **44,904** votes. In his evidence, Mr. Mpendazoe claimed that it was his information gathering network which had collected the projected election results from copies of **Form No. 21B** which were posted at the notice boards of polling stations.

Mr. Mpendazoe conceded under cross examination that while he could project his win by this total of **56,962** votes, he could not similarly project total votes he had obtained from each of the eight administrative Wards of Segerea Constituency. Mr. Mpendazoe's projection was supported by Mr. Mwakatobe (PW13) his constituency counting agent. Under cross examination by Mr. Msemwa, Mr. Mwakatobe stated that he had written the projected votes for each Ward on a piece of paper which he left in his car.

Reacting to the question as to whether a candidate in an election petition can project himself to be the winner in a Parliamentary election, the learned Senior State Attorneys

submitted that the Petitioner did not comply with Rule 13 (1) of the **Election Petition Rules** which required him to lodge with the Registrar of this court a list of polling station election results upon which he intends to rely during the hearing of his petition. The learned State Attorneys urged this court to reject the figure of votes which Mr. Mpendazoe uses to project himself the winner of Segerea Constituency seat. They further urged this court to make a finding that the Parliamentary Election Results Form **Number 24B** which was evidenced as **Exhibit D5** in law illustrates the correct election results which the Returning Officer declared on 3rd November 2010.

Also on the same issue of projected results, Mr Aliko Mwamanenge the Learned Counsel for the 2nd respondent submitted that Mr. Mpendazoe should have brought evidence and not mere stories of projections proclaiming his having won the election by majority of votes. Mr. Mwamanenge described Mr. Mpendazoe's evidence that the results he projected came from results posted at polling stations' notice boards as hearsay in so far his figures are not supported by any concrete evidence like the polling station results which were posted on notice boards or his own agents' polling station results.

From the submissions of the learned counsel on the **56,962** votes which the Petitioner has projected for himself, the remaining question calling for my determination is whether the Petitioner has laid statutory grounds for him to be declared as the winner on the basis of his own projection of votes.

As I have stated earlier, the declaration of Parliamentary results is a statutorily provided under section 81 of the Act. The Learned State Attorneys have submitted that the Petitioner failed to comply with Rule 13 (1) of the **Election Petition Rules** as the basis of his projected results. Rule 13 (1) states:

> ***13. (1)*** *Where the petitioner intends to allege that, any candidate other than the respondent was elected, he shall, not less than six days before the day fixed for the hearing of the petition, lodge with the Registrar a list of the polling station election results upon which he intends to rely.*

Under the guidance of this Rule, the Learned State Attorneys are correct in their submissions that the Petitioner should have laid the basis of his projected results by lodging with the Registrar of this court a list of polling station election results upon which he intended to base his projections of the results.

In my opinion, the prayer that petitioner should be declared winner on the basis of his own projection is untenable in law because election results declared by Returning officer is an aggregation of results from polling stations documented as **Form No. 21B** for Parliamentary election. All polling agents at polling stations were given copies of **Form No. 21B**. At the very least, the Petitioner should have based his projections on these copies from his polling agents. As I pointed earlier, the Petitioner did not exhibit his agents' copies of Election Results **Forms No. 21B** from any of his 749 polling who represented

him in polling stations. The petitioner has made no attempt to show how he arrived at **56,962** votes he projected.

Winners in Parliamentary elections in Tanzania are declared after the addition of polling station results **Forms No. 21B**. Mr. Mpendazoe did not disclose which polling station results he added to attain **56,962** votes he projected. The laws of Tanzania do not make provisions for a winner in Parliamentary election to be declared on the basis of his projection of results.

From the foregoing, the prayer in the Amended Petition that the Petitioner, Mr. Fred Mpendazoe should be declared the lawfully elected Member of Parliament for Segerea Constituency is hereby rejected as untenable in law.

Grounds that were not pleaded and the Second Issue:

Before addressing myself to the second issue asking whether the entire election exercise in Segerea Constituency was free, fair and in line with the law regulating general elections; I should address myself to matters which were not pleaded in the Amended Petition but were all the same given prominence during the hearing. Mr. Kibatala the Learned Counsel raised new grounds which the Petitioner did not specifically plead in his Amended Petition. Mr. Kibatala, in his written submissions would like this court to consider and make determination on grounds which the Petitioner did not

set forth in the Amended Petition. Mr. Kibatala has canvassed Rule 23 of the **Election Petition Rules** and the case of **Prince Bagenda vs. Wilson Masilingi and Another [1997] TLR 220** to support his submission that this Court should consider grounds which were not pleaded in the petition.

The Learned State Attorneys have submitted to oppose the request to hear and determine matters that were not pleaded in the Amended Petition. The Learned State Attorneys have submitted further that election petitions are a special type of civil proceedings where a party thereof are strictly bound to their pleadings and issues that parties have left for determination by the court. On their part, the learned Mr. Jerome Msemwa and Mr. Aliko Mwamanenge submitted that election petitions should attract a stricter construction than a Plaint in an ordinary suit because the outcome of an election petition may affect the entire constituency and the country at large. Unlike Mr. Kibatala and the two Learned State Attorneys who took definite positions regarding unpleaded grounds of petition, Mr. Msemwa and Mr. Mwamanenge did not take any position except that they addressed themselves to the un-pleaded claim that Dr. Mahanga was arrested in possession of ballot boxes and was subsequently taken to the Buguruni Police Station.

It is imperative that I should first address myself to the question whether this election petition court should take up grounds that were not pleaded in the Amended Petition and

make decisions on issues arising thereon. Pleadings (Amended Petition and Replies to the Amended Petition) which parties to this petition exchanged were the basis of eleven issues which the parties left for determination by this court. The purpose of pleadings is therefore to enable parties to know what the points in issue between them are, and to enable each side to prepare for hearing. An element of surprise is invariably introduced where a party to a petition introduces new grounds of the petition during the hearing.

The purpose of pleadings in election petitions in Tanzania is summarized under rules 5 and 23 of the **Election Petition Rules** which state:

> ***5. (1)*** *Every petition shall carry a title in the prescribed Form A and shall state–*
> *(a) the name and address of the petitioner;*
>
> *(b) the name and address of the respondent or, where there are two or more respondents, of each of the respondents;*
>
> *(c) the grounds upon which the petitioner relies for the relief sought by him; and*
>
> *(d) the nature of the relief or reliefs sought by the petitioner.*
>
> ***23.*** *The petitioner shall not, save with the leave of the court, argue or be heard in support of any ground not set forth in the petition:*
> *Provided that the court shall not, in determining a petition, be confined to the grounds set forth in the petition.*

It is clear that Rules 5 and 23 of the **Election Petition Rules** underscores the mandatory duty of the Petitioner to plead grounds upon which he prays for reliefs in an election petition court. Rules 23 directs the petitioner who would like to plead additional grounds of complaints in his petition to ask for the court's approval to be allowed to plead and to lead evidence on new grounds. The Petitioner did not ask for and obtained leave of this court for the Petitioner to be heard on new grounds of pleadings. The new ground which the Petitioner added without leave of this court was the rumour that Dr. Mahanga had been arrested and remanded for possessing ballot boxes for Parliamentary election.

An allegation that a candidate has stolen ten ballot boxes just before results are declared is a very serious allegation with the potential to incite the crowd into breakdown of law and order. It is incumbent upon this court to use the proviso to Rule 23 of the **Election Petition Rules** with a view to ascertaining the veracity of this serious allegation which can lead to breakdown of law and order.

In so far as evidence is concerned, allegations against Dr. Milton Makongoro Mahanga was made by Ms Aziza Masoud (PW9), a journalist working for the *Mwananchi Communications* which publishes *Mwananchi Newspaper* and Mr. Mbezi Mgaza Mkomwa (PW10) a Chadema polling agent at *HEKIMA A5* polling station in Buguruni Ward. According to Mr. Mkomwa, Dr. Mahanga was arrested by the citizens at Tabata Kimanga

and was taken to Police Station Buguruni. According to this witness, Dr. Mahanga was found in possession of over ten ballot boxes. Mr. Mkomwa (PW10) testified that he decided to verify the rumours by going to Buguruni Police Station. He was amongst the first people to arrive at the police station where Dr. Mahanga was being held. He saw Dr. Mahanga together with more than 10 ballot boxes besides him. The ballot boxes Mr. Mkomwa saw at Buguruni polling station had black covers. As more people were streaming into station the Police had to order the crowd to move away from the station. The crowd was informed that the police were handling the matter.

On 2nd November 2010 when *Mwananchi newspaper* published the story (admitted as **Exhibit P1**) regarding a candidate who had been arrested no name or the political party of the candidate was mentioned. But when she came to testify, Ms Aziza Masoud (PW9) identified the name of Dr. Mahanga. Under cross examination by Kakwaya, Ms Masoud stated that she did not personally see the ballot boxes that Dr. Mahanga was arrested with. Ms Masoud did not even see Dr. Mahanga being arrested.

Abdalla Riadhi (PW12) also testified on the rumour alleging the arrest of Dr. Mahanga. According to Mr. Riadhi, he and about 40 to 50 other members of *Chadema* and *CUF* political parties went to Buguruni Police Station to verify the arrest of Dr. Mahanga. At the police station they were barred from entering because some the *CUF* members were rowdy.

From evidence, there were two versions of circulating rumours. One version had it that Dr. Mahanga was arrested at Buguruni. The second version was that he was arrested at Tabata Kimanga.

Mark Njela (RW 4), an Assistant Superintendent of Police was Commanding Officer in charge of Buguruni Police Station during the 2010 General Elections. According to this police officer, there was no major incidents which were reported at Buguruni Police Station on 1st and 2nd November 2010 and the information claiming the arrest of a person with ballot boxes was never reported at Buguruni Police Station. According to ASP Njela, this incident of arresting a person in possession of ballot boxes did not take place at Buguruni Police Station. According to Mr. Njela (RW4), even the Dar es Salaam Special Police Zone Commander Suleiman Kova had said that he had no such information.

Mr. Kibatala has submitted that the arrest of Dr. Mahanga while in possession of the ballot boxes was so widespread as to become common knowledge. While acknowledging that this election petition court cannot adjudicate the validity of a widely circulated report, Mr. Kibatala submitted that this court should take into account the evidence of Mr. Mkomwa (PW10) and Abdalla Riadhi (PW 12).

Submitting on the allegation of the arrest of Dr. Mahanga, Mr. Aliko Mwamanenge for the 2nd respondent noted this allegation was never raised in the petition nor was it included

in the agreed issues for determination. According to Mr. Mwamanenge, the Petitioner has exhibited a newspaper (**Exhibit P1**) to prove a very serious allegation. That, the newspaper itself never mentioned Dr. Mahanga and the evidence of Ms Masoud is completely based on hearsay account and her evidence is not worth the belief.

As I have noted the position of law, where the allegation over any non-compliance with the provisions of the Act is raised, such non-compliance must be shown to have reference to the results of the election. It is not enough for the Petitioner to merely level a very serious allegation suggesting that a candidate in an election was arrested in possession of ballot boxes. That allegation must not only be proved by credible evidence but must be linked to how the ballot boxes affected the Parliamentary election results of Segerea Constituency.

There no doubt in my evaluation of evidence that the allegations leveled against Dr. Mahanga impliedly also affect election officials. Presiding officers are required by the provisions of Regulation 60 (4) (c) of the **Elections Regulations**, to submit to the Returning Officer or where so directed to an ARO all ballot boxes containing votes. After finalization of the election, Regulation 70 imposes a duty on Returning Officers to keep in safe custody all the ballot boxes and other used or unused election materials for safe custody. In terms of Regulation 71 (1) and (2), disciplinary measures or any other legal action await Returning Officers who fail to live up to their statutory duty to keep in safe custody all ballot

boxes. Therefore, apart from affecting the credibility of Dr. Mahanga, this allegation also implies that some Presiding Officers, or AROs and the Returning Officer responsible for Segerea Constituency did not keep in safe custody the ballot boxes and possibly other election materials. Further, the allegation implies that the police have collusively failed to take Dr. Mahanga to court and charge him for committing the offence of stealing the ballot boxes.

The evidence of Mr. Mkomwa (PW10) and Abdalla Riadhi (PW 12) which Mr. Kibatala urged me to take into account does not satisfy this Court that there was any such arrest of Dr. Mahanga. The evidence of Dr. Mahanga (RW16) contradicts Mr. Mkomwa's evidence that he (i.e. Mr. Mkomwa) had after 08:00 a.m. of 1st November 2010 visited Buguruni Police Station and found Dr. Mahanga in the custody of police with ballot boxes besides him. According to Dr. Mahanga, on same 1st November 2010 he was at home most of the time. He also visited WEO's Office of Segerea Ward because there was a dispute over the addition of councilor's votes which forced both Mr. Mpendazoe and Dr. Mahanga to be at WEO's office. The suggestion that Dr. Mahanga was in police custody on 1st November 2010 is not supported by evidence of another witness for the Petitioner. Livingston Nyaligere Rugema (PW6) was a Chadema Segerea Ward Tallying agent. In his evidence in chief Mr. Rugema (PW6) testified about the two recounts of votes at Segerea which Dr. Mahanga demanded before conceding the count.

If, as submitted by Mr. Kibatala; the arrest of Dr. Mahanga was so widespread as to become common knowledge, one wonders why not a single witness who participated in the arrest of Dr. Mahanga was not summoned to testify. Rumours, however widespread do not in my opinion translate themselves into facts for purposes of law of evidence. Courts attach no weight on rumours. It is difficult to visualize how the Petitioner failed to include the issue of arrest of Mahanga for unlawful possession of ballot boxes in his Amended Petition if it was so widespread and in common knowledge.

Mr. Mkomwa (PW10) testified that Tabata Kimanga is far from Buguruni and one has to commute from Tabata Kimanga to Buguruni Police Station. The distance separating Buguruni Police Station and Tabata Kimanga means that arrest should have attracted a very big number of anxious citizens and Chadema members some of whom must have volunteered to come and testify. I consider it to be a surprise that the Petitioner failed to locate eye-witnesses to the arrest and how Dr. Mahanga was conveyed to Buguruni Police Station.

In my opinion, it is not sufficient merely to allege that Dr. Mahanga was arrested conveying ballot boxes with votes therein without giving helpful evidence. There must be further and better evidence beyond the what Ms Masoud (PW9), Mr. Mkomwa (PW10) and Abdalla Riadhi (PW 12) stated to enable this court to determine how the citizens carried out the arrest, whether the ballot boxes were in Dr. Mahanga's car, how Dr. Mahanga and the boxes were driven or matched to Buguruni

police station. The Petitioner should also have brought evidence to determine the polling stations where those ballot boxes originated and whether those ballot boxes are for Parliamentary election for Segerea Constituency to the exclusion of other constituencies.

The Petitioner has not presented any probative evidence to satisfy this court that Dr. Mahanga was in fact arrested while in possession of ballot boxes.

Second Issue:

With regard to the second issue which is still outstanding, I am fully satisfied that the entire election exercise in Segerea Constituency was free, fair and in line with the law regulating general elections. I have similarly evaluated all other ten alleged incidents of non-compliances of the law and which Mr. Kibatala the learned Counsel for the Petitioner has identified on pages 35 and 36 of his submissions. These incidents do not in my opinion affect the results which the Returning Officer declared on 3rd November 2010.

In the upshot; the Petitioner has not satisfied this court that there was non-compliance with the provisions of the Act in relation to Parliamentary election which affected the final results which the Returning Officer declared on 3rd November 2010. My final orders shall be as follows:-

1) The orders prayed for in the Amended Petition are declined and the Amended Petition is dismissed in its entirety;

2) I hereby declare that the Dr. Milton Makongoro Mahanga (the 2nd Respondent) was validly elected as Member of Parliament for Segerea Constituency and the Petition and the prayers against the election of the 2nd Respondent is dismissed;

3) A certificate shall issue forthwith to certify to the Director of Elections that Dr. Milton Makongoro Mahanga (the 2nd Respondent) was validly elected and declared a Member of Parliament for Segerea Constituency;

4) Costs are awarded to the 1st, 2nd, and 3rd Respondents.

I.H. Juma
JUDGE
02-05-2012

Delivered in open Court at Dar es Salaam and in the presence of parties.

I.H. Juma
JUDGE
02-05-2012