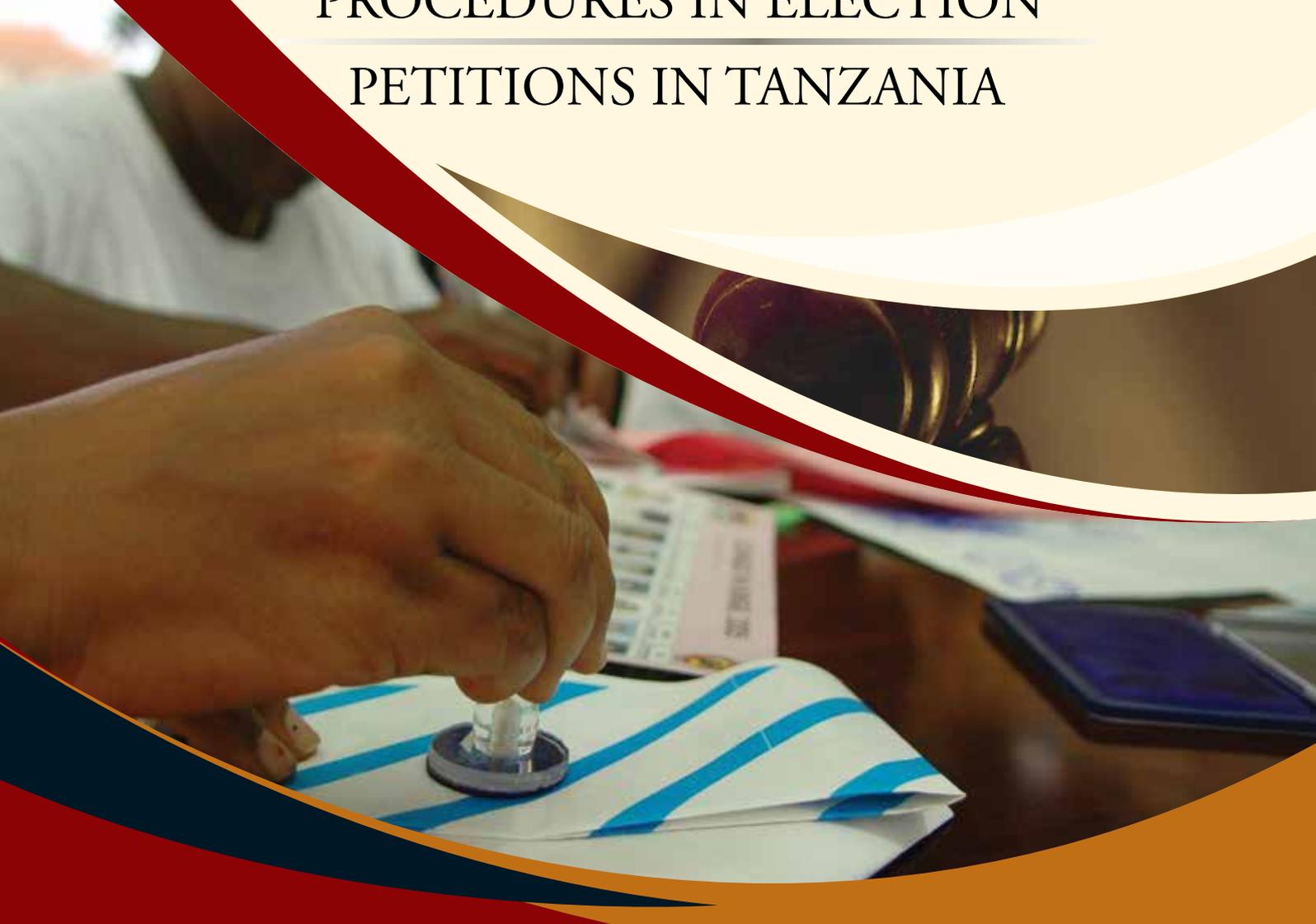




MANUAL ON PRACTICE AND PROCEDURES IN ELECTION PETITIONS IN TANZANIA



Empowered lives.
Resilient nations.

**MANUAL ON PRACTICE AND
PROCEDURE IN ELECTION PETITIONS
IN TANZANIA**

**PREPARED BY THE JUDICIARY OF TANZANIA WITH
THE SUPPORT OF THE UNITED NATIONS
DEVELOPMENT PROGRAMME (UNDP)
NOVEMBER, 2016**

TABLE OF CONTENTS

FOREWORD	iv
ACKNOWLEDGMENT	iv
CHAPTER ONE: AN OVERVIEW	1
1.0 Introduction	1
1.1 The Right to Vote and the Right to Participate in Governance	1
1.2 Legislative Powers on Electoral Laws and Resolution of Electoral Disputes	2
1.3 The Legal Framework on Public Elections and Resolution of Electoral Disputes in Tanzania	4
1.4 Other Relevant Substantive and Procedural Laws in Election Petitions	6
CHAPTER TWO: PROCEDURE IN TRIAL OF ELECTION PETITION	7
2.1: Election Petition Stages	7
2.2: Avoidance of Election	12
2.3: Application for Determination of Security for Costs	18
2.3.1: Procedure for Determination of Application for Security for Costs	18
2.3.2: Closure of Pleadings	19
CHAPTER THREE: PRE-TRIAL PROCEDURES	21
3.1 Registrar to Fix Date for Hearing	21
3.2 Preliminary Hearing	21
3.3 Framing of Issues in Election Petition	21
CHAPTER FOUR: TRIAL OF ELECTION PETITION	21
4.1 Filing of List of Votes intended to be objected	21
4.2 Consolidation of Election Petitions	22
4.3 Trial by more than one Judge or Magistrate	22
4.4 Documentary Evidence at First Hearing of Election Petition	22
4.5 Witnesses in Election Petition Trial	22
4.6: Affidavit Evidence	23
4.7 The Use of Electronic Evidence in Election Petition	23
4.8 Grounds to be Taken at Trial of Election Petition	23
4.9 Postponement of the commencement of trial	24
4.10 Adjournment of trial after commencement of trial of election petition	24
4.11 Illness of Magistrate or Judge	24
4.12 Failure of Petitioner to Appear	24
4.13 Failure of Respondent to Appear	25

4.14	Withdrawal of Election Petition	25
4.15	Abatement of Election Petition.....	25
4.16	Settlement of Election Petition by Consent Order	26
CHAPTER FIVE: GROUND FOR AVOIDANCE OF ELECTIONS		27
5.1	Specified Grounds for Avoiding Election.....	27
5.2	Unspecified Grounds for Avoiding Election.....	29
CHAPTER SIX: STANDARD AND BURDEN OF PROOF		32
6.1	Standard of Proof	32
6.2	Burden of Proof	32
CHAPTER SEVEN: CONCLUSION OF ELECTION TRIAL.....		34
7.0	Introduction	34
7.1	Reliefs to be awarded.....	34
7.2	Certification of Validation.....	34
CHAPTER EIGHT: APPEALS IN ELECTION PETITIONS		36
8.1	Appeals from Lower Courts to the High Court.....	36
8.2	Appeals from High Court to Court of Appeal.....	36
8.3	Summary of case management in election petition	36
8.3.1	What is Case Management?.....	36
Flow Chart for Parliamentary Election Petition.....		38
Flow Chart for Councilor Election Petition		39
8.4	General Conclusion.....	40

FOREWORD

The role and responsibility of the Court in the handling of electoral disputes depends on the efficiency of the judicial system, the proper functioning of the electoral system, and the legal framework for resolving electoral disputes, in particular. There must therefore exist effective legal institutions, good governance, respect for the rule of law and a conducive political environment in which credible elections are held. To complement these factors, it is significant that competent and efficient institutional arrangement exists to facilitate the effective management of elections. Moreover, an independent, credible, well-resourced, skilled, knowledgeable and competent judicial system is indispensable if it is to properly discharge its duty in the resolution of election disputes, timeously and effectively.

This Manual aims primarily at providing Judicial Officers and other key stakeholders, lawyers included, with a tool that will assist them in gaining the necessary skills, knowledge and proficiency that would give them a better understanding of legal issues, interpretation of electoral laws, the functions of the Judiciary and methodologies deployed in the adjudication of electoral disputes.

I wish to congratulate the Judiciary Team that drafted this Manual, and put together the relevant materials on the law, procedure, jurisprudence and best practices relating to a very crucial area of electoral dispute resolution. This essential information will now be available to Judicial Officers, Officers of the National Electoral Commission, State Attorneys and legal practitioners and the broader public.

The Manual is a product of a collaborative effort between the Judiciary and the United Nations Development Programme (UNDP) that started with the training of Judicial officers even before the 2015 elections were held in October 2015. There is no doubt that the speed with which both the councilor and

parliamentary election petitions were handled by the Courts was to a significant extent the result of the training given to Judges, Magistrates and lawyers in the law and best practices of handling election petitions in the run-up to the 2015 General Elections.

The Manual aims at contributing to the available legal resources, especially by providing all stakeholders with a handy tool to which they can make quick reference when handling election disputes in the future. More specifically, apart from equipping those concerned with a broad understanding of the electoral laws and the dispute resolution mechanism, the Manual aims at:

- i) Providing the tenets of interpretation and dispute resolution as envisaged by the Constitution and electoral laws.
- ii) Acting as a reference guide for Judges, Magistrates and lawyers to facilitate the efficient and speedy disposal of electoral disputes.
- iii) Providing a handy reference material for the general public on the practices and procedures involved in electoral dispute resolution.

The Manual comprises Eight chapters: The Manual exposes some old and new areas and decisions which have never been accessible, not only to Judicial Officers and lawyers, but also to members of the public. I am mindful of the fact that the Manual may not embody all matters on electoral dispute resolution. However, I remain convinced that it would, to a significant extent, serve as a starting point towards the acquisition of vital knowledge in this important subject area.

Mohamed Chande Othman
Chief Justice
Dar es Salaam, November, 2016

ACKNOWLEDGMENT

Many people and partners assisted in diverse ways in the realization of the project for the production and publication of this Manual, namely, *A Manual on Practice and Procedure of Election Petitions in Tanzania*. We wish to single out the United Nations Development Programme (UNDP) through the Democratic Empowerment Project, under the leadership of Ms Awa Dabo, UNDP Country Director, for the invaluable partnership, financial and technical support, without which this publication would not have been completed.

The publication is the product of the joint efforts of the Judiciary Team, comprising Justices, Judges, Registrars and Judges Legal Assistants on behalf of the Judiciary of Tanzania and technical personnel from UNDP, who worked tirelessly to produce the work within strict time limits.

We wish to acknowledge with sincere gratitude, the efforts of UNDP for the technical and financial support and the commitment of the Judiciary Team respectively to the realization of this project as a whole and the printing of this important manual. The passion of the Judiciary Team to see the publication of this manual succeeds was extraordinary and the effort is highly appreciated.

The success of the publication of the manual has known and unknown individuals who contributed in one way or the other. It thus suffices to state that the Judiciary of Tanzania owes the measure of any success in producing this manual to the array of inputs from many. Nevertheless, the Judiciary of Tanzania wishes to express its appreciation to the entire Judiciary Team for the wonderful tem spirit that was exhibited during the time of the project for preparation of the manual. Asante sana.

CHAPTER ONE: AN OVERVIEW

1.0 Introduction

This Manual outlines important procedural steps from the presentation, filing, trial and determination of election petition. This Manual is designed to provide judicial officers with a quick reference on practice and procedure guide during trial of election petitions. It is also a useful resource tool for all election trial practitioners.

1.1 The Right to Vote and the Right to Participate in Governance

The right to sue to challenge an election or its results is an expression of the right to vote. The right to vote and the right to participate in governance is enshrined in Article 5(1) and Article 21(1) of the Constitution of the United Republic of Tanzania 1977 Cap 2 respectively. These two rights create **democratic legitimacy**. They recognize and give force to the potential of the citizens to participate in political outcomes and to elect officials who represent their interests or desires in representation bodies.

The right to vote also finds expression in international human rights treaties. Article 25(b) of the International Convention on Civil and Political Rights (ICCPR), to which the Government of Tanzania is signatory provides that:

“There shall be the right and the opportunity to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”

The *right to vote* which is reflected in Articles 5(1) and the **right to participate in governance** which is enshrined in Article 21(1) of the Constitution of the United Republic of Tanzania 1977 are a clear reflection of the domestication by the Government of Tanzania of Article 25(b) of the ICCPR

Box No. 1 below contains some of the relevant provisions in the **Universal Declaration of Human Rights (1948 UDHR)**; the **International Covenant on Civil and Political Rights (ICCPR)** and the **1977 Constitution of the United Republic of Tanzania (URT Constitution)** on the right to vote and the right to participate in governance.

Box No.1		
The Universal Declaration of Human Rights (UDHR)	International Covenant on Civil and Political Rights (ICCPR)	The Constitution of the United Republic of Tanzania 1977
Article 21 <i>1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.</i>	Article 25 <i>Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:</i>	Article 21 <i>(1) Subject to the provisions of Article 39, 47 and 67 of this Constitution and of the laws of the land in connection with the conditions for</i>

<p>2. Everyone has the right to equal access to public service in his country.</p> <p>3. The will of the people shall be the basis of the authority of government; this will, shall be expressed in periodic and genuine elections which shall be held by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.</p>	<p>(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;</p> <p>(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot guaranteeing the free expression of the will of the electors;</p> <p>(c) to have access, on general terms of equality, to public service in his country.</p>	<p>electing and being elected or for appointing and being appointed to take part in matters related to governance of the country, every citizen of the United Republic is entitled to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people, in conformity with the procedures laid down by, or in accordance with, the law.</p> <p>(2) Every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation.</p>
--	--	---

1.2 Legislative Powers on Electoral Laws and Resolution of Electoral Disputes

The electoral law of Tanzania confers a wider right to petitioners (*locus standi*) seeking to avoid the results of either parliamentary or councilor elections. The national electoral law of Tanzania is framed at both the substantive and procedural levels so as to afford those with locus standi an opportunity to seek electoral justice through the courts of law, and hence the need to have in place an effective and efficient electoral dispute resolution mechanism (EDRM). Election petitions therefore offer an opportunity for judicial scrutiny of the

electoral process. This requires a sound grounding in rules of procedure and practice in handling election petitions for judicial officers as a prerequisite for ensuring an effective, efficient, and expeditious disposal of election petitions.

In order to ensure that public elections are governed and regulated properly, Article 5(3) and Article 83 of the Constitution of the United Republic of Tanzania 1977 respectively vest on the National Assembly (*Bunge*), which is a representative of people's power (**sovereignty**), with powers to enact laws to regulate the conduct of public elections and for the procedure and practice in the resolution of electoral disputes

Box No.2 below shows the relevant provisions in the Constitution on the powers of Parliament in electoral laws and resolution of electoral disputes.

Box No.2	
Relevant provisions in the Constitution of the United Republic of Tanzania 1977 on Parliament legislative powers in electoral laws and resolution of electoral disputes	
<p>Article 5:</p> <p>(3) Parliament shall enact electoral law to provide for the following:</p> <p>(a) the establishment of a permanent voters register and prescribing the procedure for its amendment or updating information contained in that register;</p> <p>(b) specification of places and times for the registration of voters and for voting;</p> <p>(c) procedure and conditions for enabling a person registered as a voter in one place to vote in another;</p> <p>(d) specification of the duties and functions of the Electoral Commission and the procedure for every election which shall be conducted under the direction and supervision of the Electoral Commission.</p>	<p>Art.83:</p> <p>(1) Every proceeding for the purposes of determining the question whether –</p> <p>(a) the election or appointment of any person to be Member of Parliament was valid or not; or</p> <p>(b) a Member of Parliament has ceased to be a Member of Parliament and his seat in the National Assembly is vacant, or not, shall, subject to the provisions of sub-article (2) of this Article, first be instituted and heard in the High Court of the United Republic.</p> <p>(2) Where the Electoral Commission, in the discharge of its functions in accordance with the provisions of Article 41(3) of this Constitution has declared any Member of Parliament to have been elected President, then no court or any other body shall inquire further into any question concerning the seat of that Member of Parliament being vacant.</p> <p>(3) Parliament may enact legislation providing for the following matters:</p> <p>(a) persons who may institute proceedings in the High Court seeking for determination of any question in accordance with the provisions of this Article;</p> <p>(b) the grounds and times for instituting such proceedings, procedure for instituting proceedings and conditions which have to be fulfilled in respect of every such proceeding; and</p> <p>(c) prescribing the powers of the High Court over such proceedings and specifying the procedure for the hearing of the matter itself.</p> <p>(4) There shall be a right of appeal to the Court of Appeal of Tanzania against a decision of the High Court in any matter which was heard in accordance with the provisions of this Article.</p>

1.3 The Legal Framework on Public Elections and Resolution of Electoral Disputes in Tanzania

Election challenges are a fundamental part of the electoral process. In Tanzania, election results may be challenged by issuing legal proceedings known as ‘**election petitions.**’ The procedure for bringing and managing a petition is to a certain extent similar in nature to a private legal action. However, election results are more than just private disputes, they are of significant public interest particularly considering the public interest in identifying and remedying electoral malpractice, so as to ensure a free and fair election.

The traditional focus in Electoral Dispute Resolution is on the management of election disputes. This involves judicial consideration of election petitions. In Tanzania the legal framework for public elections and electoral disputes resolution mechanisms is comprised of the following principal legislations:

- *The National Elections Act, Cap.343 Revised Edition 2015;* and
- *The Local Authorities (Elections) Act, Cap.292 Revised in 2015*

The above two principal statutes harmonize all the previous election laws with a view to streamlining the legal framework for public elections in Tanzania and the resolution of electoral disputes.

The Chief Justice of Tanzania also has delegated legislative powers under section 117(1) of the *National Elections Act*, and section 116(1) of the *Local Authorities (Elections) Act* respectively to make rules to regulate the *practice and procedure to be followed by the courts in handling election petitions.* And in exercise of this power, the Chief Justice has promulgated the following Rules to regulate the procedure and practice in election petitions, namely:

- *The National Elections (Election Petitions) Rules, 2010 [G.N. No.447]* published on 19/11/2010] as amended by the *National Elections (Election Petitions) (Amendment) Rules, 2012, G.N. No. 106 of 2012;* and
- *The Local Authorities (Election Petitions) Rules, 2010 [G.N. No.448]* published on 19/11/2010].

The powers of the Chief Justice to make to make rules to regulate the procedure and practice in election petitions were discussed in the decision of the Court of Appeal of Tanzania in *Zella Adam Abrahaman 2. Amina M. Mwadau 3. Dr. Steven L. Kirushwa Vs. 1. The Attorney General 2. Oran Manase Njeza 3. Returning Officer, Mbeya Vijijini Parliamentary Constituency, 4. Juma H. Aweso, 5. The Returning Officer, Pangani Constituency 6. Onesmo Nangole 7. Returning Officer Longido Constituency, Consolidated Civil Revisions Nos. 1, 3 and 4 of 2016* (Court of Appeal at Dar es Salaam) (unreported).

In *Zella Adam Abrahaman’s* (above), the Court of Appeal of Tanzania held that;

“Section 117 (1) of the **National Elections Act, Cap 343** gives power to the Chief Justice to make rules to regulate the practice and procedure to be followed by the courts in handling election petitions. And that, such rules are in accord with, among others, Articles 8 and 107A of the Constitution.”

The National Elections (Election Petitions) (Amendment) Rules, 2012, G.N. No. 106 of 2012 introduced for the first time in this Country the use of witness affidavits in parliamentary election petitions. There is no similar requirement for Councilor election petitions.

The National Electoral Commission (NEC), which is the national election management body (EMB) for Tanzania established under Article 74(1) of the Constitution of the United Republic of Tanzania 1977, also has powers to make Regulations and to issue Directives on the proper conduct of public elections.

And pursuant to the delegated legislative powers of NEC, in the 2015 General Elections, NEC promulgated the *National Elections (Presidential and Parliamentary Elections) Regulations, 2015 G.N No. 307*, published on 31st July 2015, which has an in-built system of recording important electoral stages in prescribed Forms. For example, Regulation 60(1) thereof states that:

“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 powers of NEC to issue directives came for judicial consideration in the **Attorney-General and Two Others v. Aman Walid Kabourou [1996] TLR 156 (CA)**, where the Court of Appeal of Tanzania held among other things that:

“The Electoral Commission is empowered in terms of the Elections Act to make only such regulations as are in furtherance of specific provisions of the Act or in furtherance of the purpose of the whole Act. This power of the Commission is, however, to be exercised subject to the underlying constitutional principle which requires democratic elections to be free and fair, and this principle should be read into the Elections Act.”

In *Attorney-General and Two Others v. Aman Walid Kabourou* (above) the Court of Appeal of Tanzania dealt with the legal effect of NEC Media Guidelines on elections “*Tamko Rasmi*.”

In *Daniel Nsanzugwanko v. Attorney General Civil Appeal No. 106 of 2012* (unreported), the Court of Appeal considered the impact of section 124A of the National Elections Act, which was introduced in the *National Elections Act by the Electoral Laws (Miscellaneous Amendments) Act No.7 of 2010*.

Section 124A of the National Elections Act recognizes the Electoral Code of Conduct, which sets a pre-condition of reporting any complaints arising in the election process including the time for election campaigns to the Electoral Code of Conduct (Committee). The Electoral Code of Conduct among other things mandates submission of pre-election complaints to the Ethics Committee of the National Electoral Commission.

In *Daniel Nsanzugwanko*, the Court of Appeal of Tanzania considered the effect of non adherence with the procedure for submission of complaints to the Ethics Committee of NEC and held that:

“...The appellant who was a signatory to the Electoral Code of Conduct was bound by the Code to report the complaints. We agree that failure to refer the complaint to the Electoral Code of Conduct did not bar the appellant from filing the petition.... However, we agree with the learned trial judge that his failure to refer his claims to the Electoral Code of Conduct watered down his case. As already said, the standard of proof in election petitions is proof beyond reasonable doubt.”

1.4 Other Relevant Substantive and Procedural Laws in Election Petitions

i) Rules regulating practice and procedure in civil litigation

In case of matters of procedure in election petition which are not expressly provided for in the electoral laws, Rule 22(1) of GN 447 of 2010 and Rule 19(1) of GN 448 of 2010] fills the gap by stipulating that:

“Subject to the provisions of the Act and of the Rules, the hearing, practice and procedure in respect of a petition shall be regulated, by the rules regulating the practice and procedure in a civil suit”

The rules regulating the practice and procedure are largely contained in the Civil Procedure Code Act, Cap.33 R.E. 2002. However, only specific areas of the Civil Procedure Code apply in proceedings in a trial of election petition as per Rule 22(2) of GN 447 of 2010 and as per Rule 19(2) of GN 448 of 2010. The Rules provide as follows:

“Without prejudice to the generality of the provisions of sub rule (1) of this rule, the provisions of section 80 and of the First Schedule to the Civil Procedure Code, which relate to the discovery and inspection of documents, admissions, production, impounding and returning of documents, transfer of proceedings, settlement of issues and determination of suits, summoning of witnesses, admissibility of affidavits, awarding of costs, judgments and execution of a decree, shall apply mutatis mutandis to the proceedings on a trial of a petition and to the enforcement of an order for costs made by the court.”

The Election Petition Rules also make other specific areas of the Civil Procedure Code [Cap.33 R.E. 2002] than those mentioned in Rule 22(2) of GN 447 of 2010 and as per Rule 19(2) of GN 448 of 2010, namely;

- Order XIII of the C.P.C. with respect to production of documents as per Rule 18(3) of GN 447 and as per Rule 16(3) of GN 448]; and
- Order XIV of C.P.C. with respect to framing of issues as per Rule 20(2) of GN 447 and as per Rule 18(2) of GN 448;

ii) Rules of Evidence

In the conduct of proceedings in election petition the rules of evidence in the Law of Evidence Act, Cap. 6 R.E. 2002 apply.

The *Electronic Transactions Act, 2015* which amended the Law of Evidence Act, Cap.6 R.E. 2002 defines the term “*document*” to include electronic document, and also make provisions for the admissibility electronic evidence in both criminal and civil legal proceedings. The *Electronic Transactions Act, 2015* save for Part VII thereof, came into force on **01.09.2015** by virtue of the *Electronic Transactions (Date of Commencement) Notice, 2015*, G.N. No.329 of **14.08.2015**.

iii) Other relevant legislations

- The Penal Code, Cap.16 R.E. 2002
- The Prevention and Combating of Corruption Act, CAP. 329
- *The Anti-Money Laundering Act No. 12 of 2006* as amended by the Anti-Money Laundering (Amendment) Act No. 1 of 2012
- The Election Expenses Act, Cap.278 R.E. 2015
- The Election Expenses Regulations, G.N. No. 246/2010
- The Political Parties Act, Cap.258 R.E. 2015

CHAPTER TWO:

PROCEDURE IN TRIAL OF ELECTION PETITION

2.1: Election Petition Stages

<i>Box No.3: Stages in Election Petition</i>			
<i>Stage</i>	<i>Activity</i>	<i>Remarks</i>	<i>Responsible Person</i>
1	<i>Filing of a Petition for Parliamentary elections u/s 108 NEA, Cap. 343; for Councilor election u/s 107 of LG (E) A, Cap. 292</i>	<i>For prescribed fees: Rule 33 of the National Elections (Election Petitions) Rules GN 447 of 2010; and Local Government (Elections) Petition Rules GN 443</i>	<i>Registrars (DRs) for High Court and "court" (RM i/c or DRM i/c) for Councilor election petition.</i>
2	<i>Petitioner supplies the Registrar/Court with 3 copies of the Petition plus such additional copies of petitions as there are respondents.</i>	<i>Rule 8(1), (3), (4) of the National Elections (Election Petitions) Rules GN 447 of 2010;</i>	<i>Registrars (DRs) for High Court and "court" (RM i/c or DRM i/c) for Councilor election petition.</i>
3.	<i>Registrar or RM i/c or DRM i/c scrutinizes the petition to satisfy him/herself that the petition has been drawn in compliance with Rules 5, 6 and 7 of the of the National Elections (Election Petitions) Rules GN 447 of 2010;</i>	<i>Rule 8 (1), (3), (4) of the National Elections (Election Petitions) Rules GN 447 of 2010</i>	<i>Registrars (DRs) for High Court and "court" (RM i/c or DRM i/c) for Councilor election petition.</i>
4	<i>If petition has not complied with Rules 5, 6 and 7 of the of the National Elections (Election Petitions) Rules GN 447 of 2010 the Registrar or RMi/c or DRM i/c may either REJECT the petition or RETURN it to the petitioner to be amended</i>	<i>Rules 9 of the of the National Elections (Election Petitions) Rules GN 447 of 2010</i>	<i>Registrars (DRs) for High Court and "court" (RM i/c or DRM i/c) for Councilor election petition.</i>

	<i>within such time as the Registrar may have directed.</i>		
	<i>Where the Registrar or RM i/c or DRM i/c REJECTS the petition, he/she must record his/her reasons.</i>	<i>Rules 9 of the National Elections (Election Petitions) Rules GN 447 of 2010</i>	<i>Registrars (DRs) for High Court and "court" (RM i/c or DRM i/c) for Councilor election petition.</i>
5	<i>If the Petition is not rejected or returned the Petitioner pays filing fees</i>	<i>Schedule to the Rules</i>	<i>Registrar or Court</i>
6	<i>Personal Service of the Petition together with PRESCRIBED FORM B to the Returning Officer & Petition together with Form C to all the respondents.</i>	<i>Rules 10 (1) & (2) of the of the National Elections (Election Petitions) Rules GN 447 of 2010</i>	<i>Registrars (DRs) for High Court and "court" (RM i/c or DRM i/c) for Councilor election petition.</i>
	<i>Where personal service is not possible conditions prescribed under Rule 10 (2) must be satisfied.</i>	<i>Substituted service</i>	<i>Registrars (DRs) for High Court and "court" (RM i/c or DRM i/c) for Councilor election petition.</i>
7	<i>Petitioner within 14 days after filing petition, files application for determination of amount to be paid as security for costs</i>	<i>Section 111 (3) NEC, Cap. 343. Rule 11-(2) identifies exemptions from payment of security for costs.</i>	<i>Registrars (DRs) for High Court and "court" (RM i/c or DRM i/c) for Councilor election petition.</i>
8	<i>Hearing of determination of the application for determination of security for costs</i>	<i>Section 111 of the Act</i>	<i>Registrar consults Judge-in-Charge before he/she fixes Hearing date [i.e. after security for costs has been paid] Assigned Judge/Magistrate fixes hearing date</i>

9	Case File is forwarded to Hon. Judge in Charge or RM i/c or DRM i/c who will assign the petition file to a Judge/Magistrate to hear application for exemption from payment of security for costs.	Section 111 of the Act Rule 11-(2) identifies exemptions from payment of security for costs.	Judge-In-Charge or RM i/c or DRM i/c Assigned Judge/Magistrate
10	Hearing of application for determination of security for costs	Section 111 of the Act Rule 11-(2) identifies exemptions from payment of security for costs.	Assigned Judge/Magistrate
	Within 14 days after filing of application for determination of security for costs, court makes a determination	Section 111 (3) NEC, Cap. 343. What Court considers when determining an application to determine security for costs: whether compliance with security for costs requirements will cause considerable hardship. - section 111 (5) NEC, Cap. 343.	Assigned Judge/Magistrate
		May direct the petitioner to give other form of security value of which does not exceed Tshs.5 million- [section 111 (5) (a) NEC, Cap. 343.]; TShs.500,000/= or May exempt the Petitioner from payment of any form of security for costs [section 111 (5) (b) NEC, Cap. 343.	Assigned Judge/Magistrate
		Security for costs where any person is made respondent by order of the court- section 111 (4) read together with section 111 (5) NEC, Cap. 343.	

11	Case file sent to Registrar-section 111 (2) NEC, Cap. 343.	(ii) Registrar/RM i/c or DRM i/c to receive the security for costs ordered by the Judge	
		(iii) Registrar to fix hearing date after security for costs has been paid.	
12	Production of Documents and accurate list of the documents by parties - Rule 18 of GN 447/2010 and Order XIII of CPC	Documents in possession or power of parties Documents a party intends to rely on which has not already been filed	Registrar/RM i/c or DRM i/c NB: The Rule prescribes at First hearing, but we propose that the Registrar can as well receive these well before Preliminary Hearing
13	Closing of Pleadings	Case file forwarded to Judge-in-Charge.	Judge-in-Charge requests Principal Judge to appoint Trial Judge Judge in Charge assigns case file to appointed trial Judge RM i/c or DRM i/c assigns case file to trial magistrate
14	Summons Issued and served		Registrar or RM I/c or DRM i/c
15	Preliminary Hearing, Conclusion thereof Memorandum of matters agreed prepared with the parties/advocates and read over to the parties/advocates and signed. Ascertainment of matters of which parties are at variance and Framing of Issues	Rule 19 Recommended: Though not provided in the Rules, names of Witnesses be furnished Rule 20 read with Order XIV of CPC; (Rule 21)	Trial Judge/Magistrate

16	<p>Parties to file Witness Affidavits 48 hours before date fixed for the trial</p> <p>A party seeking scrutiny to file list of votes intended to be objected to not less than six days before the date fixed for hearing the petition.</p>	<p>Rule 21A (1) of GN 106 of 2012</p> <p>Rule 12(1)</p>	<p>Registrar</p> <p>Registrar</p>
17	First Day of Hearing of Petition	<p>Production of witnesses</p> <p>Opening of witness affidavits in Court by Judge</p>	Trial Judge
18	If trial not concluded within 12 months extension of time by Minister for Justice for another period not exceeding six months	Section 111(5). of Cap. 343	Minister for Justice on request from the Chief Justice
19	Conclusion of trial and delivery of Judgment	Declaration and Issuance of Court Orders	Trial Judge/Magistrate
20	Preparation of Certificate of Validation and Forwarding to NEC or Electoral Authority	We propose for preparation and adoption of a standard format of Certification of Validation of Election Petition	Registrar or RM i/c or DRM i/c
21	Determination of Bill for Costs		Taxing Master (DR) or RM i/c or DRM i/c

The stages in election petition shown above cover both Parliamentary and Councilor election petitions.

2.2: Avoidance of Election

In Tanzania, the avoidance of election for Parliamentary and Councilor elections is only by way of **election petition** as per section 108(2) of the National Elections Act, Cap.343 Revised in 2015 and section 107(1) of the Local Authorities (Elections) Act, Cap.292 Revised in 2015 respectively.

(1) Time limit for presentation and determination of election petitions

The electoral laws of Tanzania provide for time lines for presentation and determination of election petitions by courts in Parliamentary and Councilor election petitions as shown at Box 4 below:

Box No. 4: Presentation and Determination of Election Petitions		
Type of Election	Parliamentary Elections	Councilor Elections
Relevant Law	Section 115 of the <i>National Elections Act</i> [Cap.343 R.E 2015	Section 114 of the <i>Local Authorities (Elections) Act</i> [Cap.292 R.E 2015
Time for presentation of petition	(1) Every election petition shall be presented <u>within thirty days</u> from the date of the declaration of the results of the election by the Returning Officer.	(1) Every election petition shall be presented within <u>one month</u> of the date of declaration of the result by the Returning Officer: <i>Provided that an election petition questioning the election upon the ground of a corrupt practice and specifically alleging a payment of money or other act to have been made or done since the date of declaration of the results by the Returning Officer by or with the knowledge and consent or approval of the member whose election is questioned or by or with the knowledge and consent or approval of an agent of the member, in the pursuance or in furtherance of that corrupt practice, may be presented at any time within twenty-eight days after the date of that payment or act.</i> (2) Without prejudice to the provisions of any rules of court made under section 116, an election petition presented in due time may, for the purpose of questioning the election upon an allegation of a corrupt or illegal practice, be amended with the leave of the court within the time

		<i>within which an election petition questioning the return or the election upon that ground may be presented.</i>
Time for determination of election petition.	<i>(2) The Court shall hear and determine each election petition within <u>twelve months</u> from the date of filing a petition.</i>	<i>(3) The Court shall hear and determine every election petition within <u>eighteen months</u> from the date of filing a petition.</i>
Extension of time	<i>(5) Where the election case is unlikely to be determined within twelve months, the Minister responsible for legal affairs may, after consultation with the Chief Justice and by notice published in the Gazette extend the prescribed time for further period not exceeding <u>six months</u> as he shall determine.</i>	
Appeals to the Court of Appeal	<i>(4) An appeal lodged pursuant to this section shall lie to the Court of Appeal.</i> <i>Note: Article 83(4) of the Constitution of United Republic of Tanzania 1977 provides that:</i> <i>“There shall be a right of appeal to the Court of Appeal of Tanzania against a decision of the High Court in any matter which was heard in accordance with the provisions of this Article.”</i>	
Time for hearing and determining appeal	<i>(3) The Court shall hear and determine an appeal within <u>twelve months</u> from the date of lodging the appeal.</i>	

(2) Who may bring an election petition?

Eligibility to launch an election petition for someone dissatisfied with election results or the conduct of the election is enshrined in section 111(1)(a)-(d) of the *National Elections Act* [Cap.343 R.E in 2015] for parliamentary elections; and section 110(1)(a)-(d) of the *Local Authorities (Elections) Act* [Cap.292 R.E in 2015] for Councilor elections.

Under the provisions of the National Elections Act, Cap.343 and the Local Authorities (Elections) Act, Cap.292, the following categories of persons are eligible to launch an election petition, namely:

- “(a) a person who lawfully voted or had a right to vote at the election to which the election petition relates;*
- (b) a person claiming to have had a right to be nominated as a candidate or elected at the election to which the election petition relates;*
- (c) a person claiming to have been a candidate at the election to which the election petition relates;*
- (d) the Attorney-General.”*

(3) Who may be made a party to an Election Petition

(i) The Attorney General

In every petition, the Attorney General must be made a party as the respondent except for a petition presented by the Attorney General as per **Rule 6(1) of GN 447 of 2010 and as per Rule 4(1) of GN 448 of 2010**], where the Attorney General may make all such persons, parties to the petition as respondents who are *“likely to be adversely affected in the event of the relief sought by the Attorney General being granted”* [**Rule 6(4) of GN 447 and Rule 4(4) of GN 448 of 2010**].

(ii) The Successful Candidate and Election Officer

Where a petition alleges any misconduct or contravention of any provisions of any written law by the **successful candidate** or by any person acting for or on behalf of the successful candidate, or by the **election officer** as per **Rule 6(3) of GN 447 and as per Rule 4(3) of GN 448 of 2010**], the successful candidate as per **Rule 6(2) of GN 447 of 2010**] and such election officer as per **Rule 6(3) of GN 447 of 2010 and Rule 4(3) of GN 448 of 2010**] has to be made a party to the petition in addition to the Attorney General.

(iii) Addition and Substitution of Parties

Rule 7(2) of G.N. No. 447 and Rule 5(2) of G.N. No. 448, make provision for the adjournment of the proceedings to enable unsuccessful candidate or any other person made a party where the only party made a party to a petition is the Attorney General to be served with a copy of the petition.

The inclusion of the unsuccessful candidate or any other party is predicated upon the opinion of the court that, it is desirable for such inclusion for purposes of determination of the issues involved as per Rule 7(1) of G.N No. 447 and as per Rule 5(1) of G.N No.448].

Under the Rules, the Attorney General enjoys the liberty of advising the court in writing that he has no interest in the petition where he has been joined as a party with the unsuccessful candidate.

If the court is satisfied that no misconduct on the part of any election officer is alleged, then it may order that the Attorney General ceases to be a party and the petition to be proceeded with between the petitioner and the remaining respondent or respondents as the case may be.

(4) What is the Form and Content of Election Petition?

An election petition must be presented in a special form (**Form A**) prescribed in the First Schedule to the Rules, wherein the Petitioner must state the following:

- (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.*

Every petition has to be divided into paragraphs numbered consequently, each of which must as nearly as possible, be confined to a distinct portion of the subject matter as per **Rule 5(2) of GN 447 and Rule 3(3) of GN 448**.

Note: The giving of particulars of allegations in an election petition is regulated under Order VI Rules 4 and 5 of the Civil Procedure Code, 1966, which applies to election petition cases by virtue of **Rule 22(1) of GN No. 447 of 2010 and Rule 19(1) of GN No. 448 of 2010**.

(5) Which reliefs may be claimed in Election Petition?

According to section 112(a) to (d) of Cap.343 R.E 2015 and section 111 (a) to (d) of Cap.292 R.E. 2015, a petitioner may claim all or any of the following reliefs to which the petitioner may be entitled, namely-

- “(a) a declaration that the election is void;*
- (b) a declaration that the nomination of the person elected was invalid;*
- (c) a declaration that any other candidate was elected;*
- (d) where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny.”*

(6) Where should the election petition be presented?

If the petition is for challenging the election results of a Member of Parliament, the petition has to be **presented** to the High Court as per section 110(1) of the *National Elections Act* Cap.343.

And if the petition is for challenging the election results of a Councilor, the petition has to be **presented** to the Resident Magistrates’ Courts as per section 111 of the *Local Authorities (Elections) Act*, Cap. 292.

(7) Before whom should the election petition be presented?

In the case of petition to challenge the results of parliamentary election, the petition has to be presented by lodging it with the Registrar as per **Rule 8(1) of GN 447 of 2010**, and for Councilor election, by the court as per **Rule 6(1) of GN 448 of 2010** upon payment of the prescribed fee.

In respect of parliamentary election petitions the Rules provide further that where the constituency to which the petition relates lies wholly within the jurisdiction of a District Registry of the High Court, the petition has to be presented to the Registrar of such District Registry as per **Rule 8(2) of G.N. No. 447 of 2010**.

(8) Who is to present the election petition?

The petition is to be presented either by the **petitioner himself** or by **his advocate** as per **Rule 8(3) of GN 447 of 2010** and as per **Rule 6(2) of GN 448 of 2010**.

(9) How many copies of the election petition should be supplied?

In the case of parliamentary election petition the petitioner has to supply the Registrar as per **Rule 8(4) of GN 447 of 2010** and in the case of Councilor election petition as per **Rule 6(3) of GN 448 of 2010**, the court, with **three copies of the petition** and with **such additional number of copies as there may be respondents**.

(10) Rejection and Return of Election Petition

A petition not drawn up in the manner prescribed in **Rules 8 of G.N. No. 447 of 2010** and **Rule 6 of G.N. No. 448 of 2010**, may either be **rejected** or **returned** to the petitioner for the purpose of being **amended** within a time to be fixed by the Registrar as per **Rule 9(1) of G.N. No. 447 of 2010** or the court as the case may be as per **Rule 7(1) of GN 448 of 2010**.

If the Registrar or the court as the case may be rejects the petition, the Registrar or the court must give reasons which are to be recorded as per **Rule 9(2) of G.N. No. 447 of 2010** and as per **Rule 7(2) of G.N. No.448 of 2010** respectively.

Note: A petition may be **rejected** if it is time barred and may be **returned** if it does not comply with the form and content as stipulated in the laws and regulations.

(11) Payment of Court Fees

If the petition is not rejected or returned, the petitioner has to pay the prescribed fees contained in the Second Schedule to the Rules which are payable in respect of the matters specified in relation thereto as per **Rule 34 of GN 447 of 2010** and as per **Rule 30 of GN 448 of 2010**.

The prescribed fees must be paid in relation to the **specified matter** before the Registrar or the court, as the case may be, **take any action in respect of the matters** in relation to the fees.

The fees for lodging a parliamentary election petition are **Tshs.200,000/=** as prescribed in the **Second Schedule to G.N. No.447**, and for Councilor election it is **Tshs.100,000/=** as prescribed in the **Second Schedule to G.N. No.448**.

Note: The rules regulating payment of fees in a civil suit before the High Court or the Resident Magistrates Court for matters not prescribed in the Election Petition Rules apply as regards payment of court fees.

On **the** effect of non-payment of filing fees in an election petition refer to the decision of the Court of Appeal in the case of *Martha Michael Weja Vs. Hon Attorney General and 3 Others* [1982] TLR 35 where the Court held that the payment of fees in respect of election petitions, which is provided for in the election rules is a matter of procedure and practice and not of substantive law.

(12) Who is to serve petition and documents?

A petition which has not been rejected or returned has to served either by the **Registrar** in the case of parliamentary election or the **court** in the case of Councilor election petition as per **Rule 10(1) of GN 447 of 2010** and as per **Rule 8(1) of GN 448 of 2010**.

(13) On whom is service to be effected?

Service can be on the following persons:

- (a) The election officer together with prescribed notice **(Form B)**
- (b) Each of the respondents together with prescribed notice **(Form C)**
- (c) Posting on the court notice board a certified copy of the petition.

(14) How is service to be effected?

Service of the petition and the prescribed documents upon the respondent has to be by **personal service** as per Rule 10(2) of G.N. No. 447 of 2010 and as per Rule 8(2) of G.N. No.448 of 2010.

It can however be directed that the petition and documents be served by **substituted service** in such manner as the court may direct as per Rule 10(2) of G.N. No.447 of 2010 and as per Rule 8(2) of G.N. No. 448 of 2010.

(15) Dismissal of Election Petition for Reason of Irregularity

Non-compliance with the Rules or other procedural irregularity should not be the reason for dismissing a petition, unless such non-compliance or irregularity in the opinion of the court has resulted or is likely to result in a miscarriage of justice as per Rule 32(1) of GN 447 of 2010 and as per Rule 29(1) of GN 448 of 2010.

The court however, has some discretion where there has been any non-compliance with the Rules or irregularity to require the petitioner to rectify the non-compliance or the irregularity but subject to such terms as to costs or otherwise as the court may direct as per Rule 32(2) of GN 447 of 2010 and Rule 29(2) of GN 448 of 2010.

Where the petitioner fails to comply with an order of the court for rectification within the specified time, the court may dismiss the petition as per Rule 32(3) of GN 447 of 2010 and as per Rule 29(3) of GN 448 of 2010].

Rule 32(1) of GN 447 of 2010 provides that:

“...no petition shall be dismissed for the reason only of non-compliance with any of the provisions of the Rules or for the reason only of any other procedural irregularity unless the court is of the opinion that such non-compliance or irregularity has resulted or is likely to result in a miscarriage of justice.”

In *Liberatus Laurent Mwang'ombe V. The Attorney General, Haroon Mullah Pilmohamed and The Returning Officer Mbarali Parliamentary Constituency, Civil Appeal No 45 of 2016*, the Court of Appeal of Tanzania dealt with the question whether the judge was entitled to strike out the petition anyway? The Court stated as follows:

“In our view there was every reason for the trial judge to have been inspired by the provisions of rule 32(1) of the Election Petition Rules and should have restrained herself from striking out the petition for some non-compliance or irregularities which even if they were there would not have resulted in a miscarriage of justice.”

2.3: Application for Determination of Security for Costs

2.3.1: Procedure for Determination of Application for Security for Costs

In terms of Rule 11(1) of GN 447 of 2010 and Rule 9(1) of GN 448 of 2010, the procedure for deposit of security for costs in respect of parliamentary election petitions is regulated by the provisions of the National Elections Act and in respect of Councilor elections, the Local Authorities (Elections) Act respectively.

Section 111 of the National Elections Act which was amended by the *Written Laws (Miscellaneous Amendment) Act No.2 of 2002*, provides as follows:

“Section 111 “(1)...(not relevant)

(2) The Registrar shall not fix a date for the hearing of any election petition unless the petitioner has paid into the court as security for costs, an amount not exceeding five million shillings in respect of each respondent.

(3) The petitioner shall within fourteen days after filing a petition, make an application for determination of the amount payable as security for costs, and the court shall determine such application within the next fourteen days following the date of filing of an application for determination of the amount payable as security for costs.

(4) Where a person is made a respondent pursuant to an order of the court, the petitioner shall within fourteen days of the date on which the order directing a person to be joined as a respondent was made, pay into the court a further amount not exceeding three million shillings, as shall be directed by the court in respect of such person.

(5) Where on an application made by the petitioner, the court is satisfied that compliance with the provisions of subsection (2) or (4) will cause considerable hardship to the petitioner, it may direct that-

(a) the petitioner gives such other form of security the value which does not exceed five million shillings, as the court may consider fit; or

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

(6) No order shall be made under subsection (3), (4) and (5) unless an opportunity has been given to the respondent, or, where there are two or more respondents, to each of the respondents to make representations in that behalf.

(7) In the event of security for costs not being paid into the court within fourteen days from the date of determination by the court of the amount payable as security for costs, no further proceedings shall be heard on the application.

(8) The provisions of subsection (2) and (3) shall not apply to the Attorney General in any case in which the Attorney General is the petitioner or one of the petitioners.

(9) The amount of money deposited as security for costs or the balance of it shall, where the petitioner succeeds in the petition or on appeal and where no order as to costs lies against the petitioner, be immediately refunded to the petitioner.”

Section 110(1) of the LOCAL AUTHORITIES (ELECTIONS) ACT NO.4 OF Cap.292 R.E. 2015 contains more or less similar provisions as section 111 of the NATIONAL ELECTIONS Cap.343 R.E. 2015 on security for costs with respect to Councilor elections which is set at an amount not exceeding **Tshs. 500,000/=**.

As per decision of the Full Bench of the Court of Appeal in *Chiriko Haruna David V. Kangi Alphaxa Lugora, The Returning Officer For Mwibara Constituency, And Attorney General Civil Appeal No.36 of 2012 ((CAT) delivered on 31st May 2013 unreported)*, a petitioner able and capable of complying with the requirement of paying the maximum amount of security for costs stipulated in section 111(2) and (4) of the National Elections Act does not need to apply to the court for a determination of the amount as required under section 111(3) of the Act.

According to *Chiriko v. Kangi Lugora*, the provisions in the electoral law and rules for applying for determination of the amount payable as security for costs were meant for genuine indigent petitioners, and further that the rigors imposed on such petitioners are mitigated by the provisions of subsection (3) and (5) of section 111 of Cap.343 R.E. 2015 and section 110 of Cap.292 R.E. 2015 respectfully.

In summary, the legal position on application, determination and payment of security for costs in an election petition is as follows:

1. *The law does not provide a specific time within which to pay the maximum security for costs of Tshs. 5,000,000/- for Parliamentary election as stipulated in subsection (2) of section 111 of the National Elections Act and Tshs. 500,000/= as stipulated under subsection (2) of section 1110 of the Local Authorities (Elections) Act However, the said amount must be paid within a reasonable time.*
2. *A petitioner able and capable of complying with the requirement of paying the maximum amount mentioned in section 111(2) and (4) of Cap. 343 and section 110(2) and (4) of Cap. 292 as security for costs does not need to apply to court for the determination of the said amount under section 111(3) of Cap. 343 or section 110(3) of cap. 292.*
3. *An application for determination by the court of the amount payable as security for costs is only intended for a Petitioner whose means makes it difficult for him or her to comply. A petitioner capable of paying the maximum sum does not need the indulgence of the court's discretion to determine the payment of a lesser sum or total exemption of security for costs as stipulated under section 111(5) of Cap. 343 or section 110(5) of Cap. 292.*
4. *After the court has made a determination of the amount payable and the petitioner still believes that paying the determined amount will cause considerable hardship to him/her, he or she should proceed to take advantage of subsection (5) of section 111 of Cap. 343 or subsection (5) of section 110 of Cap. 292.*
5. *Similarly a petitioner who has been directed to pay a certain amount of money, not exceeding three million, as security for costs under subsection (4) of section 111 of Cap. 343 or subsection (4) of section 110 of Cap. 292 can also take advantage of subsection (5) of section 111 of Cap. 343 or subsection (5) of section 110 of Cap. 292*

2.3.2: Closure of Pleadings

Payment of security for costs marks the close of the pleadings and signals that the petition is now ripe for hearing and thus enjoins the Registrar to fix the date for hearing of the petition.

If security for costs is not paid, the provisions of subsection (7) of section 111 of the National Elections Act come into play by stating that:

“111(7) In the event of security for costs not being paid into the court within fourteen days from the date of determination by the court of the amount payable as security for costs, no further proceedings shall be heard on the application.”

So far there is no decision of the Court of Appeal of Tanzania on the interpretation of the phrase *“no further proceedings shall be heard on the application”* in section 111(7) of the National Elections Act. Consequently, there has been a variation in the decisions of the High Court on the legal effect of that phrase, some decisions marking the “matter as closed” and yet others dismissing the petition.

CHAPTER THREE:

PRE-TRIAL PROCEDURES

The trial of election petition for challenging the results of election of a Member of Parliament is to be conducted by the High Court and for contesting the results of election of Councilor by the Resident Magistrates' Court.

3.1 Registrar to Fix Date for Hearing

The provisions of section 111(2) of the National Elections Act provides as follows:

"111(2) The Registrar shall not fix a date for the hearing of any election petition unless the petitioner has paid into the court as security for costs, an amount not exceeding five million shillings in respect of each respondent."

Payment of security for costs is therefore a condition precedent for the Registrar to fix the date of hearing of the petition.

3.2 Preliminary Hearing

Preparation of Memorandum Matters Agreed

A preliminary hearing is conducted as soon as the pleadings are complete in the presence of the parties or their advocates for the purpose of considering "*such matters as are not in dispute between the parties and which will promote a fair and expeditious trial*" as per Rule 19(1) of GN 447 of 2010 and as per Rule 17(1) of GN 448 of 2010.

At the preliminary hearing, the court has to ascertain from the parties of which legal or factual material propositions that are not in dispute.

Upon conclusion of the preliminary hearing, the court has to prepare a memorandum of matters agreed, which is to be read over and explained to the parties or their advocates as per Rule 19(3) of GN 447 of 2010 and as per Rule 17(3) of GN 448 of 2010 and signed by the parties or their advocates and the judge or the magistrates as per Rule 19(4) of GN 447 of 2010 and as per Rule 17(4) of GN 448 of 2010] as the case may be.

Any fact or document admitted or agreed in a memorandum filed is deemed to have been duly proved.

However, during the course of the trial where the court is of the opinion that interests of justice demand, it may direct that any fact or document admitted or agreed in the memorandum be formally proved as per Rule 19(5) of GN 447 of 2010 and as per Rule 17(5) of GN 448 of 2010.

3.3 Framing of Issues in Election Petition

The framing of issues is done by the court after the conclusion of the preliminary hearing, having ascertained matters of which the parties are at variance and record them as per Rule 20(1) of GN 447 of 2010 and as per Rule 18(1) of GN 448 of 2010.

The right decision of the petition is therefore predicated on the issues as ascertained and recorded by the court. The Rules however stipulate that the framing of issues is to be regulated as nearly as possible in accordance with Order XVI of the Civil Procedure Code.

CHAPTER FOUR: TRIAL OF ELECTION PETITION

4.1 Filing of List of Votes intended to be objected

A party (respondent or petitioner) seeking scrutiny must lodge with the Registrar not less than six days before the day fixed for the hearing of the petition a list of votes intended to be objected to by him and of the objections to each vote. This mandatory requirement is as per Rule 12 (1) of GN No. 447 of 2010 which stipulates that -

“Where scrutiny under the provisions of paragraph (d) of s 112 of the Act is sought wither by the petitioner or a respondent, the party seeking such scrutiny shall not less than six days before the day fixed for the hearing of the petition, lodge with the Registrar a list of votes intended to be objected to by him and of the objections to each vote.”

NOTE: The term "**scrutiny**" is not defined in the National Elections Act, Cap.343 or in the Election Petition Rules GN 447. Simply stated scrutiny means "*an enquiry as to the validity of the votes cast, and includes the determination of the number of valid votes cast for each candidate in the election in respect of which the application for a scrutiny is made.*" The legal effect of scrutiny is that votes may be struck off at scrutiny.

In **ARUSHA KALWA AND FIVE OTHERS v WILBROAD SLAA AND ANOTHER [1997] T.L.R. 250 (CA)**, the Court of Appeal of Tanzania laid down the following principles in relation to the relief of scrutiny in an election petition:

- 1) *The party seeking scrutiny must lodge with the Registrar of the High Court a list of votes intended to be objected to not less than six days before the date fixed for hearing the petition.*
- 2) *The requirement to lodge a list of votes intended to be objected to not less than six days before the date of hearing is a fundamental and mandatory requirement which goes to the very root of the matter failure of which renders the granting of the relief of scrutiny untenable.*
- 3) *Scrutiny is aimed at disputed and specified votes which are the subject of scrutiny in order to ascertain the claim by the petitioner or respondent that he or she had a majority of votes. It is not aimed at re-doing the whole exercise of counting votes in the whole constituency.*
- 4) *The reliefs of recount and scrutiny are distinctly different and available under the National Elections Act at different stages of the process of counting of votes and the period after the declaration of the election results.*
- 5) *Recount is available at the stage when the counting of votes is being completed at the polling station. After the addition of votes and declaration of the results, the National Elections Act does not provide for the recount of the votes.*

4.2 Consolidation of Election Petitions

Where two or more petitions are presented in relation to the same election, they should be consolidated. The trial court may direct that some or all of such petitions be consolidated and tried as one petition **as per Rule 16 of GN 447 of 2010 and as per Rule 14 of GN 447 of 2010**. The main reason for consolidation is to avoid multiplicity of trials and to save the precious time of both of the court and the parties as well as costs.

4.3 Trial by more than one Judge or Magistrate

In the event that a petition is likely to raise complicated questions of law or of fact, the Rules vest on the Chief Justice with discretionary powers to direct the petition to be tried by three or five judges in the case of parliamentary election petition or two or more magistrates in the case of Councilor election petition as per Rule 17(1) of GN 447 of 2010 and as per Rule 15(1) of GN 447 of 2010.

Where a petition is tried by three or five judges or two or more magistrates as the case may be, the petition is to be determined in accordance with the decision of the majority of the judges or the magistrates as the case may be as per Rule 17(2) of GN 447 of 2010 and as per Rule 15(2) of GN 448 of 2010.

NOTE: There is a drafting error in Rule 15(2) of GN 448 of 2010 where it is stated that "*where a petition is tried by three or five magistrates.*" instead of "*...where a petition is tried by two or more magistrates.*"

4.4 Documentary Evidence at First Hearing of Election Petition

All the documentary evidence of every description in the possession or power of the parties on which they intend to rely and which has not already been filed in court and all documents which the court has ordered to be produced must be produced by the parties or their advocates at the first hearing of the petition as per Rule 18(1) of GN 447 of 2010 and as per Rule 16(1) of GN 448 of 2010.

NOTE: There is a drafting error in Rule 18(1) of GN 447 of 2010 which make reference to "*...first hearing of the suit...*" instead of "*...first hearing of the petition...*"

The general principle is that the court has to receive the documents so produced, provided they are accompanied by an accurate list prepared in "*such form as the High Court or the court directs.*" The procedure for production of documents is to be regulated "*as nearly as possible*" in accordance with Order XIII of the Civil Procedure Code as per Rule 18(3) of GN 447 of 2010 and as per Rule 16(3) of GN 448 of 2010.

4.5 Witnesses in Election Petition Trial

The summoning and swearing in of witnesses in a trial of election petition is to be in the same manner "*as nearly as circumstances admit, as in a trial by the court in the exercise of its original civil jurisdiction.*"

Witnesses in a trial of election petition are subjected to the same penalties for giving false evidence (perjury) or for non-attendance as witnesses a civil suit as per Rule 21 of GN 447 of 2010.

There is no similar provision on witnesses and consequences of giving false testimony or non-attendance in the Local Authorities (Election Petitions) Rules.

4.6: Affidavit Evidence

The production of evidence in criminal and civil matters is generally by producing witnesses to testify orally (testimonial evidence) and/or to produce documents (documentary evidence).

The Tanzania Evidence Act was amended to introduce the production of evidence in court by way of written witness statements. Until recently, rules governing production of evidence and examination of witness in election petitions were being governed by the Tanzania Evidence Act, Cap.6 and of the Election Petition Rules, 2010.

Rule 21 of the *National Elections (Election Petitions) Rules, 2010 G.N. No. 447 of 2010*, which is a replica of section 110(2) of the National Elections Act provides that:

“21. Witnesses shall be summoned and sworn in the same manner as nearly as circumstances admit, as in a trial by the court in the exercise of its original civil jurisdiction and shall, without prejudice to the provisions of any other law, be subject to the same penalties for giving false evidence for non-appearance.”

In 2012, the Chief Justice exercising his delegated legislative powers, promulgated the *National Elections (Election Petitions) (Amendment) Rules, 2012, G.N. No. 106 of 2012*, amending the *National Elections (Election Petitions) Rules, 2010 vide G.N. 447 of 2010*. The new Rule 12A (1) stipulates thus:

“21A- (1) The Petitioner shall, not less than 48 hours before the time fixed by the court for trial of an election petition deliver at the office of the Registrar an affidavit sworn by each witness whom the petitioner intends to call at the trial, setting out the substance of his evidence.”

The Court of Appeal in **1. Zella Adam Abrahaman 2. Amina M. Mwadau 3. Dr. Steven L. Kirushwa Vs. 1. The Attorney General 2. Oran Manase Njeza 3. Returning Officer, Mbeya Vijijini Parliamentary Constituency, 4. Juma H. Aweso, 5. The Returning Officer, Pangani Constituency 6. Onesmo Nangole 7. Returning Officer Longido Constituency**, Consolidated Civil Revisions Nos. 1, 3 and 4 of 2016 (Court of Appeal at Dar es Salaam), dealt with the issue whether both Rules 21 and 21A are contradictory, confusing and vague and held that:

- *Rule 21 did not shut out completely oral evidence.*
- *Failure to comply with Rule 21A, which is a replica of section 110 (2) of the National Elections Act, which has never been questioned in any election petition, was not a fatal irregularity.*

4.7 The Use of Electronic Evidence in Election Petition

In **Emmanuel Godfrey Masonga v. Edward Franz Mwalongo, The Returning Officer of Njombe Township Council, The Attorney General**, Miscellaneous Civil Cause No. 6 of 2015, High Court of Tanzania at Njombe, the Court dealt with the issue of admissibility of evidence of a Video Recorded via a Mobile Phone.

4.8 Grounds to be Taken at Trial of Election Petition

Rule 5(1) of GN 447 and Rule 3(2) of GN 448 requires that in election petition it should be stated among other things *“(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.”* The Rules insist that the

petitioner cannot argue or be heard in support of any ground not set in the petition save with leave of the court.

In determining a petition however, the court is not confined to the grounds set in the petition as per Rule 23 of GN 447 of 2010 and as per Rule 20 of GN 448 of 2010.

4.9 Postponement of the commencement of trial

Postponement happens before the commencement of the trial of an election petition. The Rules make provisions for the court to postpone the beginning of the trial of the petition.

The **postponement of the commencement** of the trial by the Court could be either on its own motion or upon application by a party supported by an affidavit made by a party and after notice to the other parties as per Rule 24(1) of GN 447 of 2010 and as per Rule 21(1) of GN 448 of 2010.

A copy of such notice and of the order issued by the Court must be sent to the Registrar to each of the parties to the petition and another copy is to be posted on the court notice board as per Rule 24(2) of GN 447 of 2010 and as per Rule 21(2) of GN 448 of 2010.

Where the trial of the election petition cannot commence on the day appointed date due to absence of the judge or magistrate it will stand adjourned to the following day, and so on from day to day, until a judge or magistrate is available to try it as per Rule 24(3) of GN 447 of 2010 and as per Rule 21(3) of GN 448 of 2010.

4.10 Adjournment of trial after commencement of trial of election petition

Adjournment of a trial of an election petition occurs after the trial of the petition has already commenced but for some reasons the court cannot continue with the trial. The general principle is that the trial of election petition must continue until its conclusion as per Rule 25(2) of GN 447 of 2010 and as per Rule 22(2) of GN 448 of 2010. The court has discretion to adjourn the trial from time to time as per Rule 25(1) of GN 447 of 2010 and as per Rule 22(1) of GN 448 of 2010.

4.11 Illness of Magistrate or Judge

The Rules make it possible for a successor judge or magistrate to deal with any evidence or memorandum taken down or made by his or her predecessor who has begun the trial of a petition who has been prevented by reason of illness, death or other reasonable cause from concluding the trial, as if such evidence or memorandum has been taken down or made by the predecessor judge or magistrate and may proceed with the suit/petition from the stage at which his or her predecessor left it as per Rule 26 of GN 447 of 2010 and as per Rule 23 of GN 448 of 2010.

A Judge or magistrate may pronounce a judgment written but not pronounced by his or her predecessor as per the Proviso to Rule 26 of GN 447 of 2010 and Rule 23 of GN 448 of 2010.

4.12 Failure of Petitioner to Appear

Failure by a petitioner to appear before the court on the day on which the petition is to be heard may lead to dismissal of the petition as per Rule 27(1) of GN 447 of 2010 and as per Rule 24(1) of GN 448 of 2010.

A dismissed petition may be re-admitted by the court upon the petitioner satisfying the court that his or her failure to appear on the day of the hearing was due to a **reasonable cause** as per Rule 27(2) of GN 447 of 2010 and as per Rule 24(2) of GN of 2010.

4.13 Failure of Respondent to Appear

Failure by the Respondent to appear on the day on which the petition is to be heard, entitles the court to proceed to try the petition despite the absence of the Respondent and the decision of the court will be binding upon the Respondent as per Rule 28 of GN 447 of 2010 and as per Rule 25 of GN 448 of 2010.

Appearance by advocate where a party is represented by an advocate is deemed to be appearance by the party whom the advocate represents as per Rule 29 of GN 447 of 2010 and as per Rule 26 of GN 448 of 2010.

4.14 Withdrawal of Election Petition

A petitioner may withdraw the petition lodged before the decision has been delivered. The withdrawal has to be in writing addressed to the Registrar or the court as the case may be. The withdrawal of the petition by the petitioner is subject to costs as the court may deem fit to order as per Rule 30(1) of GN 447 of 2010 and as per Rule 27(1) of GN 448 of 2010.

The Rules provide generally that withdrawal bars the Petitioner from filing fresh petition in respect of the same petition. The only instance however, where the court may allow the petitioner to lodge a fresh petition in respect of the same petition is if the Court is satisfied that the petition was withdrawn for the reason that it would have been defeated on the ground of any procedural irregularity as per Rule 30(2) of GN 447 of 2010 and as per Rule 27(2) of GN 448 of 2010 and the Proviso thereto.

In the case of two or more petitioners, the withdrawal of the petition is only by application in writing by all the petitioners as per Rule 30(3) of GN 447 of 2010 and as per Rule 27(3) of GN 448 of 2010.

4.15 Abatement of Election Petition

The general rule in civil suits that death does not cause a civil suit to abate also finds expression in election petitions.

There are two situations in an election petition which make a petition to abate. These are (a) death of sole petitioner or of the sole surviving petitioner; or (b) death of the successful candidate as per Rule 31(1)(a) & (b) of GN 447 and as per Rule 28(1)(a) & (b) of GN 448 of 2010.

In the event of the petition abating by reason of the death of sole petitioner or the sole surviving petitioner, the Rules provide that if the court considers it equitable and just so to do, may award such costs to the respondent or to each of the respondents where there are two or more respondents, as it may deem proper as per Rule 31(2) of GN 447 of 2010 and as per Rule 28(2) of GN 448 of 2010.

The amount of costs awarded to a respondent however, are not to exceed the amount of costs for which the petitioner had given security in respect of that respondent as per Proviso to Rule 31(2) of GN 447 of 2010 and to Rule 28(2) of GN 448 of 2010.

The general principle is that all costs, charges and expenses of and incidental to the presentation and trial of an election petition shall be borne in such manner and in such proportions as the High Court or the court may order and in particular, any costs which in the opinion of the High Court or the Court have been caused by any vexatious conduct or by

any frivolous or vexatious allegations or objections on the part of the petitioner or of the respondent/respondents, may be ordered to be paid by the party by whom such costs have been caused.

4.16 Settlement of Election Petition by Consent Order

Where the parties signify their intention to “settle” the matter by consent they may do so and file the settlement in Court and an order marking the petition as settled will accordingly be entered by the Court.

Essentially, the settlement has the effect of concluding the trial and therefore the Court will enter a signification to that effect and issue a Certificate of Validation to the Director of Election in terms of section 113(1) of the Elections Acts, Cap 343. This happened in **Augustino Lyatonga Mrema v. James Francis Mbatia, The Returning Officer Vunjo Constituency and the Attorney General**, Miscellaneous Cause No. 1 of 2015, High Court of Tanzania at Moshi (unreported).

CHAPTER FIVE:

GROUNDS FOR AVOIDANCE OF ELECTIONS

5.1 Specified Grounds for Avoiding Election

The relevant sections of the electoral laws on the grounds for avoiding elections are found under section 108 of the National Elections Act, Cap.343 R.E. 2015, and section 107 of the Local Authorities (Elections) Act, Cap.292 R.E. 2015.

<i>Box No. 5: Grounds for Avoiding Election</i>	
<i>Parliamentary Election</i>	<i>Councilor Election</i>
<i>Section 108 of the National Elections Act, [Cap.343 Revised 2015]</i>	<i>Section 107 of the Local Authorities (Elections) Act, [Cap.292 Revised 2015].</i>
<i>(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 Member of Parliament</i>	<i>(1) The Election of a Candidate as a member shall not be questioned except on an election petition.</i>
<i>(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 court and no other ground, namely –</i>	<i>(2) The election of a candidate as a member shall be declared void on any of the following grounds which are proved to the satisfaction of the court namely –</i>
<i>(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;</i>	<i>(a) that by reason of corrupt or illegal practices committed in connection with the election, or other circumstances, whether similar to those enumerated or not, the majority of voters where or, may have been prevented from election the candidate whom they preferred.</i>
<i>(b) non-compliance with the provisions of this Act relating to election if it appears that the election was not conducted in accordance with principles laid down in such provisions and that such non-compliance affected the result of the</i>	<i>(b) 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</i>

<p><i>election;</i></p>	<p><i>election or relating to any of the candidates or where the candidates are not of the same sex, with intent to exploit such difference;</i></p>
<p><i>(c) that the candidate was at the time of his election a person not qualified for election as a member.</i></p>	<p><i>(c) non-compliance with the provisions of this Act relating to election if it appears that the election was not conducted in accordance with principles laid down in such provisions and that such non-compliance affected the result of the election;</i></p>
<p><i>(3) Notwithstanding the provisions of subsection (2), where upon trial of an election petition respect of an election under this Act the High Court finds that corrupt or illegal practice in connection with the election has been committed by or with the knowledge or approval of any of the candidate' agents and the High Court further finds, after giving the Attorney-General or his representative an opportunity of being heard, that the candidate has proved to the High Court –</i></p>	<p><i>(d) that corrupt or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or with the knowledge and consent or approval of any of his agents; or</i></p>
<p><i>(a) that no corrupt or illegal practice was committed by the candidate himself or with the knowledge and consent or approval of such candidate;</i></p>	<p><i>(e) that the candidate was at the time of his election a person not qualified for election as a member.</i></p>
<p><i>(b) that the candidate took all reasonable means for preventing the commission of any corrupt or illegal practices at such an election; and</i></p>	<p><i>(3) Notwithstanding the provisions of subsection (2), where upon trial of an election petition respecting an election under this Act, the court finds that corrupt or illegal practice in connection with the election has been committed by or with the knowledge or approval of any of the candidate' agents and the court further finds, after giving the Attorney-General or his representative an opportunity of being heard, that the candidate has proved to the court –</i></p>
<p><i>(c) that in all respects the election was free from any corrupt or illegal practice on the part of the candidate;</i></p>	<p><i>(a) that no corrupt or illegal practice was committed by the candidate himself or with the knowledge and consent or approval of such candidate or his agent;</i></p>

<i>then, if the High Court so recommends, the election of such candidate shall not by reason of any such practice be void.</i>	<i>(b) that the candidate took all reasonable means for preventing the commission of corrupt or illegal practices at the election; and</i>
	<i>(c) that in all respects the election was free from any illegal practice on the part of the candidate and of his agent;</i>
	<i>then, if the court so recommends, the election of that candidate shall not by reason of any that practice be void."</i>

INTERPRETATION OF GROUNDS BY THE COURTS

1) Abusive and Defamatory Statements

The law targets statements made during the election campaign by a candidate or his agents with knowledge, consent or approval of the candidate with intent to exploit tribal or religious differences during the election campaign pertinent to the election.

See **LUTTER SYMPORIAN NELSON AND THE HON ATTORNEY GENERAL AND IBRAHIM MSABAHA;**

JOSEPH WARIOBA v. STEPHEN WASSIRA AND TWO OTHERS Misc. Civil Cause No.25 of 1995 (unreported);

SEBASTIAN RUKIZA KINYONDO v. DR. MEDARD MUTALEMWA MUTUNGI Civil Appeal No.83 of 1998 (unreported); and

CHOYA ANATORY KASAZI AND KASHEMEZA PHARES KABUYE AND THE HON ATTORNEY GENERAL Misc. Civil Cause No.10 of 2005.

2) Non-Compliance with Electoral Law

In **MUJUNI JOSEPH KATARAIA v. SAMWEL NTAMBALA LUANGISA AND ANOTHER** [1986] TLR 53 (CA) one of the complaints the appellant raised before the Court of Appeal was that there was an irregularity arising out of failure of the Assistant Returning Officer to follow the guidelines given in a booklet titled "*Guidelines to the Presiding Officers on the Election Procedure.*"

The said guidelines required the officers to record on the counterfoils of ballot papers three numbers - the registration centre number, the constituency number and the voter's serial number. In that case it was alleged that the officer had recorded the voter's serial number only and this was in compliance with s.61(c)(iii) of the Elections Act, 1985. It was held that, the Elections Act requires only that the number of the voter be recorded.

In **TALAZI ANTONI YOWELI AND 3 OTHERS V. ATTORNEY GENERAL AND ALLY RAMADHANI KIHIIYO** Civil Cause No.143 of 1995 c/f Misc. Civil Causes No.146 and 151 (unreported) Mapigano, J. (as he then was) held that where the National Electoral

Commission fails in its duty to organize free and fair election by not providing adequate ballot papers thus rendering the citizens unable to vote due to shortage of ballot papers the election cannot be conducted in terms of the law and the citizens thereby fail to enjoy their basic right to vote.

In that petition the election results for the Temeke Constituency in the 1995 general multiparty election was being challenged. Apparently a large number of voters could not vote due to shortage of ballot papers and the National Election Commission had to postpone the election.

3) Candidate Unqualified at Time of Election

In terms of section 36 of the National Elections Act, the qualification for election or appointment as a Member of Parliament are as stipulated in Article 67(2) of the 1977 permanent Constitution of the United Republic of Tanzania as amended from time to time.

According to Article 67(2) of the Constitution, for a person to qualify for election or appointment as a Member of Parliament, he or she must be a citizen of the United Republic who has attained the age of twenty-one years and who can read and write in Kiswahili or English; and is a member and a candidate proposed by a political party.

The qualifications for election as a member of a local government or stand as a candidate at an election for local government authorities are clearly stated under section 39 of the Local Authorities (Elections) Act. They include citizenship of the United Republic; attainment of age of twenty-one years; and member of and sponsored by registered political party.

The issue of citizenship as a qualification for election as Member of Parliament came for thorough discussion in **ATTORNEY GENERAL AND TWO OTHERS VS AMAN WALID KABOUROU [1996] TLR 156 (CA)** where it was held among other things that the three factors which determine citizenship by birth are firstly, being born in Tanganyika by 8 December 1961; secondly, being a citizen of the UK and colonies or being a British protected person on 8 December 1961; and finally having at least parent born in Tanganyika.

In **ARCADO NTAGAZWA v BUYOGERA BUNYAMBO [1997] T.L.R. 242 (CA)**, which was an appeal against the decision of the High Court nullifying the election of the appellant as a Member of Parliament for Muhambwe constituency during the 1995 general election, on the ground that the appellant, Mr. Arcado Dennis Ntagazwa, is a foreigner i.e. a citizen of Burundi, and hence a person not qualified for election as Member of Parliament under our law, the Court of Appeal reversed the decision and ordered the trial to proceed in the High Court.

5.2 Unspecified Grounds for Avoiding Election

1) Corrupt or Illegal Practices

Both the National Elections Act and the Local Authorities (Elections) Act, state corrupt or illegal practice as a ground for avoiding an election but not as a specific ground since it only attracts deletion from the register of voters, in respect of a person registered in a polling station.

The law does not provide corrupt or illegal practice as express ground for avoiding an election by stating that the election of a candidate "*shall not by reason of any corrupt or illegal practice be void*" but only for the court to certify to the Director of Elections or the

returning officer as the case may be with the consequence of only deleting such person from the voters' register.

If a person is found guilty of corrupt or illegal practice he or she is disqualified to contest presidential, parliamentary, and councilor elections for a period not exceeding five years.

In **ATTORNEY-GENERAL AND TWO OTHERS vs. AMAN WALID KABOUROU [1996] TLR 156 (CA)** the Court of Appeal stated that the grounds listed under paras (a) to (c) of subsection (2) of section 108 of the Elections Act, 1985 (now Cap.343 R.E. 2015) are not exhaustive by reason of the fact that the word 'only' is not used therein.

The Court of Appeal stated further that for purposes of clarity the removal of illegal practices and corrupt practices from section 108 by the Elections (Amendment) Act 1992 (Act 6 of 1992) as specific grounds for nullification of election results cannot be construed as having the effect of making illegal practices or corrupt practices permissible under the Elections Act, 1985. What the amendment achieved was to make illegal practices and corrupt practices per se no longer sufficient grounds for nullification of election results under the circumstances stipulated under section 108(3)(a) and (d) as it then was before the amendment.

According to the Court of Appeal in **AMAN WALID KABOUROU's case (above)**:

"It is pertinent to point out for purposes of clarity that it is conceivable to have generally free and fair elections but which are afflicted with a non-compliance of specific provisions of the Elections Act and which affects the results of the elections. In other words, 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. Such an incident would clearly be a non-compliance with the provisions of s 61(a) and (b) concerning methods of voting. A non-compliance of this nature may affect the results but does not necessarily make the election unfree and unfair [1996 T.L.R. p. 175-176]."

2) Prohibited Practices

According to section 3 of the Elections Expenses Act, Cap 278 R.E 2015 "prohibited practices" means any offence mentioned in and punishable under the provisions of Part V of the Act.

Under the Elections Expenses Act, the commission of a prohibited practice by a person or a political party is both a ground for disqualification from participation in the nomination process or election as per section 24(2) of the Act, and also for institution of criminal proceedings or an election petition under section 24(7) of the Act by the Attorney General.

The relevant sections in the **Election Expenses Act** provides as follows:

"24(2) Any candidate who, by himself, his agent or by his political party which commits an act amounting to a prohibited practice as stipulated in this Part shall himself or itself liable for disqualification from participation in the nomination process or election."

"24(7) Where a candidate, or his agent or his political party commits an act which amounts to a prohibited practice in respect of which no action was taken, the Attorney General may institute criminal proceedings or an election petition against that candidate."

Under section 24(2) of the Elections Expenses Act, the liability for disqualification on ground of commission of prohibited acts is mandatory. Under section 24(7) of the Act, the Attorney General has discretion whether to institute criminal proceedings or an election petition against a candidate alleged to have committed acts amounting to a prohibited practice.

3) Non-disclosure of Funds

In terms of section 14(1) of the Election Expenses Act, all expenses to be incurred during the nomination process within the political parties *“shall be borne out by a political party concerned.”*

According to section 8(1) of the Act, the obligation to conduct and fund its election campaign by utilizing its own funds from the sources stipulated under the Political Parties is placed squarely on a political party.

In terms of section 9(1)(b)(i) and (ii) of the Act, a candidate is required, in the case of a candidate for the post of Member of Parliament, to disclose to the District Party Secretary of a political party which sponsored that candidate, the amount of funds the candidate has in his possession; and expects to receive or intends to use as election expenses, at least seven days before the nomination day.

In terms of section 18(4) of the Act, failure to disclose source of funds for political campaigns is a ground for challenging the nomination of a candidate by a political party or election of a candidate.

Section 18(4) Election Expenses Act provides as follows:

“Without prejudice to the preceding provisions of this section, the Attorney General, a person who was a candidate, voter or a political party which sponsored a candidate, may file an election petition challenging the nomination of a candidate by a political party or election of a candidate who contravened the requirement for disclosure of funds under this Act.”

According to section 18(4) of the Elections Expenses Act, non-disclosure of funds for political campaigns has been added as another possible ground for avoiding an election lodged by the Attorney General.

4) Disqualification for Election or Appointment as Member of Parliament etc.

The general grounds for disqualification of a Member of Parliament are stipulated in the Constitution of the United Republic of Tanzania 1977 as amended. In terms of Article 71(1) of the Constitution, a Member of Parliament *“shall cease to be Member of Parliament and shall vacate his seat in the National Assembly upon the occurrence of any of the following matters”:*

- (a) *where anything happens which, had he not been a Member of Parliament, would have disqualified him from election, or would make him lose the qualifications for election, or would disqualify him from election or appointment in accordance with the provisions of this Constitution;”*

In terms of Article 67(1)(h) of the Constitution, *“any person shall be qualified for election or appointment as a Member of Parliament if he –*

(h) in accordance with a law enacted by Parliament dealing with offences concerning election of any kind such person has been disqualified from registering as a voter or from voting in a Parliamentary election.”

CHAPTER SIX:

STANDARD AND BURDEN OF PROOF

6.1 Standard of Proof

The provisions of section 108(2) of the National Elections Act and section 107(2) of the Local Authorities (Elections) provide the standard of proof in trial of election petition. It is proving any or all of the grounds for avoiding the election to the *“satisfaction of the court.”*

In **CHABANGA M. HASSAN DYAMWALE v. ALHAJI MUSA SEFU MASOMO AND THE ATTORNEY GENERAL [1982] TLR 69 (HC)** (Tanga) it was stated that the standard of proof required to avoid an election is proof beyond reasonable doubt. In that petition Sisy J. (as he then was) observed that the term *“proved to the satisfaction of the court”* means that the standard of proof must be such that no reasonable doubt exists that one or more of the grounds set out in the relevant section have been established. The same principle had earlier been laid down by Georges C.J. (as he then was) in **MBOWE v. ELIUFOO [1967] E.A. 240**.

The matter dealt with section 99 of the National Assembly (Elections) Act, 1964 as amended in 1965 which was repealed in 1970 and replaced by Elections Act No.25 of 1970 whose section 123 corresponds to section 99. The same meaning of the term and measures of proof laid down in Mbowe (supra) was discussed in **NG'WESHENI v. THE ATTORNEY GENERAL [1971] H.C.D. No.151**.

The phrase *“affected the result”* was also judicially considered in the case of **BURA V. SARWATT [1967] E.A. 234** and the case of **In RE K.A. THABIT [1967] E.A. 777**

The rationale for the high standard of proof in election petitions was stated by the Court of Appeal of Tanzania in the case of **MANJU SALUM MSAMBYA V. THE ATTORNEY GENERAL & KIFU GULAMHUSSEIN KIFU Civil Appeal No. 2 of 2002** (unreported) thus:

“...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... The reason for putting the standard that high is not far to seek. An election is the exercise of a constitutional right and the fulfillment of an obligation by the citizenry. It is perhaps the only occasion when the people are enabled directly to participate in the running the affairs of their country. Courts, therefore, have a duty to respect the people’s conscience and not to interfere in their choice except in the most compelling circumstances...”

6.2 Burden of Proof

The general principle in civil litigation is that he who alleges or asserts must prove on a balance of probabilities the existence of material facts by adducing cogent evidence to the satisfaction of the court. This principle is well captured under the provisions of section 110(1) and (2) of the **Tanzania Evidence Act [Cap.6 R.E. 2002]** which stipulates thus:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. "

In the case of an election petition which is sui generis, the standard of proof is over and above the normal standard and it is beyond any reasonable doubt. This means that a petitioner in an election petition has a tough burden of bringing cogent evidence which will enable the court to be satisfied beyond any reasonable doubt that an election is void.

The rationale is that since the court in an election petition is being asked to annul the choice of the electorate and turn down their will while at the same time unseating a candidate. This should not therefore be taken lightly but with the seriousness it deserves. As it was stated in **LUTTER SYMPORIAN NELSON AND THE HON ATTORNEY GENERAL V. IBRAHIM MSABAHA Civil Appeal No.24 of 1999** (unreported) the burden is heavy on him who assails an election which has been concluded - he must prove his case beyond any reasonable doubt.

The standard of proof however depends upon the seriousness of the allegation made and what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case as it was succinctly stated by Lord Oakley at page 133 in **PRESTON v. JONES [1951] 1 All E.R. 124**.

CHAPTER SEVEN:

CONCLUSION OF ELECTION TRIAL

7.0 Introduction

According to section 115(2) of the National Elections Act, Cap.343 as revised in 2015, the hearing and determination of election petition in parliamentary election is twelve (12) months from the filing of petition. However, if the case is unlikely to be determined within twelve months, the Minister responsible for legal affairs may, after consultation with the Chief Justice and by notice published in the Gazette extend the prescribed time for further period not exceeding six months as he shall determine.

In terms of section 114(3) of the Local Authorities (Elections) Act, Cap.292 as revised in 2015, the hearing and determination of election petition in Councilor election is eighteen (18) months from the filing of petition. There is however no similar provision in the Local Authorities (Elections) Act for extension of time where the case is unlikely to be determined within the statutorily prescribed period of eighteen months.

The limitation period for the hearing and determination of parliamentary election petition came for consideration in the case of **WILBROAD PETER SLAA AND ANOTHER V. ARUSHA KALWA AND OTHERS [1999] TLR 85**, where the issue was whether computation of the statutorily prescribed time for hearing and determining election petition should exclude Sundays and public holidays; whether the prescribed period takes account of the time taken up by appeals from preliminary rulings and orders, whether the Minister may extend the time prescribed for the hearing and determination of election after it has expired.

7.1 Reliefs to be awarded

In terms of the provisions of section 111 of the National Elections Act and section 112 of the Local Authorities (Elections) Act, a Petitioner is entitled to claim the following reliefs in an election petition namely:

- (a) *A declaration that the election is void;*
- (b) *A declaration that the nomination of the person elected was invalid;*
- (c) *A declaration that any candidate was duly elected;*
- (d) *Where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny.*

Under the existing electoral laws, it is not open for a court after trial of an election petition to declare any other candidate other than the one whose election has successfully been challenged as having been duly elected. The only recourse open is therefore for the electoral authority to call for and hold of a bye-election.

7.2 Certification of Validation

In terms of section 113(1) of the National Elections Act and section 112 of the Local Authorities (Elections) Act, at the conclusion of the trial of an election petition or an appeal

(in the case of the High Court or Court of Appeal) the court has to make the following determinations:

- (i) *Whether the member (MP or Councilor) whose nomination or election is complained of, or any other person; or*
- (ii) *Which person was duly nominated or elected or*
- (iii) *Whether the election was void.*

After making such determination, the court then has to certify it to the Director of Elections in the case of parliamentary election or the Electoral Authority in the case of election in local authorities.

Upon such Certificate being given, the determination becomes final and the election will either be confirmed or a new election will be held as the case may require in accordance with the certificate.

Normally what follows after determination of election petition is application and determination of costs.

See the decision of the Court of Appeal of Tanzania in *Azim Suleman Premji v. Dr. Aman Wakid Kabourou Taxation Reference No.14 of 1995* (CAT)(unreported) on taxation of Bill of Costs in Election Petition. On application for stay of execution in election petition see the decision of the Court of Appeal of Tanzania in the case of *Dr. William F. Shija and Dr. Fortunatus Masha Civil Application No.1 of 2002* (CAT) (unreported).

CHAPTER EIGHT:

APPEALS IN ELECTION PETITIONS

8.1 Appeals from Lower Courts to the High Court

In terms of section 109(1) of the Local Authorities (Elections) Act Cap.292 R.E. 2015, every election petition and application under the Act has to be tried by the Resident Magistrate's Court within one month of the date of declaration of the result by the Returning Officer [section 114(1) of Cap.343 R.E. 2015.

All appeals from the decision of the Resident Magistrates' Court in a trial of election petition lie to the High Court [section 109(2) of LOCAL AUTHORITIES (ELECTIONS) ACT [Cap.292 R.E. 2015].

8.2 Appeals from High Court to Court of Appeal

The jurisdictional basis for the High Court in conducting trial of election petitions not only is statutory but constitutional. Article 83(4) of the Constitution provides further that a petitioner dissatisfied with the decision reached by the High Court can appeal to the Court of Appeal which has the final say in all matters including election petitions, except presidential elections, which under the Constitution cannot be contested in any court of law. Art. 83 (4) of the Constitution provides that:

"There shall be a right of appeal to the Court of Appeal of Tanzania against a decision of the High Court in any matter which was heard in accordance with the provisions of this Article."

Section 115(4) of the National Election Act, Cap 343 R.E. 2015 provides that appeal under the section shall lie to the Court of Appeal.

For a detailed explanation and understanding of the position of law in this matter see the decisions of the Court of Appeal of Tanzania in *Magambo J. Masato, Matwiga M. Matwiga, Janes S. Ezekiel and Ascetic N. Malagila v. Ester Amos Bulaya & 2 Others, Civil Appeal No. 49 of 2016* (CAT)(DSM) (unreported); *Edson Oswald Mbogoro v. Dr. Emmanuel John Nchimbi and The Attorney General, Civil Appeal No.140 of 2005* (CAT)(DSM) and *Freeman Aikael Mbowe and Another v. Alex O. Lema, [2004] TLR 85*.

8.3 Summary of case management in election petition

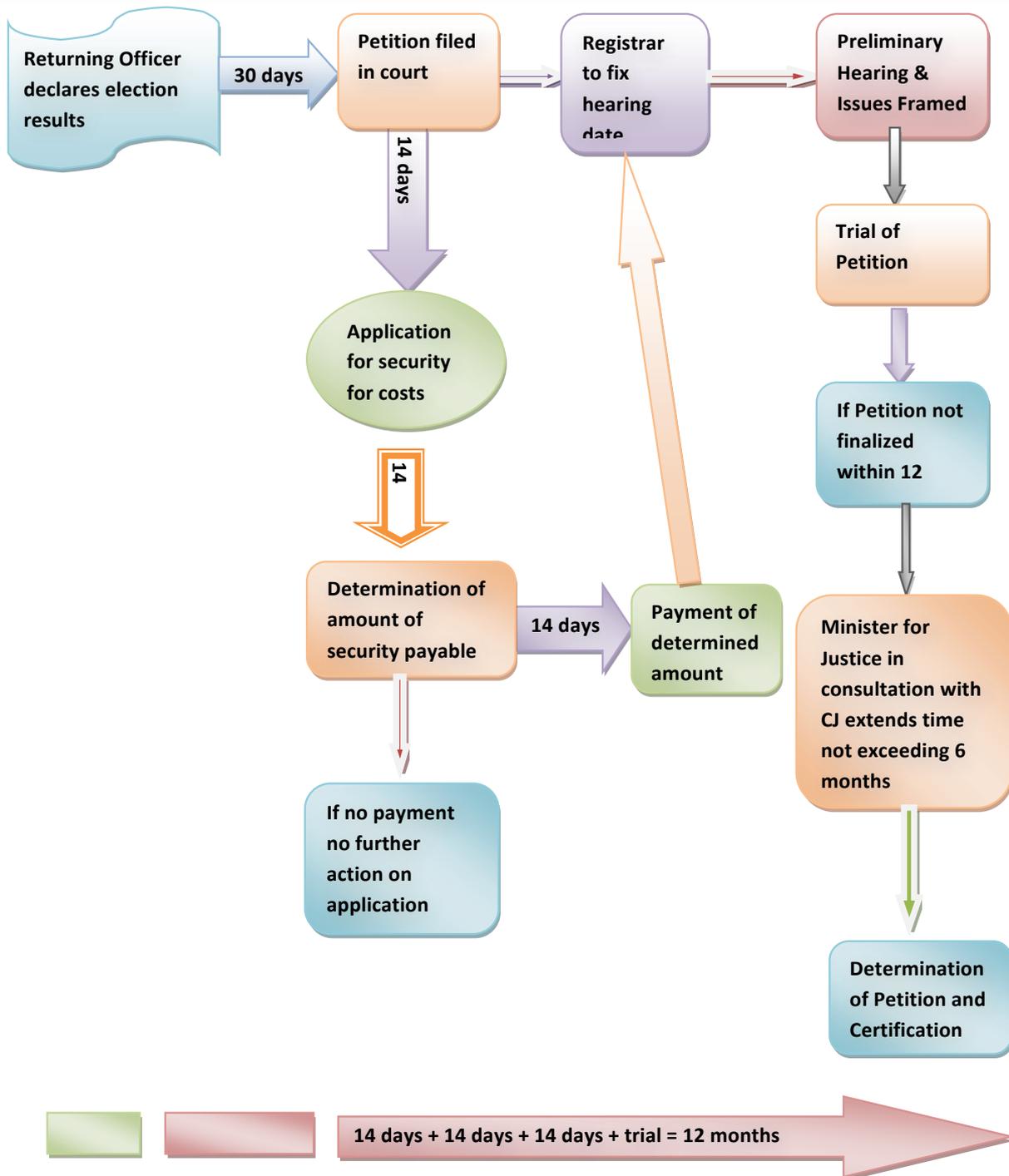
8.3.1 What is Case Management?

Case management or case flow management is the court supervision of the case progress of all cases filed in that court. It includes management of the **time** and **events** necessary to move a case from the point of initiation (filing) through disposition, regardless of the type of disposition. Case flow management is an administrative process; therefore, it does not directly impact the adjudication of substantive legal or procedural issues.

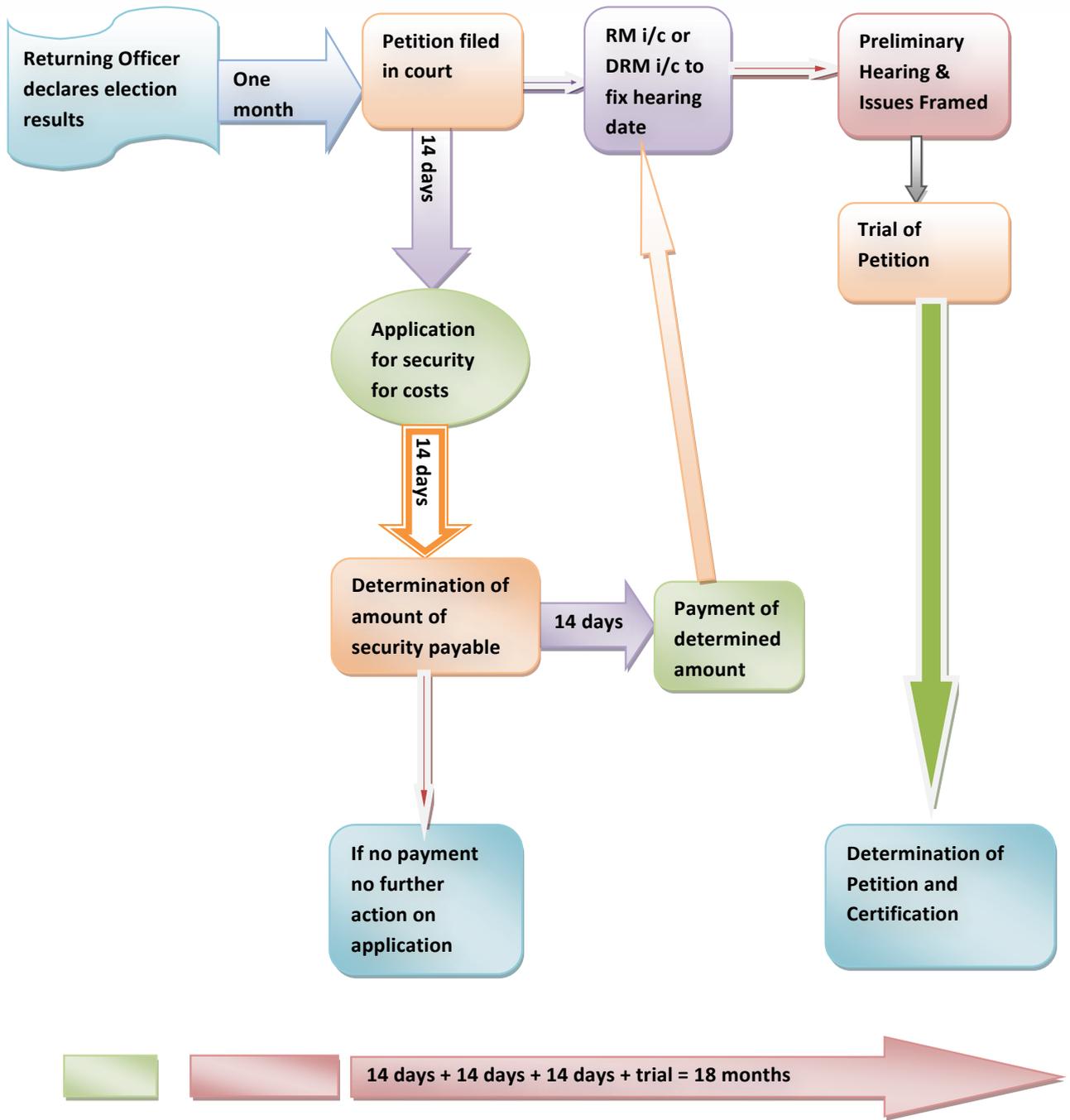
The following are the requisite **events** from the time of filing of election petition through its determination and to appeal (if any):

1. Election petitions commenced by way of petition – Title as per Schedule to Election Petition Rules
2. Parties to the petition
3. Checklist of various documents to be filed in court
4. Petition to comply with the law and the rules as to content and form
5. Payment of prescribed court filing fees – as per Schedule to the Election Petition Rules and Court Fees Rules, 2015 G.N. 187 of 2015 (dated 7th May, 2015)
6. Service of petition (personal or by way of substituted service)
7. Summonses as per Civil Procedure Code Act, Cap.33 R.E. 2002
8. Reply to the petition
9. Addition of parties and payment of further security for costs
10. Compliance with prescribed strict time lines
11. Determination of application for security for costs
12. Payment of security for costs
13. Fixing the case for hearing
14. If scrutiny applied (in parliamentary election), within 6 days file list
15. Holding of pre-trial conference with parties
16. Close of pleadings
17. Holding of Preliminary Hearing, drawing up of Memorandum of Undisputed Facts and framing of issues
18. Conducting the trial within (twelve months for parliamentary election petition with possibility of extension), (eighteen months for Councilor election petition without possibility of extension)
19. Conclusion of trial and certification to Election Authorities
20. Type and form of Certification
21. Application for and determination of Bill of costs
22. Notice of Appeal – no application for leave to appeal to Court of Appeal of Tanzania
23. Preparation of Court of Appeal Record
24. Application for Stay of execution
25. The Appeal to be heard and determined within twelve months

Flow Chart for Parliamentary Election Petition



Flow Chart for Councilor Election Petition



8.4 General Conclusion

The electoral laws and the election petition rules provides for mandatory and strict requirement with respect to presentation and determination of election petitions. The law also contains some provisions on the jurisdiction of courts to hear and determine election petitions, the time for presentation and determination of such petitions, and the determination of payment of security for costs.

Further to that we have seen the diversity of the grounds for avoiding an election and the standard and burden of proof. It is settled law that there are other grounds developed by the courts than those stated in the law for avoiding election and that the standard of proof in election petition is beyond reasonable doubt. A judge or a magistrate in a trial of an election petition is therefore to be satisfied that the grounds for annulling an election have been proved to the required standard.

Election petitions are a seasonal business in our courts. They are not an everyday business of the court. There is a need therefore for judges and magistrates to be armed with the requisite knowledge on practice and procedure to effectively and efficiently administer electoral justice.

**DEMOCRATIC EMPOWERMENT PROJECT
2013-2016**

The Democratic Empowerment Project 2013 - 2016 is supported by a joint basket fund financed by Canada, Denmark, the European Commission, Finland, Ireland, Norway, Sweden, Switzerland, the United Kingdom and UNDP. The project is directly implemented by the United Nations Development Programme in Tanzania.



*Empowered lives.
Resilient nations.*