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| AFRICAN UNION   |  | UNION AFRICAINE |
| الاتحاد الأفريقي  |   | UNIÃO AFRICANA  |
| AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS<br>COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES |   |                 |

**THE MATTER OF**

**BOB CHACHA WANGWE**

**AND**

**LEGAL AND HUMAN RIGHTS CENTRE**

**V.**

**UNITED REPUBLIC OF TANZANIA**

**APPLICATION No. 011/2020**

**JUDGMENT**

**13 JUNE 2023**



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**The Court composed of:** Blaise TCHIKAYA, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO, Dennis D ADJEI – Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court (hereinafter referred to as "the Rules"),<sup>1</sup> Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

In the Matter of:

Bob Chacha WANGWE and Legal and Human Rights Centre

*Represented by:*

- i. Advocate Jebra KAMBOLE, Law Guards Advocates;
- ii. Advocate Fulgence MASSAWE, Legal and Human Rights Centre; and
- iii. Advocate Amani JOACHIM, Legal and Human Rights Centre.

Versus

UNITED REPUBLIC OF TANZANIA

*Represented by:*

- i. Dr Boniface Naliya LUHENDE, Solicitor General, Office of the Solicitor General;
- ii. Ms Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General;
- iii. Mr Vincent E. A. TANGO, Director, Civil Litigation, Office of the Solicitor General;

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<sup>1</sup> Rule 8(2), Rules of Court, 2 June 2010.

- iv. Ms Alesia A MBUYA, Assistant Director, Constitutional, Human Rights and Election Petitions, Principal State Attorney, Office of the Solicitor General;
- v. Daniel NYAKIHA, State Attorney, Office of the Solicitor General;
- vi. Vivian METHOD, State Attorney, Office of the Solicitor General;
- vii. Ms Caroline Kitana CHIPETA, Acting Director, Legal Affairs, Ministry of Foreign Affairs and East African Cooperation; and
- viii. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East African Cooperation.

after deliberation,

*renders this judgment:*

## **I. THE PARTIES**

1. Bob Chacha Wangwe and the Legal and Human Rights Centre, (hereinafter jointly referred to as “the Applicants”) are, respectively, a Tanzanian national and a Non-Governmental Organisation (hereinafter referred to as “NGO”) registered in Tanzania that has observer status before the African Commission on Human and Peoples’ Rights (hereinafter referred to as “the Commission”).<sup>2</sup> The Applicants bring this action challenging provisions of the National Elections Act of Tanzania.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and the Protocol on 10 February 2006. It further deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive cases from individuals and NGOs. On 21 November 2019, the Respondent

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<sup>2</sup> The Legal and Human Rights Centre was granted observer status during the Commission’s 28<sup>th</sup> Session held between 28 October 2000 and 6 November 2000 in Cotonou, Benin – <https://achpr.au.int/en/network/ngos>.

State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal has no effect on pending cases and new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one (1) year after its deposit.<sup>3</sup>

## **II. SUBJECT MATTER OF THE APPLICATION**

### **A. Facts of the matter**

3. By a petition filed before the Respondent State's High Court, Bob Chacha Wangwe sought declaratory orders to the effect that sections 6(1), 7(1), 7(2) and 7(3) of the National Elections Act (hereinafter referred to as "the NEA") contravened articles 21(1), 21(2) and 26(1) of the Respondent State's Constitution.
4. By a judgment dated 10 May 2019, the High Court held that sections 7(1) and 7(3) of the NEA were "unconstitutional and void" for, among other things, failing to "reflect the safeguards set out under article 74(14) of the Constitution."<sup>4</sup> As for sections 6(1) and 7(2) of the NEA, the High Court "... found no evidence to show that the two provisions infringe the relevant articles of the constitution."
5. On the Respondent State's appeal to the Court of Appeal, in a judgment delivered on 15 October 2019, the High Court's decision was set aside in its entirety.

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<sup>3</sup> *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 ACtHPR 219, § 38.

<sup>4</sup> Article 74(14) provides as follows: "It is hereby prohibited for persons concerned with the conduct of elections to join any political party, save only that each of them shall have the right to vote which is specified in Article 5 of this Constitution."

6. The LHRC, it must be noted, was a not a party to the petition filed by Bob Chacha Wangwe before the Respondent State's High Court but jointly filed this Application before the Court.

## **B. Alleged violations**

7. The Applicants allege that the composition of the Electoral Commission, as stipulated under section 4(1) of the NEA, violates "Article 1, 13(1), 21(1) & 3, 25(2) & 26, 21(1) & 21(2), 74(7) & 74(14) of the Charter, UDHR, ICCPR and the URTC<sup>5</sup> respectively" since it does not guarantee its independence and impartiality.
8. The Applicants also allege a violation of "Articles 1, 3, 13(1), 21(1) & (2), 25(2) and 74(7) of the Charter, UDHR, ICCPR and the URTC respectively" by section 6(1) of the NEA since the Respondent State's President (hereinafter referred to as "the President") is empowered to "appoint a Director of Elections from the civil service after recommendations from Electoral Commission ...". According to the Applicants, this "... prohibits other persons who are not civil servants from having a fair chance of being appointed as Director of Elections ...".
9. The Applicants further allege that section 7(1) of the NEA violates their rights under "Articles 1, 3, 13(1), 21(1) & (2), 25(2) and 74(7) of the Charter, UDHR, ICCPR and the URTC respectively" for directing that presidential appointees such as the City Director, Municipal Director, Town Director and District Executive Director be returning officers for elections conducted within their areas.
10. It is the Applicants' further averment that section 7(2) of the NEA violates "Article 1, 3, 13(1), 21(1) & (2), 25(2) and 74(7) of the Charter, UDHR, ICCPR and the URTC respectively" by permitting the Electoral Commission "to appoint by office or name from amongst public officers, such number of

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<sup>5</sup> The Applicants use "URTC" to refer to the United Republic of Tanzania Constitution.

Returning Officers or Assistant Returning Officers for purposes of conducting an election in a constituency” thereby opening the possibility of appointing partisan returning officers.

11. The Applicants also allege that section 7(3) of the NEA, on the appointment of returning officers, “... portrays a restriction to those who also want to be appointed but do not hold any public office and secondly, it bears no proper qualifications other than just one holding a public office” thereby violating their rights under “... Articles 1, 3, 13(1), 21(1) & 2, 25(2) and 74(7) of the Charter, UDHR, ICCPR and the URTC respectively.”
12. The Applicants further allege that the various provisions of the NEA, as referred to herein earlier, allowed the Respondent State to “appoint a number District Executive Directors who were members of the *Chama Cha Mapinduzi*<sup>6</sup> and also acted as Returning Officers throughout the Respondent State, an act which grossly violated Article 1, 3, 13(1), 21(1) & (2), 25(2) and 74(7) of the Charter, UDHR, ICCPR and the URTC.”

### **III. SUMMARY OF THE PROCEDURE BEFORE THE COURT**

13. The Application was received at the Registry of the Court on 6 March 2020 and served on the Respondent State on 17 March 2020. The Respondent State was given sixty (60) days to file its Response.
14. The Respondent State filed its Response on 17 August 2020 and this was transmitted to the Applicants on 20 August 2020. The Applicants were given thirty (30) days to file a Reply.
15. On 21 September 2020, the Applicants filed a Reply and this was transmitted to the Respondent State on the same day for its information.

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<sup>6</sup> Chama cha Mapinduzi is a political party in the Respondent State. In English, the Swahili name translates to “party of the revolution.”



16. Pleadings were closed on 6 May 2022 and the Parties were duly informed.

#### **IV. PRAYERS OF THE PARTIES**

17. The Applicants pray the Court to declare that:

- i. The Respondent State by enacting sections 6(1), 7(1), 7(2) and 7(3) of the National Elections Act is an act which is in violation of Art 1, 3 and 13(1) of the African Charter on Human and Peoples' Rights.
- ii. The Respondent State, through enactment of sections 6(1), 7(1), 7(2) and 7(3) of the National Elections Act has violated Art 25(a) and (b) and 26 of International Covenant on Civil and Political Rights, and 21(1)(3) of Universal Declaration of Human Rights.
- iii. That the Respondent puts in place constitutional and legislative measures to guarantee the rights provided for under Article 1, 3 and 13(1) of the African Charter on Human and Peoples' Rights and other international instruments.
- iv. Make an Order that the Respondent reports to the Honourable Court, within a period of twelve (12) months from the date of the judgment issues by the Honourable Court, on implementation of this judgment and consequential orders.
- v. Any other remedy and/or relief that the Honourable Court will deem to grant; and
- vi. The Respondent to pay the Applicants cost.

18. On jurisdiction and admissibility, the Respondent State prays the Court to order:

- i. That, the Hon. Court is not vested with jurisdiction to adjudicate the Application.
- ii. That, the Application has not met the admissibility requirements provided in Article 56(5) of the Charter, Article 6(2) of the Protocol and Rule 40(5) of the Rules of Court.
- iii. That, the Application be declared inadmissible.

19. On the merits, the Respondent State prays the Court for the following:

- i. A declaration that the Respondent State has not violated Article 1, 3 and 13(1) of the African Charter on Human and Peoples' Rights by enacting sections 4(1), 6(1), 7(2) and 7(3) of the National Elections Act;
- ii. A declaration that the Respondent State has not violated Article 25(a) and (b) and 26 of the International Covenant on Civil and Political Rights by enacting sections 4(1), 6(1), 7(2) and 7(3) of the National Elections Act;
- iii. A declaration that the Respondent State has not violated Article 21(1) and (3) of the Universal Declaration of Human Rights by enacting sections 4(1), 6(1), 7(2) and 7(3) of the National Elections Act;
- iv. Any other order or relief that the Hon. Court will deem fit to grant; and
- v. That the Application be dismissed with costs.

## **V. JURISDICTION**

20. The Court recalls that Article 3 of the Protocol provides that:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

21. The Court further recalls that pursuant to Rule 49(1) of the Rules, it "shall preliminarily ascertain its jurisdiction ... in accordance with the Charter, the Protocol and these Rules."<sup>7</sup>

22. On the basis of the above-cited provisions, the Court must preliminarily establish its jurisdiction and dispose of objections thereto, if there are any.

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<sup>7</sup> Rule 39(1), Rules of Court, 2 June 2010.

23. In the present Application, the Court notes that the Respondent State has raised an objection to its material jurisdiction. The Court will thus consider the objection to its material jurisdiction (A) before assessing other aspects of its jurisdiction (B).

#### **A. Objection to the Court's material jurisdiction**

24. The Respondent State argues that, under Article 3 of the Protocol, the Court complements rather than substitutes a State's internal domestic mechanisms for redressing human rights violations. In the instant Application, according to the Respondent State, if the Court considered the Applicants' allegations in relation to section 4(1) of the NEA it would be sitting as a court of first instance to consider a provision that has never been challenged in its domestic courts. In support of its argument, the Respondent State cites the Court's decision in *Kijiji Isiaga v. Tanzania* and submits that "... the Court lacks material jurisdiction to entertain this matter in its entirety...".
25. The Respondent State's further argues that "the Application is frivolous and vexatious as it does not establish any human rights which is violated regarding section 4(1) of the National Elections Act."

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26. In their Reply, the Applicants contest the Respondent State's arguments and submit that the Court has material jurisdiction to hear the Application. According to the Applicants, the Application "... is based on interpretation of the African Charter as well as other international human rights instruments which the Respondent is a party to and has duty to respect, fulfil and comply."

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27. At the outset, the Court notes that the Respondent State raises two arguments against its material jurisdiction. Firstly, that the Applicants are

asking it to constitute itself as a court of first instance and, secondly, that the Application is frivolous and vexatious for not raising any human rights violations.

28. With regard to the argument that the Court will constitute itself as a court of first instance in considering this Application, the Court recalls that it has consistently held that, so long as an Application alleges violation of rights protected in the Charter or any other international instrument to which the Respondent State is a party, it possesses jurisdiction.<sup>8</sup> In *Armand Guehi v. Tanzania*, the Court held that “... with respect to whether it is called to act as court of first instance, [the Court is of the view] that, by virtue of Article 3 of the Protocol, it has material jurisdiction so long as the Application alleges violations of provisions of international instruments to which the Respondent State is a party.”<sup>9</sup>
29. In relation to the Applicants’ allegations in this case, the Court observes that these directly relate to rights guaranteed in the Charter. The Applicants have questioned the compatibility of provisions of the NEA with Articles 1, 3 and 13(1) of the Charter, Article 25 of the International Covenant on Civil and Political Rights (hereinafter referred to as “the ICCPR”) and Articles 21(1) and 21(2) of the Universal Declaration of Human Rights (hereinafter referred to as “the UDHR”).
30. Since the Applicants are alleging violations of the Charter, and other instruments to which the Respondent State is a party, the Court holds that it will not be sitting as a court of first instance in adjudicating on the Applicants’ allegations. Accordingly, the Court dismisses the first limb of the Respondent State’s objection to its material jurisdiction.

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<sup>8</sup> *Kenedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, §§ 20-21 and *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 36.

<sup>9</sup> (merits and reparations) (7 December 2018), § 31.

31. As to the other limb of the Respondent State's objection, by which it is contending that the Applicants' claims are frivolous and vexatious, the Court holds that the question of whether or not the Application is frivolous or vexatious is one to be resolved when it considers the merits of the Application. Given the preceding, the Court dismisses the second limb of the Respondent State's objection to its material jurisdiction.
32. In the circumstances, the Court holds that it has material jurisdiction to consider the present Application.

## **B. Other aspects of jurisdiction**

33. The Court notes that other aspects of its jurisdiction are not contested by the Parties. Nonetheless, and in line with Rule 49(1) of the Rules, the Court must satisfy itself that all aspects of its jurisdiction are met before proceeding.
34. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment, that the Respondent State, on 21 November 2019, deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration made under Article 34(6) of the Protocol. The Court further recalls that it has held that the withdrawal of a Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or new cases filed before the withdrawal takes effect.<sup>10</sup> Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.<sup>11</sup> This Application having been filed before the Respondent State deposited its notice of withdrawal was thus not affected by the said withdrawal. The Court also notes, as earlier pointed out, that the Second Applicant has observer status before the

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<sup>10</sup> *Cheusi v. Tanzania* (judgment), *supra*, §§ 35-39.

<sup>11</sup> *Ingabire Victoire Umuhaza v. United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

Commission in compliance with the requirements under Article 5(3) of the Protocol. In light of the preceding, the Court finds that it has personal jurisdiction to examine the Application.

35. As for its temporal jurisdiction, the Court notes that violations alleged by the Applicants commenced before the Respondent State became a Party to the Charter or the Protocol. However, given that the law that is allegedly causing the violations is still in force, the Court holds that the violations were continuing at the time the Application was filed, which is after the Respondent State became a party to the Protocol and deposited its Declaration.<sup>12</sup> The Court thus finds that its temporal jurisdiction is satisfied.
36. With regard to its territorial jurisdiction, the Court notes that the violations alleged by the Applicants occurred within the territory of the Respondent State, which is a state party to the Protocol. In the circumstances, the Court holds that it has territorial jurisdiction.
37. In light of all the above, the Court finds that it has jurisdiction to hear the instant Application.

## **VI. ADMISSIBILITY**

38. Pursuant to Article 6(2) of the Protocol, “[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
39. In line with Rule 50(1) of the Rules,<sup>13</sup> “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules.”

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<sup>12</sup> *Jebra Kambole v. United Republic of Tanzania* (Judgment) (15 July 2020) 4 AfCLR 460, §§ 51-53.

<sup>13</sup> Rule 40, Rules of Court, 2 June 2010.

40. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

- a. Indicate their authors even if the latter request anonymity;
- b. Are compatible with the Constitutive Act of the African Union and with the Charter;
- c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
- d. Are not based exclusively on news disseminated through the mass media;
- e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
- g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.

41. In the present case, the Respondent State has raised an objection to the admissibility of the Application questioning the Applicant's exhaustion of local remedies. The Court will thus consider the objection based on non-exhaustion of local remedies (A) before assessing other admissibility requirements (B).

#### **A. Objection alleging non-exhaustion of domestic remedies**

42. The Respondent State, citing Article 56(5) of the Charter and Rule 50(2)(e) of the Rules,<sup>14</sup> argues that this Application is inadmissible due to the

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<sup>14</sup> Rule 40(5), Rules of Court, 2010.

Applicant's failure to exhaust domestic remedies. While conceding that the Applicants did commence a case before the High Court (miscellaneous civil cause no. 17 of 2018) which was subsequently appealed to the Court of Appeal (civil appeal no. 138 of 2019), it is the Respondent State's contention that the Applicants are, before this Court, challenging section 4(1) of the NEA, which was never challenged before any domestic court. The Respondent State accordingly submits that "... this Application be declared inadmissible as the Application has failed to meet all the admissibility requirements."

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43. The Applicants, for their part, submit that, in line with Article 56(5) of the Charter, their Application is admissible. They highlight the fact that they had filed a case before the Respondent State's High Court challenging sections 6(1) and 7(1), 7(2), 7(3) of the NEA. They further point out that on the Respondent State's appeal, the Court of Appeal found in the Respondent State's favour. To substantiate their argument, the Applicants filed copies of the judgments of both the High Court and the Court of Appeal.
44. In their Reply, the Applicants reiterate that they exhausted domestic remedies. They point out that "it is not in dispute that sections 6(1), 7(1), (2) and (3) of the National Elections Act have no issue with the requirement for exhaustion of local remedies in the instant application according to the Respondents reply to the application." The Applicants concede that the dispute, in relation to the admissibility of the Application, revolves around their claims concerning section 4(1) of the NEA.
45. The Applicants submit that "... although section 4(1) was not raised in the national courts, this does not warrant the Court to declare the whole application inadmissible." In support of their position, they cite the Court's decision in *Kalebi Elisamehe v. Tanzania* and pray the Court to invoke the bundle of rights and guarantees to find the Application admissible.

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46. The Court recalls that pursuant to Article 56(5) of the Charter, whose requirements are mirrored in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. As established in the Court's jurisprudence, this requirement will only be dispensed with if it can be demonstrated that the remedies are unavailable, ineffective, insufficient or that the domestic procedures for pursuing them are unduly prolonged.<sup>15</sup>
47. Having perused the record, the Court confirms that section 4(1) of the NEA was not part of the domestic litigation between the Parties. The Applicant, however, argues that the preceding notwithstanding the Court should still admit the Application, inclusive of the allegations in respect of section 4(1) of the NEA, by using the "bundle of rights and guarantees". According to the Respondent State, however, the Applicants' failure to plead section 4(1) of the NEA before the domestic courts renders the whole Application inadmissible since admissibility conditions are cumulative.
48. In resolving the Parties' contestation on this point, the Court observes that the Applicants commenced their case before the Respondent State's High Court by way of a petition. This petition identified, with precision, the provisions of the NEA that the Applicants sought to be declared unconstitutional and these were sections 6(1), 7(1), 7(2) and 7(3). No mention, in the petition, was made either directly or indirectly to section 4(1) of the NEA.
49. Given the preceding, this Court finds that the Applicants, by failing to plead the unconstitutionality of section 4(1) of the NEA, before the Respondent State's High Court, did not exhaust domestic remedies to this extent.
50. In respect of the Applicants' reliance on the "bundle of rights and guarantees", the Court concedes that it has, previously, had recourse to this

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<sup>15</sup> *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 44 and *African Commission on Human and Peoples' Rights (ACHPR) v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

approach in finding certain cases admissible.<sup>16</sup> Key to the Court's application of the bundle of rights and guarantees has been the existence, before a domestic court, of a factual and legal context which would have allowed a domestic court to pronounce itself on matters not explicitly pleaded by a party but which by necessary implication arise from the pleadings.<sup>17</sup>

51. The Court finds, however, that the “bundle of rights and guarantees” is not applicable in the present case. The manner in which the Applicants commenced their domestic action did not provide the Respondent State an opportunity to respond to any allegations relating to section 4(1) of the NEA. Furthermore, although section 4(1), on the one hand, and section 7(1), 7(2), 7(3), on the other hand, both deal with electoral issues, they have a different focus and this is that, in the one case, the focus is on the composition of the NEC and, in the other case, it is on the appointment of returning officers and other staff of the NEC. It was not, therefore, open for the Respondent State's domestic courts to pronounce themselves on the issues covered by section 4(1) when the Applicant's petition, very clearly, raised only those issues implicated by sections 6(1), 7(1), 7(2), 7(3) of the NEA.
52. In the circumstances, given that sections 6(1) and 7(1), 7(2), 7(3) of the NEA were litigated between the Parties all the way to the highest court in the Respondent State, the Court finds that domestic remedies, in respect of these provisions, were exhausted. The Court thus finds that the Application is admissible only in so far as it relates to the Applicants' challenge of sections 6(1) and 7(1), 7(2), 7(3) of the NEA.<sup>18</sup> It thus finds all the Applicants' prayers, in so far as they are premised on the alleged violation of section 4(1) of the NEA, inadmissible.

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<sup>16</sup> See, for example, *Alex Thomas v. United Republic of Tanzania* (20 November 2015) 1 AfCLR 465; *Kennedy Owino Onyachi and Charles John Njoka v. United Republic of Tanzania* (28 September 2017) 2 AfCLR 65 and *Nguza Viking (Babu Seya) and another v. United Republic of Tanzania*, § 53.

<sup>17</sup> *Sadick Marwa Kisase v. United Republic of Tanzania*, ACtHPR, Application No. 005/2016, Judgment of 2 December 2021 (merits and reparations), §§ 38-39.

<sup>18</sup> *Shukran Masegenya Mango and Others v. United Republic of Tanzania* (26 September 2019) 3 AfCLR 439, §§ 54 & 58 and *Joseph Mukwano v. United Republic of Tanzania*, ACtHPR, Application No. 021/2016, Judgment of 24 March 2022 (merits and reparations), § 45.

## **B. Other conditions of admissibility**

53. The Court notes, from the record, that the Application's compliance with the requirements in Article 56 sub-articles (1),(2),(3),(4), (6) and (7) of the Charter, which requirements are reiterated in sub-rules 50 (2)(a),( b), (c), (d), (f) and (g) of the Rules, is not in contention between the Parties. Nevertheless, it must still ascertain that these requirements have been fulfilled.
54. The Court notes, from the record, that the Applicants are well identified thereby fulfilling the requirements of Rule 50(2)(a) of the Rules.
55. The Court also notes that the claims made by the Applicants seek to protect their rights guaranteed under the Charter and other instruments to which the Respondent State is a Party. It further notes that one of the objectives of the Constitutive Act of the African Union is the promotion and protection of human and peoples' rights. The Court, therefore, holds that the Application is compatible with the Constitutive Act of the African Union and the Charter thereby fulfilling the requirements of Rule 50(2)(b) of the Rules.
56. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, its institutions or the African Union which makes it consistent with the requirement of Rule 50(2)(c) of the Rules.
57. The Court observes that the Applicants have submitted documents of various types as evidence in support of their claims thereby establishing that the Application is not based exclusively on news disseminated through the media which makes the Application compliant with Rule 50(2)(d) of the Rules.
58. With regard to Rule 50(2)(f) of the Rules, the Court observes that this Rule requires applications to be "... submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as

being the commencement of the time limit within which it shall be seized with the matter.”

59. As the Court has established, the reasonableness of the period for seizure depends on the particular circumstances of each case and must be determined on a case-by-case basis.<sup>19</sup> In the present case, the Applicants filed their Application on 6 March 2020 while the Court of Appeal delivered its judgment on 15 October 2019. A total of four (4) months twenty (20) days thus lapsed between the Court of Appeal’s judgment and the filing of the Application and it is this period that the Court must consider for purposes of determining reasonableness under Rule 50(2)(f) of the Rules. Given the period at stake in this Application, the Court holds that the Application was filed within a reasonable period of time within the meaning of Rule 50(2)(f) of the Rules.
60. The Court also observes that the Application does not deal with matters or issues previously settled by those States involved in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the provisions of the Charter. It thus holds that the Application complies with the requirements of Rule 50(2)(g) of the Rules.
61. Given all of the above, the Court holds that the Application, except in so far as it concerns section 4(1) of the NEA, meets all the admissibility requirements in Article 56 of the Charter which are reiterated in Rule 50(2) of the Rules and declares it admissible.

## **VII. MERITS**

62. The Court must determine whether or not sections 6(1), 7(1), 7(2) and 7(3) of the NEA violate the Applicants’ rights. Although the Applicants have framed four (4) separate violations, corresponding to the four (4) sections of

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<sup>19</sup> *Anudo Ochieng Anudo v. United Republic of Tanzania* (merits) (22 March 2018) 2 AfCLR 248, § 57.

the NEA which they impugn, in the main, the Applicants are alleging a violation of their right to freely participate in the government of their country through two principal means: first, in the appointment of the Director of the Electoral Commission (section 6(1) NEA); and second, in the manner in which returning officers are appointed (sections 7(1), 7(2), 7(3) of the NEA). The Applicants have also alleged a violation of their right to non-discrimination. The Court will thus assess the alleged violation of the Applicants' rights under the earlier referred to heads.

**A. Alleged violations due to the manner in which the Director of Elections is appointed**

63. The Applicants allege that the Respondent State has violated their right to participate in the government of their country contrary to Article 13(1) of the Charter and also their right to equality before the law and to equal protection of the law contrary to Article 3 of the Charter. The Applicants have also pleaded provisions of the ICCPR and the UDHR which correspond to Articles 13(1) and 3 of the Charter.

**i. Allegations relating to the right to participate in the government of one's country**

64. The Applicants submit that section 6(1) of the NEA violates the Charter because the Director of Elections is appointed by the President who is the Chairperson of the ruling party and also among the contestants in elections. This manner of appointing the Director of Elections, the Applicants contend, "raises the question of impartiality, independence of Commission and the credibility of the elections process and results". The Applicants point out that the President "gets recommendations from the Commission for the appointment of the Director of Elections while the Commission itself was in the first place appointed by the President himself, who is also a potential candidate in the elections." They submit that section 6(1) "lacks the criteria for the appointment of the Director of Elections and thus, makes it wide, broad and vague, and subject to abuse".

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65. In response, the Respondent State submits that the Applicants' allegations under section 6(1) of the NEA have no merit. According to the Respondent State, although the appointment of the Director of Elections "... is done by the President [this is] subject to recommendation by NEC whose independence is constitutionally guaranteed." According to the Respondent State, therefore, just because the Director is appointed by the President "... does not mean that they cannot be impartial." It is the Respondent State's submission, therefore, that "... until the contrary is proved, the mere allegation that impartiality of the Director for Elections is jeopardised following appointment by the President is unfounded."

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66. The Court recalls that Article 13(1) of the Charter provides that "[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."
67. The Court notes that at the core of the Applicants' grievances in respect of the appointment of the Director of Elections is the question of the independence and impartiality of the office. In relation to this matter, in *Suy Bi Gohore Emile and Others v. Côte d'Ivoire*, the Court observed that, in Africa, "... there is a great diversity in terms of structure and composition of independent and impartial electoral bodies" due to the specificities of various countries.<sup>20</sup> The Court thus held that "... it is not incumbent on it to impose a one-size-fits-all solution on the structure and composition of the electoral bodies across the continent."<sup>21</sup>

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<sup>20</sup> *Suy Bi Gohore Emile and Others v. Republic of Côte d'Ivoire* (judgment) (15 July 2020) 4 AfCLR 406, § 170.

<sup>21</sup> *Ibid.*, § 171.

68. While acknowledging that “there are no precise indications as to the characteristics of an ‘independent’ and ‘impartial’ electoral body”, the Court has nevertheless highlighted some elements which confirm the independence and impartiality of an electoral management body. For example, in *Action pour la Protection des Droits de l’Homme (APDH) v. Côte d’Ivoire*, the Court held that “an electoral body is independent where it has administrative and financial autonomy; and offers sufficient guarantees of its members’ independence and impartiality.”<sup>22</sup> The Court further held that “... institutional independence in itself is not sufficient to guarantee [the] transparent, free and fair elections .... The electoral body in place should, in addition, be constituted according to law in a way that guarantees its independence and impartiality, and should be perceived as such.”<sup>23</sup>
69. Clearly, therefore, while States have latitude in terms of configuring their electoral management bodies, they bear the overriding responsibility of establishing an institution that is independent and impartial.<sup>24</sup>
70. Importantly, the mere act of establishing, by law, an electoral management body as an independent entity is not a sufficient measure to prevent or limit political or other attempts at undermining its impartial and autonomous functions and the general fulfilment of its mandated responsibilities.<sup>25</sup> It is also important to have a legal and institutional framework and sufficient transparency mechanisms meant to secure the independence and autonomy of an electoral management body.<sup>26</sup>
71. In assessing the possible violation of Article 13(1) of the Charter, the Court acknowledges that the rights protected under the said Article can be limited. However, as was recognised in *Tanganyika Law Society and Others v. Tanzania*, “... limitations to the rights and freedoms in the Charter are only

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<sup>22</sup> (merits) (18 November 2016) 1 AfCLR 668, § 118.

<sup>23</sup> *Ibid.*, § 123.

<sup>24</sup> General Comment No. 25 The right to participate in public affairs, voting rights, and the right of equal access to public service (Article 25), § 20.

<sup>25</sup> International IDEA *Independence in electoral management: Electoral processes primer 1* (2021) 7-8.

<sup>26</sup> *Ibid.*

those set out in Article 27(2) of the Charter and ...such limitations must take the form of law of general application and must be proportionate to the legitimate aim pursued.”<sup>27</sup>

72. The above findings were confirmed in *Konate v. Burkina Faso* where the Court held that it does not suffice for a restriction to a right to “... be provided by law and be written precisely; it must also serve a legitimate purpose.” According to the Court, therefore, “the reasons for possible limitations must be based on legitimate public interest and the disadvantages of the limitation must be strictly proportionate to and absolutely necessary for the benefits to be gained.”<sup>28</sup> As the Court further expounded, an assessment of a restriction on a Charter right must be conducted within the context of a democratic society and it must ascertain whether the restriction is a proportionate measure to achieve the protection of rights of others.<sup>29</sup> Importantly, in justifying a restriction to a Charter right, the onus always falls on the Respondent State.

73. Given all the above, it behoves the Court to assess whether section 6(1) of the NEA contravenes the provisions of the Charter and if it does whether its provisions can be a justifiable limitation to the rights protected by Article 13(1) of the Charter.

74. The Court recalls that section 6(1) of the NEA provides as follows:

There shall be a Director of Elections who shall be appointed by the President from amongst civil servants of the United Republic recommended by the Commission.

75. In considering section 6(1) of the NEA, the Court finds it apposite to take a broader view on the structure and composition of the Respondent State’s Electoral Commission as reflected both in the NEA as well as the

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<sup>27</sup> (merits) (14 June 2013) 1 AfCLR 34, § 107.1.

<sup>28</sup> (5 December 2014) 1 AfCLR 314, §§ 132-133.

<sup>29</sup> *Ibid.*, § 145.



Respondent State's Constitution. In so far as the Respondent State's Constitution is concerned, the Court notes that its article 74(7) provides as follows:

For the better carrying out of its functions, the Electoral Commission shall be an autonomous department, and its chief executive shall be the Director of Elections who shall be appointed and shall discharge duties accordance with a law enacted by Parliament.

76. The Court also notes that article 74(11) of the Respondent State's Constitution provides that:

In discharging its functions in accordance with the provisions of this Constitution, the Electoral Commission shall not be obliged to comply with orders or directions of any person or any Government department or the views of any political party.

77. The Court observes that articles 74(7) and 74(11) of the Constitution do attempt to establish a legal framework for guaranteeing the independence of the Respondent State's Electoral Commission.

78. It is to be noted, however, that in terms of its structure, the Respondent State's Electoral Commission comprises of a "supervisory board" and a secretariat. The "supervisory board" is made up of commissioners appointed by the President under article 74(1) of the Constitution. It is chaired by either a Judge of the High Court or the Court of Appeal. The secretariat is headed by the Director of Elections who is also the secretary of the Electoral Commission.<sup>30</sup>

79. Having considered the Parties arguments, and given the various methods for constituting electoral management bodies in use in Africa, the Court holds that there is no violation of Article 13(1) of the Charter by the mere reason that the Director of Elections is appointed by the President. It also

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<sup>30</sup> Section 4(4) NEA.

holds that Article 13(1) of the Charter is not violated simply by reason of the fact that the President makes the appointment of the Director of Elections on the basis of recommendation(s) by the Electoral Commission.

80. In respect of the Applicants' allegation that section 6(1) of the NEA "lacks the criteria for the appointment of the Director of Elections and thus, makes it wide, broad and vague, and subject to abuse", the Court observes that, indeed, section 6(1) does not allude to any qualifications that an appointee for the position must possess in order to qualify for appointment. Admittedly, article 74(3) of the Constitution delineates persons who are not eligible for appointment as commissioners. In the same vein, article 74(14) of the same Constitution prohibits persons "concerned with the conduct of elections" from joining any political party. Apart from these two negative prescriptions, the NEA has no provision which positively stipulates the qualifications that a potential Director of Elections must possess to be eligible for appointment.
81. The question that must be resolved, therefore, is whether the lack of a requirement stipulating the qualifications and attributes of individuals who can serve as Director of Elections violates the Charter. If the Court finds that the preceding amounts to a violation of the Charter it must, additionally, resolve the question whether or not this is a permissible limitation on the right to participate freely in one's government.
82. The Court observes that given the centrality of electoral processes to the maintenance of democratic governance, an electoral management body occupies critical space in a country's democratic architecture. It is of utmost importance, therefore, that an electoral management body should be legally and practically empowered to perform its duties in an independent and impartial manner. One important component to ensuring that an electoral management body performs its functions independently lies in the manner in which its staff is recruited. As a general rule, recruitment of staff for an electoral management body should be guided by transparent recruitment processes based on the possession of necessary qualifications for

particular positions so as to ensure that staff are not in a position of a conflict of interest.

83. In the present case, the Court finds it anomalous that the Respondent State's laws contain no provisions stipulating the qualifications that one must fulfil to be appointed a Director of Elections. The Court holds that, in relation to the head of the Electoral Commission's secretariat, it behoves the Respondent State to appoint individuals of the highest calibre who can independently, impartially and transparently coordinate the management of the electoral process. However, without a clearly laid out qualifications scheme, it is not clear the considerations that the appointing authority takes into mind when appointing a Director of Elections. This exposes the process not only to uncertainty but also the possible consideration of irrelevant factors.
84. The Court thus holds that section 6(1) of the NEA, in so far as it fails to prescribe the qualifications of persons who can be appointed as Director of Elections, violates Article 13(1) of the Charter.
85. The above notwithstanding, and as earlier alluded to, the Court must also determine whether the provisions of section 6(1) of the NEA are a justifiable limitation as stipulated under Article 27(2) of the Charter.
86. While the absence of a prescribed criteria for persons who can be appointed as Director of Elections is contained in a clearly expressed law which is of general application, the Court finds that the restriction occasioned by section 6(1) does not have a clear legitimate purpose and neither is it a proportionate means of restricting the rights under Article 13(1) of the Charter. The absence of qualification criteria, the Court holds, lends itself to the creation of a perception that the Electoral Commission may recommend, and the appointing authority appoint, someone whose competence may be ill-suited to the running of the Electoral Commission.

87. In the circumstances, the Court holds that section 6(1) of the NEA violates Article 13(1) of the Charter in so far as it does not prescribe qualification criteria for persons to be appointed as Director of Elections and that this infringement of the Charter is not a permissible limitation under the terms of Article 27(2) of the Charter.

**ii. Alleged violation of the right to equality before the law and equal protection of the law**

88. The Applicants contend that the current system for appointing the Director of Elections violates their rights under Article 3 of the Charter. According to the Applicants:

... only individuals qualifying for the appointment as Director of Elections are those who belong to the civil service of the United Republic of Tanzania. This has the effect of leaving out other members and citizens who are no part of the civil service who also have the right to take part in the electoral processes of the State, including being appointed for various positions in electoral bodies.

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89. For its part, the Respondent State argues that "... the right to participate in government is not absolute as it can be legitimately restricted by law." In support of its argument, the Respondent State cites Article 27(2) of the Charter and the Court's decision in *Tanganyika Law Society and Others v. Tanzania*. According to the Respondent State, therefore, "... restrictions as to persons who are eligible for the appointment as Director is reasonable and justifiable. Appointment of a civil servant as Director of Elections is for common interest as it is easy to ascertain his ethical, professional and educational background since public service is governed by well-established legal framework."

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90. The Court recalls that Article 3 of the Charter provides thus:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

91. As the Court's jurisprudence has confirmed, the principle of equality before the law, which is implicit in the principle of equal protection of the law, does not necessarily require equal treatment in all instances and may allow differentiated treatment of individuals placed in different situations.<sup>31</sup>

92. Consequently, a violation of Article 3 of the Charter does not necessarily follow simply from an alleged instance of differentiated treatment. Importantly, it is the party that alleges a violation of Article 3 of the Charter that bears the burden of substantiating the allegations. As the Court has previously held, general statements to the effect that a right has been violated do not suffice to justify a violation of the Charter.<sup>32</sup>

93. The Court confirms that States, within permissible limits, are allowed latitude to configure their electoral management bodies to satisfy their peculiar local needs. In the present case, the Court finds that restricting recruitment for the Director of Elections to the civil service does not violate the Charter. The Court takes notice that no impropriety has been made against the Respondent State's system for recruitment into the public service, from where the Director of Elections is subsequently appointed.

94. The Court thus holds that the section 6(1) of the NEA is not in violation of the Charter in so far as it restricts the appointment of the Director of Elections only to candidates from the public service.

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<sup>31</sup> *Kambole v. Tanzania*, *supra*, § 87.

<sup>32</sup> *George Maili Kemboge v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 369, § 51 and *Minani Evarist v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, § 75.

## **B. Alleged violations due to the manner of choosing returning officers**

95. The Applicants allege that the manner in which returning officers are appointed violates their right to participate in the government of their choice as well as their right to equality and equal protection before the law.

### **i. Allegations relating to the right to participate in the government of one's country**

96. The Applicants' challenge the manner in which returning officers are appointed under sections 7(1), 7 (2), 7(3) of the NEA. According to the Applicants, these provisions violate the Charter by "... disallowing the existence of a free and fair election through having electoral officials who are appointees of the president, who is also a chairman of the ruling party and potential candidate with a direct interest in the elections process". The Applicants also argue that the provisions do not contain any criteria or qualification or guiding principles that should inform the appointing process thereby giving "... leeway for abuse of power by the President in terms of who to appoint to occupy such a position".
97. The Applicant's further argue that, section 7(3) of the NEA, by providing that the Electoral Commission may "where circumstances so require" appoint any person in the public service as a returning officer, introduce "... wide subjectivity and likely abuse of power" due to a failure to clarify the circumstances under which the Electoral Commission may act. To buttress their allegations, the Applicants submitted a list of individuals who they allege were members of the ruling Chama Cha Mapinduzi when they were appointed as returning officers.
98. In their Reply, the Applicants further contend, among other things, that the taking of an oath by an appointee "... is a mere formality which does little to make the appointee independent. It does not at all amount to a safeguard against him being non-impartial".

99. In Response, the Respondent State raises a number of contentions. First, it contends that its laws provide enough safeguards to ensure that section 7(1) of the NEA is “implemented in line with the enjoyment of the rights to participate in the government as enshrined in the Charter and Article 74(14) of the Constitution.” It further points out that:

Upon appointment, the Directors do not automatically become Returning Officers. Before assuming the duties of Returning Officers, the Directors are to meet the requirement of section 7(5) of the Act and Regulation 16(1)(a) and (b) of the National Elections (Presidential and Parliamentary Elections) Regulations ....

100. Section 7(5) of the Act, the Respondent State submits:

... makes it mandatory for Returning Officers and Assistant Returning Officers to take and subscribe to an oath of secrecy before a Magistrate before assuming the functions of that Office. Likewise, Regulation 16(1) of the Regulations require that every regional elections coordinator, a returning officer and an assistant returning officer to take an oath of secrecy before a Magistrate before assuming duties. The same provision makes it mandatory for the officer to make a declaration before a magistrate or a Commissioner for Oaths that he is not a member of any political party or that he has withdrawn his membership from a political party.

101. Specifically in response to the list provided by the Applicants, of returning officers who assumed their duties while they were allegedly active members of Chama cha Mapinduzi, the Respondent State “... disputes the reliability and admissibility of the same and the Applicants are therefore put to strict proof.” It is submitted, therefore, that this allegation is unfounded.

102. Second, the Respondent State submits that the power under section 7(2) of the NEA to appoint returning officers ensures “... that the Commission is mandated to appoint any other officer to be a returning officer or assistant returning officer for any reason that may deem fit disregarding the Director who is in power ... besides the returning officer or assistant returning officer

can be replaced by any other officer if he/she proves to be non-performer ...”.

103. Overall, the Respondent State has also invoked the margin of appreciation as justifying the leverage that it has, as a sovereign state, to design an electoral system that best suits its political, social, economic and cultural conditions.

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104. The Court notes that the Applicants’ challenge the fact that the Respondent State’s Electoral Commission utilises civil servants for its administrative and operational requirements. Specifically in contest in the present matter is the use of civil servants, of various ranks, as returning officers.

105. The Court finds it important to point out that the use of civil servants in the operations of an electoral management body is not, by itself, inimical to the independence, autonomy and accountability of an electoral management body. Whether or not the involvement of civil servants compromises the independence of the electoral management body will, therefore, depend on the peculiar facts of each situation. As a minimum standard of acceptable conduct, however, if civil servants are involved in the operations of an electoral management body, it is important to safeguard their independence by, for example, requiring that they should be reporting directly and only to the electoral management body and not to anyone or any other entity outside.

106. In respect of the appointment of every city director, municipal director, town director and district executive director as returning officers under section 7(1) of the NEA, the Applicants contend that this violates the Charter because the appointees are all, in their positions, after being chosen by the President. The Court, however, reiterates that a lack of impartiality on particular officer bearers cannot be deduced simply from the fact that a person is appointed by the President.



107. In the circumstances the Court finds that section 7(1) of the NEA does not violate Article 13(1) of the Charter by permitting certain office bearers, to wit, city directors, municipal directors, town directors and district executive officers to serve as returning officers by virtue of their positions.
108. As for sections 7(2) and 7(3) of the NEA, however, the Court notes that these provisions grant the Electoral Commission the leeway to appoint returning officers from among public officers at large. Sections 7(2) and 7(3), therefore, are different from section 7(1) which ties the qualification of a potential returning officer to his official position within the public service. Looked at holistically, the Court holds, therefore, that the width of the latitude created by sections 7(2) and 7(3) of the NEA cannot be justified. This latitude may result in the appointment of returning officers that are not fit for duty since, for example, there is no clear indication as to the level of placement, within the public service, from whence such appointments can be made.
109. The Court must also address the Parties' contention on the effect of taking an oath of office. As the pleadings reflect, the Parties are in dispute as to the effect of the oath that persons appointed as returning officers must take before assuming office. The Applicants submit that the oath does not make a difference while the Respondent State submits that this is a crucial procedure in guaranteeing the independence of the appointees.
110. The Court recalls that it has found an oath to be a "... pertinent guarantee of independence and impartiality."<sup>33</sup> Where a litigant alleges that the taking of an oath does not guarantee independence and impartiality it is his/her duty to lead cogent evidence to demonstrate the disregard of the oath by persons to whom it was administered. In the present case, however, the Court finds that the Applicants have simply made a general allegation and have failed to lead cogent and specific evidence to prove the disregard of the oath by particular returning officers.

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<sup>33</sup> *Suy bi Gohore v. Côte d'Ivoire*, *supra*, § 179.

111. As for the list of returning officers who the Applicants allege were appointed to serve as returning officers while they were still active members of the ruling *Chama cha Mapinduzi*, the Court observes that this issue was also in contention between the Parties during the litigation at domestic level. Specifically, the Court of Appeal dealt with this matter in its judgment from pages 50 to 53. In its findings, the Court of Appeal held that the evidence by the Applicants “fell short of reliability ...” and dismissed the Applicant’s claims. Given this clear finding on an evidential matter by the Court of Appeal, the Court is constrained in interfering with the same. This is because it, ordinarily, does not engage in exhaustive factual analyses which are best conducted by domestic courts.<sup>34</sup>

112. Overall, and in light of the above, the Court finds that section 7(1) of the NEA does not violate Article 13(1) of the Charter.

113. The Court also finds that sections 7(2) and 7(3) violate the Charter. This is because these provisions do not contain any indication of the positions in the public service that public servants must occupy to be appointed returning officers or even an indication as to the qualifications that they must possess before they can be appointed as returning officers.

**ii. Allegations relating to the right to equality and equal protection before the law**

114. The Applicants also challenge the fact that under sections 7(1), 7(2) and 7(3) of the NEA only persons employed in the public service can serve as returning officers. According to the Applicants, these provisions restrict the appointment of returning officers thereby “... disallowing others from participating in public affairs by being allowed to have a chance to be appointed to various leadership positions”. The Applicants submit that restricting the appointment of returning officers to civil servants only violates Article 3 of the Charter.

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<sup>34</sup> *Oscar Josiah v. United Republic of Tanzania* (merits) (28 March 2019) 3 AfCLR 83, §§ 52-53.

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115. In response, the Respondent State submits that this allegation is "... baseless as the restriction is reasonable and allowed under Article 27(2) of the Charter." According to the Respondent State, not all forms of differences in treatment are prohibited "... except those that are unreasonable and without justification."

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116. The Court reiterates its earlier reasoning, in respect of the appointment of the Director of Elections, and finds that sections 7(1), 7(2) and 7(3) by permitting the appointment of returning officers only from the public service do not violate Articles 13(1) and 3 of the Charter. While these provisions indeed do establish a differentiation between those in the public service and those outside it, as per the Court's earlier reasoning, this differentiation is not a violation of Article 13(1) and 3 of the Charter.

117. In relation to the above finding, the Court emphasises that differentiation amounts to proscribed discrimination only if it, among other things, is disproportionate and bears no objective correlation to the goal(s) sought to be attained. In so far as the objective of selecting competent persons to lead the Electoral Commission is concerned, the Court finds that such an objective cannot be nullified simply by restricting candidates thereto to the civil service only.

### **C. Alleged violation of the right to non-discrimination**

118. The Court observes that the Applicants did not specifically plead any violation of Article 2 of the Charter. However, in their submissions, especially in substantiating the alleged violation of Article 3 of the Charter, they have submitted that the manner in which the Director of Elections is appointed is discriminatory. A similar argument has been made in respect of the appointment of returning officers under sections 7(1), 7(2) and 7(3) of the NEA. The Applicants submit that by restricting these appointments to

only those persons in the civil service, they have suffered discrimination which compromises their right to participate in electoral processes.

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119. On its part, the Respondent State concedes that sections 6(1), on the one hand, and sections 7(1), 7(2) and 7(3) do provide for a differentiated treatment. It is argued, however, that the differentiated treatment is reasonable and justified. In the case of the Director of Elections, the Respondent State submits that “the appointment of a civil servant as Director of Elections is for common interests as it is easy to ascertain his ethical, professional and educational background since public service is governed by well-established legal framework.” As for the returning officers, the Respondent State submits that the differentiation is justified because “the National Electoral Commission do not have branch offices at constituency level hence the use of the Directors as returning officers since they have enough office facilities and expertise in electoral management.”

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120. The Court notes that Article 2 of the Charter provides as follows:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune birth or any status.

121. As the Court has previously noted, Article 2 of the Charter is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter.<sup>35</sup> Under Article 2, all forms of differentiation on the grounds listed therein is prohibited. Importantly, however, differentiation or distinction on any other basis that does not have objective and reasonable justification, in

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<sup>35</sup> *ACHPR v. Kenya, supra*, § 137.

circumstances where it is not necessary and proportional, is also prohibited by Article 2.<sup>36</sup>

122. Given that there is no dispute between the Parties in this case that sections 6(1), 7(1), 7(2) and 7(3) effect a differentiation, the question to be resolved by the Court is whether or not this differentiation amounts to the discrimination proscribed by Article 2 of the Charter.
123. The differentiation in this case is as between those employed in the civil service, who are eligible to serve in the Electoral Commission, and those outside the civil service who are automatically ineligible to serve in the Electoral Commission either as Director of Elections or returning officers.
124. As earlier alluded to, countries are permitted latitude in configuring their electoral management bodies to deal with their peculiar local challenges. This, however, does not mean that arrangements chosen by a State Party are immune from scrutiny by competent bodies such as the Court.
125. The Court has taken note of the submissions by the Respondent State for its preference in the use of civil servants for managing various aspects of the electoral process. The Court recalls its earlier finding that the involvement of civil servants in the management of electoral processes is not, without more, *per se*, irregular. In the instant Application, in so far as the Applicants have alleged a violation of their right to non-discrimination, primarily, in connection with their right to participate in the government of their country, the Court remains aware that participation in one's government can take many forms with serving as a Director of Elections or a returning officer(s) being just some of the possible avenues. In the circumstances, the Court holds that limiting the selection of the Director of Elections and the returning officers, from the civil service is not a violation of Article 2 of the Charter.

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<sup>36</sup> *Ibid.*, § 139.

#### **D. Alleged violation of Article 1 of the Charter**

126. Apart from generally asserting that the Respondent State has violated Article 1 of the Charter, the Applicants did not make any specific submissions under this head.

127. The Respondent State did not also specifically respond to the allegation of a violation of Article 1 of the Charter save to deny the alleged violation.

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128. The Court recalls that Article 1 of the Charter provides as follows:

The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

129. In respect of Article 1 of the Charter the Court has acknowledged that:

when the Court finds that any of the rights, duties and freedoms set out in the Charter are curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with and has been violated.<sup>37</sup>

130. Having found that the Respondent State has violated Article 13(1) of the Charter, the Court holds that the Respondent State has also violated Article 1 of the Charter.

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<sup>37</sup> *Alex Thomas v. Tanzania* (merits), *supra*, § 135.

## VIII. REPARATIONS

131. The Applicants pray the Court to order that “the Respondent puts in place Constitutional and Legislative measures to guarantee the rights provided for under Article 1, 3 and 13(1) of the Charter.”

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132. The Respondent State prays the Court for the following:

- i. A declaration that the Respondent State has not violated Article 1, 3 and 13(1) of the African Charter on Human and Peoples’ Rights by enacting sections 4(1), 6(1), 7(2) and 7(3) of the National Elections Act;
- ii. A declaration that the Respondent State has not violated Article 25(a) and (b) and 26 of the International Covenant on Civil and Political Rights by enacting sections 4(1), 6(1), 7(2) and 7(3) of the National Elections Act;
- iii. A declaration that the Respondent State has not violated Article 21(1) and (3) of the Universal Declaration of Human Rights by enacting sections 4(1), 6(1), 7(2) and 7(3) of the National Elections Act;
- iv. Any other order or relief that the Hon. Court will deem fit to grant; and
- v. That the Application be dismissed with costs.

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133. Article 27 of the Protocol provides that: “if the Court finds that there has been violation of a human or people’s rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”

134. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should, first, be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is

granted, reparation should cover the full prejudice suffered. Finally, the Applicant bears the onus to justify the claims made.<sup>38</sup>

135. The Court also reiterates that measures that a State can be ordered to take to remedy a violation of human rights include: restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations taking into account the circumstances of each case.<sup>39</sup>

136. As the Court has earlier found, aspects of sections 6(1), 7(2) and 7(3) of the Respondent State's NEA violate Article 13(1) of the Charter. It is on the basis of this finding that the Respondent State's responsibility has been established and the prayers of the Parties will be examined.

#### **A. Adoption of constitutional and legislative measures**

137. The Court recalls that, in appropriate cases, it has ordered State Parties to amend their legislation in order to bring it in conformity with the Charter. For example, the Court has previously ordered the Respondent State "to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken."<sup>40</sup> In another case, the Court ordered Burkina Faso to "amend its legislation on defamation in order to make it compliant with Article 9 of the Charter, Article 19 of the Covenant and Article 66(2) of the Revised ECOWAS Treaty."<sup>41</sup> A similar approach was adopted by the Court in *Association pour la Protection des Droits des Femmes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v. Mali*<sup>42</sup> as well as in *Jebra Kambole v. Tanzania*.<sup>43</sup>

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<sup>38</sup> *Amini Juma v. United Republic of Tanzania*, ACTHPR, Application No. 024/2016, Judgment of 30 September 2021 (merits and reparations), § 141; *Armand Guehi v. Tanzania* (merits and reparations), § 15; *Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, §§ 20-31.

<sup>39</sup> *Umuhoza v. Rwanda* (jurisdiction), *supra*, § 20.

<sup>40</sup> *Tanganyika Law Society and Others v. Tanzania* (merits), *supra*, § 126.

<sup>41</sup> *Konate v. Burkina Faso* (merits), *supra*, § 176.

<sup>42</sup> *APDF and IHRDA v. Republic of Mali* (merits and reparations) (11 May 2018) 2 AfCLR 380, § 130.

<sup>43</sup> *Kambole v. Tanzania*, *supra*, § 118.



138. The Court having found that parts of sections 6(1), 7(2) and 7(3) of the NEA violate Article 13(1) of the Charter, orders the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time and without any undue delay, to ensure that these provisions are amended and aligned with the provisions of the Charter so as to eliminate the violations of Article 13(1) of the Charter as established by the Court.

## **B. Other measures of reparations**

139. The Court notes that the Applicant did not specifically request for other measures of reparation but prays the Court to order “any other remedy and/or relief that the Honourable Court will deem fit to grant.”

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140. The Respondent State, for its part, also prayed the Court to make any order or grant any relief as it deems fit.

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141. The Court reiterates that Article 27(1) of the Protocol gives it power to “make appropriate orders to remedy” violations. In the circumstances, the Court reaffirms that it can, by way of reparations, order, among other reliefs, the publication of its decisions *suo motu* where the circumstances of the case so require.<sup>44</sup>

### **i. Publication of the judgment**

142. In the present case, the Court notes that the violations that it has established raise critical matters of public concern and specifically in relation to the management of electoral processes within the Respondent State. The Court holds that the manner in which elections are managed, including how

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<sup>44</sup> *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, §§ 165-167.

officials managing elections are chosen, contributes significantly to the sustenance of a democratic culture in any country.

143. In the circumstances, the Court deems it proper to make an order *suo motu* for publication of this Judgment. The Court, therefore, orders the Respondent State to publish this Judgment within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

## **ii. Implementation and reporting**

144. As the Court has previously noted, reporting on implementation of decisions is required as a matter of judicial practice.<sup>45</sup> The Court, therefore, orders the Respondent State to submit to it within twelve (12) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

## **IX. COSTS**

145. In their submissions, both Parties prayed the Court to order that the other Party pays the costs.

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146. Pursuant to Rule 32(2) of the Rules, “unless otherwise decided by the Court, each party shall bear its own costs”.

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<sup>45</sup> *Ghati Mwita v. United Republic of Tanzania*, ACtHPR, Application No. 012/2019, Judgment of 1 December 2022 (merits and reparations), § 179 and *Marthine Christian Msuguri v. United Republic of Tanzania*, ACtHPR, Application No. 052/2016, Judgment of 1 December 2022 (merits and reparations), § 138.

147. In the instant case, the Court does not find any reason for departing from its established practice and thus orders that each Party will bear its own costs.

## **X. OPERATIVE PART**

148. For these reasons:

### **THE COURT**

*Unanimously:*

*On jurisdiction*

- i. *Dismisses* the objection to its jurisdiction;
- ii. *Declares* that it has jurisdiction.

*On admissibility*

- iii. *Dismisses* the objection to the admissibility of the Application;
- iv. *Declares* that the Application is admissible in relation to the alleged violations of sections 6(1) and 7(1), 7(2), 7(3) of the NEA.

*On merits*

*By a majority of Nine (9) for, and One (1) against, Justice Rafaâ BEN ACHOUR dissenting,*

- v. *Finds* that the Respondent State has not violated Article 2 of the Charter;
- vi. *Finds* that the Respondent State has not violated Article 3 of the Charter in so far as section 6(1) of the NEA restricts the appointment of the Director of Elections only to candidates from the civil service;

- vii. *Finds* that the Respondent State has not violated Articles 13(1) and 3 of the Charter by permitting, in sections 7(1), 7(2) and 7(3) of the NEA, the appointment of returning officers only from the public service;

*Unanimously,*

- viii. *Finds* that the Respondent State has violated Article 13(1) of the Charter in so far as section 6(1) of the NEA does not prescribe qualification criteria for persons to be appointed as Director of Elections;
- ix. *Finds* that the Respondent State has violated Article 13(1) of the Charter to the extent that sections 7(2) and 7(3) of the NEA do not contain any indication of the positions in the public service that public servants must occupy to be appointed as returning officers or even an indication as to the qualifications that they must possess before they can be appointed as returning officers;
- x. *Finds* that the Respondent State has violated Article 1 of the Charter.

*On reparations*

- xi. *Orders* the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time, to ensure that sections 6(1), 7(2) and 7(3) of the NEA are amended and aligned with the provisions of the Charter so as to eliminate the violation of Article 13(1) of the Charter;
- xii. *Orders* the Respondent State to publish this Judgment within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

*On implementation and reporting*

- xiii. *Orders* the Respondent State to submit to it, within twelve (12) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

*On costs*

- xiv. *Orders* that each Party will bear its own costs.

**Signed:**

Blaise TCHIKAYA, Vice President;



Ben KIOKO, Judge;



Rafaâ BEN ACHOUR, Judge;



Suzanne MENGUE, Judge;



Tujilane R. CHIZUMILA, Judge;



Chafika BENSAOULA, Judge;



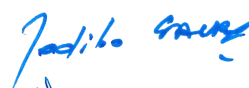
Stella I. ANUKAM, Judge;



Dumisa B. NTSEBEZA, Judge;



Modibo SACKO, Judge;



Dennis D. ADJEI, Judge;



and Robert ENO, Registrar.



In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules, the partly Dissenting Opinion of Justice Rafaâ BEN ACHOUR is appended to this Judgment.

Done at Arusha, this Thirteenth Day of June in the Year Two Thousand and Twenty-Two, in English and French, the English version being authoritative.

