IN THE COURT OF DISPUTED RETURNS OF NAURU
AT YAREN DISTRICT

Election Petition No: **1** of **2022**

IN THE MATTER of section 93 and Part 8 of the *Electoral Act 2016;*

AND IN THE MATTER of a General Election in the constituency of Ubenide held on 24th September, 2022.

AND IN THE MATTER of a petition by Vyko Adeang, George Gioura, Gregor Garoa and Ranin Akua.

BETWEEN: 1. VYKO ADEANG of Ubenide Constituency, Self-employed
2. GEORGE GIOURA of Ubenide Constituency, Self-employed
3. GREGOR GAROA of Ubenide Constituency, Self-employed
4. RANIN AKUA of Ubenide Constituency, Self-employed

PETITIONERS

AND: REAGAN WALIKLIK of Ubenide Constituency, Self-employed

1ST RESPONDENT

AND: WAWANI J DOWIYOGO of Ubenide Constituency, Self-employed

2ND RESPONDENT

AND: ELECTORAL COMMISSION a statutory body established under Electoral Act 2016 and joined as a party under Section 99 of the Electoral Act 2016.

3RD RESPONDENT

AND: DELPHINA ALIKLIK of Batisi District, Self-employed

4TH RESPONDENT

AND: VALENTINA BILL of Denigomodu, Self-employed

5TH RESPONDENT

AND: BAMO ALIKLIK of Nibok, Self-employed

6TH RESPONDENT

AND: KURT ALIKLIK of Nibok, Self-employed

7TH RESPONDENT

Before: Khan, ACJ
Date Hearing: 5 December 2022
Date of Ruling: 14 December 2022

Case to be cited as: *Adeang and Others v Aliklik and Dowiyogo and Others*

CATCHWORDS: Election Petition – Electoral Act 2016 – Election Petition Rules 2019 – Where Gazette published and election results declared (first publication) where Gazette was recalled and another Gazette published (second publication) – Whether the time commences from the date of the first publication or the second publication of the Gazette – Where one Election Petition filed challenging 4 seats – Where the petitioners paid $500.00 as security for costs – Whether the security for costs was in compliance with the electoral laws and the Election Petition Rules – Where out of the 4 candidates only 2 were joined as respondents – Whether failure to join in all successful candidates whose results are impugned makes the petition incompetent.

APPEARANCES:

Counsels for the Petitioners:	R Tom, T Tannang and V Clodumar
Counsel for the First and Second Respondents:	S Lee
Counsels for the Third Respondent:	J Udit (Secretary for Justice) and B Narayan (Solicitor General)
Counsel for the Fourth to Seventh Respondents:	R Tagivakatini

RULING

BACKGROUND

1. A general election was held in the Republic of Nauru on 24 September 2022 in accordance with the Constitution of the Republic of Nauru (Constitution) and the Electoral Act 2016 (the Act).

2. Two sets of Gazette Notices were issued declaring the results. The first one being Gazette Notice 261 of 2022 - G.N. No. 1002/2022 published on 26 September 2022 and the second one being Gazette Notice 262 of 2022 G.N. No. 1003/2022 published on 27 September 2022.

3. The results in the Constituency of Ubenide (Ubenide), which is subject to the challenge in this matter in both Gazette Notices are same and state as follows:

Constituency of Ubenide

Valid Vote 1566
Invalid Vote 64
Total Vote 1630

Candidates:	Value of Votes Cast
DAGAGIO, Starsky, Ethelbert Breaker	199.098
GIOURA, George Garoquan	301.159
RIBAUW, Fabian	194.575
GAROA, Gregor Ruson	343.897
MENKE, Mark	228.912
AKUA, Ranin	347.464
ALIKLIK, Reagan Winson	409.732
ADEANG, Vyko	352.390
ATTO, Aidan-Luke Paul	209.879
HIRAM, Livingstone Tekamaua	213.987
KUN, Russ Joseph	592.124
ITSIMAERA, Danial	258.646
HARRIS, Wayman Keith	190.896
KUN, Maximillian Mesrasrik	176.097
ADEANG, David Waiau	554.938
DOWIYOGO, Wawani Joe-Grant	515.666
TANANG, Temakau	171.506
GIOUBA, Ceila Cecilia	212.373

4. On 18 October 2022 the petitioners filed an election petition (petition) jointly challenging the results in Ubenide against the two successful candidates namely Reagan W Aliklik (first respondent) and Wawani J Dowiyogo (second respondent). The Electoral Commission was also named as the third respondent together with four other respondents.

5. In the petition various allegations were made including: allegations of electoral treating under s.129 (d) of the Act against the first and second respondents; allegations of undue influence and electoral treating under s.128 and s.129(c) of the Act against the fourth and fifth respondents; and allegations of intimidation and undue influence and electoral treating under s.127 and 128 of the Act, respectively, against the sixth and seventh respondents.

6. All the respondents were personally served with the petition except for first, second and fourth respondents, who were away overseas. They were served by way of substituted service pursuant to orders made by me on 21 and 22 October 2022.

7. The first and second respondents filed their Notices to Appear in Person, while the third respondent filed its Notice to Appear through the Office of the Department of Justice within time (within 5 days from the date of service of the petition). The fourth, fifth,

sixth and seventh respondents were granted leave to file their Notice to Appear as they did not file it within the prescribed time.

8. The third respondent filed its answer to the petition on 27 October 2022. The first and second respondents filed their answer to the petition on 2 November 2022 in person.

INTERLOCTORY APPLICATIONS

9. On 2 November 2022 the first, second, and third respondents filed an interlocutory summons seeking dismissal of the petition (strike out) for failure of the petitioners to file and serve affidavits of witnesses and list of witnesses within 14 days from the date of the presentation of the petition under rule 20 of Election Petition Rules 2019 (the rules).

10. On 3 November 2022 the petitioners filed an interlocutory summons for an extension of time for filing of affidavits of witnesses and list of witnesses under rule 20 of the rules.

LEGISLATIVE PROVISIONS

11. Having set out the proceedings before this court, I shall now set out the relevant legislation and the rules.

LEGISLATION

12. Under s.93 of the Act, an election result can only be challenged by way of a petition filed by:

    a) A candidate; or

    b) A voter

13. S.93(2) provides that the petition shall be presented in accordance with the provisions of Part 8 of the Act.

14. S.94 - STATUS OF PERSONS ELECTED

> "Where the validity of an election or declaration of an election is disputed, and pending a declaration by the Court of Disputed Returns in accordance with s.100(f), (g) and (h), the person or persons named in the Electoral Commission's Notice published under s.88 as the candidate or candidates elected are for all purposes deemed to be a member or members of Parliament as the case may be, duly elected."

15. S.96 - CONTENTS OF PETITION

> "A petition disputing an election or declaration of an election shall:
>
> a) Set out the facts relied on to invalidate the election or the declaration of the election;

b) Contain a prayer asking for relief to which the petitioner claims to be entitled;

c) Be signed by a candidate at the election or by a person who was qualified to vote at the election;

d) Be verified by an affidavit; and

e) Be presented in the registry of the Supreme Court within 21 days after the publication in the Gazette of the Notice in relation to elections in accordance with Section 88."

16. S.97 – DEPOSIT AS SECURITY FOR COSTS

"At the time of presentation of the petition, the petitioner shall deposit with the Registrar of Courts $500 as security for costs."

17. S.100 – POWER OF THE COURT

"(1) The Court of Disputed Returns sits as an open Court and its powers include the following:

(a) To adjourn;

(b) To compel the attendance of witnesses and production of documents;

(c) To grant a party to a petition, leave to inspect, in the presence of the Registrar of Courts and the Electoral Commission, the Roll and other documents used at or in connection with an election and to take, in the presence of the Electoral Commission, extracts from those Rolls and other documents;

(d) To examine witnesses on oath;

(e) Order the Electoral Commission to recount the ballot papers of one or more constituencies;

(f) To declare that a candidate who has been declared to be elected under Section 88 was not duly elected;

(g) To declare that a candidate who has not been declared to be elected under Section 88, duly elected;

(h) To declare an election for a constituency absolutely void;

(i) To dismiss or uphold a petition in whole or in part; and

(j) To award costs."

18. S.101 – REAL JUSTICE TO BE OBSERVED

> "The Court of Disputed Returns shall be guided by good conscience and the substantial merits of each case without regard to legal form and technicalities and is not bound by any rules of evidence."

19. S.102 – DECISION TO BE FINAL

> "1. The Court of Disputed Returns shall hear and determine any petitions presented under this Part by no later than 90 days from the presentation of the petition.
>
> 2. The decision of the Court of Disputed Returns is final and conclusive and is not reviewable or appealable."

RULES

20. I shall now set out the relevant rules.

Rule 4 – CONTENTS AND FORM OF PETITION

1) "A petition shall set out in Form 2 of the Schedule.

2) A petition under subrule (1) shall:

   (a) State whether the petitioner is a candidate or voter required under Section 93(1) of the Act;

   (b) State the date and result of the election;

   (c) State the name, address and occupation of each of the successful candidates as separate respondents;

   (d) State the names, addresses and occupations of any other persons joined as respondents;

   (e) State the names, addresses and occupations of the unsuccessful candidates, whether they are joined as a respondent or not;

   (f) State the capacity in which each party is joined;

   (g) State the grounds for the prayer for relief;

   (h) Provide a prayer for relief including where applicable, a declaration seeking:

      i) A candidate be duly returned or elected;
      ii) The election be void; or
      iii) A Writ of Election be returned;

(i) Be signed by the petitioner or each of the petitioners where there is more than one petitioner; and

(j) Be divided into paragraphs numbered consecutively and each allegation shall as far as convenient be contained in separate paragraphs."

RULE 5 - PARTIES TO THE PETITIONS

"The parties to a petition shall be:

a) The petitioner;

b) The successful candidate or candidates as respondent or respondents;

c) The Election Commission as a respondent; and

d) Any other party as a respondent or interested party against whom a relief is sought or whose inclusion is necessary for the purpose of a just and fair hearing of the petition."

RULE 7 – EVIDENCE NOT TO BE PLEADED OR EXHIBITED

1) "The petition shall contain a summary of material facts on which the petitioner seeks relief, but not the evidence by which those facts are to be proven, which shall be filed under Part 7.

2) Where an allegation is made against a person for the alleged or actual commission of an offence prescribed under the Act, the following particulars of such offence shall be stated in the petition:

   a) nature of the offence;
   b) the name, address and occupation of the person who is alleged to have or has committed the offence;
   c) the name, address and occupation of persons against whom the offence is alleged to have been or was committed;
   d) when and where such offence is alleged to have been or was committed;
   e) whether the complaint of the alleged offence was made to the Electoral Commission, Nauru Police Force or any other person of authority; and
   f) the outcome of any complaint made in paragraph (e).

3) The Court may, on the application of a party, order such particulars for the purposes of subrule (2) to be provided as may be necessary to ensure a fair hearing or trial of the petition.

4) Where the Court orders under subrule (3) that particulars of any allegation made in a petition shall be served on a party, it shall be filed and served to all the parties in accordance with the order of the Court.

5) Where a party fails to comply with an order under subrule (4), the Court may:

a) dismiss or summarily strike out the relevant parts of the petition or any reply to the petition relating to such particulars;

b) summarily dismiss the petition or any reply to the petition where substantial injustice will be caused to the other party or parties; or

c) exclude the admission of such particulars or evidence at the hearing or trial of the petition where the Court deems appropriate."

RULE 9 – PRESENTATION OF PETITION

1) "A petition shall be presented within 21 days of the publication in the Gazette of the results of the election.

2) The petition shall be presented with such number of copies as required for service on each of the respondents.

3) The Registrar shall endorse the date and time of the presentation of the petition and the deposit of the security for costs.

4) The Registrar shall not accept or process a petition for presentation:

a) on the expiry of 21 days from the publication in the Gazette of the results of the election; and

b) without the deposit of the security for costs at the time of the presentation of the petition or where the security for costs was deposited after expiry of the time for presentation of the petition."

RULE 10 – SECURITY FOR COSTS

1) "The deposit of $500.00 for security for costs shall be made with the Registrar at the time of presentation of the petition.

2) Where the security for costs is not deposited as required by the Act and these Rules, the petition is deemed not to be presented.

3) The Registrar shall on the receipt of the deposit of security for costs under subrule (1) issue a Notice of the Payment of Security for Costs in Form 4 of the Schedule.*"*

RULE 12 – SERVICE OF PETITION

1) "The petition and the Notice of Payment of Security for Costs shall be served personally on each of the named respondents in the petition within 5 days from the endorsement and issuance of the petition.

2) Before the expiry of the time for service under subrule (1), the Court may on application of the petitioner, extend the time for service of the petition and Notice of Payment of Security for Costs on one or more of the respondents for a further period not exceeding 5 days where:

   a) personal service was not effected despite reasonable efforts;

   b) the respondent at all material times is outside the jurisdiction; or

   c) the respondent evades personal service.

3) In considering an application for extension of time for the service of the petition and Notice of Payment of Security for Costs under subrule (2), the Court may order substituted service of the petition and Notice of Payment of Security for Costs:

   a) by leaving a copy of the documents at the respective respondents residence;

   b) by serving a copy of the documents to a named adult member of the family residing with the respective respondent; or

   c) in any other manner by which a respective respondent is capable of being notified of the petition to the satisfaction of the Court.

4) The application under subrule (3) shall be made to the Registrar:

   a) by an ex-parte Notice of Motion in Form 6 of the Schedule; and

   b) accompanied by an affidavit in Form 7 of the Schedule of the person engaged to serve the petition and Notice of Payment of Security for Costs deposing the effort made and reasons for not being able to effect personal service.

5) The Registrar shall prepare and issue a sealed copy of an order for substituted service in Form 8 of the Schedule.

6) The petition and Notice of Payment of Security for Costs shall be served on the respondent by any other person other than the petitioner personally.

7) Where a petition and Notice of Payment of Security for Costs is served by the petitioner personally, the petition shall be deemed as not served on the respective respondent."

RULE 14 – NOTICE TO APPEAR

1) "The respondent shall within 5 days of the service of the petition and Notice of Payment of Security for Costs file a Notice to Appear in person or by a legal practitioner in Form 11 of the Schedule and serve a

copy at the address of the petitioner contained in the petition and on every other party to the petition.

2) Where a respondent fails to file a Notice to Appear in accordance with subrule (1), he or she shall only be permitted to enter an appearance or participate at the hearing or trial of the petition with the leave of the Court."

RULE 16 – OBJECTION TO IRREGULARITY, COMPETENCY OR SERVICE OF PETITION

1) "A respondent who objects to the irregularity, competency or service of the petition shall within 7 days after the service of the petition file and serve on the petitioner and other parties the grounds of such objection in Form 13 of the Schedule.

2) Where a petitioner fails to rectify a legitimate objection raised under subrule (1) the respondent may by a summons supported by an affidavit seek appropriate orders setting aside or dismissal of the petition.*"*

RULE 20 – AFFIDAVIT

1) "The petitioner shall file and serve within 14 days from the date of the presentation of the petition:

   a) an affidavit of the petitioner exhibiting all such evidence that he or she intends to adduce or rely on at the hearing or trial of the petition;

   b) affidavits of any other persons who he or she intends to rely upon for the hearing or trial of the petition whether or not such persons may be summoned to appear as witnesses for the hearing or trial of the petition; and

   c) a list of witnesses in Form 16 of the Schedule that he or she intends to summon for the hearing or the trial of the petition.

2) The respondent shall file and serve within 14 days of the filing of the answer to the petition:

   a) one or more affidavits in reply to the petition or the affidavits filed for or on behalf of the petitioner;

   b) affidavits of any other persons he or she intends to call as witnesses or rely upon for the hearing or trial of the petition; and

   c) a list of witnesses in Form 17 of the Schedule that he or she intends to summon for the hearing or trial of the petition."

RULE 25 – DIRECTIONS HEARING

1) "The Registrar shall list the petition for a directions hearing within 28 days of the presentation of the petition.

2) The Court at the directions hearing may:

   a) deal with any application as to the competency of the petition;

   b) order that a person be joined as party;

   c) adjourn to another date for a directions hearing and to fix a date for the hearing or trial of the petition; or

   d) Make orders for:

      i) filing and serving of documents by parties and their witnesses;

      ii) disclosure of information and documents;

      iii) filing and serving written submissions and list of Statutes, Regulations or Case Authorities;

      iv) giving notice to the witnesses to attend the hearing; and

      v) any other matter necessary to assist in the expeditious hearing or trial of the petition.

3) Where the petitioner is challenging the result of the election on the ground that the petitioner had a majority of lawful votes, the Court at the directions hearing may order that in the presence of the Registrar:

   a) an examination of the counted and void votes; and

   b) an examination of the recounting of votes."

RULE 26 – INTERLOCUTORY APPLICATIONS

1) "All interlocutory questions and matters may be heard and disposed of, where appropriate by a judge, in the course of the proceedings.

2) All interlocutory questions and matters vested to the jurisdiction of the Registrar may be heard and disposed of by the Registrar, who shall have same jurisdiction over the proceedings as a judge in the Court.

3) All interlocutory applications shall be made by a summons in Form 20 of the Schedule and where necessary, supported by an affidavit."

RULE 29 – SUBSTITUTION OF A PETITIONER

1) "A person, who was eligible to be a petitioner in respect of a petition where the petitioner has given a Notice of Application to Withdraw the Petition, may apply to the Court within 7 days of the publication of such Notice for Leave to be substituted as the petitioner.

2) An Application for Leave to be substituted as a petitioner under the Rule shall be made by a summons and be supported by an affidavit.

3) On the hearing of the Application for Leave to withdraw, the Court may concurrently hear an application under subrule (1) for the substitution as a petitioner and the Court may if it deems fit substitute such person accordingly.

4) Where the proposed withdrawal is induced by an ulterior or illegitimate purpose the Court may, by order, direct that the security deposited on behalf of the original petitioner:

   a) remain as security for the substituted petitioner; and

   b) the original petitioner by liable to pay the costs of the substituted petitioner.

5) Subject to sub rule (4), the substituted petitioner shall within 3 days of the order for substitution deposit the security for costs of $500.00 before he or she proceeds with his or her petition.

6) A substituted Petitioner shall be in the same position and subject to the same liabilities as the original petitioner.

7) No application for substitution as a petitioner may be granted, after the expiry of 21 days, within which a petition is to be filed under Section 96 of the Act."

RULE 45 – COSTS

1) " Except where specifically provided for in these Rules, all costs, charges, expenses of and incidental to the presentation of a petition or any consequent proceedings shall be at the discretion of the Court and shall be defrayed by the parties in a manner and in the proportions as the Court may determine
   …

4) Where the petitioner is ordered to pay any costs and he or she fails to pay the costs as ordered by the Court, the Registrar shall pay the costs out of any money deposited with the Court as security under these Rules and execution may be issued against the petitioner and the surety jointly and severally for any balance not covered by the deposit."

RULE 48 – COURT MAY ENLARGE TIME

> "The Court may where appropriate enlarge any period of time provided under these Rules unless such time is mandatory."

RULE 49 – CIVIL PROCEDURE RULES APPLY

1) "Where these Rules do not make provision for a matter relating to a petition, the Civil Procedure Rules 1972 apply.

2) Where there is any inconsistency between the Civil Procedure Rules 1972 and these Rules, these Rules shall prevail to the extent of the inconsistency."

DIRECTIONS HEARING

21. At the directions hearing held on 15 November 2022, the respondents and the petitioners were ordered to file and serve their written submissions in respect to their respective applications for the strike out application and for an extension of time.

COURT OF DISPUTES RETURNS

22. In *Dabwido v Aingimea and Kam and Another*[1] I stated at [17] that:

> "…that the Court of Disputed Returns enjoys a very special jurisdiction which is essentially a Parliamentary jurisdiction assigned to the judiciary by the Constitution and legislature." The Constitutional powers of the Court are under Article 48(2) of the Constitution which states:
>
> "…such jurisdiction as is prescribed by the law"; and the law that prescribed the jurisdiction of this Court is the Act."

23. On the special jurisdiction of this Court, in *Dabwido v Aingimea and Kam and Another* at [8] I stated as follows:

> "[8] In the East Caribbean case of **Ezechiel Joseph and Alvina Reynolds and others HCVAP 2012/0014 unreported** the Court of Appeal stated as follows at paragraph:
>
> "[18] In adopting this strict approach, our Courts have stated that the jurisdiction of the election court is a very peculiar jurisdiction one, which is not the ordinary civil jurisdiction of the court. It is seen essentially as a parliamentary jurisdiction assigned to the judiciary by the various constitutions and by leglisation. It has been stated that it is not a jurisdiction to determine mere ordinary civil rights. Thus, in **Browne v Francis-Gibson and Another 1995 50 WIR 143**, in which is Court extensively reviewed the jurisprudence of the Privy Council and the House of Lords in the foregoing and other cases, Sir Vincent

[1] [2016] NRSC 22; Election Petition 70 (12 September 2016, Khan J)

Floissacc JJ stated as follows:

> "The Judicial Committee of the Privy Council has repeatedly affirmed the jurisdiction conferred on local courts of a British Colony or former British Colony **to determine questions as to the validity of elections and appointments to the local legislature is a peculiar and a special jurisdiction in at least 5 respects**. **Firstly,** constitutionally **the jurisdiction is essentially a parliamentary jurisdiction conveniently assigned to judiciary by the Constitution or by legislature**. It is not a jurisdiction to determine the mere ordinary civil rights. **Secondly, the parliamentary questions which the local courts are constitutionally or statutorily authorised to determine are expected to determine expeditiously so that the composition of the legislature may be established as speedily as possible. Thirdly, the legislature must have envisaged that the parliamentary questions would be determined either on their merits or purely on procedural grounds and without hearing evidence. Fourthly,** because of the urgency of the parliamentary questions, the legislature is presumed to have intended that the **decisions of the local original and appellant courts would be unappealable** to Her Majesty in Council. **Finally,** the presumption against appeals to Her Majesty in Council is usually confirmed by imperial or local legislation declaring **the decisions of the local courts to be final and unappealable.** In any event, the presumption is rebuttable only by specific imperial or local legislation unequal locally authorising such appeals.""[Emphasis added]

24. The Solicitor General filed written submissions on behalf of the third respondent. She referred to the answer to the petition filed on behalf of the third respondent, where it stated that an order is sought for the dismissal of the petition on the ground that it disclosed no reasonable course of action, is frivolous or vexatious and is an abuse of process of the court. She further stated that rule 25 gives the court jurisdiction *"to deal with competency of the petition."* On this basis she raised two issues about the competency of the petition which are:

    a) Firstly, that the results were delivered in the first Gazette Notice 261 of 2022 on 26 September 2022, which was recalled on 27 September 2022 by Gazette Notice 262 of 2022. The results were not changed in the subsequent Gazette Notice 262 of 2022. Therefore, the 21 days for filing of the petition commenced on 26 September 2022 and expired on 17 October 2022. The petition was filed on 18 October 2022 and is out of time.

    b) Secondly, the petitioners have not paid the correct amount for security of costs. They are individual petitioners and should have paid $500 each (total $2,000). Instead, a sum of $500 was paid collectively by all the petitioners.

25. The petitioners responded to the issues raised by the Solicitor General in their written submissions[2]. Mr Tannang addressed the two issues as follows:

    a) Firstly, with respect to the filing of the petition, that the Solicitor General's contention that the time for filing of the petition commenced on 26 September 2022 was wrong as Gazette Notice 261 of 2022 was replaced by Gazette Notice 262 of 2022. The time commenced on 27 September 2022 and thus, the filing of the petition on 18 October 2022 was within time.

    b) In respect of the issue of security for costs, he submitted that a single petition with 4 petitioners was filed; therefore, the correct amount to be paid as security for costs was $500 as required by the Act and the Rules.

26. Mr Lee's position in respect of the publication of the Gazette is that it was published on 27 September 2022 (Gazette No. 262 of 2022) and that the petition was filed on the last day of the 21-day period and it was within time. He did not address the Court on the issue of security for costs in his written submissions but at the hearing of this matter he supported the Solicitor General's contention that the amount paid as security for costs was not adequate.

27. Mr Tagivakatini was granted leave to file Notice to Appear on behalf of the fourth, fifth, sixth and the seventh respondents pursuant to rule 14 because his office had failed to file the Notice to Appear within 5 days of the service of the petition. Since the Notice to Appear was filed out of time, he was not allowed to address the two applications, namely, the strike out and the extension of time but was allowed to make submissions on them generally.

28. Mr Tagivakatini in his submissions addressed the issue of security for costs. He supported the Solicitor General's submissions and stated that there are four petitioners and each of them was required to pay a sum of $500 each. Notwithstanding the fact that the petition has been issued under rule10(2), the petition is "deemed not to be presented." He further submitted that under rule 5 parties other than successful candidates can be joined provided reliefs are sought against them. No relief is sought against the fourth, fifth, sixth and the seventh respondents. He also submitted that the Court's powers under s.100 of the Act is limited. The Court does not have powers to make any orders against the fourth, fifth, sixth and the seventh respondents.

29. Mr Tannang conceded that no relief is being sought against the fourth, fifth, sixth and the seventh respondents.

RULES 4 AND 5

30. The Solicitor General submitted that rules 4 and 5 of the rules were not complied with. Rule 4(2)(c) and 5(b) provide that all successful candidates should be joined as party/parties. Further, rule 4(e) provides that all unsuccessful candidates should be named in the petition irrespective of whether they are joined in as parties or not. She also submitted that the petition does not have names of all the unsuccessful candidates. Further, she submitted that the successful candidates, namely, Russ Joseph Kun and

[2] Filed on 29 November 2022

David Adeang should have been joined in as respondents.

31. Mr Tannang's response is that both the petitioners and they as their lawyers made a conscious decision not to join in Russ Joseph Kun and David Adeang as no allegations are made against them. He concedes that the relief sought is that all four seats in the constituency be vacated.

CONSIDERATION

32. I shall first determine the competency of the petition as that goes to the jurisdiction of the court to deal with this matter.

33. On the issue of competency of the petition, the Solicitor General raised two issues. Firstly, whether the petition was filed within 21 days. Secondly, whether the petitioners have paid the requisite amount as security for costs. In addition to these two issues, I am of the view that the issue of the failure to join the successful candidates as respondents may also fall within the ambit of the competency of the petition. I shall discuss the three issues in that order.

WHETHER THE PETITION WAS FILED WITHIN TIME?

34. If Gazette Notice 261 of 2022, published on 26 September 2022, is taken as the correct publication then the petition would be out of time by one day.

35. S.88 of the Act requires the Electoral Commission to publicly declare and publish the results. It states:

> "The Electoral Commission shall as soon as the results of an election are **ascertained**:
>
> a) Publicly declare those candidates elected as members of Parliament; and
>
> b) Publish by notice exhibited in a conspicuous place at or near the Government offices, Yaren and by notice in the Gazette:
>
> i) The results of the election;
> ii) The names of the candidates elected for each constituency;
> iii) The number of votes cast; and
> iv) The number of invalid votes."

36. The use of the word "and" at the end of s.88(a) means that there is "implied conjunction" or the provisions in s.88(a) and (b) are cumulative – see *Kepae v Republic*[3] where it is stated at [15] as follows:

> "[15] In s.3(b) the word 'and' appears at the end, and consequently all paragraphs (a), (b) and (c) are cumulative which means that all the conditions have to be fulfilled. I refer to Statutory Interpretation in Australia where at page 14 it is stated as:

[3] NRSC37; Criminal Appeal No. 14 of 2019 (18 September 2019, Khan J)

"(i) *The implied conjunction.* Where a series of paragraphs within a section are

either all cumulative or alternatives, the conjunction 'and' 'or' is included only at the end of the penultimate paragraph. Thus, the form

a) …
b) …;
c) …; or
d) …

means that the word 'or' is to be read at the end of each paragraph. Likewise, if paragraph (c) concluded with 'and', the conjunction shall be read as if it appeared at the end of each paragraph. A failure to understand this form of drafting led to much difficulty of interpretation of s.46(3) of the Income Tax Assessment Act 1936-1968 (Cth) that was finally resolved by the High Court in *Finance Facilities Pty Ltd v FCT* (1971) 127 CLR 106; see particularly Windyer J at 133.""

37. Mr Tannang submits that Gazette Notice 262 of 2022 is the correct gazette and he relies on the case of *Tom v NLC and Others*[4]where it is stated at [18] as follows:

"[18] What has to be borne in mind is that G.N. No. 40 was not a subsequent gazette following an event, that is, a death etc. It was published to amend certain errors to which I have referred to above and the whole exercise was to correct those minor errors, however, by publishing the amendment the entire decision in G.N. No. 259 became the subject of an appeal and not only the items mentioned in G.N. No. 40 – thus, this appeal is within time and is therefore competent."

38. Mr Lee, as I stated earlier, accepts that Gazette Notice 262 of 2022 published on 27 September 2022 was the correct gazette.

39. The Electoral Commission is required, amongst other things, to publish the results in the gazette. If Gazette Notice 261 of 2022 was recalled, then the gazette in which the results were published is Gazette Notice 262 of 2022. Therefore, I find that the petition was filed within time.

SECURITY FOR COSTS

40. When the petitioners lodged their petition, they collectively paid a sum of $500 as security for costs. Upon payment of that amount the Registrar issued a document which states:

"**Notice of Deposit of Security for Costs**

Take Notice that the petitioners Mr Vyko Adeang, Mr George Gioura, Mr Gregor Garoa and Mr Ranin Akua has deposited a sum of $500.00 as

[4] [2020] NRSC 21; Land Appeal 7 of 2020 (9 June 2020, Khan J)

security for costs with the Registrar on this 18th day of October 2022. This Notice is issued pursuant to Rule 10(3) of the Election Petition Rules 2019."

41. The Solicitor General submits that adequate amount of security for costs were not paid as there were 4 different petitioners in one petition. They all have separate claims and that the correct amount to be paid as security for costs was the sum of $2,000.00.

42. The Solicitor General further submitted that s.97 of the Act states that **"the petitioner",** which is very specific, shall pay $500.00 as security for costs. The petition has to be filed either by a candidate or a voter.

43. In written submissions[5], the Solicitor General submits at [20] that the petitioners have correctly followed the procedure for signing the petition and verifying the facts individually and that they knew and treated themselves as individual petitioners and this is reflected in the prayer that they are seeking.

44. It is further submitted that Rule 10(2) provides that *"if the security for costs is not deposited as required by the Act in these Rules, then the petition is deemed not to be presented". S*ince the correct amount of $2,000.00 has not been paid, the petition is deemed not to be presented.

45. Mr Tannang points out that neither the Act nor the rules make provision for multiple petitioners to be included in one petition. This was one petition and therefore the costs of $500.00 is the correct amount in the circumstances. He further stated that the Registrar accepted the sum of $500.00 as security of costs and therefore all the requirements of the Act and Rules have been complied with and the petition is validly before the Court.

PETITION

46. Now let me examine the petition and in the list of unsuccessful candidates the following names appear:

1) Vyko Adeang
2) George Gioura
3) Gregor Garoa
4) Ranin Akua

47. The following reliefs are sought:

a) The election for the Constituency of Ubenide be declared void; and
b) All 4 elected seats for Ubenide be returned for re-election;
c) The results for first respondent and second respondent be declared void; and
d) A re-election be ordered for the seats of first and second respondents; or
e) The elected results for first and second respondents be declared void numbers fifth and sixth candidates were duly elected.

[5] Filed on 22 November 2022

48. In para 47(e), relief is sought that the first and second respondents' election be declared void and number fifth and sixth candidates be elected in their place. The question that I ask is as to who are the fifth and sixth candidates as the petition has named only 4 unsuccessful candidates. Rule 7 provides that the petition shall contain a summary of the material facts on which the petitioners seek relief.

49. In addition to the requirements for the petitioners to provide summary of facts under rule 7, the Petitioners are also required to provide details of the actual commission of the offence under rule 7(2) including the following:

(a) Nature of the offence; (this has been provided)
(b) Details of the person who is alleged to have committed the offence;
(c) Persons against whom the offence is alleged to have been committed;
(d) When and where the offence is alleged to have been committed;
(e) Whether a complaint of the alleged offence was made to the Electoral Commission, Nauru Police or any other authority; and
(f) The outcome of the complaint under sub-paragraph (e) above.

50. It is unfortunate that the petition does not contain any summary of material facts. However, just by looking at the reliefs sought the court is asked to declare the whole election of the constituency of Ubenide to be declared void, which in my respectful opinion means that there has to be four partitioners with four separate claims for the court to be able to grant that relief. In light of this observation, even though one petition with four petitioners was presented, in effect there were four separate petitioners with four separate claims and therefore they were required to pay the security for costs in the sum of $2000 ($500 each and not $500 collectively).

51. Mr Tannang blames the Registrar for accepting the sum of $500.00 as the correct amount of security for costs. Lawyers should not blame the court or the registry staff for their own mistakes, and in that regard, I refer to the case of *Chee Siok Chin v Attorney General*[6] where the role of the court registry is very aptly stated at [34] as follows:

> "[34] In so far as the Charlee Soh case is concerned, the following observations by Clement Skinner J are particularly apposite and merit quotation in full (and which ought, in the main, to be read together with the observations of Lee J in the Chong Thain Vun case quoted at [32] above):
>
> Mr. Soh's explanation for failing to [furnish the requisite security for costs] is that on his enquiry at the registry as to how much he had to pay to file his petition, he was informed that the filing fees was RM80.00 which he duly paid. Mr. Soh's explanation implies that he is not to be blamed for not having given security for costs as the registry did not inform him about this requirement of law. It is a matter of some regret that the assistance rendered to Mr. Soh by the court registry in informing him of the amount of filing fees payable should now be used by him as an excuse for not having given security for costs. **I regret that I must reject any attempt**

[6] [2006] SGHC112

by him to blame the registry. In the first place, it is incumbent on Mr. Soh as a person who wishes to avail himself to the right to challenge the result of an election to acquaint himself with the relevant provisions of law which gives him that right to do so because that right being a 'special kind of right', must be subject to the 'limitations imposed' by the statute that creates it. In the second place, I agree with learned Senior Federal Counsel **that ignorance of the law is no excuse for noncompliance therewith**. In the third place, it **is not the function of the court to advise any party on how to go about bringing a petition and thereafter to prosecute it.** The **reason the court does not** do so is that **it cannot be seen to descend into the arena and take part in the litigation between the parties.** In the fourth place, Mr. Soh seems to be confused between paying filing fees for lodging a document in court and giving security for the payment of all costs, charges, and expenses that may become payable by him, which are two different things. As far as the giving of **security for costs on the presentation of an election petition is concerned, rule 12(1) of the Election Petition Rules are clear and the words used in the rule are that such security for costs 'shall be given'**. And rule 12(2) goes on to provide that the security 'shall be given' by a deposit of money of not less than RM2,000.00 and rule 12(3) goes on to state that if security for costs is not given by the petitioner, **no further proceedings 'shall be had on the petition'** and the respondent may apply to the judge for a dismissal of the petition.

I have deliberately referred to the provisions of rule 12 in some detail to show that it uses **peremptory language and also stipulates the consequences for non-compliance therewith – dismissal of the petition on application by the respondent, which all the respondents have applied for now**. In Chong Thain Vun v Watson & Anor. (1968) 1 MLJ 65, this is what Lee Hun Hoe J. (as he then was) had to say about rule 12 (at pg. 74):

'Peremptory language is used by the rules and it behoves a petitioner to study the rules carefully so that every provision is complied with [...] **If there is a breach of the provision of this rule, it makes no difference whether the petitioner has misinterpreted or misunderstood it he must take the risk. The respondent is entitled to take advantage of a petitioner's faults. The provisions of this rule must be strictly complied with.'**

I fully agree with what was stated above by his Lordship Lee Hun Hoe J. Mr. Soh has so very clearly not complied with the mandatory requirements of rule 12 and his request to treat the filing fees of RM80.00 as part payment of the security for costs cannot be entertained as the Election Petition Rules, 1954 do not allow for security for costs to be given in such a manner. The petition must be dismissed on this ground alone.
[**emphasis added**]"

FAILURE TO JOIN IN SUCCESSFUL CANDIDATES

52. As mentioned earlier, the petitioners have joined the first and second respondents as successful candidates whilst **rule 4(c) clearly provides that the petitioners shall *"state the name, address and occupation of each of the successful candidates as separate respondents."***

53. Rule 5 on **parties to the petition provides inter alia that the parties to the petition shall be:**

a) "The petitioner;
b) Successful candidate as respondent or respondents..." [Emphasis added]

54. The naming of successful candidates as respondent or respondents is a mandatory requirement in a petition. The petitioners, as stated earlier, have only joined the first and second respondents and failed to join in Russ Joseph Kun and David Adeang, the other two successful candidates for the constituency of Ubenide.

55. Mr Tannang states that a conscious decision was made not to join them since no allegations are made against them. However, notwithstanding that, the prayer in the petition seeks relief that the election for Ubenide be declared void and that all 4 seats be returned for re-election.

56. The petitioners and their lawyers were bound by rules 4 and 5. They were required to comply with the procedural requirements stated therein as those requirements are mandatory. Instead of complying with the procedural requirements of the rules, they appear to have created their own rules and which has serious consequences to the petition. In *Nair v Tiek*[7] it is stated at page 36 as follows:

"[36] That case was not dissimilar to that before their Lordships, for the question was whether the petitioner had amended his petition within the proper time for service. The second is *Arzu v Arthurs* [1965] 1W.L.R. 675; the petitions were dismissed on the ground that they did not state when they were served and **that the first respondent had not been made a respondent thereto**. Lord Pearce, delivering the judgement of the Board, said at p.679:

> "Nor can they find a distinction in the fact that the dismissal of the petitions was based on **procedural grounds**. **If the decision in this peculiar jurisdiction is to be final such finality must apply irrespective of the reasons for the decision**. The fact that no evidence has been heard does not affect the general principle. The Court in the present case did not refuse jurisdiction; **it decided in its peculiar jurisdiction that the petitions were defective**. **As a result the petitions were dismissed. A dismissal based on a procedural matter is nonetheless a decision in an election petition, even where the matter has not proceeded to the hearing of evidence.""** [**Emphasis added**]

[7] (1967) 2 All ER 34; Privy Council

57. In *Absalom v Gillett*[8] it is stated at pages 668, 669, 670, 671 and 672 as follows:

> "We turn then to Mr Prices's primary argument, which is altogether more formidable. He submitted that the conceded failure to join the successful candidates as respondents is fatal to the petition because, he says, it means that the court has no jurisdiction to entertain it. In our judgement, it is important for the purposes of this part of the argument to distinguish between the following propositions:
>
> 1) The successful candidates ought to have been joined as respondents;
>
> 2) The failure to join them means the petition cannot be entertained by the court.
>
> In our judgement, the first proposition is plainly correct.…Nothing could be more obvious than that a party whose very status as a democratic representative is sought to be impugned by litigation before the court should have the right to be heard. It makes no difference that the successful candidate might not have anything to say over and above the arguments of the aldermen, whose decision had guaranteed their election. If this petition succeeds, their election would be invalidated.
>
> We do not understand how it can be suggested that there is no affront to justice in the fact, which is agreed to be the result of the procedural steps taken or not taken in this case,…**But in principle, we regard it as wholly elementary that successful candidates whose election is impugned by a petition such as this should be made respondents.**…However, before leaving the first proposition we should notice Mr Burrell's reference to authorities in which the successful did not appear: *Re Melton Mowbray (Egerton Ward) UDC Election* [1968] 3 All ER 761, [1969] 1 QB 192; and where the successful candidate was not joined as a respondent: *Greenway-Stanley v Paterson* [1977] 2 All ER 663. The first of these cases tells us nothing. **It is elementary that a respondent has no obligation to appear in the litigation in which he has been impleaded**…plainly, then, the successful candidate should have been joined. **But the second question on this part of the case whether the failure to join them means that the petition is incompetent** – that this Court has no jurisdiction to entertain it. That is an altogether different question…In *Copeland v Jackson* (July 1933, jurisdiction to entertain unreported), decided by a commissioner in the Kings Bench, an election petition had not been served on the successful candidate, whom it was sought to unseat. The commissioner said:
>
> > 'I am entirely satisfied that to unseat anyone who has been elected, he must be made a respondent to the petition, whether or not – for purposes of costs or otherwise – the returning officer be made a respondent. **The petition is otherwise in the air.** Whether its allegations as to the returning officer's conduct be true or not, no effect can come from it in the only sense desired by the petitioner, that is to say, the unseating of Blakemore.'

[8] (1995) 2 All ER 661; Queens Bench Division; Laws and Forbes JJ

In fact the candidate Blakemore had had notice of the petition (though not served as a respondent) and appeared before the commissioner by counsel. Nevertheless the commissioner said:

> 'without Blakemore as a party to the petition I cannot unseat Blakemore, and therefore there is nothing for the petition to act on, however true its allegations may be. It is, as I have already said, **in the air and is entirely ineffective for any purpose.'**

… '**it is quite plain that the whole of the case law to date is one way, and supports the proposition that a successful candidate whose election is sought to be impugned must be made a respondent, and that if he is not the petition cannot go forward… It follows that this petition is incompetent, and must be struck out…"** [**Emphasis added**]

58. In *Ahmed v Kennedy and Others*[9] the Court of Appeal adopted the observations made in *Absalom v Gillett* and stated at page 447 at [18] as follows:

> "[18] Having then referred to further authorities as to who must be made respondents to election petitions, the court continued ([1995] 2 All ER 661 at 671-672 [1995] 1W.L.R. 128 at 138):
>
> > 'It is quite plain that the whole of the case law to date is one way, and supports the **proposition that a successful candidate whose election is sought to be impugned must be made a respondent, and that if he is not the petition cannot go forward … If a petition is to be brought, it must be so served [ie upon the successful candidate]. The requirement is mandatory.** It follows that this petition is incompetent, and must be struck out …'" [**Emphasis added**]

COMPETENT LEGAL ADVICE

59. In the case of *Williams v Mayor of Tenbyy and Others*[10] it is stated at page 138 as follows:

> "I think the petitioners in these cases are advised by **competent persons**, and ought to pursue the provisions of the Act." [**Emphasis added**]

60. In the case of *Ezechiel Joseph and Elvina Reynolds and Others*[11] referred to in the case of *Dabwido v Aingimea (supra)* at [23] above it is stated at [85] as follows:

> "[85] It is my view that **lawyers who wish to practice in our election courts** have a **solemn duty, obligation and responsibility to be well acquainted** with electoral laws and procedures in order to facilitate the right to access, the democratic process and the vindication of electoral rights guaranteed ultimately by the constitution. **Their duty is to ensure that things are done as prescribed by law**

[9] (2003) 2 All ER 440 Court of Appeal, Civil Division: Simon Brown, May and Clarke LJJ
[10] [1879] 5 CPB 135 DC
[11] HCVAP 2012/0014 unreported the Court of Appeal

in order to ensure that elections cases are eventually determined on their merits thus serving these high public interest and ideals…" [**Emphasis added**]

CONCLUSION

61. For the reasons given above, I find that the petition is incompetent and is struck out.

62. I order the petitioners to pay the respondents costs to be taxed if not agreed.

DATED this 14 day of December 2022

Mohammed Shafiullah Khan
Acting Chief Justice.