

2016/CC/0025

AND

BETWEEN:

AND

For the Petitioner : Mr. B. A. Sitali, Butler and Company
For the Respondent : Ms. M. Mulenga, In-House Counsel
Electoral Commission of Zambia

JUDGMENT

Cases referred to:

1. **Rafiu Raviu v S (1981) 2 NCLR 293**
2. **Ifezue v Mbagdugha and another (1985) LRC (CONST) 1141**
3. **Nalyanabo v Attorney General (2001) 2 EA 485**
4. **Reverend Dr. Timothy Njoya and others v The Attorney General and others (2004) 1 KLR 232**

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016

The Petitioner, Stephen Katuka, filed this petition against the Electoral Commission of Zambia (ECZ) on 12th July, 2016 in his capacity as Secretary General of the United Party for National Development (UPND). The petition was filed pursuant to Article 128 of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016.

The Petitioner seeks the determination of the Court as to whether the refusal or neglect by the Electoral Commission of Zambia to cancel the election to the National Assembly in the Petauke Central Constituency and to call for the filing of fresh nominations and hold elections within thirty days of the filing of such nominations, contravenes Article 52(6) of the Constitution of Zambia as amended. He, therefore, claimed the following reliefs from the Court:

- (i) A declaration that following Mr. Josab Changa's withdrawal as a candidate in the election to the National Assembly for Petauke Central Constituency, the elections to the National Assembly for the Petauke Central Constituency be cancelled, and fresh nominations be filed by eligible candidates and that an election be held within thirty (30) days of the filing of such nominations.
- (ii) An Order of mandatory injunction compelling the Respondent to cancel the elections to the National Assembly in the Petauke Central Constituency, and to call for fresh nominations to be filed by eligible candidates and to hold an election within thirty (30) days of the filing of such nominations.
- (iii) Costs of and incidental to this Petition.
- (iv) Such declaration and Orders as this Honourable Court may consider fit.

In his affidavit verifying facts, the Petitioner averred that nominations for the National Assembly election scheduled for 11th August, 2016, for Petauke Central Constituency closed on or about 31st May, 2016. That by close of nomination, the Respondent announced the following as having filed valid nominations:

Banda Emmanuel J	-	Independent
Changa Josab	-	Independent
Phiri Abeal	-	FDD
Phiri Ignasio A.S	-	UNIP
Siliya Dora	-	PF
Tembo Mike	-	UPND

The Petitioner stated that Mr. Josab Changa, an independent candidate in the National Assembly elections for the Petauke Central Constituency, withdrew his candidature. To support the allegation, the Petitioner relied on media reports to the effect that Changa had withdrawn his candidature in the Petauke Central Constituency and had opted to support the Patriotic Front (PF) in the 11th August, 2016 general elections.

The Petitioner further averred that on 1st July, 2016, he through his advocates, wrote to the Respondent drawing their attention to the provisions of Article 52(6) of the Constitution of Zambia as amended and the requirement to cancel elections when a candidate withdraws, dies or is disqualified before the election date. The Petitioner contended that despite having been so notified, the Respondent has neglected or refused to cancel the

election and call for the filing of fresh nominations for the elections to the National Assembly in Petauke Central Constituency.

In its Answer, the Respondent stated that the Respondent was a constitutional body mandated to delimit electoral boundaries, register voters, and conduct elections and referenda, among other functions, and that these functions are guided by the Constitution, which is the supreme law of the land, and statutory laws made by Parliament. In the affidavit in opposition filed on behalf of the Respondent, the Director of Elections, Priscilla Mulenga Isaac, averred that during the months of June and July, 2016, the Respondent heard information which indicated that Josab Changa, the United Democratic Front (UDF) candidate had resigned from the party to join the Patriotic Front (PF). The Respondent, however, had not received any formal communication from Mr. Changa indicating that he had resigned his candidature as alleged.

The Respondent summoned Josab Changa to a meeting on 18th July, 2016 and asked him to state his position on the matter, whereupon he promised to tender his position in writing the following day but he did not do so. The Respondent proceeded to print ballot papers as scheduled in accordance with its election timetable and that the exercise has since been completed.

In his Reply, the Petitioner stated, among other things, that the Respondent in its public notice in the media had indicated that Josab Changa had successfully filed his nomination as an independent candidate and not as a candidate for the UDF. The Petitioner contended that having received Josab Changa's nomination papers, the Respondent was aware of his residential and other details that could be used to seek information from him in order for it to make a decision on the matter. The petitioner contended that since Josab Changa had failed to state his position, the Respondent, should cancel the election for the National Assembly in Petauke Central Constituency and call for fresh nominations and thereafter hold elections thirty days after the close of nominations.

In the skeleton arguments in support of the petition, Mr. Sitali, Counsel for the Petitioner submitted that it was the contention of the Petitioner that after the close of the nominations for Petauke Central Constituency, one of the candidates, Mr. Josab Changa, resigned his candidature or withdrew from participating in the election to the National Assembly for the said constituency on or about the 28th of June, 2016. According to the Petitioner, Mr. Changa's resignation or withdrawal from contesting

the 11th August, 2016, elections had been widely reported in the media, including the **Zambia Daily Mail** of Wednesday June 29, 2016 and the **Daily Nation** of the same date. This Court was invited to take judicial notice that the newspapers in which Mr. Josab Changa's resignation or withdrawal was reported enjoy popular and wide circulation in the Republic of Zambia. Counsel argued that it was inconceivable that Mr. Changa could not have come across the story in which he was alleged to have resigned or withdrawn his candidature for the Petauke Central Constituency election to the National Assembly. Counsel further argued that despite being given an opportunity to state his position on the matter and to set the record straight at a meeting with the Respondent on 18th July, 2016, Mr. Changa did not do so, nor did he challenge the veracity of the story.

Counsel contended that the actions of Mr. Changa were inconsistent with those of a person who had not resigned or withdrawn his candidature from an election and that, in the context of Article 52(6), a candidate resigns from candidature and not from a political party as indicated in other provisions of the Constitution, such as Article 72(2)(d) and 72(6)(b). Counsel further submitted that even if it were assumed that resignation in Article 52(6) means resignation from a political party, in the present case the

Respondent as custodian of the electoral records had stated that Mr. Josab Changa was a UDF candidate who resigned to join the PF and was not an independent candidate. According to Counsel, whichever interpretation is given to the word 'resign' as used in Article 52(6), the inevitable conclusion in the present case is that Mr. Josab Changa had withdrawn from the election and, as a consequence, that election must be cancelled.

Counsel enjoined us to employ the purposive approach to interpreting the Constitution, which Constitution is a unique legal instrument whose interpretation should not be approached in the pedantic fashion ordinarily applied in the interpretation of Acts of Parliament. Counsel referred us to a number of cases urging the purposive interpretation of constitutions, including the Nigerian case of **Rafiu Raviu v S**,⁽¹⁾ where the court had this to say:

“...the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions in which the development of our several communities must evolve, ours being a plural, dynamic society, and therefore, more technical rules of interpretation of statutes are to some extent inadmissible in a way as to defeat the principles of government enshrined in the Constitution.”

Counsel also referred to the case of **Ifezue v Mbagdugha and Another**,⁽²⁾ where it was stated that provisions of the Constitution must be read together, and not disjointedly, in order to arrive at an interpretation that serves the purpose and object of the

Constitution. He cited the case of **Nalyanabo v Attorney General**,⁽³⁾ in which the Court of Appeal of Tanzania stated in reference to the Constitution of the Republic of Tanzania that the Constitution "is a living instrument, having a soul and consciousness of its own...." and that courts should "endeavour to avoid crippling it by construing it technically or in a narrow spirit". He further cited the Kenyan case of **Reverend Dr. Timothy Njoya and Others v The Attorney General and Others** ⁽⁴⁾ in which it was stated that "the court should not be obsessed with the ordinary and natural meaning of words if to do so would lead to an absurdity or plainly dilute, transgress or vitiate constitutional values and principles."

Counsel submitted that in the present case, the requirement for cancellation of an election in Article 52(6) is aimed at promoting and preserving an electoral process which is free and fair as stipulated in Article 45 and which accords with the national values of democracy and constitutionalism, equality and good governance as set out in Article 8 of the Constitution as amended. Counsel argued that the requirement to cancel an election was intended to promote our constitutional democracy and prevent manipulation of the electoral process by candidates. It was, therefore, the Petitioner's view that as Mr. Josab Changa had withdrawn his

candidature in the election to the National Assembly for Petauke Central Constituency, the election must be cancelled.

In the Respondent's skeleton arguments in opposition, Mrs Mulenga, Counsel for the Respondent opposed the petition on the ground that it was prematurely presented to the Court and, was therefore, incompetent. Mrs Mulenga cited the provisions of Article 52(6) of the Constitution and submitted that, although Mr. Josab Changa was reported to have resigned and joined the PF, there was no written document from him to the Respondent regarding the resignation. It was submitted that the Respondent is a public body established to serve the interest of the electorate in accordance with the law and that it is not driven by rumours in the discharge of its functions. Counsel argued for that reason that the Petition is misconceived and should be dismissed.

In skeleton arguments in reply, Counsel for the Petitioner argued that it was surprising that the Respondent could characterise information relating to Mr. Changa's resignation as a rumour when in summoning him to a meeting to clarify his position in the matter, it acted on a rumour that he had resigned. Counsel contended that the Respondent had not cited any statutory provision which prescribes the form in which a candidate who has

resigned their candidature or withdrawn from an election should notify the Respondent.

Counsel went on to contend that it is trite law that where a person has had an opportunity to explain or provide an answer but fails to do so, the Court must draw an appropriate inference. According to Counsel, where more than one inference is possible, the Court should adopt the inference that is more favourable to the person if there is nothing to exclude such inference. Counsel submitted that the facts of this case are such that the only inference that should be drawn by the Court from Mr. Changa's conduct is that he has indeed resigned his candidature from the poll.

At the hearing of the matter, Mr. Sitali, Counsel for the Petitioner, relied on the petition, the affidavit verifying facts and the skeleton arguments in support of the petition. In augmenting the skeleton arguments, Mr. Sitali submitted that Mr. Josab Changa who had filed his nomination to stand as a Member of Parliament for Petauke Central Constituency should be considered as having withdrawn or resigned his candidature in view of the fact that he did not protest his widely reported resignation and defection to the Patriotic Front (PF) Party. He argued that even when given an opportunity to state his position on the matter at a meeting held on

18th July, 2016 by the Respondent, he failed to state that he was still a candidate.

Counsel contended that to date the candidate has not delivered the letter. He urged us, on the facts of this case to draw the only inference, which according to him is that Mr. Josab Changa has resigned or withdrawn his candidature for the said election. He further urged us to find that in keeping with Article 52(6) of the Constitution, the election to the National Assembly for Petauke Central Constituency should be cancelled by the Respondent and fresh elections called for in the constituency.

In opposing the application, Mrs Mulenga relied on the Answer, the affidavit in opposition and the skeleton arguments filed on behalf of the Respondent. She submitted that whereas there may have been information widely circulated in the cited newspapers alleging that Mr. Josab Changa, a parliamentary candidate who had filed nomination papers to stand as a Member of Parliament for the Petauke Central Constituency had resigned his candidature, there was still no official communication from the said Josab Changa to the Respondent to indicate that he had resigned his candidature. Counsel submitted that this is cemented by the fact that after his meeting with the Respondent, he has not

indicated to date that he has resigned his candidature for the Petauke Central Constituency National Assembly seat.

Counsel further submitted that the official position therefore remains that Mr. Changa is a candidate for election to the position of Member of Parliament for the Petauke Central Constituency. She submitted that that being the case, there was no reasonable cause for the Respondent to cancel the election in the said constituency and to call for fresh nominations from eligible candidates. Counsel submitted that this application is misconceived and should therefore be dismissed with costs to the Respondent.

Mr. Sitali did not make any oral submissions in reply.

We are grateful to Counsel on both sides for their submissions, which we have carefully considered. The issue in this matter is whether or not, on the facts as stated by the parties, there has been a contravention of Article 52(6) on the part of the Respondent. Article 52(6) of the Constitution provides as follows:

“(6) Where a candidate dies, resigns or becomes disqualified in accordance with Article 70, 100 or 153 or a court disqualifies a candidate for corruption or malpractice, after the close of nominations and before the election date, the Electoral Commission shall cancel the election and require the filing of fresh nominations by eligible candidates and elections shall be held within thirty days of the filing of the fresh nominations.”

The question for our determination is, did Mr. Josab Changa resign or withdraw his candidature for election to the National Assembly in the Petauke Central Constituency?

On the evidence laid before us, we find that the Petitioner has not proved his allegation that Mr. Changa, has resigned his candidature. It is trite that a party who alleges a fact must prove it to the required standard. In this case, the Petitioner has not presented before this Court any documentary proof that Mr. Changa has indeed resigned. Further the Petitioner did not cite Mr. Changa as a respondent to state to the Court clearly whether indeed he had resigned. It is our considered view that in the same manner that Mr. Josab Changa formally filed his nomination papers for the Petauke Central Constituency seat, it was imperative that he should write formally to the Electoral Commission of Zambia advising them of his resignation, if indeed he did resign.

Without such resignation in writing by the candidate in question, the Respondent was on firm ground when it declined to cancel the National Assembly elections in the Petauke Central Constituency. The Respondent is a statutory body established by the Constitution with the responsibility of running elections. The Respondent, therefore, acted properly by calling Mr. Changa to

inquire about his position regarding his alleged resignation as a candidate for the elections to the National Assembly in the Petauke Central Constituency. The fact that he did not state his alleged resignation in writing to the Respondent means that he has not formally withdrawn or resigned as a candidate.

Considering the important and critical constitutional mandate that the Respondent has to conduct free and fair elections, it cannot be expected to take important decisions based on media reports on such important matters as the resignation of a candidate for election after the closure of nominations. Although Article 52(6) is silent on the form the resignation of a candidate standing for elections should take, it is our considered view that it was not the intention of the framers of the Constitution that candidates should resign from standing for elections after the closure of nominations without giving formal notification to the Respondent to that effect. To imply otherwise would be a recipe for anarchy in the management of elections and in the electoral system in general.

We agree with Mrs. Mulenga that in the absence of formal communication by Mr. Josab Changa to the Respondent that he had resigned as a candidate for the elections for the Petauke Central Constituency, this petition has no merit and is

misconceived. It is therefore dismissed with costs to the Respondent.

The costs are to be agreed and taxed in default of agreement.



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A.M. SITALI,
CONSTITUTIONAL COURT JUDGE



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E. MULEMBE,
CONSTITUTIONAL COURT JUDGE



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M.M. MUNALULA,
CONSTITUTIONAL COURT JUDGE