

**IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA**
(Constitutional Jurisdiction)

2022/CCZ/0018

**IN THE MATTER OF: ARTICLES 72(4) OF THE CONSTITUTION
OF ZAMBIA CHAPTER 1 OF THE LAWS
OF ZAMBIA**

**IN THE MATTER OF: THE ELECTORAL PROCESS ACT
NUMBER 35 OF 2016**

AND

**IN THE MATTER OF: THE DECISION OF THE ELECTORAL
COMMISSION OF ZAMBIA DATED 24TH**

AUGUST, 2022

BETWEEN:

**JOSEPH MALANJI
BOWMAN CHILOSHI LUSAMBO**



**1ST APPLICANT
2ND APPLICANT**

AND

**THE ATTORNEY GENERAL
ELECTORAL COMMISSION OF ZAMBIA**

**1ST RESPONDENT
2ND RESPONDENT**

**Before Justice P. Mulonda, JC in Chambers, on the 25th day of August,
2022.**

For the Applicants: **Mr. T. Ngulube of Messrs Tutwa S.
Ngulube and Co**

For the 1st Respondent: **Mr. M. Muchende SC, - Solicitor General
Mr. J. Simachela Deputy Chief State
Advocate
Ms. L. S. Chibowa Principal State
Advocate
Mr. M. S. Mwiya Ass. Snr State
Advocate**

For the 2nd Respondent: **Ms. T. Phiri**

RULING

Cases Referred to:

1. **Nyampala Safaris and Others v ZAWA and other SCZ No. 6 of 2004**
2. **ZRA v Post Newspapers SCZ No. 18 of 2016**
3. **LAZ v The Attorney General 2021/CCZ/0051**
4. **Sony Mulenga and Vismer Mulenga v Chainama Hotels Limited & Others SCZ Judgment No. 15 of 1999**
5. **Stanbic Bank v Savenda CAZ/08/040/2016**
6. **Isaac Mwanza v the Attorney General 2021/CCZ/0045.**

Legislation Referred to:

1. **Constitution of Zambia Amendment Act No. 2 of 2016**

This is a ruling on the Applicant's application for a Stay of the decision of the Electoral Commission of Zambia contained in a media statement dated 24th August, 2022.

The Application is supported by an affidavit deposed to by one Joseph Malanji, the 1st Applicant herein.

The 1st Applicant avers that on 24th August, 2022 the Electoral Commission of Zambia issued a media statement through their Corporate Affairs Manager Patricia Luhanga stating that the Electoral Commission wished to state its position on the

eligibility of candidates whose elections were nullified by the Constitutional Court and thereby causing vacancies in the National Assembly. It was stated that the timing of the Media Statement was meant to create an emergency in the by-election timetable by releasing the same a few hours before the times slated for the Nominations which left the Applicants with limited time within which to challenge their illegal decision. It was the Applicants' contention that the Electoral Commission of Zambia were trying to illegally and unconstitutionally prevent them from participating in the nominations. The deponent averred that the Applicants had been threatened that they Electoral Commission of Zambia will not accept nominations from any candidates who caused a vacancy in the National Assembly.

It was stated that causing a vacancy does not mean nullification and nullification is not causing a vacancy as interpreted by the Electoral Commission of Zambia and that only this Court has the mandate to interpret what the Constitution provision in Article 72(4) referred to means.

The matter was heard *interparte* on 25th August, 2022 where the Applicants in addition to their written submissions made oral submissions. On behalf of the Applicant, it was submitted that

the Electoral Commission of Zambia on the day of hearing the application was conducting nominations for the by elections slated for 15th September, 2022. The learned Counsel for the Applicants cited the case of **Nyampala Safaris and Others v ZAWA and Other SCZ No. 6 of 2004** where it was held that:

A stay of execution is granted on good and convincing reasons. The rationale of this position is clear. Which is that a successful litigant should not be deprived of the fruits of litigation as a matter of course. The application must therefore clearly demonstrate the basis upon which a stay should be granted.

Counsel submitted that the Applicants' matter is likely to be rendered academic if the stay is not granted. He referred to the Court's inherent jurisdiction to hear and determine this application. He also referred to the case of **ZRA v Post Newspapers SCZ No. 18 of 2016** where DCJ Mwanamwambwa, as he then was, gave guidance as to what types of decisions can be stayed. He submitted that in the present matter there is a subsisting main matter and therefore the application for stay is pending the determination of the said main matter.

It was submitted that if the stay is not granted both the Applicants will be ruined in light of the Electoral Commission of Zambia's decision. He referred us to two English decisions to support this proposition. He prayed that the Court should grant

the application for stay and in the alternative that the Court should stay any nominations currently going on pending determination of this Application.

In opposing this Application, the learned Solicitor General argued that in the case of **Stanbic Bank v Savenda CAZ/08/040/2016**, it was stated that:

When a Judge receives an incompetent application, he is not expected to expend valuable time hearing that application but should on paper indicate that such application is incompetent ...

It was submitted that this case presents a menu of calamities because the originating process or what it is anchored on is incompetently before this Court and it follows that the application before this Court is incompetent. The Solicitor General submitted that one cannot put something on nothing and expect it to stand. He argued that the application before the Court stands on nothing. He referred to the case of **Sony Mulenga and Vismer Mulenga v Chainama Hotels Limited & Others SCZ Judgment No. 15 of 1999** where it was stated that in granting a stay, the Court must preview the prospects of success of the appeal or the main matter.

It was further submitted that perusal of the originating process will show that the issues raised are not fit for commencement by way of originating summons because the issues raised are highly contentious. Further, that the main matter seeks to assail the decision of the 2nd Respondent on account that it is illegal. It was State Counsel' contention that this case has been wrongly commenced and will have no prospects of success. He also relied on this Court's decision in **Isaac Mwanza v the Attorney General 2021/CCZ/0045** on the effect of matters wrongly commenced.

It was further submitted that there are procedures that one can use to challenge the rejection of nominations under Article 52 of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

In augmenting, Mr. Simachela, Chief State Advocate, submitted that the affidavit filed in support of the application only relates to one Applicant and the 2nd Applicant is not on record. He argued that in the event that an application for stay is considered, the same cannot and should not relate to the 2nd Applicant as he has

not deposed to what has necessitated his grievance before this Court.

On behalf of the 2nd Respondent, it was submitted that the Application to stay the Electoral Commission of Zambia's media statement is premature as stated in the ***Nyampala Safaris case SCZ No. 6 of 2004*** referred to by the Applicants. Ms. Phiri submitted that to grant a stay would be before the procedures as set out in the Constitution on nominations are exhausted. She referred the Court to Article 52(3) of the Constitution which provides for the manner in which a candidate with a grievance challenge nominations. She also submitted that the statement in issue did not mention the names of the Applicants.

Counsel for the Applicants made oral submissions in reply which I shall not reproduce.

I have considered the application before me and the arguments by the parties which have touched on a number of issues. However, I will not delve into a detailed interrogation of the said issues save to say that what I consider important at this hour is whether to grant a stay of execution of the Electoral Commission of Zambia media statement or not based on the main argument

for the stay canvassed by the Applicants considering the need to have the matter settled within the shortest possible time.

To begin with, it is trite that a stay of execution is at the discretion of the Court though demanding that it be exercised judiciously.

In the case before me the Applicants are seeking for the Court to stay the decision of the 2nd Respondent dated 24th August, 2022 where it stated that it will not accept nominations of candidates who caused a vacancy in the National Assembly as stipulated by Article 72(4) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 which category the two Applicants are said to fall. I have carefully considered the issue raised in support of the Applicants' application.

This Court is alive to the fact that the Applicants' apprehension stems from the fact that both Applicants who are potential candidates in the 15th September, 2022 by-elections may be politically ruined in that even if they were successful in the main matter the nominations would have passed and elections would have equally been held rendering the whole matter academic.

From the above facts, the issue that falls for my determination is whether a stay of execution if not granted would result in the main matter becoming academic. In my opinion the matter at hand is capable of being determined and concluded way before the said elections, a scenario that does not in any way prejudice the Applicants.

In view of what I have stated above, I dismiss the Applicants' application for stay of execution and to this end, I Order the following directions which must be strictly adhered to by all parties:

1. The 1st and 2nd Respondents are to file in their affidavits in opposition and accompanying skeleton arguments to the Originating Summons by Monday the 29th August, 2022 at noon and serve the Applicants on the same day.
2. The 1st and 2nd Applicants shall file their reply, if any, by Wednesday, 31st August, 2022 at noon.
3. The Applicants shall file the record of proceedings on Thursday the 1st of September, 2022 at noon.
4. There shall be compliance conference on Friday 2nd September, 2022 at 08:30hrs.

5. The Originating Summons shall be heard on Tuesday 6th September, 2022 at 09:00hrs. This will be followed by an abridged judgment of the Court on 7th September, 2022.

Dated the 25 day of August 2022



PALAN MULONDA
CONSTITUTIONAL COURT JUDGE