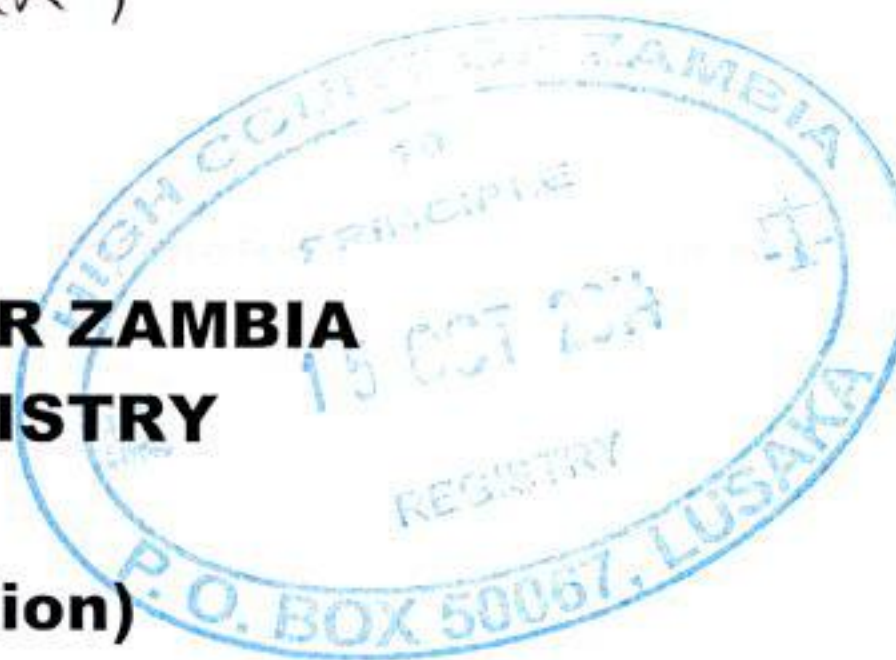


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**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)**



2013/HP/EP/002

**IN THE MATTER OF: A PARLIAMENTARY ELECTION FOR
CHIPATA CENTRAL CONSTITUENCY
HELD IN THE CHIPATA DISTRICT OF
THE REPUBLIC OF ZAMBIA HELD ON
THE 25TH DAY OF JULY, 2013**

AND

**IN THE MATTER OF: ARTICLE 65(6) OF THE CONSTITUTION
OF ZAMBIA, CHAPTER 1 OF THE LAWS
OF ZAMBIA**

AND

**IN THE MATTER OF: SECTIONS 22(b), 84(2) and 93(2)(b) AND
(d) OF THE ELECTORAL ACT NO. 12 OF
2006**

AND

**IN THE MATTER OF: THE ELECTORAL (GENERAL
REGULATIONS)**

AND

**IN THE MATTER OF: THE ELECTORAL PETITION RULES
STATUTORY INSTRUMENT NO. 426
OF 1968 (AS AMENDED)**

BETWEEN:

LAMECK MANGANI

PETITIONER

AND

REUBEN MTOLO PHIRI

1ST RESPONDENT

THE ELECTORAL COMMISSION OF ZAMBIA 2ND RESPONDENT

Before Hon. Mrs. Justice M.S. Mulenga on 15th day of October 2014.

For the Petitioner : Mr. K. Kaunda – Messrs Ellis and Company
For the 1st Respondent : Mr. Eric Silwamba SC, Mr. J. Jalasi and Mr. L. Linyama of Messrs Erick Silwamba Jalasi and Linyama Legal Practitioners
For the 2nd Respondent : Mrs. Mulenga – Legal Counsel, Electoral Commission of Zambia

R U L I N G

Cases cited:

Ruth Kumbi v Robinson Kaleb Zulu SCZ Judgment No. 19 of 2009
Samuels v Lindzi Dresses Ltd [1980] 1 All ER 803

Legislation referred to:

1. **Constitution of Cap 1, Article 65(6)**
2. **Electoral Act No. 12 of 2006, sections 102, 104(6) 129 (5)**
3. **Interpretation and General Provisions Act Cap 2, section 37**
4. **High Court Act Cap. 27, Order 19 rule 2**

This Ruling is on the Petitioner's application for leave to apply out of time for an order to vary or enlarge the period in which to comply with the Orders for Directions. It is made pursuant to section 37 of the Interpretation and General Provisions Act and Order 19 Rule 2 of the High Court Rules Chapters 2 and 27 of the Laws of Zambia, respectively.

In his affidavit in support dated 6th September 2013, the Petitioner stated that he through his former advocates, wrote to the High Court Registrar concerning cause No. 2011/HP/EP003 (Appeal No. 135/2012), requesting for a report to be prepared. A copy of the said letter is exhibited as "LM1." He further stated that he had been advised

by his advocates that his Lordship Judge E. Hamaundu who had conduct of the said matter in the aforementioned cause was in Chipata presiding over the sessions for the most part of September and that consequently the report will only be prepared after the sessions, possibly towards the end of the month. The Petitioner further deposed that he wished to rely on the said report in his current petition.

The 1st Respondent filed an affidavit in opposition dated 20th September 2013 and stated that the Petitioner herein filed an Election Petition on 7th August, 2013 to question his election as a Member of Parliament for Chipata Central Parliamentary Constituency on ground that he should not have been allowed to file his nomination papers on account that he was allegedly found guilty of corrupt practices.

The 1st Respondent further stated that no report was rendered at the conclusion of the Election Petition proceedings by the High Court Judge who presided over the said proceedings as prescribed by the law. It followed therefore that the 2nd Respondent correctly allowed him to file his nomination papers and subsequently he was duly elected as a Member of Parliament for Chipata Central Constituency. That to his surprise, the Petitioner, whose entire cause of action rested on the fact that prior to the filing of the 1st Respondent's nomination papers there was a report, had since conceded in his affidavit that no such report existed and this renders his election as valid.

Further that the Petitioner's request for the High Court Judge to prepare a report was illegal and that no such practice was provided for under any statute or legislation in this jurisdiction. That even if the

said reports were to be prepared, the purported corrupt practices were now statute barred and he could no longer be prosecuted.

The 1st Respondent added that the Petitioner's application was irregular and an abuse of court process and it should have been lodged on or before 30th August, 2013 as directed by this Court. He surmised that the Petitioner would not be prejudiced in any way if his application was denied as same was illegal and misconceived.

The Petitioner filed an Affidavit in Reply in which he denied conceding that the 1st Respondent was validly elected and stated that the illegal and corrupt practices were only statute barred in relation to criminal prosecutions and not the election of the 1st Respondent as a Member of Parliament. He insisted that this Court has power to extend the period in which to comply with the Orders for Directions notwithstanding the expiry of the same. That his application was not an abuse of court process and no prejudice will be suffered by the 1st Respondent and the people of Chipata Central if his application was granted and that it was him who would suffer same if the application was denied.

When the matter came up for hearing, both parties relied on their respective affidavits and counsels for the respective parties made oral submissions, the details of which are on record.

Mr. Kaunda, counsel for the Petitioner, submitted that the legislation and orders pursuant to which the application was made, empowered the court to extend the time given for complying with the Orders for Directions even in a situation where that time or period had expired. Further, that a perusal of the Petition and supporting affidavit does not

state anywhere that there was a report. It was argued that no prejudice would be caused to the people of the constituency in the event that the application was granted.

The Petitioner's counsel relied on section 129(5) of the Electoral Act No. 12 of 2006 and further submitted that contrary to the 1st Respondent's statement that the mode of requesting for a report from the High Court Judge was illegal, it was his submission that it is the said Judge who was better placed to determine the legality of the request by the Petitioner's former advocates.

In response, learned State Counsel, Mr. Eric Silwamba opposed the application on two (2) grounds. Firstly, that the application was made long after the period the Court gave had expired. That although the Court has jurisdiction to extend time even after it had expired, it was incumbent upon the person seeking the extension to demonstrate exceptional circumstances justifying why they have come late and it was submitted that the Petitioner did not do that in both affidavits.

Secondly, that the legal effect of the application was that it was academic as the Petitioner's case was in the main based on the fact that the 1st Respondent was not qualified to lodge a valid nomination. This presupposed that a report was in existence and to argue otherwise would be to concede that the Petition was misconceived in the first place.

In response to the Petitioner's submission refuting the issue of the report, Mr. Silwamba submitted that the caption of the Petition was that

it was anchored on Article 65(6) and that is in clear reference to report of a Judge after trial.

Mr. Jalasi also submitted, on behalf of the 1st Respondent, on the requirement to demonstrate special circumstances by referring to the case of **Ruth Kumbi v Robinson Kaleb Zulu SCZ Judgment No. 19 of 2009** wherein it was stated that the party applying to extend time must demonstrate to the Court special circumstances. That the application was an afterthought intended to prejudice the 1st Respondent's case as the pleadings had closed and which clearly demonstrated that at the time of filing the Petition, the Petitioner's cause of action did not exist. It was also argued that the Petitioner had not demonstrated how and when he intended to procure the report and the impact it would have on this matter which was scheduled for hearing on 30th September 2013. In addition, counsel raised his concern on the mode the Petitioner had used to attempt to procure the report.

Mr. Linyama, also added that Order 19 Rule 2 of the High Court Rules which gives the Court the jurisdiction to vary its orders for directions emphasized the issue of sufficient reason. Order 25/L/3 Rules of the Supreme Court (RSC) 1999 Edition defines such an order. The limitation the Court placed on the parties was owing to the fact that this is not ordinary litigation. Section 102 of the Electoral Act limits the time in which the court should determine this matter to 180 days there is no indication from the Judge when and how the report being sought will be given. The case of **Samuels v Lindzi Dresses Ltd [1980] 1 All ER 803** was cited wherein it was held that the power to extend must be exercised cautiously and only in exceptional circumstances. The Petitioner's

exhibit "LM1" was authored a day before the presentation of the Petition showing that the Petitioner was aware that there was no report and was thus attempting to create a case *ex post facto*. Variation of Orders of Directions cannot be used as a device to create documentation that may favour only one party to the action. This conduct was clearly proscribed by Order 25/L7 RSC. Further that over 45 days had elapsed from the statutory 180 days and if the application is granted the court will continue to lose time.

The 2nd Respondent did not file an Affidavit in Opposition but made oral submissions through its counsel, Mrs. Mulenga, who endorsed the 1st Respondent's submissions. She added that all parties had complied with the Orders for Directions and as such no prejudice will be suffered by the Petitioner. That the effect of the Petitioner's application was to cure defects that were in the main cause of action.

In reply, counsel for the Petitioner stated that the application was made six (6) days after the set period had expired and this did not amount to inordinate delay. He stated that the Petitioner had demonstrated special circumstances in paragraph 5 of the affidavit in support of the application and has also stated the period he felt the report would be ready. That apart from referring to Article 65, there was no single paragraph in the Court process filed by the Petitioner in which he conceded that there was no report and that the Petitioner was not creating a case *ex post facto* nor was he trying to cure any perceived defects. Counsel further stated that the 1st and 2nd Respondents had not stated the nature of the prejudice that they were likely to suffer in the event that the application was granted. On the issue of the statutory

time limit, counsel submitted that he was aware of several other election petition cases which were concluded way after the prescribed period. He maintained that the application had merit and should therefore be granted.

I have considered the affidavits and submissions by the parties on this application. I note that the parties have submitted on various issues but I will not necessarily comment on all of them as some of them touch on the substantive issues for determination. What I find requiring determination at this stage is whether or not the Petitioner has met the requirements for variation or enlarging of the period in which to comply with the Orders for Directions granted herein.

Section 37 of the Interpretation and General Provisions Act Cap 2 provides that the courts may generally extend the times given or prescribed for doing certain things and taking relevant actions.

Order 19 rule 2 of the High Court Rules Cap 27 provides:

2. Notwithstanding rule 1, the Court may, for sufficient reason, extend the period within which to do any of the acts specified in rule 1.

As rightly argued by the Respondents, the granting of an order for variation or enlarging of time is not automatic. It is discretionary and an applicant has to show sufficient cause or demonstrate special circumstances to warrant the granting on the same. In the words of Order 19 High Court Rules, there has to be sufficient cause for that. The two cited authorities of **Ruth Kumbi v Robinson Kaleb Zulu** and **Samuels v Lindzi Dresses Ltd** are clear on the requirement to show

sufficient reason or demonstrate special or exceptional circumstances before a Court can grant an application for extension of time.

The Petitioner in his affidavit has advanced the reason in paragraphs 4 to 6 as:

4. **That on 6th August, 2013, my advocates in cause no. 2011/HP/EP/003 (Appeal No. 135/2012) wrote to the Registrar, and copied the Marshal to Judge E Hamaundu, requesting that a report in the said cause be prepared. Produced and shown to me marked "LM1" is a copy of the said letter.**
5. **That I am advised by my Advocates and believe that the said Judge is presiding over the Chipata criminal sessions for the most part of September, 2013. I believe the Report will only be prepared after the sessions for Chipata sometime towards the end of this month.**
6. **That I wish to rely on the said report once it is prepared.**

Does this reason show sufficient cause to warrant extension or enlargement of time?

I find that it does not for the following two reasons. Firstly, the exhibit relied upon, that is "LM1", does not show that the Petitioner has made any application to the High Court Judge under cause no 2011/HP/EP/003 requesting for a report. It is trite that a Judge or Court is only moved by a motion made on the relevant case record for consideration. Where there is no such motion, statements such as those of the Petitioner in the relevant paragraphs of his affidavit do not amount to any such proof. It is therefore absurd and contrary to procedure for one to equate a letter written to the High Court Registrar as amounting to making a motion or application before a Judge under a particular cause. That letter cannot therefore be said to be a formal application of which the Judge is obliged to consider.

It is apparent that the Petitioner or his counsels were well aware that in terms of section 104(6) of the Electoral Act, the Judge after trying an election petition and finding illegal and corrupt practices and wishing to make a report, ordinarily moves on his or her own motion to that effect to summon any concerned person to show cause why the person should not be named. Hence the attempt to try and use the office of the High Court Registrar, but which office does not have the authority to direct a Judge on the issue of the report.

Therefore, as stated above, the Petitioner has not shown that he has a pending application for issuance of a report before the Judge that tried the 2011 election petition involving the 1st Respondent. On this basis alone, this application must fail as being misconceived and lacking merit.

Secondly, it is clear that the Petitioner is attempting to create documentation *ex post facto* to favour his case. This type of action is proscribed in paragraph 25/L/7 RSC cited by the 1st Respondent. This is an attempt to abuse the Court process. Generally, when one commences an action, one does so on the strength of the documents one knows to be in existence. Therefore, for the Petitioner to commence an action and then seek to stall the proceedings, after the time given within which to apply has lapsed, in order to seek to have a document created to favour his case, is a misdirection and contrary to the tenets of justice.

I thus find the arguments by the Respondents on this aspect entirely valid.

In view of what I have discussed above, I find that the Petitioner has neither shown sufficient reason nor demonstrated special or exceptional circumstances to warrant the granting of the application. Consequently, this application fails and I hereby dismiss it as lacking merit.

Costs are for the Respondents and are to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 15th day of October 2014.



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M.S. MULENGA
HIGH COURT JUDGE