

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



2016/HP/EP/069

IN THE MATTER OF:

**THE PARLIAMENTARY PETITION RELATING
TO THE PARLIAMENTARY ELECTIONS FOR
BWACHA CONSTITUENCY OF CENTRAL
PROVINCE HELD ON 11TH AUGUST, 2016**

AND

IN THE MATTER OF:

**THE CONSTITUTION OF ZAMBIA, THE
CONSTITUTION OF ZAMBIA ACT, CHAPTER
1, VOLUME 1, OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

**ARTICLES 1, 2, 5, 8, 9, 45, 46, 47, 48, 49,
50, 54, 70, 71, 72, AND 73 OF THE
CONSTITUTION OF ZAMBIA, CONSTITUTION
OF ZAMBIA ACT, CHAPTER 1, VOLUME 1, OF
THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

**SECTIONS 29, 37, 38, 51, 52, 55 58, 59, 60,
66, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82, 83,
86, 87 AND 89 OF THE ELECTORAL
PROCESS ACT NO. 35 OF 2016 OF THE LAWS
OF ZAMBIA**

AND

IN THE MATTER OF:

**SECTION 96, 97, 98, 99, 100, 106, 107 AND
108 OF THE ELECTORAL PROCESS ACT NO.
35 OF 2016 OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

THE ELECTORAL CODE OF CONDUCT 2016

BETWEEN:

SAIDI CHIBWANA

APPLICANT

AND

SYDNEY MUSHANGA

1ST RESPONDENT

THE ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

Delivered in Chambers before Hon. Mr. Justice Sunday B. Nkonde, SC at Lusaka this 14th day of October, 2016

For the Applicant : N/A
For the 1st Respondent : N/A
For the 2nd Respondent : N/A

R U L I N G

CASES REFERRED TO:

- 1) *Makula International Limited vs. His Eminence Nsubuga & Another* (1982) HCB 11
- 2) *Besweri Lubuye Kiibuka vs. Electoral Commission & Another, Constitutional Appeal No. 8/98*
- 3) *Basawaraj & Another Vs Spl. Land Acquisition Officer* (2013) 14 SCC 81 1
- 4) *P. Ramachandra Rao Vs. State of Karnataka* AIR 2002 SC

LEGISLATION REFERRED TO:

- 1) *Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by Act No. 2 of 2016*
- 2) *High Court Act, Chapter 27 of the Laws of Zambia*
- 3) *High Court Rules, Chapter 27 of the Laws of Zambia*
- 4) *Electoral Process Act, No. 35 of 2016 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

- 1) *Halsbury's Laws of England, Volume 15 (4th Edition)*

This is an application dated 30th September, 2016 by SAIDI CHIBWANA as Applicant for an Order to extend time within which to file Election Petition. The application was by way of exparte Originating Summons filed pursuant to **Articles 118 (2) and 271** of the Constitution of Zambia as amended by **Act No. 2 of 2016, Section 13** of the **High Court Act, Order 2 Rule 2** and **Order 30 Rule (11) (a)** of the **High Court Rules** and the inherent jurisdiction of the Court.

Also filed was a supporting affidavit sworn by the Applicant. It is deposed in the affidavit that the 1st Respondent, SYDNEY MUSHANGA, was declared duly elected Member of Parliament for Bwacha Constituency in Kabwe on 13th August, 2016 but the Applicant did not believe so and desired to petition his election. Thus, on 20th August, 2016, the Applicant instructed Learned Counsel, Martha Mushipe, to petition the election but the said Learned Counsel failed to do so in good time as she was one of the Lawyers preparing the Presidential Election Petition and appearing in the Constitutional Court.

The deponent further stated that Learned Counsel Mushipe thereafter fell sick for four (4) weeks and medical slips to the effect were exhibited in the affidavit. The first one indicated that the Learned Counsel was put on sick leave by the University Teaching Hospital in Lusaka for 7 days from 25th August, 2016 and the second one by Teba Care Clinic, Lusaka indicated that she was on sick leave from 26th September, 2016 to 30th September, 2016.

The deponent also stated that the 1st Respondent, as the intended 1st Respondent to the intended Petition will not be prejudiced in any way if the extension of time within which to file petition was to be granted as the delay had not been inordinate but instead the interests of the voting public stood to suffer greatly if the Petition was to be barred from being heard and determined on account of procedural technicality as to the lapse of time within which to file the Petition.

The intended Petition was also exhibited in the affidavit in support.

I must here mention that the application came with a Certificate of Urgency which for convenience is re-produced here below;

“I MARTHA MUSHIPE, Counsel seized with the conduct of this matter do HEREBY CERTIFY that this application is of utmost urgency and ought to be heard and determined expeditiously by this honourable Court on the ground that the Petition herein is by law required to be heard within 90 days pursuant to Article 73 (2) of the Constitution of Zambia Amendment Act No. 2 of 2016.

Dated at Lusaka thisday of.....2016.

Per (signed)

***Malambo and Company
Moomba House Plot 18959
Off Katima Mulilo Road
Olympia Park
P/Bag E342
infor@malamboandco.com***

***Mushipe & Associates
Millennium Village, Villa 48
Birdcage Walk Longacres
mushipe@yahoo.com
P. O. Box 33813
Lusaka***

ADVOCATES FOR THE APPLICANTS

Evidently, the Applicant's advocates were and are conscious of time limitation within which the Election Petition, if allowed to be filed within extended time, has to be heard and determined. However, on 27th October, 2016, I directed that the application be heard inter-partes on 12th October, 2016 due to very important matters of law raised by virtue of the application.

Unfortunately, at the hearing set for 12th October, 2016, none of the parties appeared and in the interest of time, I decided to proceed to determine the application.

The question that falls for determination is whether this Court has jurisdiction to extend time within which to file Election Petition.

Even as I proceed to delve into the relevant applicable law, I am compelled to first make a comment at the manner the application was prepared. A cursory perusal of the Originating Summons and affidavit in support reveals irregularities. The title on the Summons and affidavit contains LUNTE OF NORTHERN PROVINCE as the description of the parliamentary election which is the subject of the

application instead of BWACHA OF CENTRAL PROVINCE. Further, the title on the Summons and affidavit contains reference to various Sections of the purported Electoral Process (Electoral Code of Conduct) No, 35 of 2016 of the Laws of Zambia instead of the **Electoral Process Act, No. 35 of 2016 of the Laws of Zambia**. These irregularities (which I have since corrected on this Ruling) depict a serious casual approach by the Applicant's Counsel in the preparation of the application and save for the important matters of law raised and the nature of the application, I would have struck out the Originating Summons and the affidavit in support altogether.

Now coming back to the applicable law, **Section 100 (3)** of the **Electoral Process Act** provides as follows:

“An election petition shall be signed by the petitioner or by all the petitioners if more than one, and shall be presented not later than fourteen days after the date on which the result of the election to which it relates is duly declared.”

Section 102 (1) of the same **Act** empowers the Chief Justice to make Rules relating to presentation and trial of Election Petitions as follows:

“subject to the provisions of this Act, the Chief Justice may make rules regulating generally the practice and procedure of the High Court and tribunals with respect to the presentation and trial of election petitions, including rules as to the time

within which any requirement of the rules is to be complied with and as to the costs of and incidental to the presentation and trial of the election petitions and as to fees to be charged in respect of proceedings therein, and generally as regard to any other matter relating thereto as the Chief Justice may consider necessary or desirable.

As to the time within which Election Petitions have to be heard and be determined by the High Court, **Section 106 (1) (b)** of the **Act** provides as follows:

- (1) An election petition shall be tried and determined by the High Court or a tribunal in open Court.*
- (b) In the case of the election of a candidate as a Member of Parliament, within ninety days from the date of filing an election petition.*

In the case of **Makula International Limited vs. His Eminence Nsubuga & Another**¹, the former Court of Appeal of Uganda emphasised the principle that a Court shall not exercise its residual or inherent jurisdiction to extend or enlarge time which is fixed by an Act of Parliament. This principle was also cited with approval by the Constitutional Court of Uganda in the case of **Besweri Lubuye Kiibuka vs. Electoral Commission & Another**² where it was held that:

“In our view, the correct ratio decidedi of Makula International Limited is that if there is no statutory provision or rule which gives the Court discretion to extend or abridge the time set by statute or rule, then the Court has no residual or inherent jurisdiction to enlarge a period of time laid down by the statute or rule.”

I find the Ugandan cases referred to be very persuasive on the subject matter.

In any event, Learned Counsel for the Applicant has not referred this Court to any Electoral Petition Rule that replicates **Section 100 (3)** of the **Electoral Process Act** so as to clothe me with the jurisdiction to extend time within which to file the Election Petition. Thus, I hold that I have no such jurisdiction and take the view that it was the intention of Parliament that the word “*shall*” in **Section 106 (1)** of the **Electoral Process Act** would be mandatory and not directory. In short, it gives me no discretion or choice on the subject matter.

Similarly, any contention that the failure to file Election Petition within the prescribed time is a procedural technicality is untenable.

I am alive to the fact that I am dealing with an application relating to an intended Election Petition. This entails that I have to take cognisance of the peculiar nature of the jurisdiction of the Court in an election matter and the importance in public interest of securing at a

very early stage final determination of the matter and ensuring representation in Parliament of the Constituency affected.

To illustrate, the Learned Authors of **Halsbury's Laws of England, Volume 15 (4th Edition) in paragraph 845** state as follows:

“The High Court has no jurisdiction to allow an amendment of a petition after the time prescribed by statute by the introduction of a fresh substantive charge...”

It should then follow that there cannot be any legal logic that would be discerned from construing the provisions of one and the same statute, as on the one hand totally ousting the High Court from allowing a substantive amendment to a petition after the time prescribed by statute but on the other hand not ousting the High Court from allowing a fresh petition after the time prescribed by statute. In both instances, the High Court simply has no jurisdiction.

This does not mean that I have not heard the Applicant's contention in paragraph 13 of the affidavit in support that

“...the interests of the voting public stand to suffer greatly if the petition is barred from being heard and determined...”

I must in fact add - and it can reasonably be inferred - that the Applicant will suffer a serious setback and possibly complain that this Court, by refusing to extend the time sought, has shut him out from

being heard on the merits of his intended Petition. Also by making reference to **Section 13** of the **High Court Act**, I discern the intention as being to persuade me to decide on **equitable** grounds. To all this, I can do no more than adopt what the Supreme Court of India aptly said in relation to limitation law in the case of **Basawaraj & Another vs Spl. Land Acquisition Officer**³, that:

“It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. ‘A result flowing from a statutory provision is never an evil. A Court has no power to ignore a statutory provision to relieve what it considers a distress resulting from its operation’. The statutory provision may cause hardship or inconvenience to a particular party but the Court has no choice but to enforce it giving full effect to the same. The legal maxim ‘dura lex sed lex’ which means ‘the law is hard but it is the law’ stands attracted in such a situation. It has consistently been held that, ‘inconvenience is not’ a decisive factor to be considered while interpreting a statute.”

In the same case, the Supreme Court of India cited its earlier case of **P. Ramachandra Rao vs. State of Karnataka**⁴ where it held that:

“Judicially engrafting principles of limitation amounts to legislating”

Therefore, if there is anything I have to emphasize, it is that this Court is not attracted to show utter disregard for the legislature in order to accommodate the feelings of others who may be distressed by this Court's decision. Instead, the doctrine of separation of powers in a democracy ought to be given effect to.

But the application does not just end here. Assuming I am wrong in deciding that I have no jurisdiction to extend time for filing Election Petition, what explanation for the delay to file within time would make the Court condone the delay? The position I take is that the Applicant ought to not just give any explanation but ought to show a sufficient explanation, reason or cause for the delay.

In the same case of **Basawaraj** (supra) the Supreme Court of India discussed “**sufficient cause**” and the meaning of the word “**sufficient**” as follows:

“Sufficient cause is the cause for which (the Applicant) could not be blamed for his absence. The meaning of the word ‘sufficient’ is ‘adequate’ or ‘enough’, in as much as may be necessary to answer the purpose intended. Therefore, the word ‘sufficient’ embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose in the facts and

circumstances existing in a case duly examined from the view of a reasonable standard of a cautious man. In this context, 'sufficient cause' means that the party stands not to have acted in a negligent manner or there was a want of bonafide on its part in view of the facts and circumstances of the case or it cannot be alleged that the party has 'not acted diligently' or 'remained inactive'. However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercise discretion it has to do so judiciously. The Applicant must satisfy the Court that he was prevented by any 'sufficient cause' from prosecuting his case, and unless a satisfactory explanation is furnished, the Court should not allow for condonation of delay. The Court has to examine whether the mistake is bonafide or was merely a device to cover an ulterior motive."

The Court went on to state that:

"The expression 'sufficient cause' has to be given a liberal interpretation to ensure that substantial justice is done, but only so long as negligence, inaction or lack of bonafides cannot be imputed to the party concerned, whether or not sufficient cause has been furnished, can be decided on the facts of a

particular case and no straightjacket formula is possible". (Emphasis added)

In this application, the Applicant's explanation, reason or cause for the delay in filing the Election Petition within the prescribed time is that:

- (i) Learned Counsel Martha Mushipe who had been instructed to file the Petition by the Applicant on 20th August, 2016 was one of the lawyers preparing the Presidential Election Petition and appearing in the Constitutional Court.***
- (ii) The said Learned Counsel also fell sick and was on sick leave for 7 days from 25th August, 2016 and then from 26th September, 2016 to 30th September, 2016.***

With respect to the first explanation, I have no difficulty in finding that engaging an extremely busy Learned Counsel cannot amount to sufficient explanation, reason or cause for failing to file Election Petition within the prescribed time. This explanation was no doubt destined to fail.

With respect to the second explanation, the same appears plausible except that the illness, regrettable as it was, happened long after the declaration of the result of the subject Poll on 13th August, 2016. I find that in between 13th August, 2016 and 25th August, 2016, there was inaction attributable to the Applicant and his Counsel to file the

Election Petition within the prescribed time and which inaction, as revealed by the Applicant, was partly because his appointed Counsel was busy with preparation of the Presidential Election Petition and appearing in the Constitutional Court. The Applicant is, thus, not blameless to have the benefit of the order sought extended to him.

There is also something else. In his affidavit, the Applicant said nothing on why his application for leave to extend time within which to file Election Petition was not filed earlier than 26th September, 2016; considering that the Applicant's Learned Counsel went on the second sick leave on 26th September, 2016. In the absence of any explanation, I find that there was inexcusable inordinate delay by the Applicant in filing the herein application.

Based on what I have stated above, even if I had the discretion to exercise on whether the Applicant's application for an order for leave to extend time within which to file Election Petition should be granted, I would still not grant the same because the Applicant has not shown sufficient explanation, reason or cause for failing to file Election Petition within the time prescribed by statute and also for inordinately delaying to file the application for leave to extend time.

In a nutshell, I state the fate of the Applicant's application before me as follows:

- 1) The application lacks merit because this Court has no jurisdiction to extend time for filing Election Petition fixed by statute; and**

2) On the assumption that this Court has the jurisdiction to extend time for filing Election Petition, for the reasons I have outlined already, the Applicant's application still lacks merit.

The consequence is that the Applicant's application for leave to extend time within which to file Election Petition is refused and I accordingly dismiss the same.

There having been neither appearance by the parties at the scheduled date of hearing nor any documents filed into Court by both or either of the Respondents with respect to the herein application, I make no order as to costs.

Dated at Lusaka this 14th day of October, 2016.



Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE