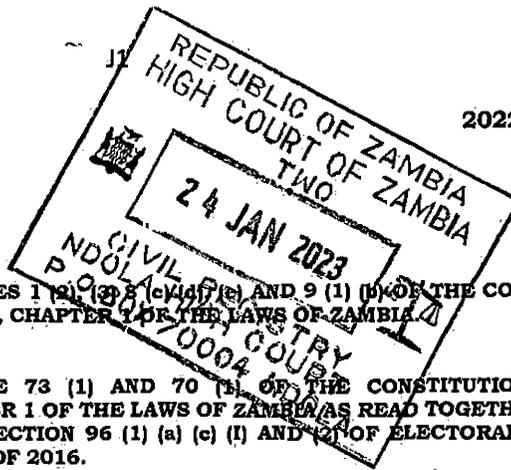


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT NDOLA
(Civil Jurisdiction)**

2022/HP/EP/003



**IN THE MATTER OF:
AND**

ARTICLES 1 (2) (3) (c) (d) (e) AND 9 (1) (b) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF:

ARTICLE 73 (1) AND 70 (b) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA AS READ TOGETHER WITH SECTION 96 (1) (a) (c) (f) AND (g) OF ELECTORAL PROCESS ACT NO. 35 OF 2016.

IN THE MATTER OF:

ARTICLE 45 (1) (a), 2 (Aa) (c) (e) AS READ TOGETHER WITH SECTION 52 (4) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA.

IN THE MATTER OF:

ARTICLE 97 (1), 2 (b) AND (4) AS READ TOGETHER WITH SECTIONS 83 (2) AND 99 (a) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF:

SECTION 98 (a) (b) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF:

SECTION 4 (1) AND (2) (a) (b) AND (c) OF THE ELECTORAL COMMISSION ACT NO. 25 OF 2016

IN THE MATTER OF:

THE NATIONAL ASSEMBLY BY-TITLE ELECTIONS (KABUSHI CONSTITUENCY NO. 36 AND KWACHA CONSTITUENCY NO. 22) (ELECTION DATE AND TIME OF POLL) (NO. 3) ORDER, 2022.

IN THE MATTER OF:

THE ELECTORAL (CODE OF CONDUCT) REGULATIONS 2011 STATUTORY INSTRUMENT NO. 52 OD 2011

IN THE MATTER OF:

THE ELECTORAL (CODE OF CONDUCT) REGULATIONS 2011 STATUTORY INSTRUMENT NO. 52 OF 2011

IN THE MATTER OF:

THE SCHEDULE TO THE ELECTORAL PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF:

THE KABUSHI CONSTITUENCY ELECTION HELD ON THE 21ST DAY OF OCTOBER, 2022

BETWEEN:

BOWMAN CHILOSHA LUSAMBO

AND

**BERNARD KANENGO
ELECTORAL COMMISSION OF ZAMBIA
THE ATTORNEY GENERAL**



PETITIONER

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

Before the Honourable Mrs Justice Ruth Chibbabbuka on the 24th January, 2022.

For the Petitioner: Mr. M. Zulu, Mr. J. Tembo & Mr. E. Phiri, Messrs Makebi Zulu Advocates
For the 1st Respondent: Mr. C. Maggubwi, Messrs Maggubwi & Associates
For the 2nd Respondent: Ms. T. Phiri, In-house Counsel, Electoral Commission of Zambia
For the 3rd Respondent: Mr. J. Simachela, Chief State Advocate & Mr. N. Mwiya, Senior State Advocate & Mr. O. Lubombe, State Advocate, The Attorney General's Chambers.

JUDGMENT

Cases referred to:

1. *Law Association of Zambia Vs Attorney General – 2021/CCZ/0051*
2. *Isaac Mwanza vs The Electoral Commission of Zambia and the Attorney General 2020/CCZ/0008*
3. *Peter Sinkamba and Isaac Mwanza vs The Electoral Commission of Zambia – 2022/CCZ/0023*
4. *Jere vs Ngoma (1969) Z.R 106*
5. *Nickson Chilangwa Vs Electoral Commission of Zambia and the Attorney General 2022/CCZ/0026*
6. *Brelsford James Gondwe Vs Catherine Namugala, SCZ Appeal No. 175 of 2012*
7. *Abuid Kawangu Vs Elijah Muchima Appeal No. 8 of 2017*
8. *Akashambatwa Mbikusita Lewanika and Others Vs Frederick Jacob Titus Chiluba S.C.Z Judgment No. 14 of 1998*
9. *Davies Chisopa Vs Sidney Chisenga Appeal No. 179 of 2012*
10. *Joseph Malanji and Bowman Chilosha Lusambo Vs Attorney General – 2022/CCZ/0018*
11. *Mlewa Vs Wightman (1996) S.J 1 (S.C)*
12. *Liambo Vs Mututwa (1974) unreported*
13. *Mulli Brother Ltd Vs Malawi Savings Bank [2015] MWSC 467*
14. *Yoti Miti Vs Attorney General SCZ/8/201/2015*
15. *Mhatani and others Vs Attorney General and others (2004) Vol. 3 Z.R 377, 458*
16. *Mutembo Nchito Vs Attorney General HP/358/2015*
17. *Bernard Kanengo Vs Electoral Commission of Zambia and Attorney General 2022/CCZ/0024*
18. *Bowman Lusambo Vs Bernard Kanengo and ECZ-2021/CCZ/A0019*
19. *The People Vs Shamwana and others [1983] ZMHC 1*
20. *Zambia Breweries Vs Central and Provincial Agencies (1983) Z.R 152 (H.C)*
21. *Macfoy Vs United Africa Co. Limited [1961] 3 ALL ER 1169*
22. *Saul Zulu Vs Victoria Kalima SCZ Judgment No. 2 of 2014*
23. *Anderson Kambela Mazoka and others Vs Levy Patrick Mwanawasa and others (2005) ZR 138*
24. *Kufuka Kufuka Vs Mundia Ndalamei Appeal No. 15 of 2016*
25. *Nkandu Luo Vs Doreen Sefuke Mwamba and Attorney General, Selected Judgment No. 51 of 2018*
26. *Austin Liato Vs Sitwala Sitwala Selected Judgment No. 23 of 2018*
27. *Richwell Siamunene Vs Sialubalo Gift Selected Judgment No. 58 of 2017*
28. *Munir Zulu Vs Gertrude Pilila Mwanza 2021/CCZ/009*
29. *William David Carlisle Wise Vs E.F Hervey Limited (1985) Z.R 179 (S.C)*
30. *Christopher Lubasi Mundia Vs Sentor Motors Limited (1982) Z.R 66 (H.C)*
31. *Bidvest Food Zambia Limited & 4 others Vs CAA Import and Export (Appeal No. 56 of 2017)*

32. *Bampi Aubrey Kapalasa and Joseph Busenga Vs The Attorney General CCZ/2021/0011 and 0014*
33. *BP Zambia Plc Vs Interland and Motors Ltd (2001) Z.R 37*
34. *Mukumbuta Mukumbuta Sam Mukamamba Kweleka Mubita Mooto Mooto and Another Vs Nkwilimba Choobana Lubinda Richard, Mbikusita Munyinda, Rosalyn Mukelabai and Another (SCZ Judgment No. 8 of 2003*
35. *Hakainde Hichilema Vs The Attorney General Appeal No. 4/2019*
36. *Matilda Mutale Vs Emmanuel Munaile [2007] ZMSC 114*
37. *Hamalambo Vs Zambia National Building Society Appeal No. 64/2013*
38. *Finance Bank Vs Monokandilos ZMHC 8 [1983]*
39. *Development Bank of Zambia and KPMG Peat Marwick Vs Sunvest Limited and Sun Pharmaceuticals Limited (1997) S.J 10 S.C*
40. *African Banking Corporation T/A Bank ABC Vs Datong Construction and 3 others 2017/HPC/0034*
41. *Dean Musale Vs Romeo Kangombe 2019/CC/A002*
42. *Anderson Kambela Mazoka and others Vs Levy Patrick Mwanawasa and others (2005) Z.R*
43. *Hakainde Hichilema and Another vs Edgar Chagwa Lungu and Others Ruling No. 33 of 2016*

Legislation referred to:

The Constitution of Zambia, Chapter 1 of the Laws of Zambia

The Electoral Process Act No. 35 of 2016

Other works referred to:

Black's Law Dictionary, 9th Edition, page 1424

Cambridge Advanced Learner's Dictionary, 3rd Edition, page 1212

Halsbury's Laws of England, 5th Edition, Volume 11.

Oxford Advanced Learner's Dictionary, page 998

1.0 Introduction

This petition emanates from the parliamentary by-elections for Kabushi constituency, held on 21st October, 2022. The petitioner is challenging the declaration of the 1st respondent as the duly elected Member of Parliament (M.P) for Kabushi constituency.

2.0 The Petition Evidence

The petition of Bowman Chilosha Lusambo reveals that following the 2021 general elections, he was declared as the duly elected member of parliament for Kabushi constituency under the Patriotic Front party ticket. His seat was subsequently nullified by the High Court of Zambia, following a petition by a losing candidate. The petitioner appealed against the nullification to the Constitutional Court of Zambia under cause number 2021/CCZ/A0019, but the said court upheld the decision of the High Court. The Constitutional Court further held that the petitioner was never disqualified by the High Court. On 21st August, 2022, the petitioner was adopted to stand as a parliamentary candidate for Kabushi constituency under the Patriotic Front ticket. The 2nd respondent had set the 25th August, 2022 as the date of filing in of nomination papers and the 15th September, 2022 as the date for the Kabushi constituency by-elections.

On 24th August, 2022, the 2nd respondent caused to be published, through a media statement, that it would not accept nominations from candidates whose seats were nullified by the Constitutional Court and caused vacancies in the National Assembly. The petitioner filed his nomination on the 25th August, 2022, but was informed by the Returning Officer that the same was unsuccessful owing to the nullification as per *Article 72 (4)* of the *Constitution* as amended by *Act No. 2 of 2016*. That the 2nd respondent's agents had no power to reject the petitioner's nominations on the basis that the petitioner's election was nullified. The petition filed under cause number 2021/CCZ/A0019 has no plea for disqualification. The Judgments of the High Court and Constitutional Court never conducted any disqualification proceedings, nor was a disqualification pronouncement made by either court. The 2nd respondent meant and intended to use undue influence to frustrate the petitioner from taking part in the by-elections for Kabushi constituency.

The Constitutional Court clarified under cause number 2022/CCZ/0009 that nullification is not the same as disqualification, and that the petitioner

was not disqualified. The petitioner further challenged the decision of the 2nd respondent's agent, the Returning Officer, in the High Court but before the matter could be heard, the Attorney General was joined to the proceedings on the basis of public interest. The petitioner applied to stay the election as the matter before the court was unlikely to be heard before the election date. The Attorney General applied to have the matter dismissed but the application failed, prompting him to appeal to the Court of Appeal where he was granted a stay of the proceedings before the High Court. The petitioner applied to the Court of Appeal to discharge the stay as the matter was one tied to time but the Court of Appeal ruled that by reason of the stay of proceedings, time had stopped running.

While the matter was before the High Court, a candidate, namely Alfred Joseph Yombwe, tendered his resignation for candidature for the Kabushi constituency by-election on or about 13th September, 2022, which he purportedly rescinded. As opposed to addressing the resignation of the candidate and while the order that stayed the election was still in force, the 2nd respondent proceeded to announce a date for the elections. The 2nd respondent proceeded to hold a by-election on the 21st October, 2022, resulting in the election of the 1st respondent as the Kabushi Member of Parliament. The candidates who contested the by-election received the following polls:

Kanengo Bernard	UPND	6, 553
Kalasa Richard	Independent	4, 607
Telela Osias	LM	226
Yombwe Alfred	Independent	81

The petitioner alleges contraventions of law as follows:

- i. There was non-compliance by the 2nd respondent with the provisions of the *Electoral Process Act* which prohibit any person from preventing the petitioner from exercising his right to contest as a candidate as conferred by the *Act* to eligible candidates.

- ii. The non-compliance by the 2nd respondent to the stay by the High Court renders the action by *statutory instrument* issued on the 12th October, 2022, and the election conducted illegal, null and void.
- iii. The non-compliance by the 2nd respondent to the electoral timelines provided under *Article 52 (4)* affected the conduct and result of the election.
- iv. The Returning Officer of the 2nd respondent violated *Article 70 (1)* of the *Constitution of Zambia* by rejecting and declaring that the petitioner's nomination as unsuccessful because his election was nullified for the Kabushi Constituency by the Constitutional Court despite the petitioner having met the specified qualifications and procedural requirements.
- v. Failure by the 2nd respondent to call for fresh nominations following the withdrawal by a candidate from the polls which communication was made to the Chief Electoral Officer in the employ of the 2nd respondent.
- vi. The 2nd respondent's agent, the returning officer for elections disallowed the petitioner's nomination, which act prevented the petitioner from exercising his right to participate in the elections, which right was subsisting at the time.

The petitioner prayed for the following reliefs:

1. A declaration that the election for Kabushi Constituency on the Copperbelt Province is and was void.
2. A declaration that the 1st respondent was not duly elected in the Kabushi Constituency by-election.
3. A declaration that upon the resignation of the said Alfred Joseph Yombwe, the second respondent ought to have called for fresh nominations.

4. An order for the 2nd respondent to call for fresh elections within 90 days from the date of the judgment of this court.
5. Damages for breach of duty by the 2nd respondent.
6. Costs.
7. Any other relief that the court may deem fit.

2.1 The Petitioner's Affidavit Evidence

The petition was accompanied by an affidavit verifying facts, wherein the petitioner deposed that following the 12th August, 2021 general elections, he was declared as the duly elected member of parliament for Kabushi Constituency, which seat was subsequently nullified by the High Court following a petition under cause number 2021/HP/1327. That he appealed against the nullification in the Constitutional Court under cause number 2021/CCZ/A0019 but that the court upheld the decision of the High Court. Following the nullification of his election, the 2nd respondent set the 25th August, 2022 as the date for filing nominations by intending candidates, and the 15th September, 2022 as the date of the by-elections for Kabushi Constituency. By a letter of 21st August, 2022, the petitioner was adopted as the parliamentary candidate for the Kabushi by-election by the Patriotic Front. On 24th August, 2022, the 2nd respondent did cause to be published through a media statement that it would not accept nominations from candidates whose seats had been nullified by the Constitutional Court and caused vacancies in the National Assembly. The petitioner filed his nomination on the 25th August, 2022, but was informed by the Returning Officer that the same was unsuccessful owing to the nullification of his seat. The petition filed, under cause number 2021/CCZ/A0019, has no plea for disqualification. The Judgments of the High Court and Constitutional Court never conducted any disqualification proceedings, nor was a disqualification pronouncement made by either court. The 2nd respondent meant and intended to use undue influence to frustrate the petitioner from taking part in the by-elections for Kabushi constituency.

The Constitutional Court clarified under cause number 2022/CCZ/0009 that nullification is not the same as disqualification, and that the petitioner was not disqualified. The petitioner further challenged the decision of the 2nd respondent's agent, the Returning Officer, in the High Court but before the matter could be heard, the Attorney General was joined to the proceedings on the basis of public interest. The petitioner applied to stay the election as the matter before the court was unlikely to be heard before the election date. The Attorney General applied to have the matter dismissed but the application failed, prompting him to appeal to the Court of Appeal where he was granted a stay of the proceedings before the High Court. The petitioner applied to the Court of Appeal to discharge the stay as the matter was one tied to time but the Court of Appeal ruled that by reason of the stay of proceedings, time had stopped running. While the matter was before the High Court, a candidate, namely Alfred Joseph Yombwe, tendered his resignation for candidature for the Kabushi constituency by-election on or about 13th September, 2022, which he purportedly rescinded on or about the 7th October, 2022. The 2nd respondent without addressing the resignation of the candidate and while the order staying the election was still in force, proceeded to announce a date for the elections. The 2nd respondent proceeded to hold a by-election on the 21st October, 2022, with ballot papers dated 15th September, 2022, resulting in the election of the 1st respondent as the Kabushi Member of Parliament. That the non-compliance by the 2nd respondent to the stay by the High Court renders the action by *statutory instrument* issued on the 12th October, 2022, and the election conducted illegal, null and void.

3.0 The 1st Respondent's Answer

The 1st respondent filed an answer on 14th November, 2022, wherein he denied the allegations contained in the petition. His answer discloses that: he was the nominated candidate for the United Party for National Development (UPND) in the Kabushi parliamentary by-election which was held on 21st October, 2022, to which he was declared the winner. That his election for the said seat can only be nullified in the form and manner

provided for under *Section 97* of the *Electoral Process Act*. The petitioner has not averred any breaches of the electoral laws and regulations to warrant the nullification of his election. The Order of stay by the High Court could not bar the elections as the High Court proceedings had been stayed by the Order of the Court of Appeal.

The Constitutional Court on 20th October, 2022 rendered its abridged judgment under cause number 2022/CCZ/0024 which was to the effect that the petitioner's challenge of the nominations was required to have been determined within 21 days of presentation, failing which the challenge lapsed. That since the petitioner's challenge was not concluded within 21 days, it lapsed and could therefore not in any way stop the election. As at the date of the election, there was no valid and pending challenge to the elections by the petitioner and thus there was no abrogation of any court order or law by the 2nd respondent. The 1st respondent categorically responded as follows:

- i. The petitioner has not disclosed the provisions of the *Electoral Process Act* that were not complied with by the 2nd respondent and if so how. At any rate, should this averment relate to the rejection of the petitioner's nomination, the ECZ was within its mandate to reject the nomination and if the rejection was wrongful as contended by the petitioner, the law provided for a challenge mechanism that was available to the petitioner at the time. The petitioner, engaged the challenge mechanism under cause number 2022/HP/1327 and his remedy resided therein.
- ii. The disregard, if at all, of the High Court Order for stay of elections, which order itself was stayed by the Court of Appeal cannot per se render the elections of 21st October, 2022 illegal, null and void as avoiding an election on that basis would be *ultra vires Section 97 of the Electoral Process Act*.
- iii. The 2nd respondent is under no obligation to comply with *Article 52 (4)* of the *Constitution* as that provision relates to a court or

tribunal. In any event, that provision does not set out any time lines to be complied with by the 2nd respondent.

- iv. The challenge or averment hereunder is wrongfully tendered before this court as matters of eligibility under *Article 70 (1)* of the *Constitution* are subject to filing of a valid nomination under *Article 52 (1)* of the *Constitution*.
- v. Any issue or question for or against the nomination process arising under the above said *Articles* then become subject of *Article 52 (4)* of the *Constitution*. Thus, the petition is on that basis irregular and incompetent.
- vi. The petitioner rightly challenged his disqualification before the High Court under cause number 2022/HP/1327 and thus it is duplicity for him to relaunch his thereof challenge before this court
- vii. The 2nd respondent was under no legal obligation to call for fresh nominations following the withdrawal of a candidate.
- viii. There was no legal need to call for fresh nominations as the earlier nominations had not successfully been challenged by the petitioner or anyone else in the manner provided for under *Article 54 (4)* of the *Constitution*.

The 1st respondent averred that the reliefs sought by the petitioner are legally untenable, and hence the petition should be dismissed.

3.1 The 1st Respondent's Affidavit Evidence

The 1st respondent filed an affidavit in support wherein he deposed as follows: he was the nominated candidate for the UPND in the Kabushi constituency parliamentary by-election which was held on 21st October, 2022, to which he was declared the winner. That his election for the said seat can only be nullified in the form and manner provided for under the *Electoral Process Act*. The petitioner has not averred any breaches of the electoral laws and regulations to warrant the nullification of his election. The Order of stay by the High Court could not bar the elections as the High Court proceedings had been stayed by the Order of the Court of Appeal. The

Constitutional Court on 20th October, 2022 rendered its abridged judgement under cause number 2022/CCZ/0024 which was to the effect that the petitioner's challenge of the nominations was required to have been determined within 21 days of presentation, failing which the challenge lapsed. The withdrawal of an independent candidate, Alfred Joseph Yombwe, from the election could not be the reason for suspension of the by-election as his candidature was not sponsored by a political party.

4.0 The 2nd Respondent's Answer

The 2nd respondent filed an answer on 14th November, 2022 wherein it averred that in the performance of its functions, it is guided by the relevant electoral laws which include the *Constitution*, the *Electoral Process Act*, the *Electoral Commission of Zambia Act No. 25 of 2016* and the regulations promulgated under these laws. That the media statement was issued to all aspiring candidates for the Kabushi constituency by-elections informing them of the guidelines on the filling of nominations for the seats that had been nullified. That the said media statement had no legal effect and did not target any person but was general guidance for all aspiring candidates. The 2nd respondent acted within its constitutional mandate regarding the conduct of nominations for the said by-elections. Contrary to the petitioner's assertions, the High Court and Constitutional Court did not pronounce itself on the eligibility of the petitioner to contest the by-elections set for 15th September, 2022. On 20th October, 2022, the Constitutional Court under cause number 2022/CCZ/0024 determined that the High Court ran out of jurisdiction to hear and determine the election petition filed under cause number 2022/HP/1327 when the 21 days prescribed by the *Constitution* for hearing and determining the said petition lapsed. The stay order granted by the High Court under cause number 2022/HP/1327 expired on or about 20th September, 2022 when the 21 days prescribed by the *Constitution* for hearing and determining the said petition lapsed. The 2nd respondent acted within its constitutional and legal mandate regarding the conduct of nominations for the Kabushi constituency by-elections, and that *Statutory Instrument No. 64 of 2022* which set the 21st October, 2022 as the poll day

for the Kabushi by-elections was issued in line with *Article 57 (3)* of the *Constitution*. The Kabushi constituency by-election was conducted in substantial conformity with the electoral laws and procedures. That the petitioner is not entitled to the reliefs sought hence the petition should be dismissed with costs.

4.1 The 2nd Respondent's Affidavit Evidence

The 2nd respondent's affidavit, deposed to by one Bob Mwelwa Musenga, the Acting Chief Electoral Officer, states that; the Kabushi constituency parliamentary by-election was nullified by the High Court, which decision was upheld by the Constitutional Court. The 2nd respondent, through a *statutory instrument*, consequently set the 25th August, 2022 as the date of nominations and 15th September, 2022 as the poll day for the Kabushi constituency by-election. On 24th August, 2022, the 2nd respondent issued a media statement to inform the aspiring candidates of the guidelines on filing of nominations. The petitioner's nomination was rejected in accordance with the law, while four other candidates successfully filed in their nominations. On 13th September, 2022, the High Court for Zambia stayed the parliamentary by-elections in Kabushi constituency which was scheduled to be held on Thursday 15th September, 2022 pending the hearing and determination of the election petition under cause no. 2022/HP/1327. On 14th September, 2022, the 2nd respondent issued a press statement to advise the electoral stakeholders and the general public that following the order of the court, the by-elections would not take place as scheduled. On 20th October, 2022, the Constitutional Court under cause number 2022/CCZ/0024 guided that the High Court ran out of jurisdiction to hear and determine the election petition filed under cause number 2022/HP/1327 when the 21 days prescribed by the *Constitution* for hearing and determining the said petition lapsed. The stay order granted by the High Court expired on or about the 20th September, 2022. Both the High Court and Constitutional Court have not pronounced themselves on the eligibility of the petitioner to contest the by-election. The 2nd respondent acted within

its constitutional mandate regarding the conduct of the Kabushi Constituency by-election.

5.0 The 3rd Respondent's Answer

The 3rd Respondent filed an answer wherein it was averred that the issues raised herein have been litigated and resolved under cause no. 2022/CCZ/0024 by the Constitutional Court. The petition is an appeal disguised as a petition and must be dismissed.

That the Constitutional Court upheld the decision of the High Court for Zambia which nullified the elections. At the material time, the 2nd respondent's agents had authority to reject the petitioner's nomination papers on the basis that the petitioner's election was nullified as the Constitutional Court had not yet interpreted the effects of the nullification of an election on the validity of a candidate that sought to be nominated. The court did not pronounce itself on the qualification or disqualification of the petitioner.

It was averred further that there was no subsisting High Court order, staying or suspending elections when the 2nd respondent proceeded to announce the date for elections. The date for elections was announced on 11th October, 2022 whereas the High Court's jurisdiction ceased on 20th September, 2022, a position that was confirmed by the Constitutional Court in cause no. 2022/CCZ/0024. The validity or otherwise of *Statutory Instrument Number 64 of 2022* is the subject matter of litigation in the Constitutional Court under cause number 2022/CCZ/0029.

As regards the alleged contraventions of law, the 3rd respondent averred that the 2nd respondent complied with the provisions of the *Electoral Process Act* more so the *Constitution of Zambia*. That through this petition, the petitioner is in essence throwing a veiled attempt to challenge the legality or otherwise of *Statutory Instrument No. 64 of 2022*. That the Constitutional Court, in its abridged judgment under Cause No. 2022/CCZ/0023, held at paragraph 27 that the 2nd respondent did not breach its constitutional mandate when it did not cancel the by-elections in the

Kabushi and Kwacha constituencies set for 15th September, 2022, call for fresh nominations and hold elections within thirty days. That the 2nd respondent acted within its constitutional and statutory mandate for conducting elections, and that the petition is an abuse of court process as some of the issues raised therein have already been resolved by the Constitutional Court, while others are still before the said court.

The 3rd respondent averred further that the petitioner is not entitled to any of the claims sought. That reliefs 3 and 4 were settled by the Constitutional Court under cause No. 2022/CCZ/0023 at paragraph 35 of the abridged judgment dated 17th October, 2022, wherein the court declined to grant the declaration that the respondent is obliged to hold fresh nominations for Kabushi and Kwacha constituencies. The court further declined to grant an order compelling the 2nd respondent to conduct fresh nominations and elections in the said constituencies.

The 3rd respondent prayed that the petition be dismissed with costs.

5.1 The 3rd Respondent's Affidavit Evidence

The 3rd respondent's affidavit, deposed to by the Solicitor General for Zambia, Marshal Muchende SC, states as follows: the issues raised in the petition have been litigated on and already resolved by the Constitutional Court under cause no. 2022/CCZ/0024. There was no High Court Order of a stay subsisting when the 2nd respondent proceeded to announce the date for the election. The date for the election was announced on 11th October, 2022 whereas the High Court's jurisdiction ceased on 20th September, 2022 as affirmed by the Constitutional Court under cause no. 2022/CCZ/0024. The petitioner is in essence attempting to challenge the legality or otherwise of *Statutory Instrument No. 64 of 2022* in the wrong manner. The 2nd respondent did not breach its constitutional mandate when it did not cancel the by-election in the Kabushi and Kwacha constituencies set for 15th September, 2022 and call for fresh nominations.

6.0 The Petitioner's Reply to the 1st Respondent's Answer

In response to the 1st respondent's answer, the petitioner joined issue with the 1st respondent.

7.0 The Petitioner's Reply to the 3rd Respondent' Answer

In response to the 3rd respondent's answer, the petitioner averred that he seeks to challenge the legalities of the by-election held when the stay of the High Court was still in effect. The *Constitution* does not confer the 2nd respondent with authority to reject nominations for a candidate whose seat has been nullified by the Constitutional Court, and that there is a decision by the Constitutional Court clarifying that there is a difference between nullification and disqualification. That following the said clarification by the Constitutional Court, the 2nd respondent should have rescinded their decision but they proceeded with the illegality. The petitioner maintained that the 2nd respondent announced the date of the election while the High Court order was still in force. That the petitioner is entitled to the reliefs sought.

7.1 The Petitioner's Affidavit in Reply to the 3rd Respondent's Affidavit

In response to the 3rd respondent's affidavit, the petitioner deposed that: his petition is not an appeal in disguise, and that the High Court did on 13th September, 2022 stay the elections that were scheduled to be held on 15th September, 2022. The petition is challenging the legality of the elections held amid a court ruling staying the elections and is not challenging the *statutory instrument* as asserted by the 3rd respondent. The 2nd respondent did breach the *Constitution* when it went ahead and made a declaration that no fresh nominations will be conducted and proceeded to hold elections when a stay was still in effect. The 2nd respondent's constitutional and statutory mandate is not being questioned by this petition, it is the decision to conduct elections with a stay still in effect that is being questioned. The issues raised in this petition are novel as they are not embedded nor addressed in the matters that were being dealt with by the Court of Appeal and Constitutional Court as they are issues birthed from an election held in total disregard of the law.

8.0 The Hearing

8.1 The Petitioner's Case

At the hearing, the petitioner called a total of 6 witnesses.

8.1.0 The Testimony of PW1

The first witness, PW1, was the petitioner himself. His testimony was as follows: he was duly declared as the elected Member of Parliament for Kabushi constituency following the 2021 general elections, but his seat was subsequently nullified by the High Court sitting in Ndola following a petition by the 1st respondent. The petitioner appealed to the Constitutional Court but it upheld the decision of the High Court. Consequently, the 2nd respondent set the 25th August, 2022 as the date of filing in of nominations, and the 15th September, 2022 as the voting day.

On 24th August, 2022, around 16:00 or 17:00 hours, he saw a letter from the 2nd respondent on social media advising all those whose seats were nullified by the court that the 2nd respondent would not receive their nomination papers. He and his constituency campaign team however continued with preparations for the filing in of nominations on the belief that he was not affected by the media statement issued by the 2nd respondent as the issue had already been determined by the Constitutional Court in the case of the **Law Association of Zambia vs the Attorney General**¹ wherein the court had guided that nullification does not amount to disqualification. On 25th August, 2022, the petitioner gathered approximately 13,000 supporters, who possessed valid voter's cards and NRCs, from the various wards of Kabushi constituency to escort him to file his nomination.

On arrival at the nomination centre, which was at Lubuto Secondary School, the petitioner, in the company of his election agents, Mr Innocent Phiri and Mr Eddie Kakula, his campaign managers Mr Mike Katambo and Franklyn Ngambi, their former Secretary General Mr Davis Mwila, and the number of supporters recognised by law, was received by the Returning Officer, Mr Elias Mwalaba who received and verified his nomination documents. The

petitioner's passport sized photo was taken, and his fingerprints lifted using the 2nd respondent's machines. After completing the required process, he was informed by Mr Elias Mwalaba, in full view of the public and private media, and his team that all his documents were okay but that his nomination would not be successful based on *Article 72 (4)* of the *Constitution of Zambia*. He applied to the Constitutional Court for interpretation of the *Article*, which court upheld its earlier ruling in which it had held that nullification is not disqualification. The petitioner commenced an action in the High Court seeking an order that the 2nd respondent be compelled to either call for fresh nominations or to place him on the ballot. He also applied for the stay of the Kabushi constituency by-elections, which stay was granted.

Upon conclusion of the hearings, the High Court reserved the matter for judgment, but before it could be passed, an independent candidate, Alfred Yombwe, withdrew from the race. Further, the State applied to the Court of Appeal for a stay of the delivery of the judgment in the High Court which stay was granted. While the court orders of stay granted by the High Court and Court of Appeal were still subsisting, the 2nd respondent announced the 21st October, 2022 as the date of elections for Kabushi constituency. The Kabushi constituency by-election took place on 21st October, 2022. The 2nd respondent used expired ballot papers for the said election. The ballot papers were expired in the sense that they were printed to be used on the 15th September, 2022, but when the 2nd respondent changed the date of the elections, they did not print new ballot papers.

The UPND candidate received 6000 votes from the total registered voters of Kabushi constituency of 49,804. The said candidate's closest rival, the independent candidate, received 4000 plus votes. Statistically speaking, less than 21% went to vote. The election was illegal. According to the 2nd respondent's records, only 11,000 people turned up to vote in the Kabushi constituency by-elections out of the total number of 49,804 registered voters, while in the 2021 August elections, more than 36,000 voters turned up, representing about 72 to 77 percent. Kabushi constituency only

produced 11,000 votes because of various factors, the most cardinal being that the people's preferred candidate was not on the ballot paper. The 2nd respondent has to follow the *Electoral Code of Conduct* and respect the *Constitution*. The people of Kabushi constituency were taken aback by the conduct of the 2nd respondent, who had no right to bar the petitioner from contesting the by-election.

The 2nd respondent is a referee and not a court of law and therefore it breached the *Constitution of Zambia* and interfered with his right to stand for the by-election. It was contempt of court for the 2nd respondent to disregard the stay orders of the High Court and Court of Appeal by going ahead with holding an illegal election. When a candidate withdraws from the race, the 2nd respondent is mandated to call for fresh nominations, which was not the case in the Kabushi constituency by-elections. The 2nd respondent ignored the law when it held an illegal election with a withdrawn candidate's portrait appearing on the ballot paper.

8.1.1 Cross Examination of PW1 by the 1st Respondent

When cross examined by counsel for the 1st respondent, the petitioner responded as follows: according to the *Constitution of Zambia*, the elections are supposed to be held within 90 days from the date the 2nd respondent announces the dates, which in this case was 15th September, 2022. The nominations for Kabushi constituency were supposed to be on 25th August, 2022. He challenged the nomination within 7 days before the Lusaka High Court, and obtained a stay. The matter under cause number 2022/HP/1327 challenged the 2nd respondent to call for fresh nominations or to put his name on the ballot. The matter was heard by the court within 21 days but judgment was not rendered because the State obtained a stay from the Court of Appeal. The State obtained a stay over the weekend. What the Court of Appeal stayed was the judgment and not the proceedings of the High Court because the proceedings had already been concluded.

The reliefs being sought in this matter are different from those sought in the other High Court matter. In this matter he is seeking a declaration that the

elections of 21st October, 2022 were null and void. At this juncture, counsel asked this court to take judicial notice of the reliefs sought under cause number 2022/HP/1327. In paragraphs 1 (d) and (e) of his petition before this court, he is complaining against the rejection of his nomination. He was not aware that the 1st respondent sued the 2nd respondent and the Attorney General under cause number 2022/CCZ/0024, which action was centred on the nominations for Kabushi constituency, and wherein the court guided that the proceedings in the High Court and Court of Appeal had been overtaken by time and were therefore irrelevant. By law, he was only required to go with 15 supporters to the nomination centre. He did not have evidence that he went with 13,000 supporters. His complaint against the 1st respondent is that he is illegally in parliament.

8.1.2 Cross Examination of PW1 by the 2nd Respondent

When cross examined by counsel for the 2nd respondent, the petitioner responded as follows: the Constitutional Court nullified his election on the ground that he was offering bribes. The case of **Law Association of Zambia vs Attorney General** he referred the court to was not an election petition but it dealt with eligibility. He was not aware that there were several cases in the courts seeking interpretation over the issues he has raised in this petition. He was not aware of the Bernard Kanengo case, and he was not aware that there was no order on the 21st October, 2022 stopping the election. The 2nd respondent failed to adhere to the timeline by calling for elections on the 15th September, 2022 but only to hold the same on 21st October, 2022. He was aware that elections are supposed to be held within 90 days. The 21st October, 2022 was within 90 days. When the 2nd respondent announces a particular date as the date of election, the ballot papers must indicate that very date.

8.1.3 Cross Examination of PW1 by the 3rd Respondent

When cross examined by counsel Simachela, for the 3rd respondent, the petitioner responded as follows: the elections for Kabushi constituency were illegal. According to *Article 52 (4)*, Mr Yombwe resigned and withdrew from

the Kabushi constituency by-elections. He was not aware that the issue of Alfred Yombwe's resignation was already dealt with by the Constitutional Court. He is an interested party in the matter of the **Institute of Policy, Isaac Mwanza and Peter Sinkamba 2022/CCZ/0029**. He is aware that the third relief is before a higher court where he is an interested party. His prayer is for this court to grant any relief it deems fit.

When cross examined by counsel Mwiya, the petitioner stated that the elections of 21st October, 2022 were held during the subsistence of the stay.

8.1.4 Re-examination of PW1

In re-examination, the petitioner clarified as follows: the first relief in his petition is directed against the 1st respondent because he was declared winner of an illegal election. As at 12th October, 2022, the date the 2nd respondent announced the 21st October, 2022 as the date of elections, the High Court and Court of Appeal orders of stay were both active.

8.2.0 The Testimony of PW2

PW2 was Eddie Kakula, who was the petitioner's election agent. His testimony was that: he was elected as the petitioner's election agent around July, 2022. He was the liaison between the petitioner and the 2nd respondent. His role included ensuring that verifications of the petitioner's election documents are conducted, and paying for nomination fees. From 12th August, 2022, to the date of filing in, he attended to consultative meetings held with the 2nd respondent, security wings and other stakeholders. He was the one who deposited the K15, 000 participation fee before the 25th August, 2022.

On the date of filing in of nominations, the candidate was escorted to Lubuto Secondary School, the nomination centre, by over 10,000 supporters. A verification of documents was conducted, the candidate's finger prints lifted, and his passport sized photo taken. The petitioner and

his team were attended to by the Returning Officer, Mr Elias Mwalaba, who after the verification process stated that he had rejected the application citing *Article 72 (4) of the Constitution*. He votes from the polling station at Lubuto High School, Kabushi constituency but he did not vote in the election of 21st October, 2022 because his preferred candidate did not participate in the election. To the best of his knowledge, about 11,000 people voted, from which the winning candidate, the 1st respondent herein, scored about 6533 votes, while the independent candidate scored about 4600 votes.

PW2 was not cross examined by any of the respondents.

8.3.0 The Testimony of PW3

PW3 was Wilbroad Pascal Mwamba, whose testimony was that: he did not vote in the elections of 21st October, 2022 because his preferred candidate, the petitioner, was not on the ballot paper. The petitioner was not on the ballot paper because the 2nd respondent did not allow him to contest the elections.

8.3.1 Cross Examination of PW3 by the 1st Respondent

When cross examined by counsel for the 1st respondent, PW3 replied as follows: he is a P.F supporter. He was not allowed to exercise his right to vote because his preferred candidate was not allowed to contest the elections by the 2nd respondent.

8.3.2 Cross Examination of PW3 by the 2nd Respondent

When cross examined by counsel for the 2nd respondent, PW3 replied that after the nominations, the petitioner's matter was taken to court.

PW3 was not cross-examined by the 3rd respondent.

8.3.3 Re- Examination of PW3

PW3 was not re-examined.

8.4.0 The Testimony of PW4

PW4 was Alfred Joseph Yombwe, whose testimony was that: he contested the Kabushi constituency by-elections as an independent candidate following an advert by the 2nd respondent. He filed in his nominations on 25th August, 2022, and proceeded to conduct his campaign in accordance with the timetable issued by the 2nd respondent. During the campaign period, he was not happy with the malpractices which were particularly exhibited by the UPND who were bribing and dishing out money to the residents of Kabushi. He was also displeased with the time allocation especially when the President and Vice President were around. The police did not allow him to campaign in the constituency until the President and Vice President were done campaigning for their candidate.

He thus decided to withdraw from the elections, and therefore wrote a letter to the 2nd respondent to that effect. The 2nd respondent acknowledged his resignation by a letter written to him by the said 2nd respondent. He later started receiving calls from persons who identified themselves as the Anti-Corruption Commission (ACC) officers, requesting him to report to their offices on the basis that he had been reported to the Commission as having been bought by the P.F. He was receiving a lot of threats from UPND cadres. His cousin's job as a police officer was also threatened. To safeguard himself and his family, he decided to rescind his resignation which was verbally acknowledged by the 2nd respondent but to date no official communication has been made. The 2nd respondent did not respond to the complaints raised in his letters.

8.4.1 Cross Examination of PW4 by the 1st Respondent

When cross examined by counsel for the 1st respondent, PW4 replied as follows: he wrote two letters to the 2nd respondent, one on 12th September, 2022, informing the 2nd respondent that he was resigning from the race. The other on 19th September, 2022, 7 days later, rescinding his resignation and withdrawal. His letter of 19th September, 2022 does not state that it was motivated by threats. His letter rescinding his withdrawal and resignation

did not mean that his earlier letter had no effect. What he meant by the statement that, "my resignation and withdrawal has no effect" is that even if he resigned, the election would go on and he would still appear on the ballot paper. By the date of the elections, he had not retracted his letter of 19th September, 2022, hence he was still a candidate.

8.4.2 Cross examination of PW4 by the 2nd Respondent

PW4 was not cross examined by the 2nd respondent.

8.4.3 Cross examination of PW4 by the 3rd Respondent

When crossed examined by counsel Simachela, PW4 replied as follows: he is the candidate appearing as Yombwe Alfred on the table tabulating the 21st October, 2022 results appearing on page 6 of the petitioner's bundle of pleadings. He duly participated in the elections of 21st October, 2022 and he received 81 votes. He has grievances concerning the Kabushi constituency by-elections. The elections were not free and fair. He has not petitioned the elections before any court because he has limited resources to hire a lawyer to represent him.

When cross examined by counsel Mwiya on behalf of the 3rd respondent, PW4 replied that there is no evidence in the bundles before court that he was called by the ACC, nor was there any evidence that there was no equal distribution of campaign time. He did not complain to the 2nd respondent regarding the call from ACC because he is not stupid.

8.4.4 Re-Examination of PW4.

PW4 was not re-examined.

8.5.0 The Testimony of PW5

PW5 was Elias Mwalaba, whose evidence was as follows: he has been the Returning Officer for Kabushi constituency from late 2020, the time of the voter registration exercise. His role was to manage the elections at the district and constituency levels. The 2021 Kabushi constituency elections were petitioned and subsequently nullified, resulting in a by-election which

was initially announced to be held on 15th September, 2022 but was only held on 21st October, 2022. His role together with his team of assistant returning officers in that election was to receive nominations from various aspiring candidates. During the nomination period they received various nomination papers from the candidates who were aspiring to stand and there was an aspiring candidate from P.F who came to file in his nomination. Upon checking their documents, they saw that according to *Article 74 (2)* that the P.F aspiring candidate was not eligible to stand. *Article 72 (4)* of the *Constitution* had been interpreted by the courts of law, though he was not sure in which exact case the interpretation was made.

The statement dated 24th August, 2022 appearing on page 2 of the petitioner's supplementary bundle of documents shows the 2nd respondent's position on the candidate's whose seats had been nullified in accordance with the law. The letter was issued before the date of nominations. He was aware of the letter from the date it was issued, being the 24th August, 2022. His decision invalidated the petitioner's candidature. Kabushi constituency has about 46,000 registered voters, and about 11,446 voters participated in the by-elections. The winner received 6,563 votes, which represents about 14% of the registered voters.

PW5 was not cross examined by the 1st and 3rd respondents.

8.5.1 Cross examination of PW5 by the 2nd Respondent

When cross examined by counsel for the 2nd respondent, PW5 replied as follows: he was aware that the nominations were challenged in the courts of law.

8.5.2 Re Examination of PW4.

PW5 was not re-examined.

8.6.0 The Testimony of PW6

PW6 was Bob Mwelwa Musenga, the Acting Chief Electoral Officer at the Electoral Commission of Zambia. His testimony was as follows: his duties as Acting Chief Electoral Officer are to supervise the conduct of electoral

activities by implementing the decisions of the Commission. He further handles electoral administrative matters, and is the Commission Secretary.

The document on page 1 of the petitioner's bundle of documents is a media notice issued by the 2nd respondent's Corporate Affairs Manager relating to the Kabushi and Kwacha constituencies by-elections. The elections were to be held on 25th August, 2022 while the nominations were to be held on 15th September, 2022. The document appearing on page 2 of the petitioner's supplementary bundle of documents is a media statement issued on 24th August, 2022 by the 2nd respondent to guide potential candidates who were to participate in the elections whose nominations were to be held on 25th August, 2022. The guidance was that the 2nd respondent would not accept any nominations for a candidate who had caused a vacancy in Parliament in accordance with *Article 72 (4) of the Constitution*. The same related to Kabushi and Kwacha constituencies. The statement did not specifically refer to any candidate but was for all potential candidates but it meant that the 2nd respondent would not accept nominations from candidates such as the petitioner.

Nominations went ahead on the said 25th August, 2022, and the document on page 1 of the petitioner's supplementary bundle of documents reveals that the petitioner's nomination was rejected by the Returning Officer on the basis that he did not qualify as per *Article 72 (4) of the Constitution*. The Returning Officer followed the 2nd respondent's interpretation of the *Article*. PW6 is not aware of any court process undertaken before the court to disqualify the petitioner. He is aware of the case of **Law Association of Zambia vs Attorney General** wherein the court took the position that nullification does not amount to a disqualification. The said decision was passed prior to the 2nd respondent's notification.

The case of **Law Association of Zambia vs Attorney General** does not relate to a parliamentary petition but interpretation of a constitutional provision. The court's interpretation of *Article 72 (4)* was different from that of the 2nd respondent. It is the interpretation of the Constitutional Court

that is binding, hence the document at page 1 of the petitioner's supplementary bundle of documents goes against the interpretation of the Constitutional Court. In view of the decision of the Constitutional Court, and the Returning Officer verifying the petitioner's documents, he was entitled to participate in the Kabushi constituency by-elections.

When asked whether it was fair to exclude the petitioner from contesting the by-elections, PW6 replied that the 2nd respondent took a position, whether right or wrong. The interpretation by the Constitutional Court was legal, which renders the 2nd respondent's interpretation illegal. Alfred Yombwe resigned from participation in the by-elections, but he later rescinded that decision. The case of **Isaac Mwanza vs The Electoral Commission of Zambia and the Attorney General**² related to resignations by councillors. The court in that case took the position that once a resignation was held within 30 days, it could not be rescinded because the law requires that a councillor gives 30 days' notice if they want to resign. *Article 52 (6)* of the *Constitution* invoked by Alfred Yombwe, does not provide for a notice period. The law is not clear as to whether a candidate can rescind his decision or not, this action is distinguishable from the **Isaac Mwanza** case.

The 2nd respondent's interpretation was that a candidate could rescind his decision. It is the Constitutional Court that has the legal mandate to interpret the *Constitution* and not the 2nd respondent. The 2nd respondent did not call for fresh nominations following Alfred Yombwe's resignation because he subsequently rescinded that decision. PW6 confirmed that in the case of **Peter Sinkamba and Isaac Mwanza vs The Electoral Commission of Zambia**³, the ECZ argued that it could not call for fresh nominations following the resignation of Alfred Yombwe because there was a stay by the High Court. The court held that there was a stay in force hence fresh nominations could not be held. On 12th October, 2022, the 2nd respondent issued dates for the Kabushi constituency by-elections because it was constrained because the *Constitution* gives the Commission 90 days within which elections must be held.

As at 12th October, 2022, the stay order by the High Court was still in effect. A court order stops taking effect when reversed or overturned by a superior court. The 2nd respondent did not act in conformity with the stay when it issued the election date. The ballot papers had the date of 15th September, 2022 instead of the date of 21st October, 2022 because the election was initially scheduled for the 15th September, 2022. The *Electoral Process Act* prescribes the features that should be on a ballot paper. The issue of the date on the ballot paper is an administrative position and not a statutory requirement. He is not familiar with the case of **Jere vs Ngoma**⁴ and could not comment on the holding of the court.

8.6.1 Cross Examination of PW6 by the 1st Respondent

When cross examined by counsel for the 1st respondent, PW6 replied as follows: a candidate who has been wrongly disqualified has recourse to petition to the court under *Article 52 (4) of the Constitution*. To the best of his knowledge, the petitioner petitioned the courts under that provision but the petition was not determined within the prescribed 21 days hence the 2nd respondent was at liberty to proceed as it deemed fit. That the challenge not being determined within 21 days meant that it lapsed, and therefore the petitioner was not entitled to participate in the Kabushi constituency by-elections.

Article 53 (6) of the Constitution does not bar a candidate from rescinding his decision to resign from an election. It is not feasible for the 2nd respondent to seek interpretation of every *Article* in the *Constitution*, otherwise it would cease to function. There is no provision that bars the 2nd respondent from taking a position on its understanding of a provision of the *Constitution*, and if it makes a mistake, the aggrieved party has the right to challenge that decision in the courts of law. If the petitioner believes the 2nd respondent acted contrary to the court order of stay, he could commence contempt proceedings. Contempt proceedings were commenced in the Court of Appeal.

PW6 was aware that the 1st respondent herein sought interpretation of *Article 52 (6) of the Constitution* from the Constitutional Court, and judgment

was made that all challenges relating to the nominations not having taken place within 21 days were overtaken, which decision removed all logs on the road travelled towards holding the Kabushi constituency by-elections.

8.6.2 Cross Examination of PW6 by the 2nd Respondent

When cross examined by counsel for the 2nd respondent, PW6 replied as follows: the intention behind the media statement was to give guidance to prospective candidates. The 2nd respondent was applying the law as it understood it. The case of **Law Association of Zambia vs The Attorney General** was not an election petition case, and the 2nd respondent was not a party to that case. The petitioner has alleged a contravention of his right to participate in the nomination process, which process was challenged before the High Court. The case was in relation to Mr Malanji and the petitioner herein.

If a person is dissatisfied with the decision of the High Court, he can appeal to the higher court. This matter is not an appeal from the earlier case to which the petitioner was a party. To the best of his knowledge, there was no court that pronounced that the petitioner was eligible to contest the Kabushi by-elections, hence the 2nd respondent cannot be said to have acted illegally. Mr Yombwe rescinded his decision to resign from the elections, hence he remained a candidate. The law as it is under *Article 52 (6) of the Constitution* does not clearly indicate as to whether a candidate who resigns is at liberty to rescind that decision. There are a number of cases pending before the Constitutional Court for interpretation of *Article 52 (6) of the Constitution*, such as the **Peter Sinkamba, Isaac Mwanza** case, and **Nickson Chilangwa vs The Electoral Commission of Zambia vs The Attorney General**.⁵

As at 21st October, 2022, there was no stay in place, hence the elections held on that date were not illegal. The *Statutory Instrument* issued on 12th October, 2022 was legally issued, and it was not challenged. A *Statutory Instrument* ought to be challenged within 14 days from the date of its issuance. The election was conducted within the statutory timelines and in conformity with the law. The ballot paper met all the statutory requirements

and hence was not illegal. The electoral laws have changed since 1969 and so have the principles. The only participant of the by-elections linked to this petition is the 1st respondent.

8.6.3 Cross examination of PW6 by the 3rd Respondent

When cross examined by counsel for the 3rd respondent, PW6 replied as follows: the declaration of the Kabushi by-elections as being null and void was pursued in the **Governance Elections Advocacy Research Institute** case, and judgment is yet to be passed.

8.6.4 Re-examination of PW6

In re-examination by counsel Zulu, PW6 replied as follows: the right forum for determination of election petitions is the High Court, and hence this matter is properly before this court. There was no determination of the challenge on the right to file nominations. The petitioner was not precluded from filing a petition on the basis that he should have been nominated as per *Section 98 (b)* of the *Electoral Process Act*. This petition was filed on 27th October, 2022. The import of section 25 (1) (F) is that calling for elections without the petitioner being allowed to participate was against the petitioner's right, that was subsisting at the time. The setting of the date during the subsistence of the stay was illegal, but in this case the proceedings ran out of time and so the date set was not illegal. The interpretation in **Law Association of Zambia vs Attorney General** could be different if it was an election petition. The law is unclear as to which court an appeal against the nomination challenge must be made to. No court pronounced itself on the eligibility of the candidate. The decision of the 2nd respondent was based on its understanding of *Article 72 (4)* of the *Constitution*.

When re-examined by counsel Phiri, PW6 stated that the 1st respondent is appearing in the reliefs in the petition.

That was the petitioner's case.

9.0 The 1st Respondent's Case

The 1st respondent only called 1 witness.

9.1.0 The Testimony of the 1st Respondent's Witness

The first respondent's witness was the 1st respondent himself. He testified as follows: he adopts the answer and affidavit filed as his own. That the petition reveals no allegations against him with regard to any abrogation of the law during the elections. Contrary to the petitioner's allegations, as at 20th October, 2022, he was duly elected by the people of Kabushi constituency and declared winner by the 2nd respondent.

9.1.1 Cross examination of the 1st Respondent's Witness (1RW) by the Petitioner

When crossed examined by Mr Zulu, 1RW replied as follows: as of October, 2022, between 49,000 to 51,000 voters were registered in Kabushi constituency. Those who voted were above 11,000 but he could not confirm if they were below 12,000. According to page 4 of the petitioner's supplementary bundle of documents, a total of 11,646 votes were cast, from which he received 6,553 votes. He is aware that the outcome of this matter affects him, and that is why he was made a party to the proceedings. He was declared winner on 21st October, 2022. Following the issues surrounding the Kabushi by-elections, he petitioned. He relied upon the judgment of the Constitutional Court delivered on 20th October, 2022. The elections were legal and valid.

When cross examined by counsel Tembo, PW6 replied that he was elected by the voters in Kabushi constituency. The people that voted for him were above 6,000 but less than 7,000.

9.1.2 Re-examination of 1RW

There was no re-examination of 1RW.

That was the case for the 1st respondent.

The 2nd and 3rd respondents opted not to call witnesses.

10.0 The Petitioner's submissions

Counsel submitted that this election petition is premised on section 97 (2) (b) and section 97 (4) of the *Electoral Process Act No. 35 of 2016* and the non-compliance with the *Constitution* and a court order.

Section 97 (2) (b) of the *Electoral Process Act* provides as follows:

"The election of a candidate as a member of parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or tribunal, as the case may be, that-
(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the results of the election.

While section 97 (4) of the *Electoral Process Act* provides as follows:

"An election shall not be declared void by reason of any act or omission by an election officer in breach of the officer's official duty in connection with an election or it appears to the High Court or tribunal that the election was so conducted as substantially in accordance with the provisions of this Act, and that such act or omission did not affect the results of that election."

In referring to the foregoing sections counsel argued that in order for the court to invalidate an election under the said provisions, the petitioner would have to prove that the non-compliance of the *Electoral Process Act*, by an election officer resulted in the results being affected. Counsel argued that the burden of proof rests on the petitioner and to buttress this argument the court was referred to the cases of **Brelsford James Gondwe Vs Catherine Namugala**⁶ and **Abuid Kawangu Vs Elijah Muchima**.⁷ It was counsel's further argument that in the case of an election petition the standard of proof required is that allegations must be proved to a fairly high degree of

convincing clarity and that this does not depend on the number of witnesses called but on the quality of the evidence. For these arguments the court was referred to the cases of **Akashambatwa Mbikusita Lewanika and others Vs Frederick Jacob Titus Chiluba⁸** and **Davies Chisopa Vs Sidney Chisenga⁹**. Counsel submitted that the petitioner called 6 witnesses inclusive of the petitioner to prove that the purported Kabushi parliamentary by-elections, held on the 21st October, 2022 were void and illegal on the basis that the petitioner herein was prevented from participating in the said by-elections.

In addressing the illegality of the elections held on 21st October, 2022, counsel presented four limbs of arguments being:

- (i) The refusal or prevention by the returning officer (Mr. Elias Mwalaba) PW5 to accept the petitioner's nomination despite having complied with all the requirements to contest for the Kabushi By-Election;
- (ii) The failure by the 2nd respondent, to call for fresh nominations, despite there being a resignation or withdrawal by one of the candidates for the Kabushi parliamentary by-elections;
- (iii) The conduct of the Kabushi by-elections by the 2nd respondent, despite a stay or suspension of the said by-election by a court of competent jurisdiction under cause number 2022/HP/1327; and
- (iv) Non-compliance by the election officer with the *Electoral Process Act No. 36 of 2016*.

In the first limb on the prevention or rejection of the petitioner by the 2nd respondent, counsel firstly argued that the evidence of PW1, PW2 and PW5 reveals that the petitioner's nomination was rejected by the 2nd respondent through their agent, PW5. That it was not disputed that the said rejection was based on *Article 72 (4) of the Constitution* which provides that:

"(4) A person who causes a vacancy in the National Assembly due to the reasons specified under clauses (2) (a),

(b), (c), (d), (g) and (h) shall not, during the term of that Parliament-

- (a) be eligible to contest an election; or*
- (b) hold public office.”*

Counsel also cited Article 72 (2)(a), (b), (c), (d), (g) and (h) of the Constitution so as to contextualize their arguments. The said Article provides as follows:

“72 (2) The office of Member of Parliament becomes vacant if the member

- (a) Resigns by notice, in writing to the speaker*
- (b) Becomes disqualified for elections in accordance with Article 70*
- (c) Acts contrary to a prescribed code of conduct*
- (d) Resigns from the political party which sponsored the member for election to the National Assembly*
- (e)*
- (f)*
- (g) having been elected to the National Assembly, as an independent candidate, joins a political party;*
- (h) is disqualified as a result of a decision of the Constitutional Court.*

It was counsel’s argument that the instances outlined in the above provisions are the ones that warrant one to be ousted from eligibility to contest an election. Counsel contended that the petitioner does not fall under any of the instances specified in the above provisions. That although the petitioner’s election was nullified by Judge Musona which nullification was upheld by the Constitutional Court, this did not warrant the 2nd respondent’s action of preventing the petitioner from filing his nomination so as to contest the Kabushi by-election. To buttress this argument, the court was referred to the **Law Association of Zambia Vs Attorney General** case delivered on the 22nd March, 2022 before the announcement of the by-elections, and **Joseph Malanji and Bowman Chilosha Lusambo Vs**

Attorney General¹⁰ where the Court held that nullification of an election does not amount to disqualification to contest the same seat.

In the **Joseph Malanji and Bowman Chilasha Lusambo** case the Constitutional Court in upholding its earlier decision in the **Law Association of Zambia Vs The Attorney General** case stated at **page 13** of its Judgment as follows:

"In conclusion we find that Article 72 (4) has specified which categories of persons cannot contest an election and these are specified in Article 72 (2) (a), (b), (c), (d), (g) and (h). These persons do not include those members whose seats fell vacant by virtue of a nullification of an election."

It was counsel's considered view that from the foregoing authorities, the petitioner was eligible to contest and the 2nd respondent maliciously prevented him from filing his nomination on a provision that does not apply to him. Counsel fortified this view by making reference to the testimonies of PW1, PW2 and PW5 who testified that a day before the nomination for the Kabushi by-election, the 2nd respondent issued a statement that it would not accept nominations from candidates whose seats were nullified.

Secondly, counsel contended that the action of the 2nd respondent in preventing or rejecting the petitioner's nomination was misconduct and the effect of this is that the election of the 1st respondent must be declared void. For this argument the court was referred to the case of **Mlewa Vs Wightman**¹¹ which cited with approval the case of **Liambo Vs Mututwa**¹² in which case the position established in the **Jere Ngoma** case was buttressed, wherein the court had the following to say on the prevention of an eligible candidate from filing his nomination;

"Where evidence shows that a candidate for election to Parliament was prevented, by the misconduct of the other persons, from lodging his papers with the returning officer, such misconduct essentially makes the election in a particular constituency void."

It was counsel's considered view that though the facts cited in the **Jere Ngoma** case are different from those in *casu*, the fundamental principle is that prevention of a candidate from lodging his nomination paper makes an election void.

Thirdly, counsel argued that the 2nd respondent having conducted elections notwithstanding the stay of the election by the court under cause number 2022/HP/1327 was illegal. In referring to the said Ruling delivered by Justice M.D Bowa, Justice S. Kaunda and Justice C. Lombé Phiri, that stayed the election, counsel argued that in spite of the stay, the 2nd respondent went ahead to announce the date of elections. That this was confirmed by the evidence of PW1 and PW6 who both stated that there was an active stay when the date for the election was set on the 12th October, 2022 through *Statutory Instrument No. 64 of 2022*, known as *National Assembly By-Elections (Kabushi Constituency No. 36 and Kwacha Constituency No. 22) (Election Date and Time of Poll) (No. 3) Order, 2022*. That this *Statutory Instrument* set the date for the polls for the Member of Parliament in Kabushi and Kwacha constituencies to take place on Friday, 21st October, 2022.

Counsel contended that the effect of the stay was that the 2nd respondent was precluded from taking any further step in the proceedings as a stay of proceedings is an interim relief order granted by the court with the effect of pausing an action or ruling pending further guidance or events that will determine the fate of the stayed action or ruling. To buttress this contention the court was referred to **Halsbury's Law of England 4th Edition, Volume 37 at paragraph 437** and the Malawian case of **Mulli Brother Ltd Vs Malawi Savings Bank**¹³.

Counsel went on to contend that an application for a stay of proceedings must be distinguished from an appeal as each of them have different consequences even though both affect the crux of the action being the proceedings. That for a stay to be effected there must be proceedings capable of being stayed and that a failed judgment or ruling cannot be stayed because it did not award anything and there is nothing to stay. The

court was referred to the case of **Yoti Miti Vs Attorney General**¹⁴ for this argument.

It was counsel's further contention that a stay is a court order just like any other court order and must be complied with whether it is wrong, oppressive or warranted to be perceived as having been overtaken by events. That a stay order once issued has to be obeyed even though erroneously issued and remains in force until discharged or set aside. To buttress these arguments the court was referred to the cases of **Mhatani and others Vs Attorney General and others**¹⁵ **Mutembo Nchito Vs Attorney General**¹⁶ and **Bernard Kanengo Vs Electoral Commission of Zambia and Attorney General**¹⁷.

Counsel argued that the stay that was issued by the court in cause number 2022/HP/1327 was never vacated and as such the holding of the by-election in the face of the stay was illegal. In that vein counsel opined that an illegal election is not an election in the strict sense, as you cannot put something on nothing and expect it to stand, it would surely fail.

Fourthly, counsel contended that although the respondents in cross examination of the petitioner advanced questions to the effect that this action was an abuse of court process, this position could not stand as there are no pending issues relating to the same relief under this matter. Counsel asked the court to take judicial notice of cause number 2022/HP/1327 and made reference to the case of **Bowman Lusambo Vs Bernard Kanengo and The Electoral Commission of Zambia**¹⁸ which adopted the position in **The People Vs Shamwana and Others**¹⁹ on courts taking judicial notice. It was counsel's contention that the reliefs sought in *casu* are different from the ones that were sought under cause number 2022/HP/1327 and therefore there can be no abuse of process. For the definition of abuse of process reference was made to the case of **Zambia Breweries Vs Central and Provincial Agencies**²⁰, and the **Halsbury's Laws of England, 5th Edition, Volume 11**.

In the second limb of their arguments, on the failure by the 2nd respondent to call for fresh nominations in light of a resignation or withdrawal of a

candidate from the Kabushi by-elections, counsel made reference to *Article 52 (6)* of the *Constitution* which provides as follows:

“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.”

Counsel argued that *Article 52 (6)* of the *Constitution* provides for the procedure to be adopted by the 2nd respondent in the event that a candidate contesting in an election dies, resigns or indeed becomes disqualified. It was counsel’s considered view that from the wording of *Article 52 (6)* of the *Constitution* it was clear that the 2nd respondent is mandated to cancel the elections 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. Counsel argued that it was not in dispute that PW4 resigned from the Kabushi by-elections that were held on the 21st October, 2022 and the said resignation was communicated to the 2nd respondent which did not cancel the elections scheduled for the 21st October, 2022. That instead the 2nd respondent called for fresh nominations on the basis that PW4 had rescinded his decision to resign as testified by PW6. In referring to the case of **Issac Mwanza Vs Electoral Commission of Zambia and Attorney General** counsel argued that the Constitutional Court held that where the *Constitution* does not provide for rescission of a resignation, the resignation cannot be rescinded. It was counsel’s considered view that the letter dated 19th September, 2022 authored by PW4 rescinding his decision to resign from the Kabushi by-election has no legal standing.

Counsel beseeched this court to adopt the position as was advanced in the case of **Macfoy Vs United Africa Co. Limited**²¹ at page 1172 where Lord Denning stated the following:

"If an act is void, then it is a nullity, it is not only bad, but it is incurably bad. There is no need for an order of the Court to set aside. It is automatically null and void without more ado, though it is sometimes convenient for the court to declare it so, and any proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse.

It was counsel's submission that the decision by the Chief Electoral Officer, PW6 to neglect to cancel and hold fresh nominations after PW5 had withdrawn from the Kabushi by-elections results in only one fate, that being of the Kabushi by-elections conducted on the 21st October, 2022 being void because *Article 52 (6) of the Constitution* does not provide for rescission of a resignation. Counsel submitted further that although the 2nd respondent may argue that it did not call for fresh nominations because there was a valid court order, being the stay of the Kabushi constituency elections slated for the 15th September, 2022, which it was mandated to obey, in the **Peter Chazya Sinkamba and Another Vs Electoral Commission of Zambia** case, the Constitutional Court held:

"...we wish to state at the outset that a party to Court proceedings is obligated to obey court orders, unless and until they are set aside, discharged or vacated. Article 52 of the Constitution recognises and makes provision for the courts to determine nomination challenges before the election in issue can be held. It was thus imperative, in this case, for the respondent to comply with the High Court Order which stayed the holding of the by-elections in the Kabushi and Kwacha constituencies on 15th September, 2022.

In the circumstances, the respondent did not breach its constitutional mandate when it did not cancel the by-elections in the Kabushi and Kwacha election set for the 15th September, 2022, call for fresh nominations and hold elections within thirty days as stipulated by Article 52 (6) of the Constitution after the

resignations tendered by the named independent candidates in the two constituencies for two reasons. Firstly, it was bound to obey the High Court order which stayed the holding of the elections on the 15th September, 2022. Secondly, Article 52 (6) of the Constitution does not give a time frame within which the dictates of Article 52 (6) should be implemented by the 2nd respondent so that it can be said that because the respondent did not cancel the election by such a date, it has breached Article 52 (6) of the Constitution. The only time frame which is stipulated in that provision is the requirement for the election to be held within 30 days of the filing of fresh nominations....”

Counsel contended that in blatant disregard of the High Court order the 2nd respondent issued *Statutory Instrument No. 64 of 2022* known as *National Assembly by-elections (Kabushi Constituency No. 36 and Kwacha Constituency No. 22) (Election Date and Time of Poll) (No. 3) Order, 2022* which set the date for the polls for the Member of Parliament in Kabushi and Kwacha constituencies on Friday, 21st October, 2022. It was counsel’s view that this action by the respondent was tantamount to its arguing against its own mouth. This was because in one breath in the **Peter Chazya Sinkamba and others Vs ECZ** case the 2nd respondent argued that it suspended the two elections in Kabushi and Kwacha constituencies following the High Court Ruling in the **Joseph Malanji and Bowman Lusambo Vs Attorney General and ECZ** case. Yet in another breath the 2nd respondent proceeded to issue *Statutory Instrument No. 64 of 2022* before the High Court Order staying the holding of the Kabushi constituency election on the 15th September, 2022, was set aside, discharged or vacated.

In the third and fourth limbs, counsel argued that the non-compliance with the *Electoral Process Act* and its effect on the voter turn-out was that the people of Kabushi shunned the 21st October, 2022 by-elections because they were illegal. Counsel argued further that it was PW1’s testimony that during the 2021 general elections, Kabushi constituency had a total number of 49,804 registered voters and at least 36,000 electorates managed to vote out

of which the petitioner managed to get at least 18,000 votes and was declared winner by the 2nd respondent. That PW1 testified further that during the 2022 by-elections, only a total number of about 11,000 registered their vote and that the winner of the said elections, being the 1st respondent only got 6,000 votes. PW1's testimony was corroborated by PW5 Mr Elias Mwalaba who testified that out of the total number of registered voters in Kabushi constituency, only about 11,000 voted and the 1st respondent, Bernard Kanengo, only managed to get about 6,000 votes representing 14 percent of the entire Kabushi constituency. It was counsel's view that the reason for the low voter turn-out was as testified by PW3 Wilbroad Pasco Mwamba who stated that the reason he did not go to vote is because the person he intended to vote for was not on the ballot paper.

Counsel contended that due to the failure by ECZ to comply with the guidelines outlined in *Section 4* of the *Electoral Process Act* which are to ensure that elections are free and fair, promote the democratic process of elections and ensuring a conducive environment for free and fair elections, the majority of the registered voters failed to vote for their preferred candidate, the petitioner, as evidenced from the testimonies of PW1 and PW3.

It was counsel's submission that where results are affected by the non-compliance of the *Act* by an electoral officer, the court has power to nullify the election. Counsel prayed that the reliefs sought by the petitioner be granted with costs.

11.0 The 1st respondent's submissions

In commencing their arguments counsel categorically stated that they took the view that this petition oscillates more on legal than factual issues which legal issues counsel argued in two main limbs. In the first limb counsel for the respondent was of the considered view that there are three legal questions to be answered as follows:

- (i) As far as the first respondent is concerned, has the petitioner made out a case under *section 97* of the

Electoral Process Act No 35 of 2016 to warrant nullification of the first respondent's election?

(ii) Can and should the disqualification of the petitioner under Article 72 (4), if wrongful, be basis for nullification of the election?

(iii) Did the second respondent breach any electoral time lines under Article 52 (4) of the Constitution?

In answering the first question counsel cited *Section 97 (2)* of the *Electoral Process Act No. 35 of 2016* which presents the two scenarios where an election can be questioned and nullified. That in the first scenario the said *Section 97 (2)* questions an election based on the winning candidates and/or his agents commission of corrupt practices, illegal practices or other misconduct. Counsel argued that on the pleadings and evidence on record, there is nothing that has been presented before court that warrants questioning and nullifying the elections based on the conduct of the 1st respondent. That in the second scenario *Section 97 (2) (b)* and *(4)* require that the petitioner demonstrates that the election was not substantially conducted in accordance with the provisions of the *Electoral Process Act* and the commission or omission of the electoral officer affected the result of the election. Counsel submitted that vide the pleadings and the evidence presented by the petitioner, the petition miserably fails to demonstrate how the 2nd respondent being the Electoral Commission of Zambia did not comply with the provisions of the *Electoral Process Act*. It was counsel's argument that the petitioner did not plead or tender evidence to show how the results of the election were affected at all by the commission or omission of the 2nd respondent's officials.

In answering the second question, counsel contended that the petitioner in his submissions attempted to cross pollinate the 2nd respondent's rejection of his nomination pursuant to *Article 72 (4)* of the *Constitution* as a breach envisaged under *Section 97 (2) (b)* and *(4)* of the *Electoral Process Act* which construction by the petitioner is seriously flawed and misguided as the said *Section 97 (2) (b)* and *(4)* make reference to non-conformity with the

provisions of the *Electoral Process Act* and not any other law or Act. It was counsel's considered view that the extrapolation of the rejection of the nomination under *Article 72 (4)* of the *Constitution* to be a breach under or of the *Electoral Process Act* is fundamentally wrong and erroneous.

Referring to *Section 31* of the *Electoral Process Act* and *Article 52 (4)* of the *Constitution of Zambia (Amendment) Act No. 2 of 2016*, counsel argued that a dissatisfied party has the right to challenge any question attached to nominations before a Court or tribunal. Counsel submitted that the law does not say that the rejection of a nomination shall be basis for challenging an election under *Section 97 (2) (b)* and *(4)* of the Act. It was counsel's further submission that there is evidence on record that the petitioner invoked the remedy under *Article 52 (4)* of the *Constitution* which challenge regrettably became statute barred as was held and guided by the Constitutional Court under cause number 2022/CCA/0024.

Concluding on this point counsel argued that the cases of **Mlewa Vs Wightman**, **Liambo Vs Mutuwa** and **Jere Vs Ngoma** referred to by the petitioner in their submissions are distinguishable firstly because they are all pre the 2016 electoral law regime, which new regime specifically provides instances and circumstances under which an election can be annulled as contained in *Section 97 (2)* of the *Electoral Process Act*. Counsel argued that these authorities should as such be read with caution and difference as in the present matter the misconduct preventing the filing in of the nomination should be ascribed to the winning candidate or should be with his knowledge, consent and or approval or that of his agent and not of any other person as was held in the cases referred to. That in the **Jere Vs Ngoma** case, the prevention was by the supporters of the candidate while in *casu* the prevention of the petitioner's nomination was by the Electoral body and not by the first respondent or his agent.

Secondly, counsel argued that the cases are distinguishable in the sense that the petitioner was not prevented from filing his nomination but rather that he proceeded to file in his nomination and his nomination was rejected by the Presiding Officer as per the powers vested in him under *Article 52 (2)*

of the *Constitution*. Counsel emphasized that the distinction lay in the petitioner's remedy being to challenge his disqualification and not prevention as provided under *Article 52 (4)*. It was counsel's strong argument and submission that the rejection of the petitioner's nomination by the presiding officer is not a basis or ground for voiding the election under *Section 97* of the *Electoral Process Act*.

In answering the third question, as to whether any time lines were violated under *Article 52 (4)* of the *Constitution* counsel submitted firstly that the petitioner made very general averments in his petition without any particulars as to what time lines were breached by the Electoral Commission of Zambia. That regrettably even through the petitioner's witnesses, the petitioner did not post any evidence to provide light as to what time lines were abrogated.

Secondly, counsel submitted that their reading of *Article 52* of the *Constitution* reveals that there are no time lines spelt out relative to the holding of a by-election. It was counsel's submission that the petitioner made a sweeping averment in his petition which was not legally and factually supported and that the petitioner raised a lot of objections to the election based on the stay of execution that he had obtained in the High Court. Counsel was of the considered view that the petitioner may not have deliberately told the Court, when, he challenged the decision to disqualify his nomination. Notwithstanding this omission, counsel argued that, what is crucial is that in cross examination the petitioner conceded that at the time the election was held his challenge had been over taken by time, that is the time within which the challenge was to be heard and determined had refluxed. To buttress this argument reference was made to the case of **Bernard Kanengo Vs Electoral Commission of Zambia and Attorney General** the Constitutional Court stated that:

".....the High Court has jurisdiction which jurisdiction must be exercised within 21 days time frame given by the Constitution under Article 52 (4). In sum to answer the two questions the 21

days in Article 52 (4) cannot be stopped or enlarged by any court or authority.”

In obiter, we wish to state that the Court of Appeal does not have jurisdiction to hear appeals to cases whatsoever dealing with Article 52 (4) of the Constitution. Nevertheless, that stay order it had issued remains in force until discharged or set aside. Thus, the High Court had to abide to the Court of Appeal stay order and ran out of time as the 21 days have since expired.”

In interpreting the aforementioned authority counsel argued firstly that the Constitutional Court stated that the proceedings in the High Court under which the petitioner had challenged his nominations had been stayed by the Constitutional Court order and as such the said proceedings were suspended and of no consequence, including the order for stay. Secondly, counsel went on to argue that the Court of Appeal categorically stated that the challenge to the nominations had expired. On this premise it was counsel's considered view that the election was held without any legal or procedural hindrance thereby rendering the petitioner's argument that the election should not have been held as otiose. Counsel argued further that the petitioner's argument that the election should be impugned based on this ground is legally feeble as factually there was no stay order on the date of the election and importantly such a prayer does not endear itself to the provisions of *Section 97* of the *Electoral Process Act*.

In their second limb, counsel addressed the challenge posed by the petitioner emanating from the alleged resignation of PW4 from the election. Reference was made to *Article 52 (6)* of the *Constitution*.

Counsel argued that it was important to moot the intention of the legislature behind the word resign used under *Article 52 (6)* of the *Constitution* and in so doing begun be defining the word resignation. That according to **Cambridge Advanced Learner's Dictionary, 3rd Edition, page 1212** resignation means:

"to give up a job or position by telling your employer that you are leaving."

Similarly the **Oxford Advanced Learner's Dictionary**, page 998 defines resignation as:

"to give up one's position."

While **Black's Law Dictionary**, 9th Edition, page 1424 resignation is defined as:

"The act or an instance of surrendering or relinquishing an office, right or claim."

It was counsel's argument that the legislature related the word resignation to the resignation of a candidate sponsored by a political party from that party once he had filed in a nomination on the ticket of that party. Counsel opined that the legislature thought not to disadvantage such a party and in so doing provided that fresh nominations would then be called. It was counsel's considered view which they argued with force, that the legislature did not refer to resignation from an election as an election is not a permanent position to which a candidate is entitled and to construe the definition in any other manner would defy the purposeful and literal interpretation of *Article 52 (6) of the Constitution*.

Counsel argued further that as such the purported "resignation" of an independent candidate, in this case PW4, could and should not have necessitated a call for fresh nominations. That at any rate as contended by the 2nd and 3rd respondents, the issue of resignation of PW4 is before another court, but that should this court be inclined to consider this issue, their views should be convincing to dislodge the petitioner's argument. In the alternative, there is evidence on record that PW4 rescinded his "resignation" and did actually participate in the election and as such this ground is otiose.

For the foregoing reasons counsel submitted that the whole petition lacks legal basis for nullification of the 1st respondent's election and prayed that the same be dismissed with costs.

12.0 The 2nd respondent's submissions

Counsel argued that under the current electoral regime, a parliamentary election can only be voided or nullified when the three grounds set out in *Section 97 (2) of the Electoral Process Act* have been proved with convincing clarity. It was counsel's considered view that the petitioner has failed to meet the statutory prerequisite for nullification of an election as no cogent evidence was laid before this Court to warrant the nullification of the election held on the 21st October, 2022. The court was referred to the holding in the case of **Peter Chazya Sinkamba, Issac Mwanza Vs Electoral Commission of Zambia** where the Constitutional Court declined to declare that the elections held under the nominations of 25th August, 2022 would be illegal and void.

With regard to the standard of proof required in election petitions, counsel submitted that the same is higher than "on a balance of probabilities". For this position the court was referred to the cases of **Lewanika vs Chiluba, Saul Zulu Vs Victoria Kalima,**²² **Anderson Kambela Mazoka and others Vs Levy Patrick Mwanawasa and others,**²³ and **Abuid Kawangu Vs Elijah Muchima**. The court was also referred to the **Josephat Mlewa Vs Wightman** case for the argument that the Constitutional Court has departed from the position taken in the said **Josephat Mlewa** case and the position now is that the wrong doer has to be specifically identified and the respondent can only be held liable of the wrong complained of, if they were done by him or through his appointed agent. Additionally, it must also be demonstrated that the act complained of must be widespread or affect the majority of the voters. To buttress these arguments the court was referred to the cases of **Kufuka Kufuka Vs Mundia Ndalamei**²⁴, **Nkandu Luo Vs Doreen Sefuke Mwamba and Attorney General,**²⁵ **Austin Liato Vs Sitwala Sitwala**²⁶, **Richwell Siamunene Vs Sialubalo Gift**²⁷ and

Akashamatwa Mbikusita Lewanika and others Vs Fredrick Jacob Titus Chiluba.

Counsel was of the firm view that the petitioner has not proved that the respondents personally, or through their appointed election or polling agents committed a corrupt practice or illegal practice or other misconduct in connection with the election and that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing their preferred candidate. It was also counsel's submission that no evidence of convincing clarity was offered showing that an illegal practice or an act of misconduct affected the majority from electing their preferred candidate so as to nullify the election.

In relation to the court process, counsel argued that the jurisdiction of hearing challenges relating to nominations under *Article 52 (4)* of the *Constitution* lies with the High Court as was held in the case of **Munir Zulu Vs Gertrude Pilila Mwanza**²⁸. Counsel argued further that the said *Article 52* of the *Constitution* provides for the manner and fashion for challenging the decision of the returning officer at the nomination stage and that the petitioner in *casu* has already challenged the nomination under cause number 2022/HP/1327. On this basis counsel urged this Court to dismiss this action for failure to follow the laid down procedures for redress relating to nominations as stipulated under *Article 52* of the *Constitution*.

With regard to the alleged prevention of the petitioner from participating in the Kwacha by-election held on 21st October, 2022, counsel contended that the evidence on record shows that the petitioner filed his nomination on 25th August, 2022 before the returning officer Mr Elias Mwalala (PW5) who rejected the said nomination and gave a reason for the rejection. Counsel opined that it was incorrect for the petitioner to allege that he was prevented from participating in the Kwacha constituency by-election held on 21st October, 2022, when the evidence shows that the nomination was rejected. Reference was made to *Regulation 18 (7)* of the *Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016* which prescribes the mode of challenging the decision of the returning officer as it states:

"The determination of the returning officer that a nomination is valid or invalid is final unless challenged through an election petition in accordance with Article 52 (4) of the Constitution."

It was counsel's considered view that rejecting a nomination is not the same as preventing the petitioner from participating in the election as this is evidenced through the action that the petitioner took to challenge his rejected nomination in the High Court under cause number 2022/HP/1327. That the **Josephat Mlewa, Jere Vs Ngoma** and **Liambo Vs Mututwa** cases, which allegedly dealt with a candidate being prevented from participating in an election, can be differentiated from the case in *casu*. Counsel emphasized that the cases cited above showed that a candidate for election to parliament was prevented by the misconduct of other persons, from lodging his nomination papers with the returning officer. It was counsel's contention that in *casu* the petitioner filed his nomination paper before the returning office and was not prevented by anyone from doing so. That the petitioner's nomination papers were processed and rejected in accordance with the law as such the petitioner cannot claim to have been prevented as the law provides for a redress mechanism for someone dissatisfied with the returning officer's decision.

Concluding on this point, counsel contended that the cases referred to by the petitioner of invalidating an election due to nominations were determined before the coming into effect of *Article 52 (4) of the Constitution of Zambia, Section 97 (2) of the Electoral Process Act No. 35 of 2016 and Regulation 18 (7) of the Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016*. Counsel submitted that the said cases cited do not help the petitioner as he was not prevented from lodging his nomination papers and the said cases have since been overtaken by the repeal and amendments that have happened to the various electoral laws.

Addressing the last point on the alleged resignation of candidates, counsel argued that the Constitutional Court has already pronounced itself on the issues relating to the alleged resignation of candidates in the case of **Peter**

Chazya Sinkamba, Issac Mwanza Vs Electoral Commission of Zambia.

This Court was asked to take judicial notice of the court cases still pending hearing and determination before the Constitutional Court relating to the resignation and cancellation of elections under *Article 52 (6)* of the *Constitution* as follows:

(i) Governance Elections Advocacy Research Services Initiative Zambia Limited Vs The Attorney General and The Electoral Commission of Zambia 2022/CCZ/0020

(ii) Institute of Law, Policy Research and Human Rights, Peter Chazya Sinkamba and Isaac Mwanza Vs Electoral Commission of Zambia and The Attorney General 2022/CCZ/0029; and

(iii) Nickson Chilangwa Vs The Attorney General and The Electoral Commission of Zambia 2022/CCZ/0026

Counsel submitted that the petitioner has failed to prove the allegations to the acceptable standard of proof in election petitions as required by law and authorities cited and further that the 2nd respondent duly conducted the elections in substantial conformity with the law. On this basis counsel prayed that the petition be dismissed for lack of merit with costs to the 2nd respondent.

13.0 The 3rd Respondent's submissions

Counsel commenced their arguments by stating that the issues raised in this petition have already been litigated and resolved in cause no. 2022/CCZ/0023 and cause no. 2022/CCZ/0024 by the Constitutional Court. It was also counsel's considered view that the petitioner's petition is an appeal disguised as a petition and must be dismissed.

In referring to the trial of the matter, counsel contended that the petitioner must be bound by his pleadings and that during the course of the trial when the respondents vehemently objected to all matters not pleaded, this Court made several Rulings with regard to the petitioner restricting himself to

what had been pleaded in the petition. For this argument the court was referred to the cases of **William David Carlisle Wise Vs E.F Hervey Limited²⁹**, **Christopher Lubasi Mundia Vs Sentor Motors Limited³⁰** and **Bidvest Food Zambia Limited & 4 others Vs CAA Import and Export³¹**. On this basis counsel submitted that to the extent that the petition herein is at variance with the evidence adduced in Court, the petitioner's case must fail.

With reference to the petition itself, counsel argued that the election of a Member of Parliament can be challenged based on the provisions of *Section 97 of the Electoral Process Act No. 35 of 2016* and that in this particular case the petitioner relied on *Section 97 (2) (b)* and *Section 97 (4)* of the *Electoral Process Act No. 35 of 2016* and non-compliance with the *Constitution* and a Court Order. Counsel submitted that to the contrary, the elections were compliant with the *Constitution* and no Court Order was in effect at the time of the elections and as a testament to this, PW6 in closing his testimony in re-examination stated that the elections were legal.

Counsel argued that the petitioner alleged that the 21st October, 2022, Kabushi by-elections were illegal and void on the basis that:

- (i) PW5 the Returning Officer refused to accept the petitioner's nomination despite him having complied with all the requirements to contest for Kabushi by-elections;
- (ii) The 2nd respondent failed to call for fresh nominations despite there being a resignation or withdrawal by one of the candidates for the Kabushi parliamentary by-elections;
- (iii) The conducting of the Kabushi by-elections by the 2nd respondent, despite a stay of the said by-election by the court under cause number 2022/HP/1327; and
- (iv) Non-compliance by the election officer with the *Electoral Process Act No. 36 of 2016*.

It was counsel's argument that the rejection of the petitioner's nomination by the 2nd respondent through their agent, PW5 premised on *Article 72 (4)* of

the *Constitution* was not in dispute. Counsel submitted that there was nothing illegal in this rejection of the petitioner's nomination as the 2nd respondent's agent is authorised to either accept or reject a nomination of a candidate. For this argument reference was made to *Article 52 (2)* of the *Constitution of Zambia Act No. 2 of 2016*. Additionally, that the case relied on by the petitioner of **Joseph Malanji and Bowman Lusambo Vs Attorney General** where the Court held that the category of persons that cannot contest an election do not include those members whose seats fell vacant by virtue of nullification, was delivered after the petitioner's nomination was rejected. On this basis it was counsel's considered view that as there was no court pronouncement on the effect of a nullification of a parliamentary seat on the qualification of a candidate, the press statement barring candidates whose seats were nullified cannot be termed to be illegal or prevention as alleged by the petitioner.

Reference was made to the evidence of PW5 who testified that the 2nd respondent is mandated by law to take its position as it deems fit and that in so doing it does not need to seek an interpretation from the Constitutional Court at every stage, or else the 2nd respondent would not function. That further evidence was led to the effect that the 2nd respondent is not infallible and a person aggrieved by the decision of the 2nd respondent can challenge the decision which the petitioner did under the case of **Joseph Malanji and Bowman Lusambo Vs Electoral Commission of Zambia 2022/HP/1327** as testified to by PW1, PW5 and PW6.

Counsel reiterated that the issues surrounding the rejection of nominations were already litigated and that any submissions touching on the nominations and rejection are therefore statute barred as they ought to have been brought within 7 days. For this argument the Court was referred to *Article 52 (4)* of the *Constitution* which states as follows:

"(4) A person may challenge, before a court or tribunal, as prescribed, the nomination of a candidate within seven days of the close of nomination and the court shall hear the case within twenty one days of its lodgement."

It was counsel's considered view that the petitioner's arguments relating to the case of the **Law Association of Zambia Vs Attorney General** cannot be determined by the High Court as the issues therein involve the interpretation of *Article 52 (4)* as it relates to *Article 70* of the *Constitution of Zambia* which issues are already before the Constitutional Court in the cases of **Nickson Chilangwa Vs Electoral Commission of Zambia and the Attorney General 2022/CCZ/0026** and **Institute of Law, Policy Research and Human Rights, Peter Chazya Sinkamba Vs Issac Mwanza 2022/CCZ/0029**.

Concluding on this point counsel contended that the petitioner was neither prevented nor rejected from participating in the 21st October, 2022 elections rather that the law took operation in line with the facts.

On the aspect of the effect of the prevention of the petitioner's nomination by the 2nd respondent counsel reiterated that the 2nd respondent was performing its constitutional functions in accordance with *Article 72 (4)* of the *Constitution* and therefore the petitioner was not prevented. Counsel made reference to the case relied on by the petitioner of **Mlewa Vs Wightman** where the court cited with approval the case of **Liambo Vs Mututwa** which buttressed the position established in the case of **Jere Vs Ngoma**. That in the **Jere Vs Ngoma** case, the court held that where a candidate was prevented from filing his nomination based on the misconduct of other people such misconduct essentially makes the elections in a particular constituency void. In distinguishing the said **Jere Vs Ngoma** case to this case, counsel argued that in *casu* there was no such misconduct further the petitioner duly filed his nomination papers which were in turn rejected by the returning officer. It was counsel's argument that for the foregoing reasons there was no basis for the elections held in Kabushi constituency on the 21st October, 2022 to be declared void. Additionally, this case was not on all fours with the **Jere Vs Ngoma** case and that in any event the electoral laws that applied in that case are not the same now as there have been changes which evidence was adduced by PW6.

In relation to the 2nd respondent conducting elections notwithstanding the stay of the election by the court under cause number 2022/HP/1327, counsel contended that there was no High Court Order, stay or suspension of elections in Kwacha and Kabushi constituencies respectively under cause number 2022/HP/1327 subsisting when the 2nd respondent proceeded to announce the date for elections. That the date for elections was announced on 11th October, 2022, whereas the High Court's jurisdiction ceased on 20th September, 2022 which position was confirmed in the case of **Bernard Kanengo Vs Attorney General & Electoral Commission of Zambia** where the Constitutional Court held that:

“And going by the Hakainde Hichilema case, once the 21 days expires the High Court is divested of jurisdiction rendering the matter before it nugatory and an academic exercise. Additionally, we cannot even employ the purposive approach to interpret Article 52 (4) to extend time for the High Court to conclude nomination proceedings before it as the time frame of 21 days is fixed by the Constitution and is stated in mandatory terms.”

The Court was also referred to the case of **Peter Sinkamba** delivered on the 17th October, 2022 where the Constitutional Court in pronouncing itself on the validity of the elections that would be based on the nominations for Kwacha Constituency that were held on 25th August, 2022, held as follows:

“We further decline to grant the declaration that nominations held by the respondent on 25th August, 2022 in the Kabushi and Kwacha constituencies are invalid and that any election held based on those nominations contravene the Constitution and are illegal and null...”

From the foregoing case it was counsel's submission that since the High Court under cause number 2022/HP/1327 did not invalidate the nominations of 25th August, 2022 within the prescribed period as per *Article 52 of the Constitution*, this Court has no jurisdiction to pronounce itself on the matter. Counsel submitted further that the act by the 2nd respondent to

cause the issuance of *Statutory Instrument No 64 of 2022*, was lawful and constitutional as there was no stay order in force by effluxion of time. That this position was confirmed by the Constitutional Court in cause number 2022/CCZ/0024 where it held that the High Court's jurisdiction and all orders therein lapsed after 21 days, that is, by the 20th September, 2022. Reference was made to PW6's testimony that an order of Court stops taking effect when overturned by a superior court as such the stay was technically overturned by the Constitutional Court.

In relation to the petitioner's argument over the effect of the stay on the purported 21st October, 2022 Kabushi by-elections, counsel contended that the stay of the High Court under cause number 2022/HP/1327 was of no legal effect the moment the 21 days within which the High Court needed to hear the petition lapsed. To buttress this argument the Court was referred to the case of **Bernard Kanengo Vs Attorney General & Electoral Commission of Zambia**. It was counsel's considered view that to argue that the stay was in effect after the 21 days in *Article 52 (4)* of the *Constitution* would be tantamount to enlarging the time given by the *Constitution* which was not tenable. That the stay granted by the High Court was in effect vacated and that is why PW6 testified that all logs that hindered the holding of the by-elections of 21st October, 2022 were removed.

Counsel also argued that the claims sought by the petitioner are an abuse of court process as the matters being sought for in the petition have already been litigated on while others are still before the Constitutional Court. This Court was urged to protect the reputation of the judiciary, by dismissing this petition and avoiding conflicting decisions more so with an apex Court. To fortify this argument the Court was referred to *Order 19 Rule 9* of the *Rules of the Supreme Court, (White Book)*, as well as the cases of **Bampi Aubrey Kapalasa and Joseph Busenga Vs The Attorney General**³², **BP Zambia Plc Vs Interland and Motors Ltd**³³, **Mukumbuta Mukumbuta Sam Mukamamba Kweleka Mubita Mooto Mooto and Another Vs Nkwilimba Choobana Lubinda Richard, Mbikusita Munyinda, Rosalyn Mukelabai and Another**³⁴, **Hakainde Hichilema Vs The Attorney General**³⁵.

In furtherance of this argument counsel outlined the reliefs claimed in the cases before the Constitutional Court the first one being the case of **Governance Elections Advocacy Research Services Initiative Zambia Limited Vs The Attorney General and The Electoral Commission of Zambia 2022/CCZ/0020** which are as follows:

“(i) whether Article 52 (6) of the Constitution of Zambia is applicable where an independent candidate in a Parliamentary election withdraws his/her candidature after the close of nominations and before the election date; and

(ii) whether, under Article 52 (6) of the Constitution and Section 31 (2) of the Electoral Process Act No. 35 of 2016, the Electoral Commission of Zambia is obligated to cancel the election and call for fresh nominations where an independent candidate withdraws from the nominations but before the election date.

Counsel stated that this case of **Governance Elections Advocacy Research Services Initiative Zambia Limited** is pending judgment. The Court was also referred to the case of **Institute of Law, Policy Research and Human Rights, Peter Sinkamba Vs Issac Mwanza 2022/CCZ/0029** where the reliefs claimed are:

“(i) An interpretation of Article 52 (6) of the Constitution to the effect that where an election candidate resigns, he/she cannot rescind their resignation and the purported rescission of such resignation had effect on the operation of the said Article 52 (6).

(ii) A declaration that Statutory Instrument No. 64 of 2022 issued by the respondent during the time the High Court Order was in force under Cause number 2022/HP/1327 was illegal and void.

(iii) A declaration that whenever a candidate resigns after close of nominations and before the date of an election, the

respondent is bound and has no option other than cancelling an election and conducting fresh nominations.

(iv) A declaration that the respondent was obliged to cancel and conduct fresh nominations in Kabushi and Kwacha Constituencies when the High Court proceedings had elapsed or declared by the Constitutional Court to have had lapsed by effluxion of time on 20th October, 2022.

(v) A declaration and order that the participation of candidates who resigned in Kabushi and Kwacha parliamentary elections conducted by the respondent on 21st October, 2022 rendered the election unconstitutional, illegal, null and void.

(vi) An order compelling the respondent to conduct fresh nominations in Kabushi and Kwacha Constituencies and hold elections within 30 days from the date of fresh nominations.

(vii) Any other relief the Court may deem fit.

The final matter the Court was referred to is the case of **Nickson Chilangwa Vs Electoral Commission of Zambia and the Attorney General, 2022/CCZ/0026** where the Constitutional Court was asked to interpret the following questions:

“(i) whether under Article 52 (6) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 after the withdrawal of two independent candidates from Kabushi and Kwacha Parliamentary by-elections, the Electoral Commission of Zambia has a discretion to conduct fresh nominations or not;

(ii) whether a candidate that withdraws from an election can rescind his decision and be allowed to contest the said election without any fresh nominations;

(iii) whether in view of the decision of the Court under cause number 2022/CCZ/18 in which this Court held that nullification is not a disqualification, Hon. Joseph Malanji and

Hon. Bowman Lusambo should be allowed to contest the Kwacha and Kabushi Parliamentary by-elections announced by the Electoral Commission of Zambia respectively;

(vi) whether under Article 52 (4) of the Constitution of Zambia (Amendment) Act No. 2 of 2016, the Electoral Commission of Zambia can proceed with the Kwacha and Kabushi Parliamentary by-elections before the final determination of the challenge of the nominations conducted by them by virtue of a stay of court proceedings under 2022/HP/1327 and the pending appeal in the Court of Appeal which stayed proceedings;

(v) what is the meaning of resigning from an election and whether an independent candidate who withdraws from the election can trigger the holding of fresh nominations;

(vi) whether there can be an interlocutory appeal in proceedings relating to Article 52 of the Constitution of Zambia and whether such an appeal lies to the Court of Appeal;

(vii) whether the time frames provided for in the Constitution can stop running, be stayed or be extended by the Court.

In referring to the said three cases before the Constitutional Court, counsel was of the considered view that the petition before this Court must be dismissed to avert issuance of conflicting decisions with the Constitutional Court as it is clear that the issues in *casu* are before the said Constitutional Court.

With regard to the petitioner's argument on the failure by the 2nd respondent to call for fresh nominations in light of a resignation or withdrawal of a candidate from the Kabushi by-elections contrary to *Article 52 (6)* of the *Constitution* which mandates the 2nd respondent to cancel the elections and require the filing of fresh nominations, it was counsel's argument that the petitioner's contention suggests that this Court interpret the *Constitution* which is beyond this Court's jurisdiction. For this argument the Court was

referred to the case of **Hakinde Hichilema Vs The Attorney General**. Counsel argued further that in any event the issues surrounding *Article 52 (6)* of the *Constitution* are already before the Constitutional Court which has the jurisdiction to interpret the *Constitution* given the factual basis surrounding the case as was guided in the case of **Isaac Mwanza Vs Attorney General**.

It was counsel's firm view that the question as to whether the failure by the 2nd respondent to cancel the Kabushi constituency by-election and to call for fresh nominations despite there being a resignation or withdrawal by one of the candidates for the Kabushi constituency, was already settled by the Constitutional Court in the **Peter Sinkamba** case. This was because the Constitutional Court held that the 2nd respondent did not breach its constitutional mandate by not cancelling the by-elections in Kabushi set for 15th September, 2022 and calling for fresh nominations so as to hold the elections within 30 days as; firstly the 2nd respondent was bound to obey the High Court Order which stayed the holding of elections on 15th September, 2022 and; secondly *Article 52 (6)* of the *Constitution* does not give a time frame within which the dictates of the said *Article 52 (6)* should be implemented by the 2nd respondent.

By way of conclusion of their submissions, counsel contended that the petitioner's argument of the non-compliance with the *Electoral Process Act* by the 2nd respondent and its effect on the voter turn-out were not pleaded and these objections were raised during the tendering of evidence by PW3 which objections were sustained by this Court in its Rulings on record. It was counsel's considered view that if the petitioner was not happy about the Rulings of this Court he should have appealed as opposed to disregarding the same and bringing the un-pleaded issues in the submissions. Counsel urged this Court to expunge the arguments under this final limb.

Counsel submitted that the petitioner was not entitled to any of the reliefs sought and that this Court should dismiss the petition for the following reasons:

- a. The claims herein are an abuse of court process as they have been determined or are yet to be determined by the Constitutional Court;
- b. The refusal or prevention by the Returning Officer (Mr Elias Mwalaba) PW5 to accept the petitioner's nomination, despite having complied with all the requirements to contest for the Kabushi by-elections was neither illegal nor made the election void;
- c. The failure by the 2nd respondent to call for fresh nominations despite there being a resignation or withdrawal by one of the candidates for the Kabushi Parliamentary by-elections was neither illegal nor made the election void;
- d. The conduct of the Kabushi by-elections by the 2nd respondent was legal as there was no subsisting stay or suspension of the said by-election by a Court of competent jurisdiction under cause number 2022/HP/1327; and
- e. There was compliance by the election officer with the *Electoral Process Act No. 36 of 2016*.

14.0 The petitioner's submissions in reply

In their submissions in reply, Counsel more or less repeated their arguments in their initial submissions save for the following hereunder produced.

Counsel argued that a petition, an appeal and pleadings are three totally different instruments at law, each performing different functions driven towards different goals. For the difference between a petition and pleadings reference was made to the case of **Matilda Mutale Vs Emmanuel Munaile**³⁶ where the court held as follows:

"at this preliminary stage we wish to agree with the findings of the learned trial judge that a petition is not a pleading. The finding is well supported by authorities in particular Order 18 of the RSC 1999 adequately deals with the issue of pleadings. In the explanatory notes in which Order 18/0/2 of the RSC is covered, the learned authors state that the term 'pleading' does not include a petition."

Counsel was of the considered view that as it was noted in the aforementioned case that a petition is not a pleading, it would be a misapprehension of the law to strictly apply the rules of pleadings to petitions. That a petition is a mode of commencement available to litigants where provided by statute as such in the pursuit of justice, a petitioner may bring forth whatsoever issue without restriction, and the gates of justice should not be hindered by rules of pleadings. Counsel argued further that this petition had been brought pursuant to *Section 97 (2) of the Electoral Process Act No. 35 of 2016* which petition is an originating process and cannot be said to be an appeal in disguise. That the petitioner was well within his rights to bring this petition under *Section 97 (2) (b) of the Electoral Process Act* and therefore this petition must have its day in court.

On the abuse of court process, it was counsel's argument that appearing before numerous tribunals in itself is not necessarily multiplicity of actions and hence an abuse of process. That multiplicity of action as defined in the case of **Hamalambo Vs Zambia National Building Society**³⁷ refers to a commencement of more than one action on the same facts or transaction, that is, piece meal litigation which is split and instituted in chapters. Counsel argued further that the case of **Finance Bank Vs Monokandilos**³⁸ affirmed that the idea of commencing matters dealing with the same subject matter was not only a multiplicity of actions but an abuse of court process.

Furthering the argument on abuse of court process, counsel contended that there are no pending issues relating to the same reliefs under this matter additionally that what was sought in case number 2022/HP/1327 is different from the case in *casu* and it cannot be said to be an abuse of court process. Counsel contended further that an abuse of court process not only entails a multiplicity of actions over the same subject matter but that it must be between the same parties. To fortify this argument the court was referred to the cases of **BP Zambia PLC Vs Interland Motors Ltd, Development Bank of Zambia and KPMG Peat Marwick Vs Sunvest Limited and Sun Pharmaceuticals Limited**³⁹ and **African Banking Corporation T/A Bank ABC Vs Datong Construction and 3 Others**⁴⁰. On

this score counsel argued that the 3rd respondent's reference to the cases under cause numbers 2022/CCZ/0020, 2022/CCZ/0026 and 2022/CCZ/0029 in an attempt to show a trend of the same subject matter and parties could not stand as the petitioner is not a party in any of these matters and none of these cases are on the subject matter before this court.

It was counsel's submission that the reliefs by the petitioner be granted with costs.

Those were the submissions by the parties to which I am indebted to all counsel and have carefully considered.

15.0 Decision of the court

The cardinal question in this petition is whether the issues brought by the petitioner in his petition fall within the confines of *Section 97 (2) (b)* of the *Electoral Process Act No. 35 of 2016* which is the provision relied on by the petitioner as it relates to the conduct of the 2nd respondent and sets out the guidelines on which an election can be nullified. The Constitutional Court in the case of **Dean Musale Vs Romeo Kangombe**⁴¹ guided that *Section 97 (2) (b)* of the *Electoral Process Act*, concerns non-compliance to the provisions of the *Act* by the Electoral Commission of Zambia, the 2nd respondent herein, which is the body charged with the conduct of elections. *Section 97 (2) (b)* of the *Electoral Process Act* provides as follows:

"(2) (b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election".

The petitioner has also placed reliance on *Section 97 subsection (4)* of the *Electoral Process Act* as read together with *Sections 83 (2)* and *99 (a)* of the *Electoral Process Act*. *Section 97 subsection (4)* provides that:

“(4) An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer’s official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.”

Section 83 (2) of the *Electoral Process Act* provides that:

“Subject to the provisions of this Act, a person shall not prevent another person from exercising a right conferred by this Act.”

While Section 99 (a) of the *Electoral Process Act* provides that:

“99 Any of the following reliefs may be claimed in an election petition:

(a) A declaration that the election was void.”

The petition alleges that the 2nd respondent contravened the law as follows:

- i. There was non-compliance by the 2nd respondent with the provisions of the *Electoral Process Act* which prohibit any person from preventing the petitioner from exercising his right to contest as a candidate as conferred by the *Act* to eligible candidates.
- ii. The non-compliance by the 2nd respondent to the stay by the High Court renders the action by *statutory instrument* issued on the 12th October, 2022, and the election conducted illegal, null and void.
- iii. The non-compliance by the 2nd respondent to the electoral timelines provided under *Article 52 (4)* affected the conduct and result of the election.
- iv. The Returning Officer of the 2nd respondent violated *Article 70 (1)* of the *Constitution of Zambia* by rejecting and declaring that

the petitioner's nominations as unsuccessful because his election was nullified for the Kabushi Constituency by the Constitutional Court despite the petitioner having met the specified qualifications and procedural requirements.

- v. Failure by the 2nd respondent to call for fresh nominations following the withdraw by a candidate from the polls which communication was made to the Chief Electoral Officer in the employ of the 2nd respondent.
- vi. The 2nd respondent's agent, the returning officer for elections disallowed the petitioner's nomination, which act prevented the petitioner from exercising his right to participate in the elections, which right was subsisting at the time.

Contraventions alleged under paragraphs (i), (iv) and (vi)

The contraventions alleged under paragraphs (i), (iv) and (vi) speak to the non-compliance of the 2nd respondent with the provisions of the *Electoral Process Act* and the *Constitution* when it refused to accept the petitioner's nomination as a candidate for the Kabushi by-election. The petitioner in his testimony alleged that the non-compliance with the *Electoral Process Act* affected the voter turnout in the 21st October, 2022 by-elections in that the said elections were shunned by the people of the Kabushi Constituency.

Counsel for the petitioner argued that it is not in dispute that the petitioner's nomination for candidacy for the Kabushi by-election was rejected by the 2nd respondent, through its returning officer, on the basis that he was not eligible to contest the said election as per the provisions of *Article 72 (4)* of the *Constitution* which provides:

"A person who causes a vacancy in the National Assembly due to the reasons specified under clause (2) (a), (b), (c), (d), (g) and (h) shall not, during the term of that Parliament—

(a) be eligible to contest an election; or

(b) hold public office"

Clause (2), subject to which Clause (4) is made provides as follows:

“The office of a Member of Parliament becomes vacant if the member—

- (a) resigns by notice, in writing, to the Speaker;*
- (b) becomes disqualified for election in accordance with Article 70;*
- (c) acts contrary to a prescribed code of conduct;*
- (d) resigns from the political party which sponsored the member for election to the National Assembly;*
- (e) is expelled from the political party which sponsored the member for election to the National Assembly;*
- (f) ceases to be a citizen;*
- (g) having been elected to the National Assembly, as an independent candidate, joins a political party;*
- (h) is disqualified as a result of a decision of the Constitutional Court; or*
- (i) dies.”*

Counsel for the petitioner argued that the petitioner does not fall under any of the instances specified in the above provisions. It was counsel’s argument that the Constitutional Court in the cases of **Law Association of Zambia Vs Attorney General** and **Joseph Malanji and Bowman Chilocha Lusambo Vs Attorney General** held that a nullification of an election does not amount to disqualification to contest the seat. On this basis counsel contended that the 2nd respondent maliciously prevented the petitioner from filing his nomination on a provision that does not apply to him. Counsel fortified this argument by making reference to the testimonies of PW1, PW2 and PW5 who testified that a day before the nomination for the Kabushi by-election, the 2nd respondent issued a statement that it would not accept nominations from candidates whose seats were nullified. It was also counsel’s firm view that the 2nd respondent was obliged to follow the Constitutional Court’s interpretation of *Article 72 (4)* of the *Constitution* more so that the decision in the **Law Association of Zambia Vs The Attorney General** case was delivered on the 22nd March, 2022.

Contrary to the petitioner's view, counsel for the 1st respondent argued that the extrapolation of the rejection of the nomination under *Article 72 (4)* of the *Constitution* to be a breach under the *Electoral Process Act* by the petitioner is fundamentally wrong and erroneous. This is because *Section 97 (2) (b)* and *(4)* of the *Electoral Process Act* make reference to non-conformity with the provisions of the *Electoral Process Act* and not any other law or Act.

Counsel for the 2nd respondent argued that rejecting a nomination is not the same as preventing the petitioner from participating in the election as this is evidenced through the action that the petitioner took to challenge his rejected nomination in the High Court under cause number 2022/HP/1327. It was counsel's considered view that the petitioner's nomination papers were processed and rejected in accordance with the law as such the petitioner cannot claim to have been prevented as the law provides for a redress mechanism for someone dissatisfied with the returning officer's decision under *Regulation 18 (7)* of the *Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016*.

Similarly, counsel for the 3rd respondent argued that there was nothing illegal in the rejection of the petitioner's nomination as the 2nd respondent's agent is authorised to either accept or reject a nomination of a candidate as provided under *Article 52 (2)* of the *Constitution*.

In terms of the evidence at trial, PW5 testified that his role together with his team of assistant returning officers in the by-election, was to receive nominations from various aspiring candidates. During the nomination period they received various nomination papers from the candidates who were aspiring to stand and there was an aspiring candidate from P.F who came to file in his nomination. Upon checking their documents, they saw that according to *Article 74 (2)* the P.F aspiring was not eligible to stand.

From the foregoing arguments and evidence, it is not in dispute that *Article 52 (2)* of the *Constitution* mandates the returning officer immediately on the filing of a nomination paper to duly reject the said nomination paper, if the candidate does not meet the qualifications of procedural requirements specified for election to that office. The petitioner's arguments reveal an

attempt to draw this court into making an assessment on the merits or demerits of the rejection of the petitioner's nomination done by the 2nd respondent's agent. In other words this court is being asked to determine the validity of the 2nd respondent's decision to reject the nomination. This court has no jurisdiction to determine such a challenge at this point in time post elections as this challenge by *Article 52 (2)* of the *Constitution* can only be determined by the High Court within 7 days of the close of the nominations.

The question that begs an answer then is whether *Article 72 (4)* of the *Constitution* can be relied on by the petitioner to have the election nullified? *Section 97 subsections 2 and 4* of the *Electoral Process Act* require that in order to have an election nullified one must prove that there was non-compliance with the provisions of the *Electoral Process Act* relating to the conduct of the election and that the said non-compliance affected the result of the election. The said provisions state as follows:

"97 (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election;"

"(4) An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election."

(Underlining mine for emphasis)

The key element in these provisions is that the non-compliance to be proved must be in relation to the *Electoral Process Act* and not any other law. As such I agree with counsel for the 1st respondent's argument that the extrapolation of the rejection of the nomination under *Article 72 (4)* of the *Constitution* to be a breach under the *Electoral Process Act* by the petitioner is fundamentally wrong and erroneous. It follows therefore that the petitioner's allegation under contravention (iv) that the 2nd respondent violated *Article 70 (1)* of the *Constitution of Zambia* by rejecting and declaring the petitioner's nomination as unsuccessful is equally fundamentally wrong. Further, as rightly argued by counsel for the 1st respondent the petitioner's recourse in challenging the declaration of the invalidity of the nomination was the commencement of nomination proceedings under *Article 52 (4)* of the *Constitution* which provides:

"A person may challenge, before a court or tribunal, as prescribed, the nomination of a candidate within seven days of the close of nomination and the court shall hear the case within twenty one day of its lodgement."

In line with the foregoing provision, respective counsel for the 1st, 2nd and 3rd respondents have all pointed out that the petitioner did commence an action to challenge the validity of his nomination under cause number 2022/HP/1327 within the requisite period as prescribed. The challenge however, was not definitively determined as the 21 days lapsed before the judgment could be delivered which position was relayed by the Constitutional Court in the case of **Bernard Kanengo Vs The Attorney General and the Electoral Commission of Zambia**.

Consequently, *Article 72 (4)* of the *Constitution* cannot be the basis upon which the election of the 1st respondent can nullified.

Counsel for the petitioner also referred to the action of the 2nd respondent in preventing or rejecting the petitioner's nomination as misconduct the effect of which the election of the 1st respondent must be declared void. Counsel

cited the case of **Jere Vs Ngoma** which case was upheld in the cases of **Liambo Vs Mututwa** and **Mlewa Vs Wightman**.

It must be stated that the facts in the case of **Jere Vs Ngoma** which the petitioner sought to rely on are substantially different from the facts herein, which fact is well acknowledged by the petitioner in his submissions. In that case, the petitioner was prevented from filing his nominations by the supporters of the opposing candidate. In the petition before this court however the petitioner was not actually prevented from filing his nomination but rather that he did and the same was rejected by the presiding officer as per the powers vested in him under *Article 52 (2) of the Constitution*. Suffice to also state that the **Jere Vs Ngoma** case was decided prior to the enactment of the *Electoral Process Act No. 35 of 2016*, which law now provides for guidance on how an election may be rendered void or nullified.

Consequently, I agree with the submissions advanced by respective counsel for the 1st, 2nd and 3rd respondents that the action of the 2nd respondent through PW5 in rejecting the nomination in and of itself did not amount to misconduct.

That being said, a perusal of this petition and the evidence adduced before this Court reveals that the petitioner failed to adduce any evidence of non-compliance by the 2nd respondent with the provisions of the *Electoral Process Act* itself. Subsequently there is nothing to warrant the nullification of the 21st October, 2022 by-elections on the basis of non-compliance with the provisions of the said *Electoral Process Act*.

Turning to the aspect of the non-compliance with the *Electoral Process Act* affecting the result of the elections, counsel for the petitioner argued that the non-compliance with the *Electoral Process Act* and its effect on the voter turnout was that the people of Kabushi shunned the 21st October, 2022 by-elections because they were illegal. Counsel for the petitioner argued further that due to the failure by the 2nd respondent to comply with the guidelines outlined in *Section 4 of the Electoral Process Act*; that is to ensure that the elections are free and fair; promote the democratic process of elections; and ensuring that a conducive environment for free and fair elections exists, the

majority of the registered voters failed to vote for their preferred candidate as testified by PW1 and PW3.

Counsel for the 1st respondent contended that the petitioner did not plead or tender evidence to show how the results of the election were affected at all by the commission or omission of the 2nd respondent's officials. While counsel for the 2nd respondent argued that there is no evidence of convincing clarity that was offered to show that there was an illegal practice or an act of misconduct that affected the majority from electing their preferred candidate so as to nullify the election. For their part counsel for the 3rd respondent contended that the petitioner's arguments on the non-compliance with the *Electoral Process Act* and its effect on the voter turnout were not pleaded and these objections were raised during the tendering of evidence by PW3 which objections were stayed by the Court in its Rulings on record.

In opposing the arguments of the respondents on this point, counsel for the petitioner argued that it was a misapprehension of the law to strictly apply the rules of pleadings to petitions. This is because a petition is a mode of commencement available to litigants provided by statute and in the pursuit of justice, a petitioner may bring forth whatsoever issue without restriction.

It is trite that a party can only adduce evidence which is based on the case pleaded and cannot, therefore adduce evidence which is inconsistent with the pleadings. It is also settled law that a petition is not a pleading as was held in the case of **Matilda Mutale Vs Emmanuel Munaile** cited by the petitioner in which case the Supreme Court made reference to *Order 18* of the *Rules of the Supreme Court* which categorically states that a petition is not a pleading. Notwithstanding this position, the Supreme Court has also guided in the case of **Anderson Kambela Mazoka and others Vs Levy Patrick Mwanawasa and Others**⁴² as follows:

"In case where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the

issue will depend on the weight the Court will attach to the evidence of unpleaded issues."

From the foregoing authority it is apparent that where evidence is presented at trial which was not included in the petition the Court is not precluded from considering the same. Where, however, an objection is raised by the other side then the converse will apply. As pointed out by the 3rd respondent, numerous objections were raised by the respective counsel for the respondents in relation to the attempts by counsel for the petitioner to lead evidence on the aspect of the non-compliance of the *Electoral Process Act* affecting the voter turnout as the people of Kabushi shunned the 21st October, 2022 by-elections because they were illegal which in turn affected the results of the election. This Court upheld the said objections but on the authority of the **Anderson Kambela Mazoka** case I will now proceed to consider the evidence that touched on the number of people that voted as it graced the record and was not objected to.

At the trial only PW1 and PW5 testified as to the approximated numbers of registered voters in Kabushi constituency and those that actually voted. PW5's testimony was that the constituency had approximately 46,000 registered voters out of which 11,466 voters actually voted in the by-election. While the margin between these figures is large, the petitioner did not establish at trial that the low voter turnout is attributed to the 2nd respondent's non-compliance with the law on two fronts; firstly the petitioner was due to the objections raised only able to call two witnesses being PW2 and PW3 who testified that they did not vote because their preferred candidate was not on the ballot; and secondly as already alluded to above the petitioner did not prove to this Court that the 2nd respondent failed to comply with the *Electoral Process Act*.

It is trite that the standard of proof in elections is higher than on a balance of probabilities and must be established to a fairly high degree of convincing clarity as was held in the case of **Akashambatwa Mbikusita Lewanika and others Vs Fredrick Jacob Titus Chiluba**. On this basis I find that the petitioner did not establish to a fairly high degree of convincing clarity that

there was non-compliance of the *Electoral Process Act* by the 2nd respondent which in turn affected the elections held on the 21st October, 2022.

Contraventions alleged under paragraphs (ii) and (iii)

The petitioner in his petition under paragraph (ii) also alleges that the 2nd respondent's failure to comply with the stay of the High Court renders the action by *Statutory Instrument* issued on the 12th October, 2022 and the election conducted on the 21st October, 2022, illegal, null and void. Counsel for the petitioner argued that the stay that was issued by the court in cause number 2022/HP/1327 was never vacated and as such the holding of the by-election in the face of the stay was illegal. Counsel for the 3rd respondent argued that there was no High Court Order for a stay of suspension of elections in the Kabushi constituency under cause number 2022/HP/1327 subsisting when the 2nd respondent proceeded to announce the date for elections. This is because the date for elections was announced on 11th October, 2022 whereas the High Court's jurisdiction ceased on the 20th September, 2022 which position was confirmed in the case of **Bernard Kanengo Vs Attorney General & Electoral Commission of Zambia**.

In assessing this argument, it goes without saying that the nomination proceedings commenced under cause no. 2022/HP/1327 were by law required to be heard and concluded by the High Court within 21 days of lodgement as per *Article 52 (4)* of the *Constitution*. During the course of those proceedings a stay on the by-elections was issued pending determination of the main challenge before the Court within 21 days. However, before the said matter could be concluded, the Court of Appeal stayed the proceedings in the High Court pending an appeal by the 2nd respondent to that Court against a ruling rendered by the High Court under cause no. 2022/HP/1327, consequently the 21 days period lapsed before the proceedings under that cause could be concluded.

An issue was raised before the Constitutional Court in the **Bernard Kanengo** case cited above as to whether the 21 days stipulated under *Article 52 (4)* of the *Constitution* can be stopped or enlarged by an order of the Court. The Court held that the High Court has no discretion to enlarge

time to go outside the prescribed 21 days, and further that a nomination that is properly before the High Court must be concluded within 21 days. That once the prescribed time expires, the High Court is stripped of jurisdiction rendering the proceedings nugatory and an academic exercise. The Constitutional Court upheld its decision in the case of **Hakainde Hichilema and Another vs Edgar Chagwa Lungu and Others**⁴³ that the 21 days for challenging the nomination is limited by the *Constitution* and it does not stop running.

The import of the guidance given by the Constitutional Court is that the time continued to run in the proceedings under cause no. 2022/HP/ 1327, which were commenced on 30th August, 2022, in spite of the subsisting order of the stay of proceedings issued by the Court of Appeal. Therefore the 21 days having lapsed on or around the 20th September, 2022, before the matter was concluded, the proceedings under the cause were rendered nugatory and academic, and the stay ordered by the High Court automatically discharged. As such, I agree with counsel for the 3rd respondent's submission that the 2nd respondent cannot be said to have failed to comply with the stay which was issued under proceedings which had subsequently been rendered nugatory and had become academic. This cannot therefore be a basis upon which the elections of 21st October, 2022 should be declared void.

Under paragraph (iii) the petitioner alleges that the non-compliance by the 2nd respondent to the electoral time lines provided under *Article 52 (4)* of the *Constitution* affected the conduct and result of the elections. Counsel for the 1st respondent argued firstly that the petitioner made very general averments in his petition without particulars as to what time lines were breached by the 2nd respondent. Further that in their reading of the *Constitution* there are no timelines spelt out in *Article 52* of the *Constitution* relative to the holding of a by-election. That in any event the time frame for the challenge to the nomination had expired when the 21 days lapsed and on this premise the election held on the 21st October, 2022 was done without any legal or procedural hindrance.

Article 52 (4) of the *Constitution* provides as follows:

“A person may challenge, before a court or tribunal, as prescribed, the nomination of a candidate within seven days of the close of nomination and the court shall hear the case within twenty-one days of its lodgement.”

In assessing this allegation with reference to the 2nd respondent's non-compliance of the aforementioned provision of the *Constitution* it must be stated that it is perplexing to decipher the petitioner's understanding of the same. I say so firstly because the onus to uphold the timelines in the said *Article 52 (4)* of the *Constitution* is on the person bringing a challenge of a nomination to court which must be done in 7 days as well as on the court that must hear the case within 21 days. Secondly, the petitioner has not shown how the 2nd respondent is at fault when the stay in the High Court was issued at the petitioner's instance, and the stay in the Court of Appeal at the Attorney General's instance.

Further, the Constitutional Court held that the order issued by the Court of Appeal, staying the proceedings under cause no. 2022/HP/ 1327, had to be obeyed until it was discharged or set aside. The 2nd respondent was thus obliged to obey the stay order which consequently resulted in the lapse of time within which the proceedings in the High Court were to be concluded. It is my considered view that the 2nd respondent cannot there be faulted for simply obeying the stay orders of the courts.

Contravention alleged under paragraph (v)

In addressing the petitioner's final allegation under paragraph (v), he alleges that the 2nd respondent contravened *Article 52 (6)* of the *Constitution* when it failed to call for fresh nominations following the resignation by a candidate from participation in the by-elections.

Counsel for the petitioner argued that *Article 52 (6)* of the *Constitution* provides the procedure to be adopted in the event that a candidate contesting in an election dies, resigns or indeed becomes disqualified. It was counsel's firm argument that the wording of *Article 52 (6)* of the

Constitution is clear in that the 2nd respondent is mandated to cancel the elections 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. That by the 2nd respondent neglecting to cancel and hold fresh nominations after PW4 had withdrawn from the Kabushi by-elections, this entailed that the Kabushi by-elections held on the 21st October, 2022 were void as *Article 52 (6)* of the *Constitution* does not provide for rescission of a resignation.

In opposing this submission counsel for the 1st respondent begun by defining the word resign and argued that the legislature related the word resignation to the resignation of a candidate sponsored by a political party from that party once he had filed in a nomination on the ticket of that party. It was counsel's considered view that the legislature did not intend to refer to resignation from an election as an election is not a permanent position to which a candidate is entitled and to construe the definition in any other manner would defy the purposeful and literal interpretation of *Article 52 (6)* of the *Constitution*. Counsel went on to argue that the purported "resignation" of an independent candidate in this case PW4, could and should not have necessitated a call for fresh nominations. That at any rate the issue of resignation of PW4 is before another court.

Counsel for the 2nd respondent argued that the Constitutional Court has already pronounced itself on the issues relating to the alleged resignations of the candidates in the case of **Peter Chazya Sinkamba, Issac Mwanza Vs Electoral Commission of Zambia**. Additionally, that there are still matters before the Constitutional Court relating to the resignation and cancellation of elections under *Article 52 (6)* of the *Constitution* which matters the Court was asked to take judicial notice of.

Similarly, counsel for the 3rd respondent argued that the issues surrounding *Article 52 (6)* of the *Constitution* are already before the Constitutional Court. It was counsel's argument that the petitioner's allegation in this regard suggests that this Court interpret the *Constitution* which is beyond the

Court's jurisdiction as was held in the case of **Hakaide Hichilema Vs The Attorney General**.

Before analysing this allegation, I take judicial notice of the cases referred to by the 2nd and 3rd respondents that are before the Constitutional Court that are not only dealing with the issues surrounding *Article 52 (6)* of the *Constitution*, but that of the resignation of a candidate, as well as the aspect of the nomination challenge among others. These cases are:

- (i) Governance Elections Advocacy Research Services Initiative Zambia Limited Vs The Attorney General and The Electoral Commission of Zambia 2022/CCZ/0020
- (ii) Institute of Law, Policy Research and Human Rights, Peter Chazya Sinkamba and Isaac Mwanza Vs Electoral Commission of Zambia and The Attorney General 2022/CCZ/0029; and
- (iii) Nickson Chilangwa Vs The Attorney General and The Electoral Commission of Zambia 2022/CCZ/0026

Flowing from this I am also mindful that it is not within this court's province to begin to interpret the *Constitution* as that is within the jurisdiction of the Constitutional Court as was guided in the **Hakaide Hichilema** case referred to by the 3rd respondent. Consequently, I will resist the temptation to venture into interpreting the meaning of the word resignation in the context of the by-elections as envisaged under the *Constitution* interesting as the 1st respondent's submissions were on this point.

The petitioner has argued with force that the 2nd respondent failed to carry out its mandate as provided for under, *Article 52 (6)* of the *Constitution* which provides as follows:

"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”

As already pointed out by the respondent’s respective counsel the issue on whether the 2nd respondent breached its constitutional duty when it failed to cancel the Kabushi constituency by-election following the resignation of a candidate has already been determined by the Constitutional Court in its abridged judgment of 17th October, 2022 in the case of **Peter Chazya Sinkamba and Isaac Mwanza vs Electoral Commission of Zambia**. The Court, at page J13, held that:

“...the Respondent did not breach its constitutional mandate when it did not cancel the by-elections in the Kabushi and Kwacha constituencies set for 15th September, 2022, call for fresh nominations and hold elections within thirty days as stipulated by Article 52 (6) of the Constitution after resignations tendered by the named independent candidates in the two constituencies for two reasons. Firstly, it was bound to obey the High Court order which stayed the holding of the elections in issue on 15th September, 2022. Secondly, Article 52 (6) of the Constitution does not give a time frame within which the dictates of clause 52 (6) should be implemented by the Respondent so that it can be said that because the Respondent did not cancel the election by such date, it breached Article 52 (6) of the Constitution.”

This court is bound by the holding of the superior court in the above cited case and cannot add to or take away from what the Constitutional Court found in its interpretation of Article 52 (6) of the Constitution.

To that extent, I agree with counsel for the 2nd and 3rd respondent’s arguments that the grievances arising from the rejection have already been challenged and litigated under cause no. 2022/HP/1327 and cannot be determined under this petition.

Concluding on this argument counsel for the 3rd respondent argued that this petition was an abuse of court process as the issues raised by the petitioner have either been determined or are yet to be determined by the Constitutional Court. By way of response, counsel for the petitioner argued that appearing before numerous tribunals in itself is not necessarily multiplicity of actions. Additionally, counsel for the 3rd respondent argued that the petitioner has used this petition as an appeal to challenge the nomination process. The petitioner in reply to the 3rd respondent's submissions argued that he was not using this petition as an appeal to challenge the nomination process.

As already shown above the alleged contraventions in the petition reveal that the petitioner seeks to have the election voided on the basis of the rejection of the petitioner's nomination papers. I find that the petitioner is indeed using the reason that his nomination was rejected as a basis to have the election voided. An election petition post the election cannot be used to challenge the rejection of a candidate's nomination. As already stated earlier the correct procedure to challenge the nomination process is to invoke *Article 52 (4) of the Constitution* which the petitioner did under cause No. 2022/HP/1327.

With regard to the argument on multiplicity of actions, it is trite that a multiplicity of actions is an abuse of court process. Nevertheless it must be stated that a multiplicity of actions on the same issues between the same parties is not the only manner in which the court's process can be abused. To elucidate **Black's Law Dictionary Nineth Edition Bryan A. Garner** defines abuse of process as;

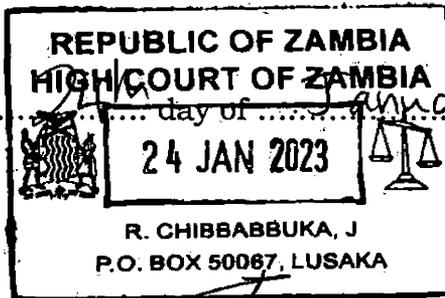
"The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope."

From the foregoing definition, it can be gleaned that when a party legitimately issues court process to obtain a result that is beyond the processes scope then that is an abuse of court process. In *casu* the petitioner has issued an election petition before this court which has

jurisdiction to entertain the same however this court at this stage post the by-election does not have jurisdiction to entertain challenges with regard to nominations hence being beyond its scope. Subsequently I agree with counsel for the 3rd respondent's arguments that this petition is indeed an abuse of the courts process as the reliefs claimed cannot be employed in a petition of this nature post elections. Thus, this allegation cannot be the basis upon which the election can be nullified or voided.

Having found, as I have, that all the allegations have failed and cannot be substantiated, in accordance with *Article 97 (2) (b)* of the *Electoral Process Act*, this petition is hereby dismissed for lack of merit. As this matter is one of public interest each party will bear their own costs for this petition.

Date the day of 2023



Ruth Chibbabbuka

JUDGE