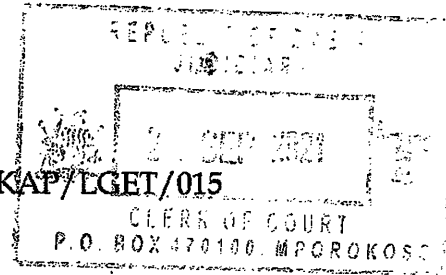


IN THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL 2021/KAP/LGET/015
HOLDEN AT MPOROKOSO
(CIVIL JURISDICTION)



IN THE MATTER OF: SECTIONS 81, 87, 99(a) AND 100 (1) OF THE ELECTORAL
PROCESS ACT NUMBER 35 OF 2016

IN THE MATTER OF: RULES 8 (1) (c) AND 9 OF THE LOCAL GOVERNMENT
ELECTIONS TRIBUNAL RULES OF 2016

IN THE MATTER OF: THE ELECTION OF THE COUNCILLOR FOR MUNWA
WARD OF THE CHIMBAMILONGA CONSTITUENCY IN
THE NSAMA DISTRICT OF THE NORTHERN PROVINCE
OF REPUBLIC OF ZAMBIA HELD ON THE 12TH AUGUST,
2021.

BETWEEN:

NSAMA NELVIS

PETITIONER

AND

CHIPILI EVANS

RESPONDENT

Coram: Before the Honourables M. Mulenga, F. Chibwe and I. Kakanda-Chuula

For the Petitioners: In Person

For the Respondent: Mr. B. Mwelwa of Linus E. Eyaa and Partners

RULING

Honourable Chibwe F, delivered the Ruling of the Tribunal

Cases referred to

1. Antonio Ventriglia Manuela and Ventriglia v Finsbury Investment Limited
Appeal No. 2 of 2019 (Supreme Court Ruling delivered on 28th October 2019).

2. Aristogerassimos Vengelatos And Another v Metro Investments Limited and 3 Others SCZ Selected Judgment No. 35 of 2016.
3. Crossland Mutinta and Bashir Seedat v Donovan Chimponda SCZ Selected judgment No. 53 of 2018.
4. Mwape Allan Chansa and Mwelwa Charles v Electoral Commission of Zambia and David Mabumba HP/EP0059 delivered on 10th September 2021
5. Zambia Revenue Authority vs Professional Insurance Corporation Limited Appeal No. 34 of 2017 (Supreme Court Ruling delivered on 23rd September, 2020.
6. Zambia Revenue Authority vs Bruce Kasonde Kaemba SCZ Appeal No. 158 of 2016
7. JCN Holdings v Development Bank of Zambia (2013) ZR 299
8. Attorney General v E.B Jones (SCZ Judgment No. 26 of 2000).
9. Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (1989) KLR.
10. Mwape Allan Chansa vs Mwewa Charles 2021/HP/EP0059 (High Court Ruling)

Legislation referred to

1. The Electoral Process Act No 35 of 2016
2. Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia
3. The Local Government Elections Tribunals Rules, Statutory Instrument No 60 of 2016

1.0 INTRODUCTION

- 1.1 From the onset, we wish to announce that we are here faced with a question of jurisprudential moment: *jurisdiction rationae materiae*. We have before us an interlocutory application for an Order to dismiss the Petition for want of jurisdiction pursuant to Article 159 of the Constitution of Zambia (Amendment) Act No. 2 of 2016, section 100 (3) of the Electoral process Act No. 35 of 2016 as read together with Rule 21(2) of the Local Government Elections Tribunal Rules of 2016.

2.0 **BACKGROUND**

- 2.1 Briefly, the factual matrix antecedent to this application is that on 12th August 2021, the people of Munwa Ward in the Chimbamilonga Constituency of the Nsama District in the Northern Province of the Republic of Zambia went to the polls to elect their councillor. The Petitioner stood on the United Party for National Development ticket (the UPND) while the Respondent stood on the Patriotic Front (the PF) ticket. On 14th August 2021, the Returning Officer declared the Respondent as duly elected Councillor for Munwa Ward having polled 867 as against the Petitioner's 515 votes.
- 2.3 Dissatisfied with the outcome of the elections referred to in 2.1, the Petitioner filed a Petition in the Subordinate Court of the First Class in the Kaputa District seeking to impugn the election of the Respondent as Councillor for the Munwa Ward. The Petition was brought pursuant to the provisions of sections 81, 87, 99 (a) and 100 (1) of the Electoral Process Act No. 35 of 2016 and Rules 8 (1) (c) and 9 of the Local Government Elections Tribunal Rules of 2016.
- 2.4 In so far as the record is concerned, the Petition was filed on 3rd of September 2021. Trial in this matter, commenced on 16th September 2021 and the Petitioner gave his evidence in chief and closed his case. During cross examination, the learned Counsel for the Respondent Mr. B Mwelwa posed a series of questions to the Petitioner. We will not regurgitate the many questions learned Counsel asked instead, we will confine ourselves to those questions which are of immediate relevance to this application. To this end, learned Counsel asked the Petitioner to confirm that he filed the Petition before us on 3rd September 2021, to which the Petitioner answered in the affirmative.

- 2.5 Learned Counsel also asked the Petitioner if at all he knew when the Respondent was declared winner of the elections by the Returning Officer, and the Petitioner answered that it was on the 16th of September, 2021.
- 2.6 Learned Counsel further asked the Petitioner whether he was aware that election results for the position of Councillors are declared by a Returning Officer at ward level, to which he responded that he was not aware. In a further bid to demonstrate that the Petition was incompetently before us, learned Counsel asked the Petitioner to state how many days were there between 3rd September, 2021, and 14th August, 2021. The Petitioner responded that there are 19 days. Learned Counsel then asked if at all his Petition was properly before the Tribunal.
- 2.7 The Petitioner sought to justify the late filing of the Petition by stating that while at Kaputa, the Clerk of Court told him that they were only receiving petitions in groups as there were a lot of candidates petitioning the results of the General Elections held on 12th August, 2021, and that it was not yet his turn to file his Petition.
- 2.8 At this juncture, we were taken aback as to why learned Counsel did not file a formal application considering that the issues Counsel was raising in cross examination bordered on whether the Tribunal had jurisdiction to hear the Petition in the very first place. The learned Counsel for the Respondent informed the Honourable Tribunal that he was aware of the provisions of Rule 21(2) which requires him to file a formal application when making interlocutory application. Counsel then prayed for an adjournment in order to make a formal application in terms of Rule 21 (2) to dismiss the Petition for want of jurisdiction.
- 2.9 We are aware that whenever a jurisdictional challenge is raised by a party to an action, it is a serious issue and requires a Court or a Tribunal to deal with the issue immediately before dealing with any other issue in the matter. In view of the

concession from the Petitioner that he did not file the Petition within fourteen days in line with the law, we directed that the matter be adjourned to consider the interlocutory application.

- 3.0 We equally informed the Petitioner that he was entitled to respond to the application by the learned Counsel and oppose it if he so wished. The Petitioner has not filed anything to oppose the application. We further guided the parties that our decision on the issue in *limine* (interlocutory application) raised by the Respondent's Counsel would inform the direction we will take on this matter.
- 3.1 Accordingly, we adjourned the matter and directed that learned Counsel for the Respondent should, on or before Friday 17th September 2021, file a formal application in accordance with Rule 21(2) of the Local Government Elections Tribunal Rules of 2016, and serve on the Petitioner. We further gave the Petitioner two days within which to respond to the application from Counsel. We reserved our ruling to Sunday 19th September, 2021, at 09:00 hours.
- 3.2 On 17th September, 2021, learned Counsel for the Respondent filed the requisite Notice to dismiss the Local Government Election Petition with an Affidavit in support, buttressed with a list of legal authorities. Considering that the determination of the question whether the Petition was filed within fourteen days as prescribed by law is a factual issue, proof of which requires examining the Electoral Commission of Zambia (the ECZ) GEN 21, we requested the District Council Secretary to favour us with the said document. A perusal of the ECZ GEN 21, revealed inter alia;
- i. that the Respondent polled 867 while the Petitioner polled 525 votes; and
 - ii. that the Returning Officer announced the results on 14th August 2021.

4.0 ISSUES FOR CONSIDERATION

4.1 We have paid anxious consideration to the Respondent's interlocutory Notice to dismiss the Local Government Election Petition filed herein and the law relied upon. Learned Counsel has identified two issues for our determination structured as follows:

- i. whether the Petitioner's petition was filed before this Honourable Tribunal on 3rd September, 2021, is competent regard being had to the fact that the declaration was announced on the 14th August, 2021? ; and
- ii. whether this Honourable Tribunal in accordance with Article 159 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 as read together with section 100 (3) of the Electoral Process Act No. 35 of 2016 of the Laws of Zambia should proceed to hear and determine a Petitioner's petition?

4.2 We may, here observe that the real question to be resolved, as can be distilled from the interlocutory application launched by the Respondent's Counsel, revolves around the jurisdiction of this Honourable Tribunal to hear and determine this matter.

5.0 THE LAW AND ANALYSIS OF THE ISSUE

5.1 It is now a principle too well settled to require a fresh debate that whenever a jurisdictional challenge is raised by a party to the proceedings, the Court or Tribunal as the case may be, has no choice but to deal with the issue with a sense of immediacy. All further proceedings must be halted until the issue of jurisdiction is resolved. On this point, authorities are galore. In terms of our jurisdiction, the *locus classicus* on the subject is to be found in the sentiments of the Supreme Court in the case of *Aristogerassimos Venglatos And Another v Metro Investments*

Limited and 3 Others SCZ Selected Judgment No. 35 of 2016 where the Supreme Court of Zambia had this to say:

However, although it is a general rule that an issue that has not been raised in the court below cannot be raised on appeal, the question of jurisdiction can be raised on appeal notwithstanding the fact that it was not raised in the court below. In arriving at this decision we are guided by the learned authors of Halsbury's Laws of England, 4th edition, volume 10, at paragraph 717 who state as follows: 'It is the duty of an appellate court to entertain a plea as to jurisdiction at any stage, even if the point was not raised in the court below.' This authority clearly places an obligation upon us to allow a plea of want of jurisdiction to be raised, even where, as in this case, the issue was not raised in the court below. The rationale for this lies in the consequence of the court exercising jurisdiction which it does not possess. Halsbury's at paragraph 715 states, in this regard, that where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

- 5.2 The position articulated by the Supreme Court above has been consistently followed in subsequent cases such as the cases of *Cross (Applicant) v Binta and Bashir Seedat v Donovan Chimponda SCZ Selected judgment, No. 33 of 2018* and *Zambia Revenue Authority vs Bruce Kasonde Keemba SCZ Appeal No. 159 of 2016*.
- 5.3 Earlier on, we intimated that immediately it became clear that what Counsel for the Respondent was raising in cross examination was that our jurisdiction to hear and determine this matter, we allowed him to address us on the jurisdictional issue notwithstanding that it was not specifically pleaded. Counsel was equally gracious enough to acknowledge that for the sake of the Petitioner who was in person, the matter be adjourned so that he could file a formal

application in accordance with Rule 21(2) of the Local Government Elections Tribunal Rules of 2016. In taking this course of action, we found solace in the case of *Zambia Revenue Authority vs Bruce Kasonde Kaemba SCZ Appeal No. 158 of 2016* at page J8, the Supreme Court had observed that:

When we heard this appeal on 9th July, 2019, Counsel for the appellant submitted that even although both parties had not raised the issue of jurisdiction in this in the court below and in this court, he felt obliged to raise it as it could have an effect on the appeal itself. Following our decisions in *Aristogerassimos Vengelatos And Another v Metro Investments Limited and 3 Others SCZ Selected Judgment No. 35 of 2016* and the recent case of *Crossland Mutinta and Hazel Is Seedat v Donovan Chimponda SCZ Selected Judgment No. 53 of 2019*, we allowed him to do so.

- 5.4 Adverting to the question of whether we have jurisdiction to hear and determine this matter, we posit that section 100 (3) of the Electoral Process Act of 2016 is dispositive of this issue. Section 100(3) of the Electoral Process Act of 2016 , provides as follows:

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

- 5.5 We have examined the record and find as a fact that the Petition was filed on 3rd September 2021, which is 19 days after 14th August, 2021, when the Returning Officer declared the Respondent as duly elected Commissioner for Minwa Ward in the Chimbamilonga Constituency. The Petition, hence, was filed way after the fourteen days provided by the law in section 100(3) of the Electoral Process Act,

2016, it is incompetently before us. More grievously, we have no jurisdiction to entertain, let alone, hear and determine this matter. Section 100(3) is couched in mandatory terms and the net effect being that the defect is incurable.

- 5.6 The question of legal ramifications of provisions of the law that are couched in mandatory terms was put to rest in the case of *Attorney - General V Million Juma (1984) Z.R. 1* where the Supreme Court had this to say:

"Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."

- 5.7 We further hold that section 100(3) operates in the same way as a statute of limitation. The mandatory nature of this provision is such that it cannot be waived nor ignored. We are alive to the fact that trial had commenced in this matter and the Petitioner had even testified and closed his case, but it is too cannot assist the Petitioner to salvage his case once a plea of want of jurisdiction is upheld.

- 5.8 In other words, the defence of estoppel cannot be set up against section 100 (3) of the Electoral Process act 2016. To this end, in the case of *Attorney General v E.B Jones (SCZ Judgment No. 26 of 2008)*, the Hon. Justice Chelima ruled that:

"The doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted to be invalid, or to give the effect of a jurisdiction which is denied to it by statute or to oust the jurisdiction of a jurisdiction under an enactment which precludes the parties from departing out of its provisions. Where a statute, enacted for the benefit of a section of the public, imposes a duty of a public body, the person charged with the performance of the duty cannot be estopped from exercising his statutory powers."

- 5.9 What emerges from this discourse is that section 100 (3) does not give us any discretion to enlarge or extend the time for filing the Petition under that section. Jurisdiction is everything and goes to the very foundation of the authority of the Court or Tribunal to entertain matters or make orders. As was aptly observed by the Supreme Court in the case of *Zambia Revenue Authority vs Professional Insurance Corporation Limited Appeal No. 31 of 2017 (Supreme Court majority Ruling delivered on 23rd September, 2020)*, where the majority held inter alia that:

Jurisdiction is the gateway to the temple of justice. In this case the question is whether the gatekeeper will allow the appellant access to the temple.

- 6.0 Again, not so long ago, the Supreme Court in the case of *Antonio Ventriglia Manuela and Ventriglia v Ministry Investment Limited Appeal No. 2 of 2019 (Supreme Court Ruling delivered on 22nd September, 2020)* pronounced itself with fluorescent ability on the competence of the Court to entertain a matter when it remarked as follows:

In making our decision to prioritize and give precedence to the Preliminary Objection to this appeal, we were guided by the principle that where a jurisdictional objection is raised at the very beginning of a matter, it is imperative and incumbent upon the Court to resolve or determine the issue before proceeding to deal with any other issue in the matter before it. In this regard, we are all guided by the following observations which were made in the case of *Bank of Zambia v Industrial Finance Corporation Limited Appeal No. 1 of 2019 (Supreme Court majority Ruling delivered on 22nd September, 2020)*:

It is clear from the Clauses and the context in which they are used that if a Court has no jurisdiction to entertain a particular matter, it cannot make any lawful order or grant any relief in respect of that matter.

- 6.1 The Supreme Court went further and quoted with approval the position adumbrated by the Kenyan Court of Appeal in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (t/a CILK)*, where it was held that:

"[I]t is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue of jurisdiction before it. Jurisdiction is everything. If there is a doubt as to jurisdiction, it is one more step. Where a court has jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it if it concludes that it holds the opinion that it is without jurisdiction. What is said to go upon itself to exercise a jurisdiction which it does not have, the exercise amounts to nothing. Jurisdiction is everything. It is the foundation upon which the law is given".

- 6.2 Having guided ourselves in terms of the jurisprudence above, and having found as a fact that the Petition was filed in the District Court of Kisumu, the Returning officer had announced the results of the election in the constituency of Lunwa Ward, the penultimate question that arises is whether the District Court has jurisdiction before us? Before answering this question, we should first state, albeit, briefly that the Supreme Court was faced with a conundrum of jurisdiction in the preceding case when it was asked to review the decision of the District Court.

Since the Court of Appeal in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (t/a CILK)* has held that an application for review of a decision of a court of law, the District Court equally confer authority on the District Court to review its own decision on appeal.

- 6.3 In answering its own question, the District Court has concluded that its decision in the preceding case was correct and that it has jurisdiction to review its own decision on appeal.

on the issue, among others, the case of *Marandola and Others v Milanese and Others Appeal No. 130 of 2008*, where the Supreme Court upheld the High Court's decision that the provisions of section 17 (3) of the Arbitration Act No. 19 of 2000 are mandatory and give the Court no discretion to extend the period for making an application to set aside an arbitral award. This was notwithstanding the fact that section 17(3) uses a permissive phraseology. We were compelled to visit the *Marandola v Milanese* case cited above in order to appreciate the context of the Supreme Court's decision since we are equally faced with a similar question of reckoning of the 14-day period time stipulated in section 100 (3) of the Electoral Process Act, 2016. In that case, the Supreme Court had this to say:

We are of the view that the purpose of putting a time frame of 3 months was to ensure that matters which are commenced through arbitration are speedily disposed of. In our view, if Parliament intended to grant the court power to extend the period of 3 months, the section could have expressly provided for such an extension. We do not see that intention from this section. Further, it is a well-known fact that parties opt to go for arbitration and not litigation so that they can get their matter disposed of speedily.

- 6.4 In his list of legal authorities, learned Counsel referred us to the case of *Mwape Allan Chansa and Mwelwa Charles v Electoral Commission of Zambia and David Mabumba HP/EP0059*, where the High Court upheld a preliminary objection that failure to file a Petition within 14 days from the date when the Returning Officer announced the winner of the Parliamentary elections as provided for in section 100(3) is fatal. It means that the Court has no jurisdiction to hear and determine the matter. We would add that even if the Petitioner's default were tested against section 35 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, the Petition would equally collapse and be found to be an incurably a nullity. The said section provides as follows:

In computing time for the purposes of any written law-

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday (which days are in this section referred to as "excluded days") the period shall include the next following day, not being an excluded day;

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

- 6.5 When trial commenced, we noted that the Petitioner was quite zealous in prosecuting this matter and when Respondent's Counsel intimated that we have no jurisdiction to hear and determine this matter, he stood perplexed. Of course, we can understand the Petitioner's anxiety especially that the Respondent's application has the ultimate effect of annihilating the entire Petition. However, applying the law as we find it, we have to regrettably hold, and we so hold that the Petition having been filed way after fourteen days when the Returning Officer had announced the Respondent as duly elected Councillor for Munwa Ward, the Petition is incompetently before us. We have no jurisdiction to hear and determine it. The Petitioner's sole excuse for the delay in filing the Petition was that he encountered some challenges at Kaputa Subordinate Court. On that basis, the Petitioner prayed that trial should continue and reach its logical conclusion. We are of the view that the excuse projected cannot assist him to salvage his

position. We are certainly of the view that it would be calamitous were we to accede to the Petitioner's exertions on this issue.

- 6.6 The Indian Supreme Court, a common law jurisdiction like ours, put the matter in somewhat more gripping terms when it declared, in the case of *Barwara Raj & Another v Spl Land Acquisition Officer* (2013) 14 SCC 81 1,

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

7.0 CONCLUSION

- 7.1 The net effect of what we have said is that the preliminary objection succeeds. Accordingly, we dismiss the Petition for want of jurisdiction. On the issue of costs, we are guided by the case of *Anderson Kambela Mazoka v Levy Patrick Mwanawasa* (1) in which the Supreme Court said the following:

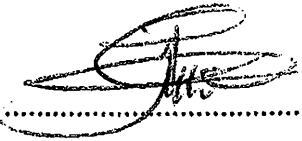
"As we have always said on costs in matters of this nature, it is in the interest of the proper functioning of our democracy that challenges to the election of the President, which are permitted by

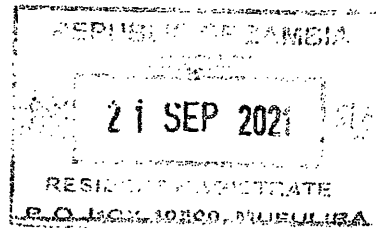
the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs.

- 7.2 For our part, we adopt the reasoning above as we would be reluctant to state in relation to the Petition that has collapsed, that we have seen anything resembling frivolity. Additionally, we observed that Tribunal sittings were characterised by a throng of members of the community keenly following Tribunal proceedings. Some of the attendees, as we later found out, had travelled long distances from as far as thirty kilometres from the seat of the Tribunal, to come and witness Tribunal proceedings. This public interest was also exhibited in many sittings and it precludes us from making any orders as to costs against the parties. We, therefore, order that each party bears their own costs. We passingly, direct the parties' attention to rule 21 (6) of the Local Government Elections Tribunal Rules of 2016, that there is no appeal on interlocutory decisions.


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Hon G. Mulenga

Chairperson


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F. Chibwe
Member




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I. Kakanda-Chuula
Member