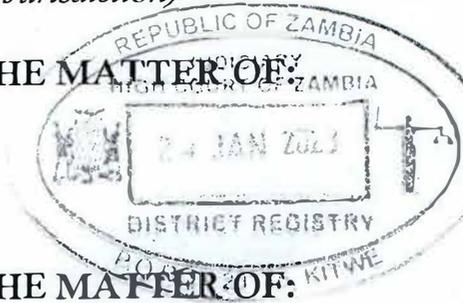


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT KITWE
(Civil Jurisdiction)

2022/HP/EP/0002

IN THE MATTER OF:



ARTICLE 1(1), (3), 8 (c) (d) (e) AND 9
(1) (b) OF THE CONSTITUTION OF
ZAMBIA, CHAPTER ONE OF THE
LAWS OF ZAMBIA

IN THE MATTER OF:

ARTICLE 73(1) AND 70 (1) OF THE
CONSTITUTION OF ZAMBIA,
CHAPTER ONE OF THE LAWS OF
ZAMBIA AS READ TOGETHER
WITH SECTION 96(1) (a) (c) (i) and (2)
OF THE ELECTORAL PROCESS ACT
No. 35 of 2016

IN THE MATTER OF:



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

IN THE MATTER OF:

SECTION 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
OF 2011

IN THE MATTER OF: THE SCHEDULE TO THE
ELECTORAL PROCESS ACT No. 35
OF 2016

IN THE MATTER OF: THE KWACHA CONSTITUENCY BY
ELECTION HELD ON THE 21ST
OCTOBER, 2022

BETWEEN:

JOSEPH MALANJI

PETITIONER

AND

CHARLES MULENGA
ELECTORAL COMMISSION OF ZAMBIA
ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

Before: Honourable Lady Justice C. Chinyanwa Zulu

*For the Petitioner: Mr. J. Zimba and Mr. F. W. Daka both of Makebi Zulu Advocates,
Mr. J. Chirwa of Fred Jere & Company*

*For the Respondents: Mr B.A. Sitali – Messrs Butler & Company Legal Practitioners
Mr. M. Bwalya-In House Counsel-Electoral Commission of Zambia
Mr. C. Mulonda- Principal State Advocate-Attorney General Chambers
Mr. C. Watopa –State Advocate- Attorney General Chambers
Mr. C. Mulumbwa- State Advocate -Attorney General's Chambers*

JUDGEMENT

CASES REFERRED TO:

1. *Joseph Malanji & Bowman Chiloshi Lusambo v Attorney General & Another 2022/CCZ/0018;*
2. *Bernard Kanengo v Attorney General and Another 2022/CCZ/0024;*
3. *Peter Chizya Sinkamba and Issac Mwanza v Electoral Commission of Zambia 2022/CCZ/0023;*
4. *Law Association of Zambia V Attorney General 2021/CCZ/0051;*
5. *Lewanika and Others v Chiluba (1998). Z.R .49;*
6. *Brelsford James Gondwe V Catherine Namugala SCZ Appeal No. 129 of 2016;*
7. *Isaac Mwanza V Electoral Commission of Zambia V Attorney General 2020/CCZ/0008;*
8. *Mulli Brother Limited V Malawi Savings Bank/2015/MWSC 467;*
9. *Jere V Ngoma (1969) ZR 106;*
10. *Mlewa V Wightman 1995/1997 ZR 171*
11. *Limbo V Muthunda 1974/HP/EP/2 Unreported;*

12. *Anderson Kambela Mazoka & Another V Levy Patrick Mwanawasa & Another* 2005 ZR138;
13. *Nkandu Luo & Electoral Commission of Zambia V Doreen Sefuka Mwamba Selected Judgment No. 51 of 2019;*
14. *Michael Mabenga V Sikota Wina & Others Supreme Court Judgment No. 15 of 2003;*
15. *Akashimatwa Mbakusita Lewanika & Another V Fredrick Chiluba* 1998 ZR 49;
16. *Bizwayo Newton Nkunika V Lawrence Nyirenda & Electoral Commission of Zambia* 2019/CCZ/005;
17. *Charles Maboshe V Steven Nyirenda, Lucy Change & Electoral Commission of Zambia* 2021/CCZ/0031;
18. *Munir Zulu V Gertrude Pilila Mwanza* 2021/CCZ/009;
19. *George Muhali Imbuwa V Electoral Commission of Zambia* 2021/CCZ/A001;
20. *Kafuka Kufuke V Mwila Ndalame Appeal No 15 of 2016;*
21. *Governance Elections Advocacy Research Services Initiative Zambia Limited vs The Attorney General and The Electoral Commission of Zambia* 2022/CCZ/0020;
22. *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
23. *Nickson Chilangwa v The Attorney General and The Electoral Commission of Zambia* 2022/CCZ/0026.
24. *William David Carlisle Wise V E.F Hervey Limited* 1995 ZR 179;
25. *Christopher Lubasi Mundia V Sentor Motor Limited* (1982) Z.R 66;
26. *Bidvest Food Zambia Limited & 4 Others V CAA Import Export (Appeal 56 of 2012;*
27. *Bapi Audrey Kipdasa & Joseph Busenga V Attorney General* 2021/CCZ/0011 & 0014;
28. *BP Zambia PLC V Interland & Motor Limited* 201 ZR 37;
29. *Mukumbuta Mukumbuta & Another V Nkuilimba Choobana Lubinda (SCZ No. 8 of 2003;*
30. *Joseph Malanji V Charles Abel Mulenga & Other* 2021/CCZ/A02;
31. *John Sangwa V Nkonde Appeal No. 2 of 2021;*
32. *Dean Masole V Romeo Kangombe* 2019 CCZ/002;
33. *Giles Chomba Yamba Yamba V Kapembwe Simbao & Other Selected Judgment No, 6 of 2018;*
34. *Austin C. Milambo V Machila Jamba* CCZ/A06/2016;
35. *Margraret Mwanaktwe V Charlottte Scott & Attorney General Selected Judgment No. 50 of 2018;*
36. *Bowman Lusambo V Bernard Kanengo* 2021/CCZ/A0019
37. *Aristogerismios Yangelatos & Another V Meto Investment & Others Supreme Court Judgment No. 35 of 2016;*

LEGISLATION AND OTHER WORK REFERRED TO:

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016;*
2. *The Electoral Process Act No. 35 of 2016 & Act No. 32 of 2021;*
3. *The Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016;*
4. *Electoral Commission of Zambia Amendment Act No. 25 of 2016 & No. 5 of 2019;*
5. *Rules of the Supreme Court (1999) Edition White Book;*
6. *Halsbury's Laws of England 4th Edition, Vol 10;*
7. *Butterworths. Landon;*
8. *Advanced Dictionary of English 14th Edition;*

9. *Pocket Oxford Dictionary and thesaurus 2nd Edition*
10. *Francis Beninon (1997) Bennion on Statutory interpretation. 3rd Edition By butterworths Londom Dublin and Edinburgh*

1.0 INTRODUCTION

1.1 By Petition made pursuant to Articles 1(1), (3), 8 (c) (d) (e), 9 (1) (b), 73(1) and 70 (1) of the Constitution of Zambia, as read together with Sections 96(1) (a) (c) (i) and (2) of the Electoral Process Act No. 35 of 2016, Article 45(1) (a), (2) (a) (c) (e) as read together with Article 52 (4) of the Constitution of Zambia, Section 97(1)(2)(b) and 4 as read together with Sections 83(2) and 99 (a) of the Electoral Process Act, Section 98 (a) (b) of the Electoral Process Act, Section 4(1) and 2(a), (b) and (c) of the Electoral Commission Act, the National Assembly by-title Elections Kwacha Constituency No.22 (Election date and time of poll) (No.3) Order, 2022, the Electoral (code of conduct) Regulations 2011 Statutory Instrument No. 52 of 2011, the schedule to the Electoral Process Act No. 35 of 2016 and the Kwacha Constituency By-Election held on the 21st October, 2022. The Petitioner, Mr Joseph Malanji seeks for the following reliefs:-

1. *A declaration that the election for Kwacha Constituency on the Copperbelt Province is and was void;*
2. *A declaration that the 1st Respondent was not duly elected in the Kwacha Constituency by-election;*
3. *A declaration that upon the resignation of the said Lawrence Kasonde, the 2nd 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.*

1.2 The provisions of the law cited is expressed in the following terms:-

Article 1 (1) This Constitution is the Supreme Law of the Republic

of Zambia and any other written law, customary law and customary law practice that is inconsistent with its provisions is void to the extent of the inconsistency;

- (3) *This Constitution shall bind all persons in Zambia, State organs and State institutions.*

Article 8 The national values and principles
(c) are democracy and Constitutionalism;
(d) human dignity, equity, social justice, equality and non-
discrimination;
(e) good governance and integrity;

Article 9 (i) The national values and principles shall apply to the-
(b) enactment and interpretation of the law;

Article 70 (1) Qualification & disqualification of a Member of Parliament;
Article 73 (1) A person may file an election petition with the High Court to
challenge the election of a Member of Parliament.

Section 96(1) A question which may arise as to whether-
(a) a person has been validly appointed or nominated as a Member of
Parliament;
(c) a petition may be heard and determined by the High Court upon
application made by any person to whom the question relates.

Article 45 (1) The electoral systems provided for in Article 47 for the election of
President, Member of Parliament or Counsellor shall ensue-
(a) that citizens are free to exercise their political rights;

(2) The Electoral process and system of administering election shall
ensue-
(a) that elections are free and fair;
(c) independence, accountability, efficiency and transparency of the
electoral process;
(e) timely resolution of electoral disputes.

Article 52 (4) A person may challenge before a court or tribunal as prescribed,
the nomination of a candidate within seven (7) days of the close of
nomination and the court shall hear the case within twenty-one (21) days of
its lodgment.

Section 97 (1) An election of a candidate as Member of Parliament shall not be
questioned except by an election petition presented;

(2) *The election of a candidate as a Member of Parliament shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court that*

(b) *Subject to the provisions of Sub Section (4), there has been non-compliance with the provisions of this Act relating to the conduct of the 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 elections.*

Section 83 (2)

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

Section 99

Any of the following reliefs may be claimed in an election petition;

(a) *a declaration that the election was void;*

Section 98

An election petition may be presented to the High Court or tribunal by one or more of the following persons

a. *A person who lawfully voted or had a right to vote to which the election petition relates;*

b. *A person claiming to have had a right to be nominated as a candidate or elected at the election to which the election petition relates.*

Section 4 (1)

The commission shall direct supervise and control elections in a fair and impartial manner;

2. *The functions of a commission are:*

(a) *Ensure that elections are free and fair;*

(b) *Promote conditions conducive to free and fair elections;*

(c) *Promote democratic electoral process*

2.0 HISTORICAL BACKGROUND

2.1 The brief history leading to this Petition is that the Petitioner stood as parliamentary candidate for Kwacha Constituency under Patriotic Front

- Ticket at the general elections that were held in 2021 and was declared as the duly elected Member of Parliament for Kwacha Constituency.
- 2.2 The Petitioner's seat was however, petitioned in the High Court for Zambia by the 1st Respondent. The High Court Judge that heard and determined the matter nullified the Kwacha Constituency Elections. The Petitioner appealed to the Constitutional Court under Cause Number 2021/CCZ/A0021, which appeal was unsuccessful, as the Constitutional Court upheld the decision of the High Court.
- 2.3 The 2nd Respondent then set 25th August, 2022 as the date for filling in of nomination papers and 15th September, 2022 as the polling date for the Kwacha Constituency By-Elections.
- 2.4 On the 21st August, 2022 the Petitioner was adopted to stand as parliamentary candidate for Kwacha Constituency By-Election under the Patriotic Front ticket. The 2nd Respondent on the 24th August, 2022 published a media statement that it would not accept nominations from candidates whose seats were nullified by the Constitutional Court causing vacancies in the National Assembly. As such, when the Petitioner filed in his nomination on the 25th August, 2022, the 2nd Respondent's Returning Officer informed the Petitioner that his nomination for the Kwacha Constituency was unsuccessful owing to the fact that his seat was nullified and that the rejection was as a result of Article 72 (4) of the Constitution.
- 2.5 The Petitioner alleged that the 2nd Respondent's agents had no power or authority to reject his nomination on the basis that his seat was nullified. Also that both the High Court judgment which nullified his seat and the Constitutional Court judgment which upheld the High Court judgment

never disqualified the Petitioner. According to the Petitioner, the 2nd Respondent was using undue influence to frustrate the Petitioner from taking part in the By-Elections for Kwacha Constituency.

2.6 Dissatisfied with the decision of the 2nd Respondent, the Petitioner proceeded to file Court Process in the Constitutional Court under Cause Number 2022/CCZ/0009 (although in his affidavit verifying facts he exhibited cause number 2022/CCZ/0018) wherein, according to the Petitioner, the Constitutional Court clarified that nullification is not the same as disqualification and further that the Court did not disqualify him.

2.7 The Petitioner also challenged the decision of the 2nd Respondent's agent, the Returning Officer in the High Court. Since the election was to be held on the 15th September, 2022 before the High Court would have concluded the Petition, the Petitioner applied for a stay which suspended the election. That before the High Court could hear and determine the matter, the 3rd Respondent joined the matter claiming public interest.

2.8 Upon being joined to the matter, the 3rd Respondent applied to dismiss the matter which application failed. The 3rd Respondent then appealed to the Court of Appeal where they obtained a stay suspending the proceedings in the High Court.

2.9 The Petitioner applied to the Court of Appeal to discharge the stay which application was unsuccessful.

2.10 It is the Petitioner's contention that while the matter was before the High Court, a candidate namely, Lawrence Kasonde, tendered his resignation for candidature in the Kwacha Constituency By-Election on or about 13th September, 2022 which he later purportedly rescinded on or about

7th October, 2022. As opposed to addressing the resignation of a candidate and while the High Court order that stopped the election was still in force, the 2nd Respondent proceeded to announce a date for elections to be held on the 21st October, 2022 notwithstanding that there was a stay or suspension of the elections and that the 1st Respondent was subsequently declared dully elected.

3.0 THE ALLEGED CONTRAVENTION OF THE LAW

3.1 As stated above, the Petitioner alleges contravention of the law in that there was:

- (a) *Non-compliance by the 2nd Respondent to provisions of the Electoral Process Act prohibiting any person from preventing the Petitioner to exercise his right to contest as a candidate as conferred by the Act to eligible candidates;*
- (b) *Non-compliance by the 2nd Respondent to stay/suspension order issued by the High Court as a Court of competent jurisdiction under this Act renders the action by the Statutory Instrument issued on the 12th October 2022 illegal, null and void and an election conducted under an illegal and void order is illegal, null and void;*
- (c) *Non-compliance by the 2nd Respondent to electoral timelines provided under Article 52(4) affected the conduct and result of the election;*
- (d) *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 kwacha Constituency by the Constitutional Court of Zambia despite the Petitioner having met the qualifications and procedural requirements specified for an election to their respective offices.*
- (e) *By not calling for fresh nominations after the decision and thereafter communication by the candidate that withdrew from the poll which communication was made to the Chief Electoral Officer in the employ of the 2nd Respondent.*
- (f) *Calling for elections without the nominations of the Petitioner being allowed by the 2nd Respondent's agent the returning officer in this case from Petitioners against their right to participate in the said elections which right was subsisting at the time.*

4.0 THE PETITIONER'S CASE

4.1 The Petitioner repeated the contents of his Petition stated above, in the affidavit verifying facts and to avoid repetitions in this judgment, I find it unnecessary to recast the same.

5.0 THE RESPONDENT'S CASE

5.1 In opposing the claims in the Petition, each of the Respondents filed an Answer and Affidavit in opposition in which they disputed all the allegations in the Petition.

5.2 I wish to state at the outset that the 3rd Respondent, the Attorney General was not a party at the commencement of this Petition. By summons for joinder filed on 9th November, 2022, the Attorney General applied to be joined to the proceedings on the ground that election petitions by their nature generate public interest and that the Attorney General being the custodian of public interest had sufficient interest in this matter. This Court through a Ruling dated 16th November, 2022 ordered the joinder of the Attorney General as the 3rd Respondent.

5.3 In his Answer, the 1st Respondent stated that the issues raised in this Petition had been litigated and already resolved under Cause No. 2022/CCZ/0024 and Cause No. 2022/CCZ/0023 by the Constitutional Court, as such, the petition ought to be dismissed for being an abuse of Court process.

5.4 As regards the assertion by the Petitioner, that the 2nd Respondent had no power or authority to reject the Petitioner's nominations on the basis that the Petitioner's election was nullified, the 1st Respondent's Answer was that the 2nd Respondent's agent had power or authority to do so. The 2nd Respondent's justification for the foregoing position was that the Constitutional Court had not yet interpreted the effect of nullification of

an election on the validity of a candidate's nomination who seeks to be re-nominated.

5.5 As regards the case of *Joseph Malanji & Bowman Chiloshi Lusambo V Attorney General & Another*,¹ the 1st Respondent's Answer was to the effect that the Constitutional Court did not pronounce itself on the qualification or disqualification of the Petitioner.

5.6 Further that there was no High Court Order, Stay or Suspension of the elections subsisting, when the 2nd Respondent announced the date for elections. It is the 1st Respondent position that the date for elections was announced on 11th October, 2022 whereas the High Court jurisdiction ceased on 20th September, 2022 a position that was confirmed by the Constitutional Court in the case of *Bernard Kanengo V Attorney General & Another*².

5.7 Also that the validity or otherwise of the Statutory Instrument No. 64 of 2022 was subject of ligation in the Constitutional Court under Cause Number 2022/CCZ/0029, hence, the Petitioner is not entitled to any of the reliefs sought.

5.8 To this effect, the 1st Respondent averred that the 2nd Respondent acted within its constitutional and statutory mandate in conducting the elections. That the Constitutional Court in its abridged Judgment of *Peter Chazya Sinkamba, Isaac Mwanza V Electoral Commission of Zambia*³ at paragraph 27 pointed out that the 2nd Respondent did not breach its constitutional mandate when it did not cancel the By-Election in the Kabushi and Kwacha Constituencies.

5.9 In winding up, the 1st Respondent's answer Counsel for the 1st Respondent maintained that the 3rd and 4th reliefs sought by the Petitioner were settled by the Constitutional Court under Cause No.

2022/CCZ/0023 under paragraph 35 in which the Court declined to grant the declaration that the 2nd Respondent was obliged to hold fresh nominations for Kabushi and Kwacha Constituencies and also that the Court declined to grant an order compelling the 2nd Respondent to conduct fresh nominations in Kabushi and Kwacha Constituencies.

5.10 The 1st Respondent's Answer was accompanied by an Affidavit in Support of the Answer, which more or less repeated the contents of the 1st Respondent's Answer. To avoid repetition I will not recast the 1st Respondent's affidavit in support of the Answer.

5.11 In reply to the 1st Respondent's Answer, the Petitioner filed its reply on the 18th December, 2022. The Petitioner contended that the petition sought to challenge the legalities of the By-Election held in Kwacha Parliamentary Constituency where he was prevented from participating by no fault of his own. Hence, the petition was no way an abuse of Court process. He further stated that although his seat was nullified, he was not disqualified from re-contesting and that the 2nd Respondent disqualified him without any proper application of the law.

5.12 The Petitioner further stated that the decision to clarify that nullification is not synonymous to disqualification was rendered before the nomination process under the Cause No. 2022/CCZ/0051 in the matter of the *Law Association of Zambia & Attorney General*⁴ which the 2nd Respondent's ignored. According to the Petitioner, the effect of aforementioned case meant that the 2nd Respondent should have rescinded their decision but that they never the less proceeded with the illegality despite the guidance by the Constitutional Court.

5.13 The Petitioner further stated that the Statutory Instrument that was subject of consideration in the Constitutional Court under Cause Number 2022/CCZ/0029 was not subject of consideration in this matter

and that the petition was not making any attempt to challenge the Statutory Instrument.

5.14 In winding up his Reply to the 1st Respondent answer, the Petitioner stated that the 1st Respondent participated in an election that was void and that the issues raised in this petition had not been resolved in any Court before and that are novel matters which need determination.

5.15 The Petitioner's reply was accompanied by an affidavit in reply. The affidavit in reply more or less repeated the contents of the Petitioner's reply to the Answer save to add that the Petitioner did not challenge in this petition the Constitutional and statutory mandate of the 2nd Respondent. However, that the petition was challenging the decision of the 2nd Respondent of preventing him from participating in the By-Elections. That he was thus challenging the illegality of the By-Election held in Kwacha Parliamentary Constituency.

5.16 Lastly that, it was correct that the Petitioner had not alleged any malpractice, corruption practices or illegalities on the part of the 1st Respondent in the petition. That he had however, challenged the illegality of the 2nd Respondent and that as a product of an illegality, the 1st Respondent participated in a void election.

5.17 In their Answer filed on 14th November, 2022, the 2nd Respondent stated that it issued a media statement to all aspiring candidates for the By-Elections informing them of the guidelines on the filing of nominations for the seats that had been nullified. Also that, the said media statement had no legal effect and did not target any person, but was a general guidance for all aspiring candidates. As such, the 2nd Respondent acted within his constitutional mandate regarding the conduct of the nominations for the said elections.

5.18 The 2nd Respondent, further stated that the Constitutional Court did not pronounce itself on the eligibility of the Petitioner to contest the By-Elections set for 15th September, 2022. Further that, on 20th October, 2022 the Constitutional Court under Cause No. 2022/CCZ/0024 determined that the High Court was out of jurisdiction to hear and determine the election petition filed under Cause No. 2022/HP/1327 when the 21 days prescribed by the Constitution for hearing and determining the said petition lapsed. Thus, that the stay/suspension of election order granted by the High Court under Cause No. 2022/HP/1327 expired on or about 20th September, 2022 when the 21 days provided by the Constitution for hearing and determining the petition lapsed.

5.19 As regards the alleged contravention of the law, the 2nd Respondent's answer, was that the 2nd Respondent acted within its constitutional and legal mandate regarding the conduct of nominations for Kwacha Constituency By-Election. That the Statutory Instrument No. 64 of 2022 which set 21st October, 2022 as the poll day for the By-Elections for Kwacha Constituency was issued in line with Article 57 (3) of the Constitution. Further that the Petitioner did not allege the provisions of the law which were breached by the issuance of the Statutory Instrument. Therefore, that the Petitioner was not entitled to any relief as the election for the Kwacha Constituency was conducted in substantial conformity with the electoral laws and procedures.

5.20 The 2nd Respondent's answer was accompanied by an affidavit in support. The sum total of the affidavit in support deposed by Bob Mwelwa Musenga, the Acting Chief Electoral Officer, was that the Kwacha Constituency National Assembly election was nullified by the Constitutional Court on appeal from the High Court on the 3rd August,

2022. Following that, the 2nd Respondent through a Statutory Instrument set 25th August, 2022 as the date of nominations and 15th September, 2022, as the poll day for the By-Election for the Kwacha Constituency. On 24th August, 2022, the 2nd Respondent issued a media statement to all aspiring candidates for the said By-Elections informing them on the guidelines on the filing of nominations for the seats that had been nullified. That the media statement was a guideline to all aspiring candidates on the nomination process that was scheduled to be conducted on 15th August, 2022 and that in accordance with the law, the Petitioner's nomination was rejected.

5.21 On 13th September, 2022, the High Court stayed/suspended the Parliamentary By-Elections in Kwacha Constituency which was scheduled to be held on Thursday, 15th September, 2022 pending the hearing and determination of 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 High Court Ruling delivered on 13th September, 2022, staying/suspending the election for Kwacha Constituency, the By-Elections set for 15th September, 2022 would not take place until further notice.

5.22 That on 20th October, 2022 the Constitutional Court under Cause No. 2022/CCZ/0024 determined that the High Court ran out of jurisdiction to hear and determine the election petition filed under Cause No. 2022/HP/1327 when the twenty-one (21) days prescribed by the Constitution for hearing and determining the petition lapsed.

5.23 Further that the Constitutional Court and the High Court had not pronounced themselves on the eligibility of the Petitioner to contest the By-Election set for 15th September, 2022.

- 5.24 The 3rd Respondent filed its answer on 12th November, 2022. The gist of the 3rd Respondent's answer was that the issues raised in the petition had already been litigated and resolved in Cause No. 2022/CCZ/0024 by the Constitutional Court and that this petition was actually an appeal disguised as a petition as such it ought to be dismissed.
- 5.25 The 3rd Respondent stated that at the material time, the 2nd Respondent's agent had power or 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 effect of nullification of an election on the validity of a nomination for a candidate that seeks to be nominated for a by election following the nullification.
- 5.26 In addition, that there was no High Court Order or stay or suspension of elections subsisting 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 jurisdiction ceased on 20th September, 2022, a position that was confirmed by the Constitutional Court in Cause No. 2022/CCZ/0024.
- 5.27 As regards the alleged contravention of the law, the 3rd Respondent stated that the 2nd Respondent complied with the provisions of the Electoral Process Act and the Constitution. That the constitutional Court in its abridged Judgment under Cause No. 2022/CCZ/0024 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 (30) days.
- 5.28 Regarding the reliefs sought by the Petitioner, the 3rd Respondent maintained that the Petitioner was not entitled to any reliefs at all. Also that reliefs No. 3 and 4, were settled by the Constitutional Court in

Cause No. 2022/CCZ/0024 at paragraph 35 of the abridged judgment dated 17th October, 2022 where the Court declined to grant the declaration that the 2nd Respondent was obliged to hold fresh nominations for Kabushi and Kwacha Constituencies and also declined to grant an order compelling the 2nd Respondent to conduct fresh nominations and elections in Kabushi and Kwacha Constituencies.

5.29 In reply to the 3rd Respondent's Answer, the Petitioner on the 23rd November, 2022 filed his reply. He maintained therein that his petition assails the legality of the By-Election held in Kwacha parliamentary constituency while a stay suspending the election was still in effect. He further stated that the clarification that nullification is not synonymous to disqualification came before the nomination process in the Constitutional Court matter of *Law Association of Zambia v Attorney General*⁴ wherein the Court clarified with utmost precision the terms nullification and disqualification which the 2nd Respondent ignored.

5.30 The Petitioner further maintained that while the High Court order which suspended the election was in force, the 2nd Respondent proceeded to announce a date for elections notwithstanding the stay or suspension of the elections.

5.31 The reply to the 3rd Respondent's Answer was accompanied by an affidavit in support, wherein it was deposed that his petition was not in any way an appeal in disguise, but a petition of an election that was held in total disregard of the Court order. Further that the issues raised in the petition were not dealt with under cause number 2022/CCZ/0024. Also that a Ruling dated 13th September, 2022 was delivered by the High Court which stayed and or suspended the elections that were scheduled to take place on 15th September 2022 under cause Number 2022/HP/1327 which the 2nd Respondent totally disregarded. As such this petition

was challenging the legality of the elections that were held amid a Court Ruling staying and or suspending the holding of the elections. Further that the petition was not challenging the Statutory Instrument as asserted by the 3rd Respondent but that the 2nd Respondent breached the Constitution when it went ahead and made a declaration that no fresh nominations were to be conducted and proceeded to hold elections when a stay was still in effect.

6.0 EVIDENCE AT TRIAL

- 6.1 At the trial of the petition, three (3) witnesses were called in aid of the Petitioner's case.
- 6.2 The first witness to take the stand was the Petitioner himself who testified as PW1. The sum total of his evidence was that he was elected in 2021 as Member of Parliament for Kwacha Constituency and that his election was challenged by the 1st Respondent. The High Court nullified his election which decision was upheld by the Constitutional Court. The 2nd Respondent then set a date for nomination for the By-Election.
- 6.3 It was PW1's evidence that considering that he was not disqualified from re-contesting the By-Election in the Constitutional Court judgment he started preparing himself for the By-Election. That on the 24th August, 2022 there was a circulation of a media statement by the 2nd Respondent preventing persons perceived to have caused nullification of Parliamentary seats from filling nominations. PW1 produced the media statement which the Court marked "P1" and read out the statement couched in the following words:

"The commission in line with Article 72(4) of the Constitution of Zambia amendment Act No 2 of 2026 will therefore not accept nominations from any candidates who caused a vacancy in the National Assembly"

6.4 PW1 then told the Court that on 25th August 2022, he went to the nomination center at River Rain within Kitwe where he presented his papers as per requirement together with the prescribed number of people and prescribed fess. The 2nd Respondent's agent the Returning Officer, a Mr. Brian Mbula went through the documents and was satisfied with the documents. That he, however, rejected PW1's nomination as invalid on the ground of article 72(4), actualizing the media statement by the 2nd Respondent. The Returning Officer then gave PW1 a document which he produced in Court and was marked as "P2" couched in the following words:

"I have rejected as invalid the nomination papers of the following candidate (i) full name Malanji Joseph, reason for rejection based on Article 72(4) of the Constitution".

6.5 According to PW1, he was prevented from participating in the election.

6.7 He told the Court that he was aggrieved and filed court process in the High Court which stayed the elections. The 2nd and 3rd Respondent however, appealed to the Court of Appeal to stay the proceedings in the High Court which application was granted and the proceedings in the High Court were stayed. PW1 testified that he then instructed his lawyers to discharge the stay in the Court of Appeal which was unsuccessful as he was given a hearing date of 20th October, 2022.

6.8 It is PW1's testimony that on the 20th October, 2022 hearing did not take place as all matters from the 3rd Respondent's chambers had been rescheduled as they were attending a workshop. He went on to state that on that same day, 20th October, 2022, the Constitutional Court delivered a Ruling allowing the election to go ahead. However, in the said Judgment, the Constitutional Court stated that the Court of Appeal had no jurisdiction to hear matters relating to nominations. PW1 stated that

in the meantime, the 2nd Respondent had already set a date for 21st October, 2022 for the By-Elections. He further testified that, it was his belief that all these happenings were an attempt by the 2nd and 3rd Respondents to prevent him from participating in the elections.

6.9 PW1 further testified that the Ruling of the Constitutional Court did not disqualify him from participating in the election but merely nullified his seat. He then proceeded to read a passage in Cause Number 2022/CCZ/0018 at page 18 which reads:

“In conclusion, we find that article 72(4) has specified which categories or persons cannot contest an election and these are specified in Article 72 a, b, c, d, g and h”

6.10 According to the Petitioner, the Article does not include persons’ whose seats fell vacant by virtual of nullification of an election in which category he falls. Therefore, the 2nd Respondent’s media statement “P1” was out of order as the Constitutional Court’s judgment was very categorical.

6.11 In winding up his testimony he told the Court that he was relying on his petition, affidavits and urged this Court to grant him the relief sought in the petition as reproduced above in paragraph 1.1.

6.12 Under *cross-examination* by Mr. Sitali, Counsel for the 1st Respondent, PW1 was asked whether he filed originating summons in cause number 2022/CCZ/0018 in the Constitutional Court against the 2nd and 3rd Respondents to determine and interpret three questions, namely that:

1. *Whether the decision of the 2nd Respondent dated 24th August, 2022 was illegal, null and void;*
2. *Whether the applicants are eligible to contest the 15th September, 2022 by-elections;*
3. *Whether fresh nominations should be conducted to allow the applicants to participate in the by-elections;*
4. *What was meant by causing a vacancy in the National Assembly as stated in Article 72 of the Constitution.*

- 6.13** His answer was in the affirmative. When further asked which decision of the 2nd Respondent he was inviting the Constitutional Court to declare as illegal, null and void, he responded that it was the decision to circulate, a day before nominations, a media statement to the effect that individuals who caused vacancies were not eligible to re-contest in By-Elections. When further asked to confirm that questions 1, 2 and 3 above were dismissed by the Constitutional Court, PW1 answered in the affirmative.
- 6.14** When asked that his petition did not allege any malpractice or illegality against the 1st Respondent, he answered that the 1st Respondent participated in an election where he was prevented from participating and that the 1st Respondent is a party to an illegality.
- 6.15** Further under *cross-examination* by Mr. Bwalya, counsel for the 2nd Respondent, PW1 was asked whether he remembered the date he filed his petition and his answer was that it was immediately after the rejection of his nomination. When asked the outcome if any of the petition challenging his nomination, he stated that there was no outcome as the 2nd Respondent appealed to the Court of Appeal. When referred to read a Ruling of the High Court as appearing at page 252 of the Petitioner's bundle of documents, PW1 stated that his petition in the High Court challenging his nomination was filed on the 30th August 2022 and that the 21 days in which the High Court had to determine the matter lapsed on the 21st September 2022. He was then asked whether the stay/suspension order lapsed after the 21 days, he stated that he was not aware. When further asked whether the Statutory Instrument issued by the 2nd Respondent on the 11th October 2022 was issued after the 21 days or before, he stated that it was issued after the 21 days.

6.16 Under further *cross-examination* by Mr. Mulonda, Principal State advocate for the 3rd Respondent, PW1 was asked the question whether it was his testimony that the 3rd Respondent prevented him from participating in the by-election, PW1 in his response stated that, it was the 2nd and 3rd Respondent who prevented him. He stated further that the 3rd Respondent appealed against the High Court decision and obtained a stay suspending the High Court proceedings. When asked what course of action and outcome he took after his nomination was rejected, he stated that he commenced an action in the High Court challenging the rejection of his nomination but that the High Court did not grant him the relief he sought because the 21 days in which the Court had to decide had lapsed, so his claims did not fail. When asked whether he was on the ballot paper for the By-Election, he stated that he was not. When further asked whether it is possible for a person that is not on the ballot paper to take part in an election as a candidate, he stated that it was not possible. When asked why this Court should declare the kwacha By-Election void, he stated that the announcement of the date of election of 21st October, 2022 by the 2nd Respondent was done before the ruling of the Constitutional Court and discharge of stay suspending elections. He was then referred to cause number 2022/CCZ/0024 and asked whether the judgment was delivered before the elections or after the elections. His evidence was that it was delivered after the fresh date of the election had already been set.

6.17 In re-examination PW1 confirmed that he had asked the Constitutional Court to determine whether he was qualified to re-contest the elections. He further stated that the 2nd Respondent breached the law by not calling for fresh nominations, therefore, he was prevented from re-contesting. Also that the electoral timelines were affected because he was prevented from contesting and yet the 2nd Respondent agent was satisfied with the

documents submitted. He further told the Court that the elections were held after the twenty-one (21) days.

6.18 The Petitioner's second witness, Alex Chembo, testified as PW2. The sum total of PW2's evidence was that he was one of the persons chosen to escort the Petitioner to file nominations at River Rain School Nomination Centre. That when he reached in the nomination Centre, he saw workers from the 2nd Respondent and the Returning Officer, a Mr. Brian Mbula. The Returning Officer told the Petitioner to give him his documents and guided him which document he wanted. The Petitioner gave the Returning Officer the documents and was taken to a camera where his image was captured, he signed and paid the prescribed fees. Further that the Petitioner's supporters had their voter's cards verified. At the end, the Returning Officer stood up and told the Petitioner that all his documents were okay and that as he was uttering the words he was also writing on a piece of paper. He further said that because of Article 72 (4) the Returning Officer refused to receive the nomination, a thing that worried PW1. PW1 said this made him worried and left him with so many questions in his mind.

6.19 PW2 then showed the Court the document marked "P2" as the document that the Returning Officer wrote. PW2's further evidence was that he developed thoughts in this mind and wondered how the 2nd Respondent being an institution that conducts elections can prevent someone from participating in the election.

6.20 Under cross-examination, by Mr Sitali Counsel for the 1st Respondent PW2 conceded that the events narrated in his evidence in chief occurred at nomination stage. In further cross-examination by Mr Bwalya Counsel for the 2nd Respondent, PW2 conceded that he did not produce any document showing that he was an election agent.

- 6.21 The 3rd Respondent's Counsel, Mr Mulumbwa merely repeated the 1st Respondent's question, which for the sake of repetition, I find unnecessary to rehash.
- 6.22 There were no questions for the Petitioner in re-examination.
- 6.23 PW3 was Brian Mbula, the 2nd Respondent's Returning Officer for Kwacha Constituency, who was subpoenaed at the instance of the Petitioner. PW3 brought two (2) documents namely a declaration of the results of the poll-Member of Parliament and the notification of the nomination received-National Assembly.
- 6.24 The sum total of PW3's evidence was that the Petitioner came at the nomination center around 14 hours on 25th August, 2022. That prior to that on 24th August, 2022 there was a media statement issued by the 2nd Respondent barring certain candidates who had caused By-Elections from filing nominations. He then stated that the Returning Officer received all the documents required from the Petitioner, scrutinized them and that he was comfortable, however, he told the Petitioner that his nomination was invalid based on Article 72(4) of the Constitution as per the media statement. As a result the nomination for the Petitioner was rejected and he did not participate in the By-Election.
- 6.25 There were no questions by the Respondents in *cross-examination*.
- 6.26 The Petitioner then closed his case.
- 6.27 The Respondents called only one witness, the 1st Respondent who testified as **RW1**. The sum total of his evidence was that he was relying on the affidavit in response filed in this matter and briefly added that he was at a loss to understand his involvement in this matter. Further that the Petitioner had not asserted that **RW1** breached or abrogated any of the provisions of the Electoral Process Act or the Constitution.

Under *cross-examination* by Mr. Zimba, RW1 stated that he participated in the By-Election that was held on 21st October, 2022 and that the Petitioner's nomination was rejected by the 2nd Respondent.

6.28 There was further cross examination by Mr Chirwa and Daka boarding on various portions of the judgment by the Constitutional Court and the High Court.

6.29 There were no questions by the Respondents in re-examination.

6.30 The 2nd and 3rd Respondents did not call any witness.

7.0 SUBMISSIONS BY THE PETITIONER

7.1 At the close of their case, Counsel for the Petitioner filed written submissions. The gist of the argument was that the 2nd Respondent prevented the Petitioner from participating in the election that was held on the 21st October, 2022 when he was eligible to participate and that the 1st Respondent participated in an illegal election.

7.2 They stated that section 98 of the Electoral Process Act provides that:-

“An election petition may be presented to the High Court or a tribunal by one or more of the following persons:

(a) A person who lawfully voted or had a right to vote at the election to which the election petition relate

(b) A person claiming to have had a right to be nominated as a candidate at the election to which the election petition relates

(c) A person claiming to have been a candidate to the election to which the election petition relates and

(d) The Attorney General ”

7.3 They submitted that the Petitioner who falls under Section 98 (b) was properly before this Court. Further that for the Petitioner to succeed in the matter, he had demonstrated and discharged the burden of proof to the required standard applicable in election petitions. The cases of

*Lewanika and another v Chiluba*⁵ and *Brelsford James Gondwe v Catherine Namugala*⁶ were cited in support of this proposition. They argued that the Petitioner had demonstrated in his evidence that the 2nd and 3rd Respondents prevented him from participating in the By-Election. That PW3 who was the 2nd Respondent's agent rejected and/or refused to accept the Petitioners nomination despite being satisfied that the Petitioner complied with all the requirements to contest the By-Election by reason of Article 72(4) of the Constitution.

- 7.4 Taking the argument further, it was submitted that Article 72(2) provides instances which warrant one to be ousted from eligibility to contest an election and that the Petitioner did not fall under any of the instances of the provision.
- 7.5 It was their submission that the instances in Article 72 (2) provision are the ones that warrant one to be ousted from eligibility to contest an election and maintained their position that the Petitioner did not fall under any of the instances specified therein.
- 7.6 It was argued that although the Petitioner's election was nullified by the High Court and upheld by the Constitutional Court, that did not warrant the 2nd Respondent to reject the Petitioners nomination to contest the By-Election. The case of *Law Association of Zambia V Attorney General*⁴ was cited and further submitted that the decision in that case was rendered on the 22nd March, 2022 before the announcement of the By- Elections or issuance of the notice relating to the By-Election by the 2nd Respondent. Further that in *Joseph Malanji and Bowman Chilosha Lusambo V Attorney General*¹, the Constitutional Court held that nullification of an election does not amount to disqualification to contest the same seat.

7.7 Referring to the case of *Joseph Malanji and Bowman Lusambo*¹, it was argued that the Constitutional Court, upheld its earlier decision in *Law Association of Zambia*⁴ where that Court held at page 11-13 that:

Article 72(4) does not apply to all the instances outlined in Article 72(2). It clearly specifies which situations causes a vacancy that would disqualify a person from contesting an election or holding public office and nullification of an election by either the High Court or the Constitutional Court is not one of them

“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.”

7.8 It was argued that the Petitioner was eligible to contest and that the 2nd Respondent prevented him from filing his nomination on the provision that did not apply to him. Further that the same was done in disobedience of the court’s decision that the Petitioner did not fall within the ambit of Article 72(2)(a)(b)(c) (d)(g) and (h) owing to the fact that his seat fell vacant by reason of nullification and not by reasons specified under the said Article.

7.9 It was further submitted that the Petitioner commenced an action in the High Court but that the 3rd Respondent appealed to the Court of Appeal. The 2nd Respondent announced the date of elections on the 11th October, 2022 when the Stay/ Suspension order was still in force.

7.10 It was then argued that an order of Court is valid unless it is set aside and this position was confirmed by the Constitutional Court in the case of *Benard Kanengo V Electoral Commission of Zambia and Attorney General*² wherein the Court stated that:

“That stay order had it issued had to be obeyed even though erroneously issued and remains in force until discharged or set aside. Thus, the High Court had to abide the Court of Appeal stay order and ran out of time as the 21 days have since expired.”

7.11 Counsel reiterated that the Petitioner was prevented from participating in the said election and at no fault of his own. In reinforcing this point, he referred the Court to the works of *Francis Bennion on Statutory interpretation at Page 876 in which it is stated that unless the contrary intention appears, an enactment by implication imports the principle of the maxim Impotentia Excusat Legem, (the law does not punish a person for not doing what they lacked power to do, or for being in a situation they were powerless to avoid), it is of the very essence of civilised law, that where there is something barbaric done to a powerless person, such person should not be punished and the helpless should not be punished for their very helplessness.*

7.12 They further submitted that the Petitioner was helpless and placed in a helpless situation by the 2nd Respondent who had a duty to conduct elections in a free and fair manner as well as level the playing field for all participants in the election. They argued that Article 229 of the Constitution establish the 2nd Respondent and Act No. 25 of 2016 enjoins the 2nd Respondent with power to conduct elections. However, the 2nd Respondent fell in grave error by conducting elections in the manner that did not reflect the dictates of the provisions of section 4 of the Act and was thus in breach of the statutory duty placed on it by the law.

7.13 It was spiritedly submitted that the 2nd Respondent took it upon themselves to interpret the Constitution which power they did not have and disqualified the Petitioner. That the power to disqualify a candidate is vested in the Court as can be seen from Article 52(4) of the Constitution. Article 52 (4) provides that:

(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 lodgment.”

7.14 It was further submitted that the 2nd Respondent contravened the Constitution particularly article 52(6) of the Constitution of Zambia by not cancelling the elections following the resignation of the two independent candidates and call for fresh nominations.

7.15 It was submitted that Article 52 (6) provides for the procedure relating to nominations and that the Constitutional Court proceedings under cause No. 2022/CCZ/0023 were anchored on clause 6. It was thus argued that the resignation of the two candidates were communicated to the Respondent on the 12th and 13th September, 2022 and that Article 52(6) was triggered. It was submitted that it mattered not, whether the nominations held on the 25th August, 2022 are and/or were found to be valid or not, Article 52(6) requires that the election based on those nominations should be cancelled and fresh nominations ought to have been held forthwith. That however, in breach of Article 5(6) the 2nd Respondent, proceeded to hold the By-Elections notwithstanding the provisions proffered above and in view of the fact that a stay was still in effect as it was not discharged by the court, making the elections held illegal and void. Further that the argument that the two (2) candidates later rescinded their decisions still remains flawed and unattainable following the decision in the case of *Isaac Mwanza v Electoral Commission of Zambia and Attorney General*⁷ where the constitutional court held that:

“Where the Constitution does not provide for a rescission of a resignation, the resignation cannot be rescinded.”

7.16 It was further submitted that the 2nd Respondent proceeded to announce the date of elections when there was a stay. They referred the Court to the Malawian Supreme Court case of *Mulli Brother Ltd v Malawi Savings Bank*⁸ where the Court held that:

“As we understand it, a stay is the act of temporarily stopping a judicial proceeding through the order of a court. It is a suspension of a case or a suspension of a particular proceeding within a case.”

7.17 It was submitted that the 2nd Respondent was obligated to comply with the High Court Order which stayed the holding of the By-Elections until it was set aside, discharged or vacated.

7.18 On the effect of preventing a candidate, the Court was referred to the case of *Jere V Ngoma*⁹ where the court stated in relation to prevention of an eligible candidate from filing his nomination and contesting in an election that:

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

7.19 In reinforcing the above argument they cited the case of *Mlewa V Wightman*¹⁰ where the Supreme Court of Zambia pronounced itself on this matter and cited with approval the cases of *Jere v Ngoma*⁹ and *Limbo v Mututwa*¹¹ which cases dealt with prevention of a candidate from contesting an election and stated as follows:

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

The election was nullified under paragraph (a) because the petitioner had been prevented by a crowd of people, nothing to do with the respondent, from lodging his nomination paper”.

7.20 They argued that the Petitioner was prevented from lodging his nomination on account of “Article 72(4)” by the 2nd Respondent and the action by the 2nd Respondent of preventing the Petitioner was misconduct which must attract the same consequence as that in *Jere v*

*Ngoma*⁹ and that the election of the 1st Respondent ought to be declared void on the basis that it was marred with illegality.

8.0 SUBMISSIONS BY THE RESPONDENTS

8.1 In the 1st Respondent's written submissions, Mr. Sitali submitted that all the issues contained in the petition had already been litigated and pronounced upon by the Court.

8.2 As regards the Petitioner's position that the 2nd Respondent contravened the law by not calling fresh nomination after some candidates withdrew from the poll, Mr Sitali argued that the allegation was conclusively determined by the Constitutional Court in *Peter Chazya Sinkamba and another v Electoral Commission of Zambia*³, where the Court held at paragraph 27 that:

"In the circumstance, the Respondent (Electoral Commission of Zambia) 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 the resignations tendered by the named independent candidates in the two constituencies

Based on the reasons we have stated above, we decline to grant the declaration that the Respondent contravened the Constitution by its omission to cancel the elections due to have taken place on 15th September, 2022 in the Kabushi and Kwacha Constituencies"

8.3 He contended that the question whether or not the 2nd Respondent contravened the Constitution or any law by not calling for fresh nominations following the resignations of the two (2) independent candidates was determined.

8.4 It was Mr. Sitali's further submission that the Petitioner's position that the courts had declared him eligible to participate in the By-Election was not correct. He cited the case of *Joseph Malanji and Bowman Lusambo v*

*Attorney General*¹ where the Petitioner and Mr Lusambo requested the Court to determine four questions as follows:

1. *Whether the decision of the 2nd respondent dated 24th August, 2022 is illegal, null and void;*
2. *Whether the applicants are eligible to contest the 15th September, 2022 By-Elections;*
3. *Whether fresh nominations should be conducted to allow the applicants to participate in the By-Elections;*
4. *What is meant by causing a vacancy in the National Assembly as stated in Article 72 of the Constitution.*

8.5 That the Court in the above judgment dated 7th September, 2022 dismissed questions 1, 2 and 3 stating as follows:

“In light of our decision in Jonas Zimba v Attorney General, we will proceed to deal with only that question that is solely for the interpretation of the Constitution and will not consider matters, which in our view, are contentious and require to be brought by way of petition. The questions raised in (1), (2), and (3) cannot be dealt with on their merits as they are not properly before us and are accordingly dismissed.”

8.6 He stated that having already dismissed the question on whether or not the Petitioner was eligible to contest the 15th September, 2022 By-Election, it was not possible for the same court to thereafter to state that they were eligible to contest the said By-Election. Therefore, it was submitted that the Court was not referring to the Petitioner when it stated that:-

“These persons do not include those members whose seats fell vacant by virtue of a nullification of an election”

8.7 He argued that the Constitutional Court did not declare the Petitioner eligible to contest the 15th September, 2022 By-Election. Further that the decision in the case of *Law Association of Zambia v Attorney General*⁴ passed on 22nd March 2022 in which the Court distinguished “nullification” from “disqualification” did not settle the Petitioner’s eligibility as the Petitioner would not have approached the

Constitutional Court four months later on 25th August, 2022 to determine the question of his eligibility.

- 8.8 As regards the issue of the rejection of the Petitioner's nomination, it was submitted that the same was heard by the High Court which ran out of time and the Petitioner conceded under cross-examination that the 21 days which the High Court was to hear and determine the matter had run out. He stressed the point by referring the Court to the case of *Benard Kanengo v Attorney General and Electoral Commission of Zambia*² where the Constitutional Court stated that:

"... The High Court has jurisdiction which jurisdiction must be exercised within the 21 days' time 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.

Thus, the High Court had to abide the Court of Appeal stay order and ran out of time as the 21 days have since expired"

- 8.9 It was submitted as regards the allegation that the By-election was illegal as the Petitioner was not allowed to participate, that the allegation was settled by the Constitutional Court under cause number 2022/CCZ/0023 where the Court held that:

"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 and void..."

- 8.10 As regards the allegation of non-compliance to the electoral time lines which affected the conduct and outcome of the elections, it was submitted that the Petitioner under *cross-examination* conceded that the question of time affected all the candidates who participated in the elections equally. To stress this point, the case of *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and others*¹² cited with approval in the case of *Nkandu Luo and Electoral Commission of Zambia v*

*Doreen Sefuka Mwamba and Another*¹³, was relied upon where the Supreme Court Stated that:

“We accept that there were flaws, incompetency and dereliction of duty on the part of the Electoral Commission of Zambia. This is exemplified by the late delivery of the election materials and insufficient supply of Presidential ballot papers in the complaining constituencies which led to the delays and extension of the gazette voting period. However, in our view, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favoring the 1st Respondent”

8.11 In winding up the submission, it was stated that the petition did not allege any malpractice. Citing section 97(2) of the Electoral Process Act, it was argued that the Petitioner is bound by the petition and cannot attempt to allege any malpractice, illegality or misconduct against the 1st Respondent. The cases of *Michael Mabenga v Sikota Wina and Others*¹⁴, *Akashambatwa Mbikusita Lewanika and Others v Fredrick Chiluba*¹⁵, *Anderson kambela Mazoka and Another v Levy Patrick Mwanawasa and others*¹² were cited in support of the proposition. Furthermore, that it is the requirement for a petition to succeed under section 97(2) of the Electoral Process Act to allege illegality or malpractice and that the majority of voters were prevented from voting for a candidate of their choice and that the petition did not disclose this fact.

8.12 In the 2nd Respondent written submissions, it was argued that the Petitioner was challenging nomination for election disguised as an election Petition. It was submitted that under the current electoral law regime, specifically Section 97 (2) of the Electoral Process Act, a parliamentary election can only be voided or nullified by Court, when the Court finds with “convincing clarity” that:

- (a) *a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –*
 - (i) *by a candidate; or*
 - (ii) *with the knowledge and consent or approval of a candidate or of that candidate’s election agent or polling agent;*

And the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

- (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; or*
- (c) the candidate was at the time of the election a person not qualified or a person disqualified for election.*

8.13 It was argued that the Petitioner ought to have proved any of the three grounds set out in Section 97 (2) of the Electoral Process Act cited above in order to have the election held on 21st October, 2022 voided or nullified by the Court.

8.14 It was further submitted that the process of nominations for members of parliament is prescribed under the Constitution of Zambia as Amended, Electoral Process Act and the Electoral Process (General) Regulations Statutory Instrument No. 63 of 2016. Thus Article 52 (4) of the Constitution of Zambia empowers a person to challenge the nomination of a candidate under Article 52 (1) and (2).

8.15 Regulation 18 (7) of the Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016, prescribes the mode of challenging the decision of the returning officer. The said Regulation 18 (7) provides that:

“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.”

8.16 Referring to the Case of *Bizwayo Newton Nkunika vs. Lawrence Nyirenda and Electoral Commission of Zambia*¹⁶, at pages J64 to J65 the

Constitutional Court guided on the mandate of the 2nd Respondent in relation to Article 52 (2) of the Constitution that:-

“The 2nd Respondent’s Mandate was to either out-rightly accept or reject the nomination based on the qualifications submitted by the candidate.”

8.17 Also in the case of *Charles Maboshe vs Steven Nyirenda, Lucy Changwe and Electoral Commission of Zambia*¹⁷, the Constitutional Court guided at pages J28 to 29 on the steps for challenging a nomination filed in accordance with Article 52 of the Constitution that:

“As aforementioned, Article 52 of the Constitution is concerned with nominations while Article 52(4) provides for this Court’s jurisdiction to deal with a challenge of a presidential candidate’s nomination such as that of the Respondent in casu. To determine whether the 1st Respondent was validly nominated, the first step is Article 52 (1) of the Constitution. It is clear that the 1st Respondent in line with that sub article filed his nomination paper to the Returning Officer, supported by an affidavit stating that he was qualified for nomination as a presidential candidate as stated by the 1st and 3rd Respondents in their Answers to the Petition. Article 52(2) provides for the second step that upon filing a nomination paper, the Returning Officer may reject it if the candidate does not meet the qualifications or procedural requirements specified for election to that office. This is also in line with the provisions of section 30 of the Electoral Process Act.”

8.18 Further that in the case of *Munir Zulu v. Gertrude Pilila Mwanza*¹⁸ the Constitutional Court held that the jurisdiction of hearing challenges relating to nominations under Article 52 (4) lies with the High Court and in the case of *George Muhali Imbuwa vs Electoral Commission of Zambia*¹⁹, the Constitutional Court stated that:

“Nowhere in Article 52 has the Constitution provided for appeals to the Constitutional Court from decisions of the Court prescribed under Article 52 (4) to hear disputes emanating or relating to nomination of candidates. The prescribed courts are, the Constitutional Court for disputes relating to nomination of presidential candidates, the High Court for nomination disputes relating to parliamentary candidates and Local Government election tribunals for nomination disputes relating to election of councillors.”

8.19 Also that in the case of *Bernard Kanengo v The Attorney General and Electoral Commission of Zambia*,³ the Constitutional Court held inter alia that:-

“Similarly, the High Court has Jurisdiction which jurisdiction must be exercised within the 21 days’ time frame given by the Constitution under article 52 (4).....Thus, the High Court had to abide the Court of Appeal stay order and ran out of time as the 21 days have since expired.”

8.20 It was submitted that in the case of *Peter Chazya Sinkamba, Isaac Mwanza v Electoral Commission of Zambia*³, the Constitutional Court declined to grant the declaration that the nomination held by the 2nd Respondent on 25th August, 2022 in Kwacha constituency were invalid. The Court held inter alia that:

“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 and void as the High Court which has jurisdiction to hear matters relating to a challenge of the nomination of candidates for parliamentary elections has no made a pronouncement to that effect.

8.21 It was argued that Article 52 of the Constitution provides for the manner and fashion for challenging the decision of the returning officer at the nomination stage. Thus it is too late in the day for the Petitioner to attempt to challenge his nomination after the elections had been conducted, as the 21 days within which the High Court was supposed to pronounce itself on the validity of the nomination of the Petitioner under cause number 2022/HP/1327 expired. This Court was thus urged to dismiss the action for having been commenced wrongly and for failure to follow the laid down procedures for redress relating to nominations as stipulated under Article 52 of the Constitution of Zambia.

8.22 As regards the allegation of prevention of the Petitioner from Participating in the Kwacha By-Election held on 21st October, 2022. It

was submitted that the Petitioner filed his nomination on 25th August, 2022 before the Returning Officer Mr. Brian Mbula (PW3) who rejected the said nomination and gave a reason for his rejection. It was therefore incorrect for the Petitioner to allege that he was prevented from participating in the Kwacha Constituency By-Election held on 21st October, 2022.

8.23 The Court was referred 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. It was submitted that rejecting a nomination is not the same as preventing the Petitioner from participating in the election. The Petitioner challenged his rejected nomination in the High Court under cause number 2022/HP/1327. It was therefore submitted that the cases cited of *Mlewa v Wightman*¹⁰, *Jere v Ngoma*⁹ and *Limbo v Mututwa*¹¹ which allegedly dealt with a candidate being prevented from participating in an election can be differentiated from the case in casu.

8.24 In the case in casu, evidence shows that the Petitioner filed his nomination paper before the Returning Officer and was not prevented by anyone from doing so. Further, his nomination papers were processed and rejected in accordance with the law. Therefore the Petitioner cannot claim to have been prevented as the law provides for a redress mechanism for someone dissatisfied with the Returning Officers decision. Also that the cases in question were delivered in 1969, 1974 and 1996 respectively 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. Thus, the said cases

have since been overtaken by the repeal and amendments that have happened to the various electoral laws.

8.25 It was further submitted that the Constitutional Court has departed from the position taken in the case of *Josephat Mlewa v Wightman*¹⁰. The wrong doer has to be specifically identified and the 1st Respondent can only be held liable if the wrong complained of, were done by him or through his appointed agent. Further that it must be demonstrated that the act complained of was widespread or affected the majority of the voters. The 2nd Respondent argued that the Constitutional Court in the *Kufuka Kufuka V Mundia Ndalamei*²⁰ discounted the *Mlewa V Wightman*¹⁰ case by stating that:-

“We wish to stress the proof of one corrupt or illegal practice or misconduct by the candidate is generally enough to nullify an election only if that one act is also proved to have been so widespread or that it affected or may have affected the majority of the electorate. It is to this effect only that the case of JOSEPHATE MLEWA V ERIC WIGHTMAN is distinguishable from the current provisions of section 97 (2) (a) of the Act.”

8.26 As regards the allegation of resignation of candidates, it was submitted that the Constitutional Court already pronounced itself on the issues relating to the alleged resignation of candidates in the case of *Peter Chazya Sinkamba, Isaac Mwanza v Electoral Commission of Zambia*.³ Further that this Court has no Jurisdiction to deal with the said alleged resignation of candidates. This Court was invited to take judicial notice of the fact that there were 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 under the following cause numbers:

- (i) *Governance Elections Advocacy Research Services Initiative Zambia Limited vs The Attorney General and The Electoral Commission of Zambia 2022/CCZ/0020*²¹;

- (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*²²; and
- (iii) *Nickson Chilangwa v The Attorney General and The Electoral Commission of Zambia 2022/CCZ/0026*²³.

8.27 In winding up the submission, the 2nd Respondent argued that the Petitioner had failed to prove the allegation to the acceptable standard of proof in election petitions as required by the law and authorities. Further that the alleged allegations did not in any way affect the final outcome of the results.

8.28 In the 3rd Respondent's written submissions, it was argued that the issues raised herein had been litigated and already resolved in Cause No. 2022/CCZ/0023 and Cause No. 2022/CCZ/0024 by the Constitutional Court. Further that the Petition is an appeal disguised as a petition.

8.29 It was submitted that although a petition is not a pleading the role and purpose of pleadings applies to petitions. Referring to the Supreme Court of Zambia's decision on the purpose of pleadings in the case of *William David Carlisle Wise V E.F. Hervey Limited*²⁴ wherein it was held that:

“Pleadings serve the useful purpose of defining the issues of fact and of law to be decided; they give each party distinct notice of the case intended to be set up by the other; and they provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended.”

8.30 Further, in the case of *Christopher Lubasi Mundia v Sentor Motors Limited*²⁵ it was held thus:

“The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Where the pleadings are at variance with the evidence adduced in court, the case fails since the plaintiff's case is completely re-cast without actual amendment of the statement of claim, and not only will the court record be incorrect as a reference thereafter but the other party will be unable to meet the case having had no correct notice.” As was stated by Lord Russell of Killowen at p. 347 in the case of *LONDON PASSENGER TRANSPORT BOARD v*

MOSCROP:...Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged, and relief claimed shall form part of the Court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended.' They should be amended in fact."

8.31 Also the case of *Bidvest Food Zambia Limited & 4 Others V CAA Import and Export*²⁶ the Supreme Court held that parties are bound by their pleadings and as such it was contended that the Petitioner be bound by his pleadings.

8.32 It was submitted that the claims sought by the Petitioner are an abuse of Court Process. Referring the Court to Order 19 rule 19 of the Rules of the Supreme Court of England-White Book which provides that:

"Abuse of the process of the Court"—Para. (1)(d) Confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation.

8.33 Also the case of *Bampi Aubrey Kapalasa and Joseph Busenga V the Attorney General*,²⁷ the Constitutional Court in finding the proceedings an abuse of court process stated that:

"Where there appears to be an abuse of the court, order 18 (1) (d) of the White Book provides that a court can dismiss an action on the ground of abuse of court process. In addition to what has been provided for in Order 18 rule 19 (10) (d) of the White Book, courts have broad inherent power to deal with and dismiss actions on account of abuse of process. This is succinctly stated in the explanatory notes at paragraph 18/19/15 of the White Book... it is a duty of, and indeed it is incumbent upon, the Court to curb abuse of its process. The abuse must be nipped in the bud and dealt with at the earliest opportunity to safeguard the scarce judicial resources which should be expended on deserving cases...we wish to emphasise that parties should desist from such conduct which is an abuse of court process."

“Although the Respondent raised the issue of res judicata in its motion, we are of the considered view that this matter is in fact an abuse of the process of this Court...

We wish to emphasise that this Court is the final arbiter in matters to do with the interpretation of the constitutional provisions as provided in Article 128 of the Constitution regarding the Court's jurisdiction. Once the Court exercises its mandate in interpreting constitutional provisions as it did in the Dr. Daniel Pule' case, that settles the law. It is therefore not open for parties who have contrary personal opinions to seek to re-litigate a settled issue in order to get their desired outcome or a different outcome. This is what is manifest in this case and such conduct must be strongly discouraged.

We wish to emphasise that parties should desist from such conduct which is an abuse of court process. Once a matter, or as in this case the interpretation of a constitutional provision is settled, this Court frowns upon parties bringing the same issue for interpretation or relitigating the issue. Whether or not a party has its own grievance or a contrary view or understanding of the constitutional provision in issue, what matters is this Court's interpretation which is final and binds the parties and the public at large. The underlying public interest is that there must be finality of litigation.

It is a duty of, and indeed it is incumbent upon, the Court to curb abuse of its process. The abuse must be nipped in the bud and dealt with at the earliest opportunity to safeguard the scarce judicial resources which should be expended on deserving cases.”

8.34 Also that in the case of *BP Zambia PLC V. Interland and Motors Limited*²⁸ the Supreme Court stated that:

“The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermine each other...”

8.35 Further that the Supreme Court in *Mukumbuta Mukumbuta Sam Mukamamba Kweleka Mubita Mooto Mooto and Another V Nkwilimba Choobana Lubinda Richard Mbikusita Munyinda Rosalyn Mukelabai and Another*²⁹ stated that:

“There is force in this argument. The High Court was certainly brought into ridicule by the forum shopping exercise brought about by the advocates for the respondents. But in our considered view, it is not the respondents who should be punished in costs. They are not lawyers

themselves. They may not have been following what was going on. On the other hand, their advocates, deliberately and consciously went forum shopping resulting in the parties twice being before this Court and before several High Court Judges. It is the advocates of the respondents and not the respondents who should be punished in costs."

8.36 As regards the allegation that the elections were illegal and void on the ground that the Petitioner was prevented from participating in the Kwacha Constituency By-Elections of 21st October, 2022, the 3rd Respondent submitted that there was nothing illegal in the action of the 2nd Respondent's agents to reject the Petitioner's nomination. Firstly, the 2nd Respondent's agent is authorized to either accept or reject a nomination of a candidate as per Article 52(2) of the Constitution which provides that:-

(2) A Returning Officer shall, immediately on the filing of a nomination paper, in accordance with clause (1), duly reject the nomination paper if the candidate does not meet the qualifications or procedural requirements specified for election to that office."

8.37 Also that the judgment under cause 2022/CCZ/0018 was delivered after the Petitioner's nomination was rejected. Therefore, since 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 a prevention on the part of the Petitioner. Also that the issues surrounding rejection of nominations were already litigated under the Case of *Joseph Malanji and Bowman Lusambo V Electoral Commission of Zambia and Attorney General*'.

8.38 As regards the allegation that the 2nd Respondent who is the agent of the 3rd Respondent contravened the Constitution particularly Article 52 (6) of the Constitution by not cancelling the elections following the resignation of two independent candidates and call for fresh

nominations, it was argued that the question as to whether the failure by the 2nd Respondent to cancel the Kwacha Constituency By-Elections and to call for fresh nominations despite there being a resignation or withdraw by one of the candidates for the Kwacha Constituency had already been settled by the Constitutional Court in the **Peter Sinkamba**³ case.

8.39 As regards the allegation that the 2nd Respondent was obligated to comply with the High Court Order which stayed the holding of the by-elections until it was set aside, discharged or vacated, it was submitted 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. Further, that the date for elections was announced on 11th October, 2022 whereas the High Court jurisdiction ceased on 20th September, 2022, a position that was confirmed by the Court in the Case of *Bernard Kanengo V Attorney General & Electoral Commission of Zambia*².

8.40 Further, that on the 17th October, 2022, the Constitutional Court pronounced itself on the validity of the nominations for the Kwacha Constituency that were held on 25th August, 2022. The Court further went on to pronounce itself on the validity of the elections that would be based on the said nominations. To support this position, the judgment in *Peter Sinkamba*³ case at paragraph 29 was cited which stated that:

“[29] 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 ...”

8.41 Therefore, 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 as the stay order granted under cause number 2022/HP/1327 was by law no longer in force by effluxion of time. That this position was confirmed by judgment dated 20th October, 2022 under cause number 2022/CCZ/0024 where it held at J20 to the effect that the High Court's jurisdiction and all orders therein lapsed after 21 days, that is, by the 20th September, 2022.

8.42 As regards the argument by the Petitioner that as a consequence of his purported prevention to participate in the Kwacha Constituency, this Court should nullify the elections of 21st October, 2022 held in Kwacha Constituency the 3rd Respondent argued that the cases of *Jere Vs Ngoma*⁹ and *Mlewa V Wightman*¹⁰ cited by the Petitioner, are distinguishable with the case *in casu* as the facts are different seeing that in those cases, the candidates were prevented from filing nominations based on the misconduct of other people unlike the case at hand where there was no such misconduct on the part of the Respondents.

9.0 PETITIONER'S SUBMISSIONS IN REPLY

9.1 In reply, Counsel for the Petitioner, stressed the point that the aggregate of the events outlined in the petition culminates into one issue, that the Petitioner was prevented to participate in an election where the Petitioner was eligible to participate. Thus, the argument by the 3rd Respondent that the petition was at variance with the pleadings was an argument replete with speculation and devoid of merit.

9.2 As regards the argument that the issues in the petition had already been litigated, Counsel argued that the argument was a misapprehension of the facts. He stated that it was astonishing, that the 2nd Respondents were insisting that the Petitioner came to this Court to challenge the nomination and the 3rd Respondent on the other hand are arguing that this matter is an abuse of court process. He submitted that these

arguments are imaginary and a ploy to mislead the court as no Court had ever dealt with the issue that the Petitioner was prevented from participating in the Kwacha by-elections, where the 1st Respondent emerged duly-elected.

- 9.3 Counsel for the Petitioner conceded that there was a Petition relating to a nomination and that, the decision of the High Court on such matters is final. Reference was made to the case of *George Muhali Imbwaie V Attorney General and Electoral Commission of Zambia*¹⁹ case where the Constitutional Court struck out order IX rule 4 of the Constitutional Court as being unconstitutional. The said provision provided for appeals from a decision of the High Court in election petitions and the Court stated that such procedure was not provided for in the constitution and therefore the provision was unconstitutional.
- 9.4 On the other hand, he argued that a cause of action relating to a challenge of an election by way of an election petition arises after the election had taken place. In the present case, the issue of whether fresh nominations ought to have been called or not only arose after the election was conducted without nominations. He stressed the point that the issue of cause of action relating to this petition only arose after the election on the 21st October, 2022. He further argued that in the present case, the cause of action was different from what was determined in the *Peter Chazy Sinkamba case and another*³. The circumstances of the said case and the reliefs being sought herein are different and that the time of the cause of action is equally different. He stated that it cannot therefore be said to have been determined. Simply put, the issue of whether fresh nominations ought to have been called or not relating to the elections held on the 21st October, 2022 has never been determined before any Court in Zambia or elsewhere. It was therefore submitted that this case

was not an abuse of Court process, the mode of commencement was not wrong and that no court has ever litigated on the issues. Hence, this court has the jurisdiction to hear this matter.

- 9.5 In relation to the position that the 2nd Respondent ought to have called for fresh nominations the moment it was in receipt of the notice of resignation by the two candidates, they argued that their submission was anchored on the provisions of Article 52(6) of the constitution which is instructive on providing the judicial guidance in the determination of the issue in so far as nominations are concerned. It was argued that the findings of the constitutional court in the case of *Peter Chazya Sinkamba and Isaac Mwanza v Electoral Commission of Zambia*,³ were based on its findings on the fact that there was a stay in effect and that the court observed that a party to a court proceedings is obligated to obey Court orders, unless and until they are set aside, discharged or vacated. That it was thus imperative for the 2nd Respondent to comply with the High Court Order which stayed the holding of the by-elections in the Kwacha and Kabushi constituencies on the 15th September, 2022. Further that the Court pointed out that there was a stay from the High Court and another one from the Court of Appeal and under the circumstances the status was to be maintained. The Court at page 26 of the same judgment made this clear. The Court pointed out as follows:

“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 Court 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- election in the Kabushi and kwacha constituencies on 15th September, 2022.”

- 9.6 It was submitted that the High Court proceedings were anchored on clause 4 of Article 52, which provides for an avenue to challenge

nominations. The issue which was subject of determination under cause No. 2022/CCZ/002 was centered on clause 6 of Article 52, regarding the death, resignation or disqualification of the candidate. Hence, the proceedings under cause number 2022/CCZ/002 and 2022/HP/1327 both sought to enforce the constitutional provisions touching on nominations.

- 9.7 It was further argued that the proceedings in the High Court, which is the court of competent jurisdiction for proceedings under Article 52(4), were commenced earlier and pursuant to which an order staying the Kabushi and Kwacha by-elections pending the determination of the nomination challenge was granted on 13th September, 2022. The resignation of the two candidates were communicated to the 2nd Respondent on the 12th and 13th September, 2022 respectively and the Petitioners then *Peter Chazya Sinkamba and Isaac Mwanza*³ commenced the action under Cause No. 2022/CCZ/002 on 26th September, 2022.
- 9.8 It was submitted that the Petitioner had no quarrels with the decision of the Court under Cause No. 2022/CCZ/002 that Article 52 of the Constitution recognizes and makes provision for the courts to determine nomination challenges before the election could be held. Hence, the 2nd Respondent was obligated to comply with the High Court order which stayed the holding of the By-Elections until it was set aside, discharged or vacated. They contended that the position is that the above findings entailed that the status quo immediately after the grant of the stay by the High Court was made, it was to be maintained until a court of competent jurisdiction pronounced itself on the status of those proceedings and after which the 2nd Respondent was to proceed to comply with the dictates of Article 52 (6), whatever was to be the outcome of the nomination challenge Article 52(4). That, that was as

result of Article 52(6) having been triggered by the resignation of candidates after nomination and before the by-election which is subsequent to Article 52(4) proceedings. That it mattered not whether the nominations held on 25th August, 2022 were to be found to be valid or invalid by the High Court under the proceedings under Article 52(4), Article 52(6) requires that the election based on those nominations should be cancelled forthwith. They contended that the 2nd Respondent was not supposed to hold elections based on the nominations of the 25th August, 2022.

9.9 Counsel conceded that Article 52(6) does not provide for a timeframe within which the 2nd Respondent was to cancel the election and the Article 274 states that a function may be performed as occasion requires. Therefore, the 2nd Respondent was also required to take into account the substantive provisions on the timeframes for holding the elections. It was submitted that the 2nd Respondent failed to maintain the status quo as required. That the 2nd Respondent proceeded to set 21st October, 2022 as the date for the by-election in the two constituencies based on the nominations of 25th August, 2022 without first complying with the provisions of Article 52(6). Counsel then invited this Court to take judicial notice of what happened during the 2021 elections in Lusaka Central when a candidate withdrew and fresh nominations were called. It was submitted that the 2nd Respondent acted in disregard of the very High Court stay order it was arguing had constrained it to act in line with Article 52(6) and whilst being fully aware of the proceedings under cause Number 2022/CCZ/002 wherein the legality of the failure or omission to cancel the election was yet to be determined.

9.10 Based on the above, they submitted that the arguments advanced by the Respondents that the issues in this petition were already litigated, that

the petition was an abuse of court process and that this court has no jurisdiction based on the *Peter Sinkamba case*³ are footless.

- 9.11 It was further argued that the Petitioner was declared eligible to re-contest his seat upon a painstaking analysis of various Court decisions on the issue. In the case of *Joseph Malanji vs Charles Abel Mulenga and Others*³⁰ the Constitutional Court upheld the decision of the High Court which nullified the kwacha parliamentary seat held by the petitioner. It was submitted that nullification of a parliamentary seat only makes the Member of Parliament loose that seat and it does not mean that a Member of Parliament is equally disqualified to re-contest. Nullification only affects the seat held by that Member of Parliament; it has nothing to do with disqualification of a person himself. It was on this premise that they submitted that when the Constitutional Court made the pronouncement that the petitioner's seat had been nullified, they meant the kwacha Parliamentary seat. Meaning therefore that the Petitioner was not disqualified by virtue of nullification of his seat.
- 9.12 Further to demonstrate that the Court declared that the Petitioner was eligible to participate in the By-elections but was prevented, they referred this court to the case of *Law Association of Zambia V Attorney General*⁴ a decision that was pronounced on the 22nd March, 2022 before the announcement of the said By- Elections or the notice relating to the said By-election was issued and the case of *Joseph Malanji and Bowman Chilasha Lusambo V Attorney General*¹, wherein the court held that nullification of an election does not amount to disqualification to re-contest the same seat.
- 9.13 Further to the above, it was argued that the unambiguous import of the above pronouncements by the Court was that nullification is not

synonymous to disqualification and the petitioner in this matter was and is still eligible to contest the kwacha By-Elections.

9.14 It was further submitted that the 1st Respondents acknowledged in his submission that there was non-compliance by the 2nd Respondent to the Electoral timelines. That notwithstanding, the failure to acknowledge that only the Petitioner was affected, was an affront to justice and an attempt to mislead this Court. Further that the case of *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others*¹² cited with Approval in the Case of *Nkandu Luo and Electoral Commission of Zambia V Doreen Sifuka Mwaba and Attorney General*,¹³ relied by the 1st Respondent is distinguishable from the circumstances in this case. That the issue in the Kambela Mazoka case was centred on failure by the 2nd Respondent herein to deliver ballot papers on time to the respective constituencies and polling stations where all candidates participated and none of them was prevented as is the case in *casu*. That, that is the reason why the court in condemning the 2nd Respondent herein stated that the negative impact arising out of these flaws affected all candidates equally because they were all participants. In this case, the petitioner was affected unilaterally as he was prevented from participating in the kwacha by-election as a result of the 2nd Respondent's conduct. Further that, even if they were to assume without conceding that all the candidates were equally affected by the flaws of the 2nd Respondent, they submitted that the 1st Respondent has failed lamentably both, in his Answer and submissions to demonstrate to the Court how negatively the flaws by the 2nd Respondent affected him and the damage he suffered as a result of the alleged negative flaws.

9.15 In winding up as regards the position that the Petitioner's Petition does not allege any malpractice, illegality or misconduct on the part of the 1st

Respondent, It was argued that the issue for determination before this Court was that the Petitioner was prevented from participating in an election and that the 1st Respondent participated in a void election. Hence, the 1st Respondent is a product of an illegality as such he cannot validly hold the kwacha Parliamentary seat. It was submitted that preventing a candidate from participating in an election is proscribed and not allowed by the law and makes that particular election void. Also that in the case of *Mlewa v Wightman*⁹, the Supreme Court cited with approval the cases of *Jere v Ngoma*¹⁰ and *Limbo v Mututwa*¹¹ which cases dealt with prevention of a candidate from contesting an election. Further that despite the facts from the case cited hereinbefore, being different from those in casu. The fundamental principle is that prevention of a candidate from lodging his nomination paper, makes an election void.

10.0 ANALYSIS AND CONSIDERATION BY THE COURT

10.1 I have considered the allegations in the Petition together with the averments in the Affidavit verifying the facts, the Respondent's Answer to the Petition and the respective affidavits in opposition. I have also considered the detailed written arguments advanced in the respective submissions and the authorities cited therein by the Learned Counsel for the parties in this matter.

10.2 However, before, I proceed to consider the petition, there are issues which I find to be profound and need to be addressed at this stage. These issues are that,

Firstly, whether or not the Petitioner has *locus standi* to file this petition as the same was raised in this petition. My brief reaction to the said issue is that, I have observed that Section 98 of the Electoral Process Act enjoins a person who lawfully voted or had a right to vote at the election

to which the election petition relates or a person claiming to have had a right to be nominated as a candidate or elected at the election to which the election petition relates to present to the High Court an election petition. This entails that the Petitioner being a person claiming to have had a right to be nominated as a candidate at the election in issue herein is rightfully before this Court.

10.3 Secondly, there have been arguments raised by both parties surrounding the issue of whether or not a petition is a pleading. Whilst the 3rd Respondent conceded in its submission that a petition is not a pleading, Counsel for the 3rd Respondent went ahead to state that the role and purpose of pleadings apply to petitions. That, to this effect the Petitioner must be bound by his pleadings and thus restrict himself to what is pleaded in the petition. In response, the Petitioner's Counsel submitted that the purpose of pleadings do not apply to petitions and that the 3rd Respondent's submission on this aspect was a ploy to mislead the Court.

10.4 I do agree with both Counsel that, it is trite law that a petition is not a pleading. This position was reaffirmed by the Supreme Court in the case of *John Sangwa V Nkonde*³¹. In the said judgment the Supreme Court at J40 opined that Order 18 sub rule 2 specifically states that "A pleading does not include a petition. Order 18A of the White Book provides that:-

"A pleading is a party's written statement of the facts on which he relies for his claim or defence, as the case may be. The term "pleading" does not include a petition, summons or preliminary act.

10.5 As regards the contents of a petition Order 9 rule 2 of the White Book provides that:-

"Every petition must be printed or embossed by an Officer of the Court at the head of the page and must include a concise statement of the nature of

the claim made or the relief or remedy required in the proceedings begun thereby (underlying is for emphasis)”

10.6 It thus follows, that although a petition is not a pleading it must contain a concise statement of the nature of the claim, the relief and remedy required. A petition therefore despite not being a pleading is still subject to rules of evidence. Thus, even in Petitions matters which are not pleaded can only be taken into account by the court in determining issues if not objected to and thus placed on record by a party. This position is fortified by the holding of the Supreme Court in the case of **Anderson Mazoka & Others V Mwanawasa and Another**¹² wherein when dealing with a presidential petition the Court stated that:

“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.”

I believe the converse applies even in election petitions that where a matter is not pleaded and objected to, it must not be placed on record and consequently cannot be taken into account by the court in determining issues. It was thus imperative that in the matter herein the Petitioner restricted himself to issues as outlined in the petition and that issues not pleaded would only be placed on record and considered by the Court if not objected to by the Respondents.

10.7 This election petition has been brought pursuant to *Section 97 (1) (2) (b) and (4) of the Electoral Process Act*. The said provisions are couched as follows:

97. (1) *An election of a candidate as a Member of Parliament, mayor, council chairperson or Councillor shall not be questioned except by an election petition presented under this part*

(2) *An election of a candidate as a Member of Parliament, Mayor, Counsel Chairperson or Councilor 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), that 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 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.

10.8 Core to this Petition therefore, is Section 97(2)(b) of the Electoral Process Act. In the case of *Nkandu Luo and another, V Doreen Sefuke Mwamba and Attorney General*¹³, the Constitutional Court stated that:

"Section 97(2) (b) of the Electoral Process Act is central to the electoral disputes"

10.9 The import of Section 97 (2) (b) was also addressed by the Constitutional Court in the case of *Dean Masule V Romeo Kangombe*³² that:-

"Section 97(2) (b) addresses acts of non-compliance with the provisions of the Act in the conduct of elections....the provision seems to suggest that it specifically relates to the conduct of elections. Article 229 (2) (b) of the Constitution as amended by Act No. 2 of 2016 vests power to conduct elections in the Electoral Commission of Zambia. If that is accepted, it follows that section 97(2) (b) relates to the discharge of the Electoral Commission of Zambia's functions during an election. This position is somehow made clear by the fact that Section 97 (2) (b) is subject to subsection (4) which provides that an election will not be declared void due to Act or omission of an election officer in breach of his official duties in relation to the conduct of the election....."

10.10 The Constitutional Court further guided in the case of *Giles Chomba Yamba Yamba V Kapembwa Simbao and Others*³³ that:-

"It is unequivocal that Section 97(2) (b) relates to non-compliance with the provisions of the law in the conduct of elections. It calls for the annulment of elections in the event that there has been non-compliance with the principals laid down in the Electoral Process Act in as far as the conduct of elections is concerned. The question then arises, who has conduct of elections?"

- *The answer, in our view, lies in Article 229 (2) (b) of the Constitution it reads:*

(2) the Electoral Commission shall... (b) conduct elections and referenda “thus, the Constitution expressly gives the function to conduct elections to the Electoral Commission of Zambia (ECZ).. Section 97 (2) (b), therefore, concerns non-compliance to the provisions of the Act by the Electoral Commission of Zambia, the body charged with the conduct and not the candidates to an election or their agents.”

10.11 Further in the case of *Austin C. Milambo V Machila Jamba*³⁴, the Constitutional Court guided that:-

“Section 97 (2) (b) of the Act relates to the conduct of elections by the Electoral Commission of Zambia. ”

10.12 In addition, in *Margaret Mwanakatwe V Charlotte Scott and the Attorney General*³⁵, the Constitutional Court equally guided that:

“Section 97 (2) (b) relates to non-compliance with the provisions of the Act in the conduct of the election in issue and that the non-compliance has affected the election result”

10.13 It is therefore, trite law that Section 97 (2) (b) of the Electoral Process Act relates to the discharge of the 2nd Respondent’s functions during an election and how that conduct by the 2nd Respondent affected the election results.

10.14 At this point I also wish to remind myself that in election Petitions, the applicable standard of proof is higher than a mere balance of probability applicable in ordinary Civil Cases. The Constitutional Court aptly explained this in the *Bowman Lusambo V Bennard Kanengo & Election Commission of Zambia*³⁶ Case. The Constitutional Court also echoed the same position in the *Nkandu Luo V Doreen Sefuke Mwamba*¹³ case when it stated that the standard of proof in Election Petitions is higher than the balance of probabilities but less than beyond all reasonable doubt and that the trial court must be satisfied with credible and cogent evidence

which a Petitioner must prove to a fairly high degree of convincing clarity.

10.15 In determining the issues raised in this Petition, I shall therefore be guided by the positions of the law as illustrated above.

10.16 As indicated above, the Petitioner alleges that the 2nd Respondent contravened the law based on six (6) grounds that there was:

- (a) *Non-compliance by the 2nd Respondent to provisions of the Electoral Process Act prohibiting any person from preventing the Petitioner to exercise his right to contest as a candidate as conferred by the Act to eligible candidates;*
- (b) *Non-compliance by the 2nd Respondent to stay/suspension order issued by the High Court as a Court of competent jurisdiction under this Act renders the action by the Statutory Instrument issued on the 12th October 2022 illegal, null and void and an election conducted under an illegal and void order is illegal, null and void;*
- (c) *Non-compliance by the 2nd Respondent to electoral timelines provided under Article 52(4) affected the conduct and result of the election;*
- (d) *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 kwacha Constituency by the Constitutional Court of Zambia despite the Petitioner having met the qualifications and procedural requirements specified for an election to their respective offices.*
- (e) *By not calling for fresh nominations after the decision and thereafter communication by the candidate that withdrew from the poll which communication was made to the Chief Electoral Officer in the employ of the 2nd Respondent.*
- (f) *Calling for elections without the nominations of the Petitioner being allowed by the 2nd Respondent's agent the returning officer in this case from Petitioners against their right to participate in the said elections which right was subsisting at the time.*

10.17 My firm view is that based on the foregoing grounds, the Petition raises two cardinal questions for determination being:

1. *Firstly, Whether or not there was non-compliance with the provisions of the Electoral Process Act relating to the conduct of the by-election for Kwacha Constituency on the Copperbelt Province held on 21st October, 2022 as provided by Section 97 (2) (b) of the Electoral Process Act.*

2. *Secondly, if the answer to the foregoing question is in the affirmative, then, whether or not that conduct affected the results of the by-election to warrant this Court to find the said by-election to have been null and void.*

10.18 In answering the two central questions posed above, I shall consider five (5) peripheral questions based on the above six (6) grounds which the Petitioner has relied on to prove that the 2nd Respondent contravened the law. I, however, find grounds (a) and (d) relied upon by the Petitioner to be interlinked as they both relate to the first issue of prevention of the Petitioner to file his nomination. In determining the same, therefore, I shall tackle the said grounds together. The five (5) peripheral questions are as follows:-

- (1) *Whether the Petitioner was prevented by the 2nd Respondent to participate in the Kwacha By-Election held on 21st October, 2022.*
- (2) *Whether the statutory instrument issued by the 2nd Respondent on 11th October, 2022 was illegal, null and void as a result of the stay/suspension order issued by the High Court in cause No. 2022/HP/1327.*
- (3) *Whether the 2nd Respondent did not comply to the electoral timelines as provided under Article 52 (4) of the Constitution of Zambia.*
- (4) *Whether or not the Returning Officer of the 2nd Respondent violated Article 70(1) of the Constitution by rejecting and declaring the Petitioner's nomination unsuccessful on the basis that his election was nullified*
- (5) *Whether or not the failure by the 2nd Respondent to conduct fresh nominations after the resignation of the independent candidate rendered the Kwacha Constituency by-election held on 21st October, 2022 null and void.*

11.0 WHETHER THE PETITIONER WAS PREVENTED BY THE 2ND RESPONDENT FROM PARTICIPATING AS A CANDIDATE IN THE KWACHA BY-ELECTION HELD ON 21ST OCTOBER, 2022.

11.1 I have considered the submission by Counsel for the respective parties on this allegation of contravention of the law. The thrust of the Petitioner's argument in support of this allegation was that there was non-compliance by the 2nd Respondent to the provisions of the Electoral Process Act when it prevented the Petitioner, who was eligible to

exercise his right to contest as a candidate in the Kwacha by-election, from filing his nomination papers. The Petitioner argued that he was eligible to contest but that the 2nd Respondent prevented him from filing his nomination on the basis of article 72(4) of the Constitution. Both PW1 and PW2 produced document marked “P2” as evidence of the prevention.

11.2 The crux of the 1st Respondent’s argument in response was that the 2nd Respondent acted within its powers or authority to reject the Petitioner’s nomination papers on the basis that the Petitioner’s election was nullified as the Court had not at that point interpreted the effect of nullification of an election on the validity of a candidate’s nomination.

11.3 The kernel of the 2nd respondent’s argument is that the Petitioner’s nomination was merely rejected and that he was not prevented in filing in his nomination as he actually presented his documents to the Returning Officer.

11.4 The thrust of the 3rd Respondent’s argument on this allegation was that the 2nd Respondent was within its powers to reject the Petitioner’s nomination as the 2nd Respondent is empowered under article 52(2) of the Constitution to reject a nomination paper.

11.5 To ably determine the above question, it is imperative first to define the word “prevention”. The Electoral Process Act does not define the word prevention. The authors of dictionary of English define “prevention” in the following terms:

“The act of hindering, obstruction of action or impede”

11.6 The authors of the *Pocket Oxford Dictionary & Thesaurus, 2nd Edition* defined the word prevent as follows:

“Stop something from happening or someone from doing something”

11.7 From the above definitions, the question therefore is was the Petitioner hindered, obstructed or impeded by the 2nd Respondent in filing his nomination. In other words, was the Petitioner stopped from filing his nomination documents? It is trite law that in election matters, like any civil actions, the burden to prove allegations complained of rests with the Petitioner, The petitioner testified that on 25th August 2022, he went to River Rain nomination center where he presented his papers as per requirement together with the prescribed number of people and fees. It was also the Petitioner's evidence that the 2nd Respondent's agent Mr. Brian Mbula (PW3) went through the documents and was satisfied with the documents presented to him. This evidence was corroborated by the Petitioner's own witness PW2 who gave a vivid account of what transpired on nomination day. He testified that he escorted the petitioner to River Rain nomination Centre. The 2nd Respondent's Returning Officer, PW3 told the Petitioner to give him documents and guided the petitioner the documents he wanted. The Petitioner was later taken to a camera where his image was captured; he signed and paid the prescribed fees. Further that the Petitioner's supporters had their voter's cards verified. PW1 and PW2 both testified that the Returning Officer, then rejected the Petitioner's nomination and that as he did so, the Nomination Officer, gave the Petitioner a document marked "P2".

11.8 I have examined the contents of the document marked "P2". It states that:

" I have relected as invalid the nomination papers of the following candidate (i) full name Malanji Joseph, reason for rejection based on Article 72(4) of the constitution" (underlying for emphasis)

11.9 I find that the Petitioner's own evidence and that of his witnesses place the Petitioner at the scene of the nomination without any hindrance,

obstruction or impediment by the 2nd Respondent or any other person. The 2nd Respondent did not stop the Petitioner from filing his nomination documents.

11.10 The words used by the 2nd Respondent on the document marked P2 are “rejected” as invalid. The word rejected in ordinary parlance means decline. The authors of the *Pocket Oxford Dictionary & Thesaurus, 2nd Edition* define the word “reject” as to:

“Refuse to accept”

11.11 I am therefore of the considered view that the words “prevention” and “rejected” connote two different actions and are distinct. Furthermore, I am of the view that the case of **Jere v Ngoma**⁹ cited by the Petitioner in support of his allegation that the Petitioner was prevented from filing his nomination is distinguishable from the facts and evidence in this petition. The facts in Jere case are that Mr Wingford Kaliza Jere, who had intended to put himself forward as a candidate for the African National Congress Party for the Chipata West Constituency at the General Election, petitioned for a declaration that the election be declared void on the ground that he, the petitioner, was prevented by the supporters of his opposing candidate, Mr John Chiponda Chisamba Peterson Ngoma, from duly lodging his nomination papers on nomination day, namely 26th November, 1968.

11.12 In the current case there is no evidence showing that the Petitioner was prevented or stopped from filing his nomination documents by any of the Respondents or their supporters but that his nomination was rejected by the 2nd Respondent. As argued by the 2nd Respondent, the law under Article 52(2) of the Constitution and Regulation 18 (7) of the Electoral Process Act, Statutory Number 63 of 2016 allows the 2nd Respondent upon filling of the nomination by a candidate to either accept or reject

the nomination, of course stating the reason for doing so. If not satisfied with the rejection, the candidate can then challenge the rejection by filing process in the High Court a right that PW1 exercised under Cause No. 2022/HP/1327. However the court ran out of jurisdiction to hear and determine the matter within the prescribed period of twenty-one (21) days.

11.13 Based on the foregoing analysis, it is therefore my finding that there no merit in the allegation that the Petitioner was prevented from filing his nomination.

11.14 I now turn to the second allegation of contravention of the law by non-compliance by the 2nd Respondent to the stay/suspension order issued by the High Court thus rendering Statutory Instrument issued on 12th October, 2022 illegal, null and void and the election conducted under it void.

12.0 WHETHER THE STATUTORY INSTRUMENT ISSUED BY THE 2ND RESPONDENT ON 11TH OCTOBER, 2022 WAS ILLEGAL, NULL AND VOID AS A RESULT OF THE STAY/SUSPENSION ORDER ISSUED BY THE HIGH COURT IN CAUSE NO. 2022/HP/1327

12.1 The thrust of the Petitioner's argument under this allegation is that the 2nd Respondent announced the date of elections on the 11th October, 2022 when the stay/ suspension order was still in force.

12.2 I must state from the outset that the Petitioner contradicted himself in his evidence in Court on this allegation. On one hand the Petitioner testified in cross-examination that the notice of election slated for 21st October 2022 was issued on the 11th October, 2022 after the 21 days had lapsed. On the other hand he testified in cross-examination that the

announcement of the date of election of 21st October, 2022 by the 2nd Respondent was done before the judgment of the Constitutional Court and thereby before the discharge of the stay suspending elections.

12.3 The evidence on record indicates that the Petitioner filed process challenging his nomination in the High Court under cause No 2022/HP/1327 on the 30th August, 2022. Following this, on 13th September, 2022, the High Court granted a stay suspending the 15th September, 2022 by election. The proceedings in the High Court were later stayed by the Court of Appeal on the 16th September, 2022. The twenty-one (21) days period provided by the Constitution in which the proceedings in the High Court challenging nomination were to be concluded thus expired on the 20th September, 2022. The 2nd Respondent issued the Statutory Instrument on the 11th October, 2022.

12.4 Consequently, the twenty-one (21) days having lapsed on 20th September, 2022, from this date onwards there was no stay as the action had been terminated by the effluxion of time. I say so because I do not see how the stay would remain in force when the matter under which it was issued has been dismissed due to lapse of time. This position is also in line with the holding of the Constitutional Court in the case of **Bernard Kanengo V The Attorney General & The Electoral Commission of Zambia**² wherein the Court held as follows:-

“The use of the word ‘Shall’ in relation to the Court hearing the case in twenty-one (21) days, leaves the Court with no discretion to enlarge time to go outside the prescribed time of twenty-one (21) days. We elucidated in the case of Hakainde Hichilema on the import of Articles 101 (5) and 103 (2) which provides for hearing of the Presidential Election Petition within fourteen (14) days of its filling, as follows:

As Article 101 (5) and 103 (2) of the Constitution limit the period within which a Presidential Election Petition must be heard by the Court to fourteen (14) days the Court cannot competently hear a petition outside this period.....

.....where the time for hearing the petition is limited by the Constitution, the Court is bound to enforce the time limit. This means that if this Petition were to be heard outside the fourteen (14) days period, the proceedings will be a nullity.”

Furthermore that:

The purposive approach to the interpretation of the Constitution does not assist in this case as the time frame for the hearing of the petition is stated in mandatory terms. As Article 101 (5) and 103 (2) of the Constitution limit the period within which a Presidential election petition must be heard by this Court to fourteen (14) days, the Court cannot competently hear a petition outside this period. Our position is that the petition stood dismissed for want of prosecution when the time limited for its hearing lapsed.

When a nomination challenge is properly before the High Court it should be concluded within twenty-one (21) days. Additionally, our decision in the Hakainde Hichilema case is that the twenty-one (21) days for hearing a nomination challenge is limited by the Constitution and it does not stop running. If anything, Article 52 (4) does not envisage appeal on nominations challenge hence the time being limited to twenty-one (21) days as those cases are to be expeditiously handled.

12.5 Based on the foregoing, I come to the inescapable conclusion that the allegation that there was non-compliance by the 2nd Respondent to the stay/suspension order issued by the High Court rendering the Statutory Instrument issued on 12th October 2022 has no merit.

12.6 I now turn to the third allegation that there was non-compliance by the 2nd Respondent to the electoral timelines provided under Article 52(4) which affected the conduct and result of the by-election.

13.0 WHETHER THE 2ND RESPONDENT DID NOT COMPLY TO THE ELECTORAL TIMELINES AS PROVIDED UNDER ARTICLE 52 (4) OF THE CONSTITUTION OF ZAMBIA.

13.1 Article 52 (4) provides that:

“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 that the court shall hear the case within 21 days of its lodgment”

13.2 In relation to this allegation the Petitioner did not lay any evidence as regards how the 2nd Respondent allegedly did not comply with the

electoral timelines neither did he argue the allegation to a fairly convincing clarity.

- 13.3** Therefore, my short response on this allegation is that Article 52(4) of the Constitution relates to a challenge of a nomination before the High Court in the case of parliamentary election. This has to be done within 7 days of the close of filing nomination and the High Court has 21 days to hear and determine the matter. In the current case, the Petitioner did file his nomination challenge in the High Court on 30th August, 2022 after his nomination was rejected by the 2nd Respondent. The High Court stayed or suspended the elections on 13th September, 2022 and consequently the elections slated for 15th September, 2022 were not held or conducted by the 2nd Respondent.
- 13.4** What I note from the above analysis is that none of the timelines indicated in Article 52(4) relate to the 2nd Respondent. To the contrary, the same relate to the Petitioner and the High Court. Furthermore, the High Court having granted a stay of the elections, there was no breach of the timelines provided under Article 52(4) and no prejudice was occasioned on the Petitioner.
- 13.5** In addition, it must be borne in mind that for this court to find the by-election null and void in casu under section 97(2)(b), the section under which the herein petition was brought, the contravention of the law must be against the Electoral Petition Act and not the Constitution. Furthermore, even if that was not the case, the Electoral Process Act, section 97(4) provides that an election shall not be declared void if it appears to the High Court that the election was so conducted as to be substantially in accordance with the provisions of the Electoral Process Act, and that the act or omission did not affect the result of that election. As earlier stated no evidence was adduced by the Petitioner to show how

substantially the 2nd Respondent did not follow the electoral timelines or how the omission affected the election results.

It is, therefore, my finding that the allegation of non-compliance to the electoral timelines equally has no merit.

14.0 WHETHER OR NOT THE FAILURE BY THE 2ND RESPONDENT TO CONDUCT FRESH NOMINATIONS AFTER THE RESIGNATION OF THE INDEPENDENT CANDIDATE RENDERED THE KWACHA CONSTITUENCY BY-ELECTION HELD ON 21ST OCTOBER, 2022 NULL AND VOID.

14.1 I have taken judicial notice, as submitted by the 2nd Respondent, that there are Court cases pending hearing and determination before the Constitutional Court relating to this allegation on the failure by the 2nd Respondent to cancel the election and call for fresh nominations as indicated under Article 52 (6) of the Constitution following the resignation of the independent candidate. The said cases are *Governance Elections Advocacy Research Services Initiative Zambia Limited V The Attorney General and The Electoral Commission of Zambia 2022/CCZ/0020*²¹, *Institute of Law, Policy Research and Human Rights, Peter Chazya Sinkamba and Isaac Mwanza V Electoral Commission of Zambia, The Attorney General 2022/ /CCZ/0029*²² and *Nickson Chilangwa V The Attorney General and The Electoral Commission of Zambia 2022/CCZ/0026*²³. I have had sight of the above cases.

14.2 In the case of *Governance Elections Advocacy Research Services Initiative Zambia Limited V The Attorney General and The Electoral Commission of Zambia*²¹, the issues for determination by the Constitutional Court are inter alia:-

1. *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;

2. 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 when an independent candidate withdraws from the election after the close of nominations but before the election date;

14.3 In the case of *Institute of Law, Policy Research and Human Rights, Peter Chazya Sinkamba and Isaac Mwanza V Electoral Commission of Zambia*²² the issues for determination by the Constitutional Court are *inter alia* :-

1. 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 a resignation has effect on the operation of the said Article 52(6);
2. 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;
3. A declaration that Respondent was obliged to cancel and conduct fresh nominations in Kabushi and Kwacha Constituencies when the High Court proceedings had lapsed or declared by the Constitutional Court to have had lapsed by effluxion of time on 20th October, 2021;

14.4 In the case of *Nickson Chilangwa V The Attorney General and The Electoral Commission of Zambia*²³ the issues for determination by the Constitutional Court are *inter alia*.

1. Whether under Article 52 (6) of the Constitution of Zambia (Amendment Act) number 2 of 2016 after the withdrawal of two (2) independent candidates from Kabushi and Kwacha Parliamentary By-Elections the Electoral Commission of Zambia has a discretion whether to conduct fresh nominations or not;

14.5 It is thus clear that indeed the issue of failure to call for fresh nominations by the 2nd Respondent upon the resignation of the independent candidate is currently pending determination by the Constitutional Court. I therefore decline to make any determination on

the issue as it is already pending determination by the Constitutional Court, a court superior to the High Court.

15.0 WHETHER OR NOT THE RETURNING OFFICER OF THE 2ND RESPONDENT VIOLATED ARTICLE 70(1) OF THE CONSTITUTION BY REJECTING AND DECLARING THE PETITIONER'S NOMINATION UNSUCCESSFUL ON THE BASIS THAT HIS ELECTION WAS NULLIFIED.

15.1 The Petitioner alleged that the Returning Officer of the 2nd Respondent violated article 70(1) of the Constitution by rejecting and declaring the Petitioner's nomination unsuccessful on the basis that his election was nullified.

15.2 My considered view is that the Returning Officer is empowered under Article 52(2) of the Constitution and Regulation 18 (7) of the Electoral Process Act, Statutory Number 63 of 2016 to, upon the filing of the nomination by a candidate, to either accept or reject the nomination. The Returning Officer's decision is final unless challenged through an election petition under Article 52(4). In the current case, the Petitioner had an opportunity and actually challenged the decision of the Returning Officer in the High Court under cause number 2022/HP/1327. Therefore, the Petitioner cannot at this stage again allege that the Returning Officer violated Article 70 (1) of the Constitution by rejecting and declaring his nomination unsuccessful post-election period. This Court does not and cannot assume jurisdiction to determine the said allegation of the Returning Officer violating Article 70 (1) by rejecting and declaring the petitioner's nomination unsuccessful on the basis of want of jurisdiction. Am fortified in saying so by the Supreme Court's decision of *Aristogersimos Vangelatos and Another v Metro Investment Ltd and Three Others*³⁷ citing Halsbury's at 715 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”

- 15.3 My firm view is that the High Court has no jurisdiction under Article 52 (4) as evidenced by regulation 18 (7) to entertain petitions regarding rejection by the Returning Officer of nomination papers of candidates for elections, post-election polls.
- 15.4 Regulation 18 (7) in my view was apparently enacted to prescribe the manner in which and stage at which rejection of nomination by the Returning Officer can be challenged. It follows by necessary implication from the language of the regulation 18 (7) that a challenge of rejection of nomination cannot be challenged in any other manner, at any other stage and before any other Court other than the High Court within seven (7) days of the decision of rejection of the nomination paper and the High Court must decide within twenty (21) days of the filing of the election petition challenging the rejection of the nomination paper by the Returning Officer. As was held by the Constitutional Court in the case of *George Muhali Imbuwa V Electoral Commission of Zambia*¹⁹ the decision of the High Court cannot even be appealed against.
- 15.5 I therefore dismiss the above allegation for lack of jurisdiction as the same ought to have been determined by the High Court at nomination. In fact, this allegation must not even have been raised in this petition as section 97 (2)(b) relates to contravention of the Electoral Process Act and not the Constitution. On this position I am fortified by the holding of the Constitutional Court in the case of *Giles Chomba Yamba Yamba V Kapembwa Simbao and Others*³³ where the court held that: -

“It is unequivocal that Section 97(2) (b) relates to non-compliance with the provisions of the law in the conduct of elections. It calls for the annulment of elections in the event that there has been non-compliance with the principals laid

*down: in the Electoral Process Act in as far as the conduct of elections is concerned.
(emphasis mine)*

15.6 Having found that all of the Petitioner's allegations have no merit, the second question whether or not the 2nd Petitioner's conduct affected the results of the by-election to warrant this Court to find the said by-election to have been null and void is rendered otiose.

15.7 On the totality of the evidence before me, I find that the Petitioner has not provided this Court with credible and cogent evidence to prove to a fairly high degree of convincing clarity that the 2nd Respondent did not comply with the provisions of the Electoral Process Act relating to the conduct of the by-election for Kwacha Constituency on the Copperbelt Province held on 21st October, 2022 and that the election was not conducted in accordance with the principles laid down in the said provisions to warrant this Court to find the said by-election to have been null and void.

16.0 ORDERS OF THE COURT

16.1 In view of the above the Petitioner's reliefs in this petition therefore fail and the petition is dismissed.

16.2 Since election petition are of public interest, I order that each party bears its own costs.

16.3 *Leave to appeal is hereby granted.*

Delivered at Kitwe this 24th day of January, 2023



C. Chinyanwa Zulu
HIGH COURT JUDGE