

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

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

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

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

BETWEEN:

CHOLA SONNY PETITIONER

AND

SINKALA OBED RESPONDENT

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

For the Petitioners: In Person

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

RULING

Honourable Chibwe F, delivered the Ruling of the Tribunal

Cases referred to

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

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

Legislation referred to

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

1.0 INTRODUCTION

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

2.0 **BACKGROUND**

2.1 Briefly, the factual matrix antecedent to this application is that on 12th August 2021, the people of Kashikishi Ward in the Chimbamilonga Constituency of the Nsama District in the Northern Province of the Republic of Zambia went to the polls to elect their Councillor. The Petitioner stood on the United Party for National Development ticket (the UPND) while the Respondent stood on the Patriotic Front (the PF) ticket. On 14th August 2021, the Returning Officer declared the Respondent as duly elected Councillor for Kashikishi Ward.

2.3 Dissatisfied with the outcome of the elections referred to in 2.1, the Petitioner filed a Petition in the Subordinate Court of the First Class in the Kaputa District seeking to impugn the election of the Respondent as Councillor for the Kashikishi Ward. The Petition was brought pursuant to the provisions of sections 81, 87, 99 (a) and 100 (1) of the Electoral Process Act No. 35 of 2016 and Rules 8 (1) (c) and 9 of the Local Government Elections Tribunal Rules of 2016.

2.4 In so far as the record is concerned, the Petition was filed on 3rd of September 2021. Trial in this matter, had not yet commenced. The learned Counsel for the Respondent raised a preliminary objection pursuant to Article 159 of the Constitution as read with the provisions of Rule 21(2) which requires him to file a formal application when making interlocutory application. We have already stated that Counsel's application is for an Order to dismiss the Petition for want of jurisdiction.

2.9 Settled is the rule that whenever a jurisdictional challenge is raised by a party to an action, it is a serious issue and requires a Court or a Tribunal to deal with the issue immediately before dealing with any other issue in the matter. In view of this, we gave this application, the urgency it deserves.

- 3.0 We gave the Petitioner two days to respond to the application by the learned Counsel and oppose it if he so wished. Consequently, the Petitioner filed an Affidavit in opposition to the application to dismiss the matter for want of jurisdiction and a list of authorities.
- 3.2 On 22nd September 2021, the Tribunal heard the rival submissions of the parties which was largely a rehash of what they had filed before the Tribunal. We reserved our ruling to Friday 24th September, 2021, at 09:00 hours.
- 3.3 Considering that the determination of the question whether the Petition was filed within fourteen days as prescribed by law is a factual issue, proof of which requires examining the Electoral Commission of Zambia (the ECZ) GEN 21, we requested the District Council Secretary to favour us with the said document. A perusal of the ECZ GEN 21, revealed inter alia; that the Returning Officer announced the results on 14th August 2021.

4.0 ISSUES FOR CONSIDERATION

- 4.1 We have paid anxious consideration to the Respondent's interlocutory Notice to dismiss the Local Government Election Petition filed herein and the law relied upon. Learned Counsel has identified two issues for our determination structured as follows:
- i. whether the Petitioner's petition was filed before this Honourable Tribunal on 3rd September, 2021, is competent regard being had to the fact that the declaration was announced on the 14th August, 2021? ; and
 - ii. whether this Honourable Tribunal in accordance with Article 159 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 as read together with section 100 (3) of the Electoral Process Act No. 35 of 2016 of the Laws of Zambia should proceed to hear and determine a Petitioner's petition?

4.2 The Tribunal is of the view that the real question to be resolved, as can be distilled from the interlocutory application launched by the Respondent's Counsel, and Affidavit in opposition filed by the Petitioner, revolves around the jurisdiction of this Honourable Tribunal to hear and determine this matter.

5.0 THE LAW AND ANALYSIS OF THE ISSUE

5.1 Settled is the rule that whenever a jurisdictional challenge is raised by a party to the proceedings, the Court or Tribunal as the case may be, has no choice but to deal with the issue with a sense of immediacy. All further proceedings must be halted until the issue of jurisdiction is resolved. On this point, authorities are galore. In terms of our jurisdiction, the *locus classicus* on the subject is to be found in the sentiments of the Supreme Court in the case of *Aristogerassimos Vengelatos And Another v Metro Investments Limited and 3 Others SCZ Selected Judgment No. 35 of 2016* where the Supreme Court of Zambia had this to say:

However, although it is a general rule that an issue that has not been raised in the court below cannot be raised on appeal, the question of jurisdiction can be raised on appeal notwithstanding the fact that it was not raised in the court below. In arriving at this decision we are guided by the learned authors of Halsbury's Laws of England, 4th edition, volume 10, at paragraph 717 who state as follows: 'It is the duty of an appellate court to entertain a plea as to jurisdiction at any stage, even if the point was not raised in the court below.' This authority clearly places an obligation upon us to allow a plea of want of jurisdiction to be raised, even where, as in this case, the issue was not raised in the court below. The rationale for this lies in the consequence of the court exercising jurisdiction which it does not possess. Halsbury's at paragraph 715 states, in this regard, that where a court takes it upon itself to exercise a

jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

5.2 The position articulated by the Supreme Court above has been consistently followed in subsequent cases such as the cases of *Crossland Mutinta and Bashir Seedat v Donovan Chimponda SCZ Selected judgment No. 53 of 2018* and *Zambia Revenue Authority vs Bruce Kasonde Kaemba SCZ Appeal No. 158 of 2016*.

5.3 In *Zambia Revenue Authority vs Bruce Kasonde Kaemba SCZ Appeal No. 158 of 2016*, the Supreme Court had this say:

When we heard this appeal on 9th July, 2019, Counsel for the appellant submitted that even although both parties had not raised the issue of jurisdiction in this in the court below and in this court, he felt obliged to raise it as it could have an effect on the appeal itself. Following our decisions in *Aristogerassimos Vengelatos And Another v Metro Investments Limited and 3 Others SCZ Selected Judgment No. 35 of 2016* and the recent case of *Crossland Mutinta and Bashir Seedat v Donovan Chimponda SCZ Selected judgment No. 53 of 2018*, we allowed him to do so.

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

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

- 5.5 We have looked at the Petition and Affidavit filed herein and it is clear that it was filed on 3rd September 2021. Counting from 14th August 2021 up to 3rd September 2021 when the Petitioner filed this Petition, is 19 days. The Petitioner contends that the last day for him to file the Petition was 28th August, 2021 which fell on a Saturday. The next day being Sunday day was a Sunday which is an excluded day in the computation of time. The Petitioner further contended that he filed his Petition on 30th August, 2021 although the date on the Petition was indicating 3rd September 2021.
- 5.6 The Petitioner sought to blame the Court Clerk for not stamping his documents on 30th August 2021. We wish to state that we do not accept the Petitioner's feeble explanation for not complying with the mandatory 14 days within to file a Petition because all court registries were open for purposes of receiving Petitions even on Saturday the 28th of August 2021.
- 5.7 We have examined the record and find as a fact that the Petition was filed on 3rd September 2021, which is 19 days after 14th August, 2021, when the Returning Officer declared the Respondent as duly elected Councillor for Kashikishi Ward in the Chimbamilonga Constituency. The Petition, having been filed way after the fourteen days provided by the law in section 100(3) of the Electoral Process Act, 2016, it is incompetently before us.
- 5.8 More grievously, we have no jurisdiction to entertain, let alone, hear and determine this matter. Section 100(3) is couched in mandatory terms and the net effect being that the defect is incurable.
- 5.9 The question of legal ramifications of provisions of the law that are couched in mandatory terms was put to rest in the case of *Attorney -General V Million Juma (1984) Z.R. 1* where the Supreme Court had this to say:

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

6.0 We further hold that section 100(3) operates in the same way as a statute of limitation. The mandatory nature of this provision is such that it cannot be waived nor ignored.

6.1 In other words, the defence of estoppel cannot be set up against section 100 (3) of the Electoral Process act 2016. To this end, in the case of *Attorney General v E.B Jones (SCZ Judgment No. 26 of 2000)*, the Supreme Court guided that:

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

6.2 What emerges from this discourse is that section 100 (3) does not give us any discretion to enlarge or extend the time for filing the Petition under that section. Jurisdiction is everything and goes to the very foundation of the authority of the Court or Tribunal to entertain matters or make orders. As was aptly observed by the Supreme Court in the case of *Zambia Revenue Authority vs Professional Insurance Corporation Limited Appeal No. 34 of 2017 (Supreme Court majority Ruling delivered on 23rd September, 2020)*, where the majority held inter alia that:

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

- 6.3 Again, not so long ago, the Supreme Court in the case of *Antonio Ventriglia Manuela and Ventriglia v Finsbury Investment Limited Appeal No. 2 of 2019* (Supreme Court Ruling delivered on 28th October 2019, had occasion to pronounce itself with fluorescent ability on the consequences of lack of jurisdiction when it remarked as follows:

In making our decision to priotise and give precedence to the Preliminary Objection to this appeal, we reminded ourselves that where a jurisdictional is mounted against having a Court proceed with the matter, it is imperative and incumbent upon the Court concerned to resolve or determine the issue before proceeding to deal with any other issue in the matter before it. In this regard, we recall to mind the lasting observations which we made in the case of *JCN Holdings v Development Bank of Zambia (2013) ZR 299* when we said, via Chibesakunda, A/CJ: It is clear from the Chikuta and New Plast Industries cases that if a Court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to the matter.

- 6.4 The Supreme Court went further and quoted with approval the position adumbrated by the Kenyan Court of Appeal in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (1989) KLR*, where it was held that:

"[I]t is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for

a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... 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 judgement is given".

- 6.5 Having guided ourselves in terms of the law canvassed above, and having found as a fact that the Petition was filed way after the fourteen days when the Returning officer had announced the Respondent as duly elected Councillor for Kashikishi Ward, the penultimate question is this: what is the fate of this present Petition before us? Before answering our question posed above, we wish to observe, albeit, briefly that the Supreme Court was faced with a somewhat, similar question in the preceding case when it was called upon to decide:

Since the Court of Appeal [did] not have the power to entertain an application for leave outside the 14-day period, it could not equally confer authority on the Supreme Court to consider and decide the appeal.

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

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

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

In computing time for the purposes of any written law-

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

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

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act

or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

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

- 6.8 Applying the law as we find it, we have to regrettably hold, and we so hold that the Petition having been filed way after fourteen days when the Returning Officer had announced the Respondent as duly elected Councillor for Kashikishi Ward, the Petition is incompetently before us. We have no jurisdiction to hear and determine it.
- 6.9 The Petitioner's sole excuse for the delay in filing the Petition that there was a mistake committed by the Court clerk not to stamp the documents on 30th August 2021, does not assist his case because, as we have already said, the Court registry was open even on Saturday and yet he failed to file his Petition on time.
- 7.0 We are of the view that the excuse projected by the Petitioner is feeble in the extreme and is an afterthought designed to try and salvage his precarious position. We will consider the date appearing on the Petition and Affidavit as the date when the Petitioner filed the Petition. We are certainly of the view that to entertain the feeble excuse set up by the Petitioner at this point would not only go against clear evidence on record that he filed on 3rd September 2021 but it would also be calamitous. We, therefore, conclude that the Petitioner's exertions on this issue are, but in vain.
- 7.1 The Indian Supreme Court, a common law jurisdiction like ours, put the matter in somewhat more gripping terms when it declared, in the case of *Bawarwaraj & Another v Spl Land Acquisition Officer* (2013) 14 SCC 81 1,

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

8.0 CONCLUSION

8.1 The net effect of what we have said is that the requirement to file a petition within fourteen (14) days under section 100(3) is mandatory and jurisdictional. In the result, the preliminary objection raised by the Respondent succeeds. Accordingly, we dismiss the Petition for want of jurisdiction. On the issue of costs, we are guided by the case of *Anderson Kambela Mazoka v Levy Patrick Mwanawasa (1)* in which the Supreme Court said the following:

“As we have always said on costs in matters of this nature, it is in the interest of the proper functioning of our democracy that challenges to the election of the President, which are permitted by the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs.

8.2 For our part, we adopt the reasoning and therefore, order that each party bears their own costs. We passingly, direct the parties' attention to rule 21 (6) of the Local Government Elections Tribunal Rules of 2016, that there is no appeal on interlocutory decisions.

24 SEP 2022



Hon F. Chibwe

Hon G. Mulenga
Chairperson



Hon I. Kakanda-Chuula