IN THE HIGH COURT OF TANZANIA
AT IRINGA

MISCELLANEOUS CIVIL APPLICATION NO. 33 OF 2015
IN THE MATTER OF ELECTION PETITION UNDER THE
NATIONAL ELECTIONS ACT CAP 343 RE 2015
AND ELECTION PETITIONS RULES

BETWEEN

WILLIAM MUNGAI ..... APPLICANT

VERSUS

COSATO CHUMI & ANOTHER ..... RESPONDENTS

15/12/2015 & 21/12/2015

RULING

Kihwelo J.

The applicant William Mungai has come before this Court armed with an application made pursuant to the provisions of Section 111(3) of the National Elections Act, Cap 343 RE 2015 seeking to move the honourable Court for the following orders:-

1. *That, this honourable Court be pleased to hear an application for determination of the amount payable as security for costs.*
2. *That, costs be provided for.*
3. *Any other order this Court may deem fit to grant.*

The instant application was supported by the affidavit of Ms. Jane Simplicius Massey learned counsel which was taken on 7th December, 2015.

The brief background to the instant application, is briefly, that the applicant is a petitioner in the Election Petition No. 8 of 2015 which is pending before this Court seeking for avoidance of election results in the General Election held on 25th October, 2015 for Mafinga Town Constituency in which the first respondent Cosato Chumi who was contesting under the umbrella of CCM was declared by the second respondent as the winner of the parliament seat for Mafinga Town Constituency while the applicant who was contesting under the umbrella of CHADEMA lost the race along with other contestants.

In compliance to the law the applicant filed the instant application within fourteen days from the date of filing Petition No. 8 of 2015 seeking for the determination of the amount payable as security for costs in respect of the pending election petition.

When the application came for hearing the applicant was under the services of Mr. Barnabas Nyalusi who was assisted by Ms. Jane Massey learned counsels. The first respondent was represented by Dr. Ashery Utamwa while the second and third

respondents were under the services of Mr. Abel Mwandalama, learned Senior State Attorney.

From the affidavit evidence of Ms. Jane Massey the applicants main reason for moving the court to determine the amount payable as security for costs is discernible at paragraphs 3, 4 and 5 which I wish to reproduce below.

"3. That it was an Applicant (sic) obligation to conduct and fund his election campaign by utilizing his own funds.

4. That the Applicant is required to pay into Court a security for costs.

5. That due to financial hardships the Applicant is unable to pay into the Court as security for costs an amount set."

The applicant did not file any reply to the respondents' Counter Affidavits.

Amplifying in support of the application Mr. Nyalusi contended that the applicant has filed an Election Petition No. 8 of 2015 against the three respondents and by virtue of Section 111(3) of the National Elections Act Cap 343 RE 2015 the applicant has filed an application seeking for determination of the amount to be paid as security for costs. Mr. Nyalusi contended further that the law requires that a Petitioner should deposit an amount not exceeding five million shillings for each respondent and it is upon those

circumstances that the applicant is requesting for the security for costs to be reduced for the reasons stated in the Affidavit.

Mr. Nyalusi forcefully argued that the applicant still has unsettled liabilities arising from the entire elections campaign process and the applicant at present is unemployed as he resigned from his employment with the Commercial Bank of Africa to pursue his political career. He strongly prayed that bearing all these circumstances in mind the honourable Court should be pleased to reduce the amount payable as security for costs.

In response Dr. Utamwa learned counsel for the first respondent he first of all started by abandoning the issues he raised in his Counter Affidavit in what looks like preliminary points of objections.

He then went ahead to spiritedly object to any consideration for reduction of the amount to be paid as security for costs for a number of reasons to be discussed below.

He argued that the requirement to pay or deposit security for costs is a statutory requirement which the Parliament using its wisdom enacted in the National Elections Act in order to bar those who seek to abuse the court process. Dr. Utamwa arguably submitted that the applicant's counsel seems to contradict himself. However, Dr. Utamwa did not substantiate well his contention.

The counsel for the first respondent valiantly argued that the counsel for the applicant's submission that the applicant has incurred unsettled financial liabilities has not been disclosed and its too risky for the Court to rely on something which has not been deponed to by the applicant. He went on to strenuously submit that the fact that the applicant is unemployed and that he funded his own campaign hence draining all his funds makes him financially impotent and therefore the more requirement for him to deposit security for cots. He invited this Court to the case of **GM Combined (U) Ltd V AK Detergents (U) Ltd** [1992] 2 EA 94 in which the court laid down principles for the court to consider in exercising the discretion to grant or refuse to grant the order for security for costs. He further argued that according to the case cited above the main factor to be considered in ordering security for costs is when the applicant is monitarily impotent hence in the instant case an order for security for costs is inevitable. Dr. Utamwa finally argued that the inability by the applicant to deposit security for costs and hence request for clemency is totally unacceptable as the applicant ought to know that in court there is no lunch for free hence he prayed for the applicant to be compelled to deposit security for costs accordingly.

Mr. Mwandalama the learned Senior State Attorney who appeared for the second and the third respondents was very brief and straight as he argued that the second and third respondents have no objection to the application provided that the applicant

complies to the court order and that the costs of the second and the third respondents are met in the event that the petition fails.

Mr. Nyalusi in his rejoinder was equally conspicuously brief and submitted that it is true that the application for determination of the security for costs is statutory but the counsel for the first respondent has ignored the provision of Section 111(5) of Cap 343 which gives the court discretion to waive or exempt payment of any security or any form of security for costs if that requirement will cause considerable hardship to the Petitioner and being financially impotent is one such reason. Mr. Nyalusi went on to argue that in any case the applicant is praying for the amount to be reduced and not total exemption from paying for security for costs. He therefore prayed that the prayers be granted.

It is not in dispute that the present application is brought under Section 111(3) of the National Elections Act, Cap 343 RE 2015. I will quote that Section:

> *"(3) The Petitioner shall within fourteen days after filing a petition, make an application for determination of the amount payable as security for costs, and the Court shall determine such application within the next fourteen days following the date of filing an application for determination of the amount payable as security for costs."*

The underlying words in the above provision is **determination of the amount payable as security for costs**. Mr. Nyalusi argued that since the law obliges the petitioner to deposit an amount not exceeding Tanzania Shillings Five Million the applicant is therefore requesting for the security for costs to be reduced. He advanced the reasons that the applicant financed his own campaigns, is unemployed at present and still has unsettled financial liabilities.

On his part Dr. Utamwa in attacking the application he submitted that the requirement to deposit security for costs is a requirement of the law and that there was contradiction from what the applicant has stated at paragraph 5 of the affidavit and what he has submitted in support of the application. Dr. Utamwa went on to submit that the fact that the applicant still has financial liabilities has not been deponed in the affidavit hence it can not be acted upon by the court. Finally Dr. Utamwa was of the view that the fact that the applicant is under financial difficulties is a good reason why he should be compelled to deposit security for costs in its full. He relied on the principles inunciated in the case of **GM Combined** (supra).

Apparently, I have come across two weaknesses from the applicant's submission when considered along with the affidavit in support of the application. First of all while the applicant's counsel in his submission sought to move the court to determine the amount to be paid as security for costs the affidavit in particular

paragraph 5 reads as though the amount to be deposited has already been determined and set. Paragraph 5 reads;

"That due to financial hardship the Applicant is unable to pay into Court as security for costs an amount set."

In my view even the provision of Section 111(2) of the National Elections Act, Cap 343 RE 2015 do not set a specific amount as it reads;

"The Registrar shall not fix a date for the hearing of any election petition unless the petitioner has paid into the Court as security for costs, an amount not exceeding five million shillings in respect of each respondent."

The import of the above provision of the law is to require the petitioner to deposit security for costs to the tune not exceeding five million shillings but in any way it does not fix that amount to any figure unless a liquid petitioner decides to deposit that figure of five million shillings which is the ceiling amount set by the legislature in consideration of the unfettered right of access to justice. Otherwise it is upon the court to determine and set the amount under Section 111(3).

The contents of paragraph 5 of the affidavit have been couched in such a way as if the applicant has brought the application under Section 111(5) of Cap 343 RE 2015 which is always brought after the determination of the amount payable under Section 111(3) of

Cap 343 RE 2015. I think this is the contradiction which Dr. Utamwa was trying to bring up but at the end of the day he fell into that trap hook, line and sinker and opposed the application as if the applicant was applying to be exempted from payment of any form of security for costs which is not as that is normally brought under Section 111(5) and after determination of the amount to be deposited under Section 111(3). This position was clearly elaborated by this Court in the case of **Shabani Itandu Selemani & Another V Tundu Antipas Mughwayi Lissu & Others**, Miscellaneous Civil Application No. 37 of 2010, High Court of Tanzania at Dodoma (unreported) in which my learned brother Mwangesi had the view that the provision of Section 111 of the National Elections Act, now Cap 343 RE 2015 is not that much ambiguous since what is covered in each subsection goes sequentially and with a logical flow in that one event has to happen after the other.

The second weakness which is discernible from the applicant's submission when considered along with the supporting affidavit as rightly pointed out by Dr. Utamwa is that the fact that the applicant is unemployed and still has unsettled liabilities arising from the elections campaign process was not deponed to by Ms. Jane Simplicius Massey who deponed the affidavit as such that is a statement from the bar which the applicant's counsel is not entitled to submit and the court is not required to give weight at all to facts not deponed in the affidavits but rather submitted from the bar as to do so would amount to considering evidence not before it which

is risky and dangerous for the dispensation of justice. This Court had an occasion to discuss this in more or less similar terms in the case of **Niemco Limited V Milo Construction Co. Ltd**, Civil Revision No. 29 of 1997 (unreported).

I have equally painstakingly considered the submission by the learned counsel for the first respondent and without mincing words I am of the considered opinion that Dr. Utamwa has misconceived the present application in that the applicant is not seeking for total exemption from paying of security for costs under Section 111(5) of Cap 343 RE 2015 but rather he is seeking for consideration of the amount to be paid as security for costs under Section 111(3) of Cap 343 RE 2015. As if that is not enough Dr. Utamwa has grossly misconceived security for costs furnished by the Plaintiff under Order XXV of the Civil Procedure Code Cap 33 RE 2002 with security for costs payable by the Petitioner in election petition under Section 111(2) of the National Elections Act, Cap 343 RE 2015 which has quet different principles from the ones inunciated in the case of **GM Combined (U) Ltd** (supra). I therefore find that the above case has no relevance to the instant application under scrutiny.

All in all the above said and done and having objectively considered the submissions by both counsel I have no doubt that the present application is tenable in law. I am aware that the applicant did not support his application with documentary evidence to substantiate his social and financial status but I am

also mindful of the fact that the provision of Section 111(2) of the National Elections Act, Cap 343 RE 2015 gives discretion to the court to fix any amount of security for costs but not exceeding five million shillings. I have also considered the fact that the applicant's counsel did not propose any amount considered to be reasonable on their part the only thing which the applicant's counsel raised was on the inability of the applicant to pay the amount set which to my view I think he was referring to the five million but this has been settled in that stating hardship at this stage its premature. In the case of **Jomba Koyi V Christopher Ole Sendeka and Another**, Miscellaneous Civil Case No. 21 of 2006, High Court of Tanzania at Arusha (unreported) in which his Lordship Rutakangwa J. (as he then was) wondered;

> *"How can one convincingly argue that he/she will experience hardship in complying with the provisions of sub-section (2) before the amount payable by him/her is determined."*

Hence my duty at this juncture is to determine the amount to be paid as security. In so doing I was guided by several factors as stated by Madam Judge Shangali in the recent case of **Emmanuel Godfrey Masonga V Edward Franz Mwalongo & Others**, Miscellaneous Civil Application No. 31 of 2015, High Court of Tanzania at Iringa (unreported) in which she stated that;

> *"Therefore the duty of this court is to consider the available evidence, circumstance of the matter, draw a middle line and determine a fair and just security for costs to be paid by the applicant."*

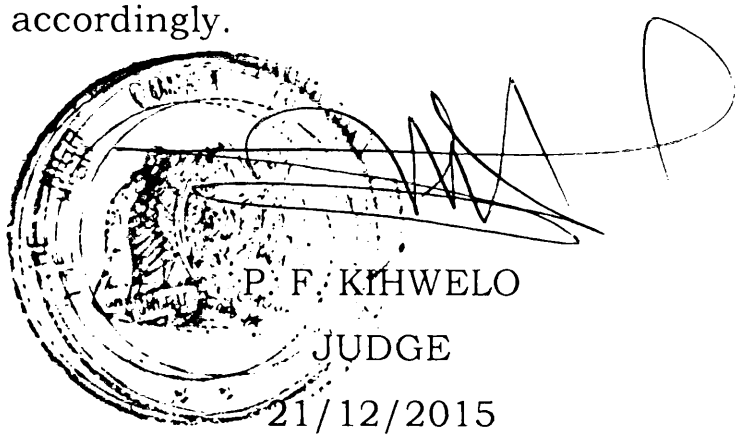
In so doing I have made sure that I do not belittle the importance and the objective of the relevant law which is to ensure that any litigant who is capable of depositing any amount of security does so in order to be able to assure the respondents that costs to be incurred will be paid in the event that the petition is not successful.

Furthermore I have considered the fundamental constitutional right to access to justice to the applicant which is an unfettered right.

In totality of the above I hereby order the applicant to pay as security for costs the sum of two million five hundred thousand shillings (TShs. 2,500,000/-) only in respect of each respondent.

The determined amount as security for costs should be paid in court within a period of fourteen (14) days from the date of this decision. Costs in the cause.

Ordered accordingly.



P. F. KIHWELO

JUDGE

21/12/2015