

IN THE HIGH COURT OF TANZANIA
AT MOSHI
MISC. CIVIL APPL. NO. 3 OF 2006
C/F PETITION MISC. CIV.CAUSE NO. 2 OF 2005
IN THE MATTER OF AN ELECTION PETITION UNDER THE ELECTION
ACT 1985 AND THE ELECTIONS (AMENDMENT) ACT, 1995
BETWEEN
PETER MZIRAY KUGAAPPLICANT
AND
1. ANNE KILANGO MALECELA)
2. THE RETURNING OFFICER,) - RESPONDENTS
SAME EAST CONSTITUENCY)
3. THE HON. ATTORNEY GENERAL)

RULING

HON. JUNDU, J.

The Applicant had contested in the Parliamentary Elections held on 14/12/2005 in the United Republic of Tanzania. He was a candidate for the Same East Constituency proposed by his party namely the Progressive Party of Tanzania (PPT – Maendeleo). He was declared an unsuccessful candidate whereas the 1st Respondent, a candidate from Chama Cha Mapinduzi (CCM) was declared by the 2nd Respondent as the successful candidate for the said Same East Constituency. The Applicant was not satisfied with the said election results for the said constituency. On 27th December, 2005, he filed an election petition in this court seeking interalia the nullification of the election of the 1st Respondent as the Member of Parliament for the Same East Constituency on the ground that the election results in the said Constituency were neither free nor fair as they were allegedly tainted with fundamental flaws. The named election petition filed by the Applicant is yet to be heard by this court subject to the fulfilment of other mandatory conditions by the Applicant as by law required.

One of such mandatory statutory condition under Section 111 (3) of the Elections Act. 1985 requires the Applicant as a Petitioner to make an application to this court within 14 days after filing the petition for determination of the amount payable as security for costs by the Applicant. On 6/1/2006, the Applicant filed his application in this court praying for this court to make the following Orders:-

1. That may this honourable court be pleased to determine the amount payable by the Applicant as security for costs in respect of the Petition.
2. That may this Honourable court be pleased to exempt the Applicant from the requirement of paying the security for costs in respect of the Petition.
3. That costs be provided for.
4. Any other order or relief which this Honourable court may deem fit to grant.

The above named prayed orders have been listed in the Chamber Summons filed by the Applicant in this court. The said Chamber Summons is purportedly supported by the Affidavit deponed by the Applicant. The Chamber Summons and the Affidavit indicated to have been drawn and filed by Julius Chambers Advocates.

On the other hand, the Respondents filed Counter-Affidavits plus notices of preliminary objections. In her Notice of Preliminary Objections, the 1st Respondent stated the following objections –

- “1. THAT, the applicant’s application is incompetent, misconceived and misplaced in law for having been brought under the wrong provisions of law.
2. THAT, the applicant’s affidavit in support of the pertinent application is incurably defective for lack of a verification clause.”

In the said notice of the Preliminary Objections, the 1st Respondent urged this court based on the said preliminary objections to struck out the application with costs.

Likewise, the 2nd and 3rd Respondents filed a notice of preliminary objection stating:-

- “1. That the application is misconceived and bad in law for the same is supported by an incurably defective Affidavit which has no verification clause contrary to law”.

In the said notice of preliminary objection, the 2nd and 3rd Respondents prayed to this court to dismiss the application. This Ruling determines the above named preliminary objections raised by the Respondents. Dr. Lamwai, learned counsel advocated for the 1st Respondent while Ms. Makala, learned State Attorney represented the 2nd and 3rd Respondents. The Applicant appeared and opposed the preliminary objections in person having informed this court that his counsel one Julius Ndyabo would not represent him in the application save in the petition.

Before commencing his submission in support of the preliminary objections, Dr. Lamwai, learned counsel for the 1st Respondent prayed to make an observation in respect of the Chamber Summons. His observation was to the effect that the Chamber Summons had indicated that the matter was to be placed before the District Registrar for hearing, but in his considered view this was an error made by the Registry of this court because the District Registrar (DR) has no power to conduct hearing of the application. However, he submitted that the error has now been rectified by placing the matter before the judge of this court as the law requires. I quite agree with this observation made by Dr. Lamwai and that the anomaly has been rectified as stated by him.

The first preliminary objection raised by the 1st Respondent, as we have seen above states that the Applicant's application is incompetent, misconceived and misplaced in law for having been brought under the wrong provisions of law. The Chamber Summons filed by the Applicant indicates that it has been made under Section 111 (3) & (5) of the Elections Act, 1985 as amended by Act No. 25 of 2002 and any other enabling provision of the law. Dr. Lamwai in his submission contended that Section 111 (3) of the Elections Act, 1985 is only the substantive law upon which an application to determine an amount payable as security for costs in an election petition is made. However, he further submitted that the application is also supposed to be governed by procedural rules found in the Election Petitions Rules specifically Rule 11 (1) and (3) thereto which the Applicant has not cited in the Chamber Summons. He therefore submitted that the application filed by the Applicant in this court is incompetent for not citing the correct and proper provisions of the law for which the application should be founded.

The second preliminary objection raised by the 1st Respondent which is similar to the one raised by the 2nd and 3rd Respondents is that the Applicant's affidavit in support

of the application is incurably defective for lack of a verification clause. Dr. Lamwai, learned counsel for the 1st Respondent further contended that the affidavit has no proper jurat as required under the Notaries Public & Commissioners for Oath Ordinance as there is no indication in the said jurat as to how the Commissioner for Oath one Ngasala came to know the identity of the deponent of the Affidavit.

Dr. Lamwai in his submission contended that under Order 43 rule 2 of the Civil Procedure Code, 1966, all applications to this court have to be made by way of Chamber Summons supported by an affidavit and that this mandatory rule is imported to the present application under Rule 26 of the Election Petitions Rules which states that the practice and procedure in respect of election petitions shall be regulated as nearly as may be by the rules regulating the practice and procedure in a civil suit. He submitted that as the affidavit filed by the Applicant lacks verification clause, it is not an affidavit, it is incurably defective hence the Chamber Summons is not supported by an affidavit and there is no affidavit in law. He invited this court to hold that there is no affidavit hence there is no application properly before this court and that the application be struck out with costs as being incompetent.

Dr. Lamwai contended further in his submission that the application cannot be saved by Rule 27 (1) of the Election Petitions Rules which provides that no petition shall be dismissed for the reason only of non-compliance with any of the rules of election petition or any other procedural irregularities. He also contended that the application cannot be saved under Rule 27 (2) of the said Rules which provides that the court can direct an amendment so that the petition can comply with the Election Petitions Rules. He gave the reason for his submission as that the court at the moment is not at the stage of considering dismissal of the Petition but the prayer before this court by the Respondents is for rejection or striking out of the application filed by the Applicant. He contended that what is before this court at the moment is not the Petition which is provided for under Sections 108 and 110 of the Elections Act, 1985. As to amendment, Dr. Lamwai contended that this court cannot order amendment of the affidavit for two reasons. He submitted that under Rule 27 (2) of the Election Petitions Rules amendment can only be done in respect of a election petition and not an application incidental to the Petition. He further submitted that an affidavit cannot be amended because it is a

statement on oath, it is not a pleading. He submitted that the effect of ordering an amendment by this court would be to allow an affidavit to be brought where there has been no affidavit at all. He further submitted that the only option open to the Applicant is for the application to be struck out and let him if he so wishes to start afresh subject to the law of limitation. Dr. Lamwai, therefore, prayed to this court to struck out the application with costs.

Ms. Makala, learned State Attorney, similarly, in her submission in pursuance of the notice of preliminary objection filed by the 2nd and 3rd Respondents contended that the application is misconceived and bad in law for the same is supported by an incurably defective affidavit which has no verification clause contrary to the law. She contended that under Rule 26 of the Election Petitions Rules, the procedure and practice governing this application filed by the Applicant will be as nearly as possible the procedure and practice provided for under the Civil Procedure Code, 1966 in civil suits which also include admissibility of affidavit. She contended that the lack of verification clause in the affidavit in support of the Chamber Summons renders the affidavit defective as it offends the provisions of Order 19 rule 3 (1) of the Civil Procedure Code, 1966 hence it is a nullity. She submitted that the verification clause would have indicated which matters were deponed by the Applicant on his own knowledge, information and belief and sources of the information and beliefs.

Ms. Makala contended further that the jurat clause in the affidavit is also defective in that it does not state as to how the Commissioner for Oath came to identify the Applicant and that this omission offends the law governing oath and statutory declarations.

She submitted that based on her foresaid submission, the affidavit in support of the application is defective and a nullity, therefore the application filed by the Applicant is incompetent and wrongly before this court. She further submitted that the application offends Order 43 rule 2 of the Civil Procedure Code, 1966 which requires that every application should mandatorily be by way of a chamber summons supported by an affidavit.

She contended further that the Affidavit filed by the Applicant in support of the application cannot be amended as it is a statement made on oath, the only way is to struck

out the application. Further, she submitted that the 2nd and 3rd Respondents are not praying to this court to struck out the Petition but the application as it is bad in law – and cannot be saved under Rule 27 (2) of the Election Petitions Rules.

The Applicant in his submission opposed the preliminary objections raised by the Respondents. He invoked Articles 13 (1) and 13 (6) (a) of the Constitution of the United Republic of Tanzania on equality before the law and protection of rights of a citizen when the same are being challenged before a court of law or a tribunal. In the latter case, he argued that he is entitled to a fair hearing and right of appeal or an other remedy under the law. He contended that his election petition has been filed under the provisions of the Elections Act, 1985 and that this court has power to determine the amount payable as security for costs provided it should not exceed five million shillings.

As regards to the 1st preliminary objection raised by the 1st Respondent, he replied that the application has been properly brought before this court under Section 111 (3) and (5) of the Elections Act, 1985. As regards the second preliminary objection raised by the 1st Respondent, he replied that Mr. Loomu –Ojare who prepared counter-affidavit for the 1st Respondent stated that the Affidavit is incurably defective. He admitted and agreed that the affidavit in support of the Chamber Summons is defective but does not agree that it is incurable. He contended that notwithstanding being defective still there exists an affidavit in support of the application. He contended that he is a layman but all what he had stated in the said defective affidavit is the truth and nothing but the truth and that the defectiveness of the said affidavit does not alter the truth he stated in it. In the alternative, the Applicant prayed to this court to allow him to make an oral oath in the interest of justice in support of the Chamber Summons or the application especially considering the time required to determine this application by this court. He urged this court to strictly limit itself to the preliminary objections as raised by the Respondents.

As regards the preliminary objection raised by the 2nd and 3rd Respondents, the Applicant admitted that the affidavit in support of the Chamber Summons is defective but contended that it is curable. He further contended that the election petition he has filed in this court has public interest and that it is protected under Rule 28 (and not Rule 27 as contended by the Respondents) which he alleged states that no election complainant will be dismissed for reasons only of non-compliance of the election petition rules or for the

reasons only of any other procedural irregularities unless the panel is of the opinion that such non-compliance or irregularity has resulted or is likely to result into miscarriage of justice . He contended that the word “complaints” is not the same as the word “Petition” and that all the preliminary objections raised by the Respondent do not state there will be miscarriage of justice. He further contended that Rule 28 (2) states that if there is non-compliance of the Rules or irregularity the court may require the complainant to rectify the non-compliance or irregularity in such manner as the panel may order.

Based on what he has stated above, the Applicant prayed to this court not to struck out the application as prayed by the Respondents because the same emanates from an election Petition filed in this court which is sensitive and has public interest,. He further prayed to this court to be allowed to make an oral oath or testify verbally in this application so as to make headway to the Petition itself.

Dr. Lamwai in his rejoinder submission contended that the rights enshrined in Articles 13 (1) and 13 (6) (a) of the Constitution of the United Republic of Tanzania cited by the Applicant is subject to compliance with the provisions of the law and that although the Applicant has rights under the Articles he has cited in the said Constitution, he has not complied with the provisions of the law governing the application he has filed in this court in that he has not invoked or cited Rule 11 (1) of the Election Petitions Rules upon which the application is supposed to be founded. He submitted that the Applicant in his submission has not answered the said point.

As regards the affidavit, Dr. Lamwai argued that the Applicant in his submission has conceded that it is defective and therefore in his view this defect makes it a nullity. He further argued that the Applicant in his submission contended that Mr. Loomu-Ojare had called the said defective affidavit as an “affidavit”, he said that Mr. Loomu – Ojare did so because the Applicant had titled it as an “Affidavit” and that the job of an advocate is not to nullify documents but to convince the court to make a ruling on them. He reiterated his earlier submission that lack of verification clause in the affidavit of the Applicant is incurable hence the said affidavit should be taken off the record and that once so done the document called Chamber Summons filed by the Applicant would remain naked or unsupported contrary to Order 43 rule 2 of the Civil Procedure Code, 1966. He submitted that though the Applicant in his submission contended that lack of

verification clause in the affidavit as a defect is curable but did not propose how the same can be cured. He said the Applicant had prayed to this court to make an oral oath which in effect means that he is urging this court to ignore the affidavit but in his view once the court so allows it means the affidavit filed by the Applicant is non-existent and the Chamber Summons or application remains unsupported. He submitted that in law there is no procedure of supporting a Chamber Summons by oral evidence.

As regards the contention of the Applicant that he is a layman, Dr. Lamwai contended that the documents, that is the chamber summons and the affidavit filed in this court by the Applicant were prepared or drawn by Julius Chambers, one of the most experienced chamber of advocates in this country hence the issue of lack of verification clause should have been known to them. He further submitted that the Applicant in his submission has urged that he should be given justice, he replied that justice to be given should be according to law and that in his considered view, the only justice that can be given to the Applicant at the moment by this court is to struck out the application with costs.

As to the Applicant's contention that the election petition he has filed in this court is of public interest, Dr. Lamwai replied that is a political statement but this court is a court of justice and not politics and that it should be guided by the law and not by emotions of the parties. As to Rule 28 cited by the Applicant in which the latter contended that he wished to correct the Respondents who cited Rule 27 of the Election Petitions Rules, Dr. Lamwai replied that Rule 28, cited by the Applicant was embodied in the Election Complaints Rules under G.N. 418 of 1990 which are irrelevant as they had been removed by Act No. 6 of 1992 and that the applicable rules are those found in the Election Petitions Rules cited by the Respondents which they have been used in all the election petitions since 1985. He said that the Election Complaints Rules were being formally used when the power to deal with elections Petitions was vested with a panel but this power was restored to the High Court and that the latter hears election petitions and not election complaints. He submitted that the High Court is not a panel. He further submitted that the Applicant has failed to challenge the Respondents position that the present application as an application is not covered by Rule 27 of the Election Petition Rules since it is not an election petition. He reiterated his earlier prayer to this court that

the application being incompetent should be struck out with costs and the Applicant should start afresh if he so wished.

Ms. Makala, the learned State Attorney for the 2nd and 3rd Respondents also made rejoinder submission. As regards the Applicant's contention on Articles 13 (1) and 13 (6) (a) of the Constitution of the United Republic of Tanzania, she submitted that in principle she agreed that all citizens of Tanzania are equal before the law and they are entitled to be protected by the laws of Tanzania but the rights stated in the said Articles should be exercised according to law. Therefore, she submitted that the Applicant should have come to this court in accordance with the laws, rules and procedures governing election petitions and applications or in other words the Applicant should have followed the laws of the country in order to abide with what is stated in the Constitution of the United Republic of Tanzania.

As regards the contention of the Applicant that he had surprises in the preliminary objections filed by the 2nd and 3rd Respondents, Ms. Makala replied that is not true because the said Respondents had filed notice of preliminary objections in which the Applicant was notified that the affidavit was incurably defective and bad in law for lack of verification clause which the Respondents have ably argued in this court. As to the defect in the jurat, she contended that it is a matter of law and that this court is supposed to take judicial notice of the same and that even if the defect on the jurat had not been raised, the absence of verification clause in the affidavit filed by the Applicant is sufficient to make the Chamber application filed by the Applicant a nullity. She therefore reiterated her earlier prayer that the application should be struck out with costs.

As regards Rule 28 cited by the Applicant in his submission, Ms. Makala replied that there is no Rule 28 in the Election Petitions Rules as the same is omitted. She submitted that the 2nd and 3rd Respondents had only cited Rule 27 of the said Rules because it is the one which is relevant to procedures governing election petitions.

Having set out in detail the submissions of the Respondents in support of the Preliminary Objections they had raised in their notices of preliminary objections filed in this court as well as the submission of the Applicant in opposition of the said Preliminary Objections, I should now move to consider them and make the necessary determination. I will first consider and determine the second preliminary objection raised by the 1st

Respondent as well as the preliminary objection raised by the 2nd and 3rd Respondents which is similar to that raised by the 1st Respondent. The preliminary objection raised by all the Respondents were that the affidavit filed by the Applicant in support of the Chamber Summons is incurably defective for lack of verification clause. This is well stated in the notices of preliminary objections filed by all the Respondents. However, during their submission before this court, the Respondents also alleged that the jurat in the affidavit is not properly made as the Commissioner for Oaths, one Mr. Ngasala did not indicate as to how he had identified the deponent in the said affidavit. This defect in the jurat was not earlier stated by the Respondents in their notices of preliminary objections. The issue to be considered is whether the affidavit in support of the chamber summons is incurably defective and whether the said defect renders the application incompetent before this court.

Dr. Lamwai, learned counsel for the 1st Respondent and Ms. Makala, learned State Attorney for 2nd and 3rd Respondents have made detailed submissions outlined above which I need not repeat that lack of verification clause renders the affidavit filed by the Applicant in support of the Chamber Summons in this court incurably defective. This defect in their considered view offends the provisions of Order 19 rule 3 and Order 43 rule 2 of the Civil Procedure Code, 1966. They have contended that as a defective affidavit is not an affidavit the application filed by the Applicant is unsupported hence incompetent before this court. They have further contended that the alleged defective affidavit cannot be amended as it is a statement on oath nor can the application be saved under Rule 27 (1) and (2) of the Election Petitions Rules because it is not a petition. They submitted that the only option that can be exercised by this court is to struck out the application on the ground of incompetence arising from the incurable defect in the affidavit in support of the Chamber Summons.

The Applicant in his submission admitted that the affidavit is defective but lamented that the defect is curable. However, as submitted by Dr. Lamwai, the Applicant did not state how the said affidavit can be cured. He only prayed to this court to be allowed to make an oral oath in place of the said affidavit. Invariably, he invoked Articles 13 (1) and 13 (1) (a) of the Constitution of the United Republic of Tanzania which the Respondents replied that the said Articles have to be exercised in accordance

with the law governing election petitions and applications. He contended that the election petition he has filed in this court is sensitive and has public interest and that non-compliance or irregularity, in the application can be rectified under Rule 28 of the Election Complaints Rules, but Dr. Lamwai responded that the Election Complaints Rules do not apply to election petitions and had long been removed hence Rule 28 cited by the Applicant is not applicable nor can this court invoke politics as it is only a court of law.

In my considered view, I quite agree with the submission of Dr. Lamwai and Ms. Makala in support of the stated preliminary objection, that lack of verification clause in the affidavit filed by the Applicant renders the affidavit incurably defective. It is a trite law that a deponent of an affidavit has to verify in the verification clause as to which matters stated in the affidavit emanate from his own knowledge, which matters emanate from information and the source of the information and what matters emanate from his belief. Now the verification clause is completely missing in the affidavit filed by the Applicant. Indeed, this makes the affidavit incurably defective and in my considered view it cannot be amended or saved in any manner as submitted by Dr. Lamwai and Ms. Makala in their submission. The Applicant in his submission has admitted that the Affidavit is defective but alleges that it is curable hence not incurably defective. In my considered view, once the Applicant admits that the affidavit is defective then it follows that it is bad in law hence incompetent. It is not the law to allow a defective affidavit to be replaced by an oral oath as suggested by the Applicant in his submission. Nor can the application be saved under Rule 28 of the Election Complaints Rules as it is irrelevant to the matter as submitted by Dr. Lamwai. Nor can the application be saved under Rule 27 of the Election Petitions Rules because the same is not a petition but a mere application as submitted by Dr. Lamwai.


Nor can Articles 13 (1) and 13 (6) (a) of the Constitution of the United Republic of Tanzania be applied to save the application because the rights stated in the said Articles of the said Constitution have to be exercised in accordance with the law as submitted by Dr. Lamwai and Ms. Makala in their submissions. The Applicant is required to abide to the law, rules, procedure and practice governing affidavits in order to be protected under the said cited Articles of the said Constitution. The court cannot be

moved by emotions or sympathy nor on the mere context of public interest, the court is a court of law it has to be governed by the law. Public interest has to be invoked within the bounds of the law.

However, as regards the issue of jurat, in my considered view should not have been canvassed by the Respondents as it was not stated in the notices of preliminary objections that were filed in this court and served to the Applicant. In my considered view, the preliminary objection was limited to lack of verification clause in the affidavit and did not extend to the jurat of the affidavit. Therefore, the Applicant was taken by surprise as he submitted. Therefore, I reject the issue of jurat of the affidavit.

Having held that the lack of verification clause makes the affidavit in support of the application incurably defective, I further hold that the application before this court filed by the Applicant is bad in law and incompetent on the said ground. In my considered view, this determination on the second preliminary objection raised by the 1st Respondent which also applies to the preliminary objection raised by the 2nd and 3rd Respondents is sufficient to dispose this manner in respect of the application filed by the Applicant in this court. I need not labour and determine the first preliminary objection raised by the 1st Respondent.

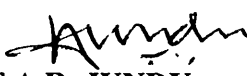
In the upshot, I uphold the first preliminary objection raised by the 1st Respondent as well as the preliminary objection raised by the 2nd and 3rd Respondents. The affidavit in support of the application is incurably defective for lack of verification clause. This makes the application filed by the Applicant in this court for determination of amount payable as security for costs in the election petition he had filed in this court incompetent. I hereby, therefore, struck out the said application with costs. However, the Applicant subject to the law of limitation is at liberty to start afresh if he so wishes. It is so ordered.


F.A.R. JUNDU,

JUDGE,

20.1.2006

Right of Appeal Explained.


F.A.R. JUNDU,
JUDGE,

20.1.2006

20.1.2006

Coram: F.A.R. Jundu, J.

For the Applicant: present in person

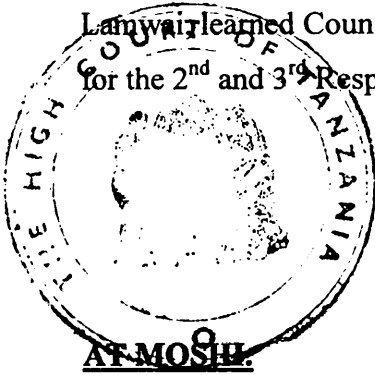
For the 1st Respondent:- Dr. Lamwai, Advocate.

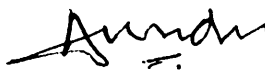
For the 2nd Respondent)

For the 3rd Respondent)Ms. Makala, State Attorney.

C/C:- Mr. Kimario.

Court:- Ruling delivered in the presence of the Applicant, and in the presence of Dr. Lamwai, learned Counsel for the 1st Respondent and Ms. Makala, learned State Attorney for the 2nd and 3rd Respondents.




F.A.R. JUNDU,
JUDGE,
20.1.2006.