

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO 98 of 2010

FRED TUNGU MPENDAZOE.....APPLICANT

VS

THE ATTORNEY GENERAL.....

1ST RESPONDENT

DR. MILTON MAKONGORO MAHANGA..

2ND RESPONDENT

THE RETURNING OFFICER,

SEGEREA CONSTITUENCY.....

3RD RESPONDENT

RULING

Date of last Order: 28-02-2011

Date of Ruling: 08-03-2011

JUMA, J.:

On 15th February 2011 this court pursuant to a preliminary point of objection by the 2nd respondent, struck out the affidavit of Mr. Fred Tungu Mpendazoe (the petitioner) which he had filed in support of his application to either be exempted from the payment of any form of security for costs or this court be moved to determine the amount which he should deposit as security for costs. Despite that setback on 28th February 2011 the petitioner through Mr. Kibatala his learned counsel, came back to this court to express the readiness of the petitioner to

deposit TZS 15,000,000 (fifteen million shillings) within one week to pave the way for the Registrar to set a hearing date for his petition. This TZS 15,000,000 (fifteen million shillings), is a total amount not exceeding five million shillings in respect of each of the 1st, 2nd and 3rd respondents.

Mr. Kibatala premised his application under subsection (2) of section 111 of the **National Elections Act, Cap. 343** (hereinafter referred to as the Act). This provision in essence directs the Registrar not to fix a date for hearing of the petition if the petitioner has not paid into court TZS 5 million as security for costs in respect of each of the respondents on record of the petition.

This time around the petitioner is no longer pursuing the option of seeking an exemption from having to pay security for costs. Neither is he seeking the determination by this court of the amount or the type of security. The petitioner now contends that once he pays into the court an amount not exceeding five million shillings in respect of each of the three respondents herein in compliance with subsection (2) of section 111 of the Act, the Registrar will be obliged by the law to fix the date for the hearing of the petition. Mr. Kibatala further submitted that the petitioner would have deposited the maximum amount of the security for costs had it not been for the ceiling of TZS 10 million for any transfer which the Bank of Tanzania has imposed on financial transactions through the commercial banks.

Mr. Kibatala elaborated why he thinks that a petitioner who is able and willing to pay the maximum amount of security for costs that is prescribed under section 111 (2) of the Act can proceed to pay that maximum without the need to apply for determination of the amount by this court. Mr. Kibatala contends that sub sections (2) and (3) of section 111 of the Act provide distinct options for compliance with security for costs requirements. The first option is when a petitioner decides to deposit TZS 5 million the maximum amount with respect to each respondent which does not require any prior determination by this court. The second option according to Mr. Kibatala is where a petitioner files a chamber application moving this court to either to determine a lesser amount than that prescribed under section 111 (2) or a different type of security or even total waiver from paying any form of security for costs.

Mr. Kibatala strongly believes that his submission on point of law has the support of an earlier Ruling of this court which was delivered by Rutakangwa, J. (as he then was) in **1. Joseph Laurent Hymu, 2. Emmanuel Denis Bura, 3. Thomas Lulu Irafay vs. 1. The Attorney General, 2. Dr. Wilbroad Peter Slaa in Misc Civil Cause No. 20 of 2005**. On pages 10 and 11 of his Ruling Rutakangwa, J. interpreted subsections (2) and (4) of section 111 of the Act after Petitioners in that petition before him had opted to pay TZS 5 million in respect of 1st Respondent and TZS 3 million in respect of 2nd Respondent:-

“ According to them (the Petitioners), and very rightly so in my view, S. 111 (2) and (4) set out the maximum

amounts of deposits to be paid by a Petitioner or Petitioners as security for costs so as to make the Petitioner(s) be entitled to a hearing date fixed by the Registrar.... In view of the fact that the Petitioners 'were able and capable' of complying with the requirement of paying the maximum amount, it is their further submission that, they (Petitioners) did not need to apply for the determination of the amount payable as security for costs under section 111 (3) of the Act."

Mr. Mwakitalu and Mr. Mweyunge the learned State Attorney appeared on behalf of the Attorney General and the Returning Officer, Segerea Constituency (the 1st and 3rd respondents herein). Mr. Mwakitalu does not agree with the contention that the petitioner can in law proceed to deposit the maximum amount of security for costs to give way to the Registrar to fix the hearing date for the election petition. According to Mr. Mwakitalu, the words "an amount not exceeding five million shillings" in section 111 (2) imply that this court still has to make a determination of the amount of security for costs and the petitioner cannot by himself unilaterally proceed to deposit TZS 5 million without appropriate determination by this court. Mr. Mwakitalu contends further that the petitioner should have moved this court to determine the security for costs payable under section 111 (2) of the Act.

Mr. Mweyunge the learned State Attorney focused his submission on time limit within which the petitioner should have moved this court under section 111 (2) of the Act. The learned State Attorney thinks that the request by the petitioner to deposit TZS 15 million should not be granted because that request should have been lodged within 14 days after the petitioner had filed his petition. The learned State Attorney cites section 111 (3) of the Act which requires a petitioner to make an application for determination of the amount payable as security for costs within fourteen days after filing a petition. In other words, Mr. Mweyunge is contending that after filing his petition a petitioner cannot in law choose and decide when to pay the prescribed maximum security for costs. And that because the petitioner filed his amended petition way back on 17th December 2010, the 14 days within which the petitioner should have applied for determination of security for costs are long gone.

The learned counsel appearing for the 2nd respondent, Mr. Msemwa also opposed any payment of security for costs under sub section (2) of section 111 of the Act without prior determination by this court. According to Mr. Msemwa, this provision of the **National Elections Act** does not stand alone but must be read together with subsection (3) of section 111 which emphasizes the,

“...making of 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”

After hearing the submissions of the of the three learned counsel, I must at the very outset observe that this application before me raises weighty issues regarding procedure for deposit of security for costs before petitioners can access justice in this court. As a result this application by the petitioner revolving around section 111 (2) of the Act deserves careful consideration because it has far reaching ramifications on the access to justice through election petitions in Tanzania.

From the submissions, two main issues stand out for my determination. The first issue is whether a petitioner can under the authority of subsection (2) of section 111 pay into court TZS 5 million to cover the security for costs in respect of each respondent without seeking prior determination by this court. The second issue is whether the security for costs that is deposited by a petitioner under subsection (2) of section 111 must be deposited within fourteen days after filing a petition.

Before directing my mind to the two issues requiring my determination it may be useful to look back and reflect the legal milestones through which the relevant provisions governing procedure for deposit of security for costs in election petitions have passed through during the past ten years. Section 111-[2] of the Act was at least once subjected to a constitutional test on the premise that it denied access to justice to

ordinary persons who had no means to raise the TZS 5 million as security for costs. The provisions governing security for cost in the **National Elections Act** were given a very detailed consideration by the Court of Appeal in **Julius Ishengoma Francis Ndyanabo v. Attorney General [2004] TLR 14**. In that land mark decision, the Court of Appeal directed that the provisions governing security for costs in election petitions must be given a broad and liberal interpretation to ensure that all those who seek access to justice through election petitions are given a chance to be heard in the main petition.

Before the Court of Appeal decision in **Julius Ishengoma Francis Ndyanabo v. Attorney General [supra]**, it was mandatory (irrespective of financial ability) to every petitioner (except the Attorney General) to deposit TZS 5 million as security for costs before a filed election petition can be allowed to proceed to a hearing stage. Following the Court of Appeal decision in the case of **Ndyanabo v. Attorney General (Supra)**, the **Written Laws (Miscellaneous Amendments) Act No. 25 of 2002** amended the **National Elections Act, Cap 343** to broaden the provisions governing security for costs without at the same time denying access to justice to those who are not able to raise TZS 5 million. In my Ruling, I will regard subsections (2), (3), (4) and (5) of section 111 of the Act as having been amended to broaden the options for paying the security for costs before the Registrar can fix a hearing date.

Let me now return to the first issue of whether security for costs in respect of each respondent can be deposited without seeking prior determination by this court. It may be useful to look at this issue from the perspectives of the broad options provided for by sub sections (2), (3), (4) and (5) of section 111 of the Act:

(1).....

(2) 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.

(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.

(4) Where any person is made a respondent pursuant to an order of the court, the petitioner shall within fourteen days of the date on which the order directing a person to be joined as a respondent was made, pay into the court a further amount not exceeding three million shillings, as shall be directed by the court in respect of such person.

(5) Where on application made by the petitioner, the court is satisfied that compliance with the provisions of subsection (2) or (4) will cause considerable hardship to the petitioner, it may direct that-

- (a) the petitioner give such other form of security the value of which does not exceed five million shillings, as the court may consider fit; or
- (b) the petitioner be exempted from payment of any form of security for costs.

In my view, the law as it is now reflected in subsections (2), (3) and (4) of section 111 of the **National Elections Act** confer distinct and separate procedures for depositing of security for costs before the Registrar fixes a hearing date. The procedure and purpose behind subsection (2) is very different from the procedure and purpose behind subsections (3) and (4). Subsections (2), (3) and (4) of section 111 are in other words *sui generis* and each subsection stands alone with distinct objects. Whereas subsection (2) governs depositing of security for costs by petitioners who are able and capable of paying the maximum amount (TZS 5 million), subsection (3) on the other hand caters for those petitioners who are not able and capable of paying the maximum under subsection (2) and would like this court to determine the amount which they should pay. Subsection (4) caters for TZS 3 million to be deposited by the petitioner as security for costs for respondents who are added as parties to a petition pursuant to an order of the court. This subsection (4) of section 111 is not relevant to the present application because this court has not issued any order directing addition of respondents.

Where a petitioner moves this court under subsection (3) of section 111 this court will be guided by subsection (5) (a) and (b) to determine the

appropriate amount of security or nature of security to be met by the petitioner. Parliament in its wisdom after the land mark decision of the Court of Appeal in **Julius Ishengoma Francis Ndyanabo v. Attorney General [2004] TLR 14** amended the **National Elections Act** to recognize different abilities of petitioners to pay security for costs. Gone are the times when every petitioner, rich or poor had to pay the TZS 5 million regardless of ability. Where a petitioner feels that he or she cannot raise the maximum amount under sections 111 (2) or (4), then the petitioner concerned can seek determination by this court under section 111 (3) read together with subsection (5) (a) and (b) of section 111.

As I have indicated earlier, subsections (2) and (3) of section 111 provide two distinct procedures for compliance by petitioners with the security for costs requirement. Section 111-(2) governs a scenario where a petitioner files his petition and proceeds to pay into the court, as security for costs, an amount not exceeding five million shillings in respect of each respondent. Once this amount is paid, the Registrar shall in my opinion be obliged to fix a hearing date. This first scenario envisaged under section 111-(2) targets those petitioners who have no difficulty in raising and paying the maximum of Tshs. 5 million security for costs prescribed under sub section (2) of section 111. With respect, Mr. Kibatala is right in insisting that a petitioner who pays the security for costs prescribed under section 111 (2) does not need any prior determination by this court.

Applications for determination of security for costs which are envisaged under section 111-(3) provides the second distinct scenario designed to cater for petitioners who are not able to raise the maximum amount of security for costs (TZS 5 million) envisaged under section 111 (2) or (TZS 3 million) with respect to respondents added by the court under 111 (4). This scenario under section 111 (3) was brought about following the Court of Appeal decision in **Julius Ishengoma Francis Ndyabo v. Attorney General (Supra)** and the amendment of the **National Elections Act** by The **Written Laws (Miscellaneous Amendments) Act No. 25 of 2002**. Section 111 (3) allows a petitioner to make an application to this court to request any other form of security the value of which does not exceed five million shillings in respect of each respondent. After hearing a petitioner's application under section 111 (3) this court may either in terms of section 111 (5) (a) direct the petitioner to give any kind of security the value of which does not exceed Tshs 5 million, or in terms of section 111 (5) (b) this court may exempt the petitioner from payment of any form of security for costs.

Significantly, whereas the word "determination" features under subsection (3) of section 111, that word does not feature at all under section 111 (2). In my opinion the respondents should not be allowed to read the word "determination" into section 111 (2). I will with respect disagree with the suggestions by both Mr. Mwakitalu the learned State Attorney and Mr. Msemwa for the 2nd respondent, that the words "an amount not exceeding five million shillings" in section 111 (2) imply that

this court has to make a determination of the amount of security for costs even where the petitioner is able and willing to deposit TZS 5 million which is a maximum amount. I will answer the first issue in affirmative. It is my finding that the petitioner herein can under the authority of subsection (2) of section 111 pay into court TZS 5 million to cover the security for costs in respect of each respondent without seeking prior determination by this court.

The next following issue is whether the security for costs that is deposited by a petitioner under sub section (2) of section 111 should have been deposited within fourteen days after a petition is filed. Mr. Mweyunge has on behalf of the 1st and 3rd respondents submitted that the petitioner should have paid the security for costs within 14 days of filing his petition. I have with respect cast an anxious glance at sub sections (2) and (3) of section 111 (2) to determine whether any limitation period is prescribed. As stated earlier subsections (2) and (3) of section 111 are as different as they are distinct. Each subsection caters for different financial abilities of petitioners. The fourteen day limitation period within which to make an application for determination of the amount payable as security for costs only applies to a petitioner who is moving this court under section 111 (3). I am in full agreement with Rutakangwa, J. (as he then was) in **1. Joseph Laurent Hymu, 2. Emmanuel Denis Bura, 3. Thomas Lulu Irafay vs. 1. The Attorney General, 2. Dr. Wilbroad Peter Slaa in Misc Civil Cause No. 20 of 2005** who stated that the legal requirement imposed on a petitioner to

make an application for determination of the amount payable as security for costs within fourteen days of filing of the petition does not apply to a petitioner who is able and willing under section 111 (2) of the Act to pay TZS 5 million as security for costs for election petition to be heard. I may hasten to point out that although section 111 (2) of the Act does not provide the time limit within which a petitioner who is able to pay should deposit security for costs, it does not mean that petitioners have unlimited and open-ended time. Section 115 of the Act prescribes that this court shall hear and determine a petition within twelve months of filing of that petition. It is to the best interest of the petitioner to pay the security for costs to enable the Registrar to fix the hearing date for the petition. Again this court has inherent powers to ensure that election petitions are prosecuted with diligence and appropriate speed.

In the upshot, since the petitioner herein is able and willing to deposit the maximum security for costs without considerable hardship, there is nothing in law that require this court to make any prior determination before the petitioner deposits that maximum amount. The petitioner is therefore allowed to make the requested deposit. After the deposit has been duly made the Registrar shall fix the hearing date for the petition. No order is made with respect to costs.

It is so ordered.



I.H. Juma
JUDGE
08-03-2011

Delivered in presence of: Mr. Kibatala, Adv. (for Petitioner) and Mr. Patience Ntwina – Principal State Attorney and David Zakaria – State Attorney (for 1st and 3rd Respondents).



**I.H. Juma
JUDGE
08-03-2011**

