

IN THE HIGH COURT OF TANZANIA

AT BUKOBA

MISCELLANEOUS CIVIL APPLICATION NUMBER 43 OF 2015

(Arising from Miscellaneous Civil Cause Number 07 of 2015)

BENEDICTO MUTACHOKA MUTUNGUREHI ----- APPLICANT

VERSUS

INNOCENT SEBBA BILAKWATE ----- 1st RESPONDENT

THE RETURNING OFFICER FOR KYERWA ----- 2nd RESPONDENT

THE ATTORNEY GENERAL ----- 3rd RESPONDENT

RULING

14/12 & 16/12/15

S. S. MWANGESI J.:

The applicant herein has petitioned to challenge the validity of the election results for the Constituency of Kyerwa, wherein Innocent Sebba Bilakawate, who happens to be the first respondent, was declared by the

returning Officer, who happens to be the second respondent herein, to be the winner for the seat of Member of Parliament in the election, which was conducted on the 25th October 2015. In compliance with the requirement of law that demands that, an election petition can only be scheduled for hearing after the petitioner has deposited in Court security for costs, in terms of the provision of section 111 (3) of the Election Petition Act, Cap 343, he has lodged this application requesting the Court to determine an amount, which he can deposit as security for costs so as to pave way for the hearing of his petition. The application has been supported by sworn affidavit of the applicant, wherein the reasons to move the Court to be considerate in considering the amount payable have been enumerated.

Through the services of Messrs Alli Kitupesa Chamani and Lameck Erasto John, the applicant's application has been orally expounded, whereby the contents of the sworn affidavit of the applicant have been adopted in full. It has been argued that, the applicant did contest for the seat of Member of Parliament for the Constituency of Kyerwa, under the sponsorship of Chama Cha Demokrasia na Maendeleo known by its acronym as CHADEMA. Following the announcement of the results, which was made by the Returning Officer (second respondent) on the 26th October 2015, he got aggrieved and hence he lodged a petition to challenge it.

It has been the assertion on behalf of the applicant that, he is not in a position capable to deposit the amount of Tanzanian shillings five million, which is required by the law for each respondent in his petition because, he is a mere peasant residing at the village of Kitwe in the Ward of Kitwe

within Kyerwa District. Since the type of peasantry which he does conduct is an ordinary one, which enables him to earn meager income, which is used to support his family of a wife and four children as well as his old parents, who also solely depend on him. Additionally, his children are studying in different levels in various secondary schools of which, the fees paid for their education, consumes all the meager income generated from his peasantry activities.

As if the foregoing position was not enough, it has as well been submitted on behalf of the applicant that, the little amount of money which he happened to have saved, was all exhaustively spent in the process of campaigning for the named Parliamentary general election, which did last for about three months or so, lasting from August to October 2015. Under the circumstance, if the financial position of the applicant will not be put into considerable consideration of this Court and therefore, he be compelled to deposit the amount of money, which has been stipulated by the law, will be tantamount to denying him access to justice as he is unable to do.

The learned Counsel for the applicant has further submitted to the effect that, in contesting for the Parliamentary seat of which its results are being contested, the applicant was exercising his constitutional rights as stipulated under the provision of article 21 of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time. To that end, regard being to the financial position of the applicant as afore submitted, it has humbly been prayed that, this Court be pleased to exercise its judicial discretion judiciously, by directing the applicant to pay a reasonable and

affordable amount of money as security for costs, or else, it be pleased to invoke the provision of section 111 (5) (b) of the Election Act, to completely exempt the applicant from depositing any amount of money as security for costs. To buttress his submission, the learned Counsel for the applicant has referred this Court to the decisions in the cases of **Julius Ishengoma Francis Ndyanabo Versus the Attorney General [2004] TLR 14** and **Katani A. Katani Versus The Returning Officer of Tandahimba District and Others Civil Appeal Number 115 of 2011 CAT (unreported)**.

In response Mr. Peter Matete learned Counsel for the first respondent has started with the concluding prayer, which has been presented by his learned brother on behalf of the applicant that, the Court be moved to exempted the applicant from depositing any amount of money in terms of terms of the provision of section 111 (5) (b) of the Act. In his view such prayer is un-maintainable, because the provision, under which the prayer has been made, was never cited by the applicant in his application and thereby, making the Court not to have been properly moved to award such sought relief. The Court has thus been requested to outright dismiss such prayer.

With regard to the contention by the applicant that, he is a mere peasant, who has got meager income, the learned Counsel for the a\first respondent has argued that, such averment is not true, because the applicant had once been a Member of Parliament for the same Constituency in the period between the years 2000 and 2005 under the sponsorship of Tanzania Labor Party (TLP). And ever since he retired from

within Kyerwa District. Since the type of peasantry which he does conduct is an ordinary one, which enables him to earn meager income, which is used to support his family of a wife and four children as well as his old parents, who also solely depend on him. Additionally, his children are studying in different levels in various secondary schools of which, the fees paid for their education, consumes all the meager income generated from his peasantry activities.

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such post, he has remained in Dar Es Salaam, where he has been conducting various businesses. Under the circumstance, any person of ordinary thinking would find it difficult to swallow the contention by the applicant that, he is a person of low income that does make him to lead a hand to mouth life.

The learned Counsel for the first respondent has asserted further that, even though in his sworn affidavit, the applicant has indicated to be a resident of Kyerwa District, where he conducts his peasantry activities, is another lie altogether, because as earlier averred above, since his retirement from being a Member of Parliament, the applicant has all along been residing in Dar Es Salaam, where he conducts his businesses. He did return to Kyerwa District just in April this year (2015), when he came to seek for nomination to contest for the seat of Member of Parliament, in which he did legally lose and that, now he wants to challenge such choice of the people.

The learned Counsel for the first respondent has bashed away the invocation of the provision of article 21 of the Constitution of the United Republic of Tanzania by his learned brother to the application at hand arguing that, it is of no any aid because during the enactment of the Election Act, the cited article was already and therefore, the legislators were fully aware of its existence and they knew that, such right had to be exercisable upon compliance with the requirements of other laws of the land.

The spirit of requiring applicants to deposit security for costs according to the learned Counsel for the first respondent was meant to safeguard and/or protect the expenses unnecessarily incurred by innocent respondents in prosecuting frivolous petitions lodged by busybody applicants. As such, to require the applicant to deposit five million Tanzanian shillings or any other reasonable amount of money as would be assessed by the Court, cannot be argued to be denying the applicant to access justice, but rather to protect the interests of other innocent civilians against who such petitions are made. Under the circumstance, the question of having dependants cannot be pleaded as a mitigating factor by the applicant, because it is unrelated. The situation could have been different if the applicant were to be condemned to be put under custody, when the question as to who would take care of his dependants would arise. But under the situation at hand, he is just required to deposit the security for cost and return to his home to proceed with his chores of taking care of his dependants.

As the applicant was being sponsored by CHADEMA, which is a very big Political Party when compared to other Political Parties save CCM, undoubtedly, he was beautifully sponsored during his campaign, as well as in this petition and thereby, making his contention that, he is a person of low income to be unfounded. Or else, it has been the view of the learned Counsel for the first respondent that, putting into consideration people of the applicant's caliber, may amount to discrimination among litigants and thereby, infringing the provision of article 13 of the Constitution of the United Republic of Tanzania, which advocates for equality before the law.

He has thus concluded his submission by strongly urging the Court to require the applicant to deposit in Court the amount stipulated by the law for each respondent in his petition.

On his part learned Senior State Attorney Mr. Matuma on behalf of the second and third respondents, has been at one with what has been submitted by his learned brother for the first respondent. Additionally, it has been his submission that, the decision in the case of ***Julius Ishengoma Ndyanabo (supra)***, which has been cited by the learned Counsel for the applicant in reliance to the instant application is on no help, because at the time when the case got determined, the provision of subsection (5) of section 111 of the Election Act, was not yet in existence and that, the said subsection was brought in by the Parliament to cure the mischief noted in the Act by that case.

Discussing the affidavit sworn by the applicant in support of his application, the learned State Attorney has argued that, in his affidavit, the applicant has failed to clearly illustrate as to why, he claims to be incapable of depositing the amount of money stipulated by the law. Citing the decision in the case of ***Morandi Versus Petro [1980] TLR 49***, the learned State Attorney has asked this Court to disregard the submissions, which have been made by the learned Counsel for the applicant outside what has been deponed in the sworn affidavit of the applicant because, such submission has infringed the provision of Order VI Rule 3 of the Civil Procedure Code Act, Cap 33.

On the issue that the applicant is a person of low income, the learned Senior State Attorney has averred that, regard being to the fact that, the applicant is a retired Member of Parliament, he ought to have informed the Court as to what happened to the payment, which he was receiving while serving as a Member of Parliament as well as his retirement benefits, so as to come and tell the Court today that, he is leading a life of hand to mouth. His failure to disclose such fact implies that, the applicant is not a trustworthy person, and has therefore, asked the Court to draw an adverse inference on such character of the applicant. In conclusion therefore, the learned Senior State Attorney has asked the Court to let the law take its course, as nothing persuasive has been submitted by the applicant to establish that, he is indeed incapable of depositing the amount of money, which has been provided by the law for each respondent.

The brief rejoinder by the learned Counsel for the applicant has been more or less recapitulation of what was submitted earlier that, the affidavit of the applicant has contained all the relevant information material enough to convince the Court to grant the sought reliefs. And on the allegations which have been raised regarding the financial status of the applicant has basically based on mere hearsay, which has not in any way, been substantiated by any concrete evidence. The Court has thus been requested to disregard such unfounded allegations from the respondents and be pleased to exempt the applicant from depositing any amount of money as security for costs.

In the light of the foregoing submissions from both sides, the issue for determination by the Court is whether there has been advanced

convincing reasons to convince the Court to adequately consider the request by the applicant. The right for petitioning to challenge the validity of the results in an election petition in the way it has been presented by the applicant herein, undeniably is a basic right which has been clearly enshrined in our Constitution of 1977 under article 21. The availability of such right notwithstanding, the law was enacted to introduce the requirement for the applicant to deposit security for costs, which as correctly pointed out by the learned Counsel for the first respondent was meant to serve a number of purposes. Among them include, to curb unreasonable and vexatious petitions by some busy bodies as well as ascertaining anyone, who has been a respondent to the petition that, in case the petition against him fails, he will be adequately refunded the costs, which he has incurred in prosecuting the petition that has been lodged against him.

It was however, noted by the Court of Appeal in the case of Julius Ishengoma Ndyababo (*supra*) that, the fixed amount which had been set by the law was too stringent and thereby, denying some indigent petitioners access to justice. As a result it did urge for broadening of the requirement for depositing of the security for costs. The outcome was the enactment of Written Laws (Miscellaneous Amendments) Act 25 of 2002, which led to the current practice. In the circumstances, I do not think that, the requirement of depositing security for costs is not in any case aimed at denying justice to any person other than mere requirement, to some procedural process.

This being a Court of which its noble task is to ensure that, access to justice is attained by all people unimpeded, upon having heard the submissions from the learned Counsel for all parties to this petition, is of the considered view that, there are sound reasons to convince this Court that, payment of the whole amount of money stipulated under the law as payment for security for costs by the applicant in this petition is uncalled for. In the same vein, the reasons, which have been advanced, do not qualify him for complete exemption from depositing security for costs. For purposes of ensuring justice to all parties in this petition, it is the considered view of this Court that, an amount of TZs 2,500,000/= as security for costs to each respondent, will meet the ends of justice.

It is so ordered.


S. S. Mwangesi

JUDGE

AT BUKOBA

16 12 - 2015

Date: 16/12/2015

Coram: Hon. S. S. Mwangesi, J.

Petitioner: Present – Lameck Erasto & Chamani

1st Respondent: Absent – Peter Matete for

2nd Respondent: }

3rd Respondent: } Matuma S S A

B/Clerk: Grace

and Mr. Matuma S S A for the 2nd & 3rd respondents and Peter Matete for the 1st respondent this 16th day of December, 2015.


S. S. Mwangesi

JUDGE

16/12/2015