

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Constitutional Jurisdiction)



2016/HP/EP0068

IN THE MATTER OF:

**THE PARLIAMENTARY PETITION RELATING
TO THE PARLIAMENTARY ELECTIONS FOR
LUNTE CONSTITUENCY OF NORTHERN
PROVINCE HELD ON 11TH AUGUST, 2016.**

AND

IN THE MATTER OF:

**THE CONSTITUTION OF ZAMBIA, THE
CONSTITUTION OF ZAMBIA ACT, CHAPTER
1, VOLUME 1, OF THE LAWS OF ZAMBIA.**

AND

IN THE MATTER OF:

**ARTICLES 1, 2, 5, 8, 9, 45, 46, 47, 48, 49,
50, 54, 70, 71, 72, AND 73 OF THE
CONSTITUTION OF ZAMBIA,
CONSTITUTION OF ZAMBIA ACT, CHAPTER
1, VOLUME 1, OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

**SECTIONS 29, 37, 38, 51, 52, 55, 58, 59, 60,
66, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82,
83, 86, 87, AND 89 OF THE ELECTORAL
PROCESS (ELECTORAL CODE OF CONDUCT)
NO. 35 OF 2016 OF THE LAWS OF ZAMBIA.**

AND

IN THE MATTER OF:

**SECTION 96, 97, 98, 99, 100, 106, 107, AND
108 OF THE ELECTORAL PROCESS
(ELECTORAL CODE OF CONDUCT) NO. 35
OF 2016 OF THE LAWS OF ZAMBIA.**

IN THE MATTER OF:

THE ELECTORAL CODE OF CONDUCT 2016.

B E T W E E N:-

HONORATO KANUNSHA

PETITIONER

AND

RONALD CHITOTELA
ELECTORAL COMMISSION OF ZAMBIA

**1ST RESPONDENT
2ND RESPONDENT**

Before Honourable Mrs. Justice M. Mapani-Kawimbe in Chambers this 14th day of October, 2016

For the Petitioner:-

Mr. L.K. Phiri
Messrs. Mushipe & Associates

For the intended 1st Respondent:-

N/A

For the intended 2nd Respondent:

N/A

RULING

Legislation Referred To:

- 1. Electoral Process Act Number 35 of 2016.*

Case Authorities Referred to:

- 1. Petch Vs. Gurney (1994) 3 All ER 731*

The Petitioner herein took out originating summons for extension of time within which to file his parliamentary election petition dated 30th September 2016. The summons are supported by an affidavit in support filed on even date. The matter came up for an ex-parte hearing on 14th October, 2016. However the intended Respondents did not appear as they were not served with court process. The reason advanced by the Petitioner was that service of process could

only be done in the event that the application to file the parliamentary election petition out of time was granted. In the affidavit in support the petitioner averred that he participated in the parliamentary election for Pambashe Constituency which was held on 12th August, 2016. That the intended 1st Respondent was declared winner. He was not happy with the outcome of the election and as a result gave instructions to his advocate Martha Mushipe to represent him in this petition on 20th August, 2016. The said Martha Mushipe failed to file the petition in good time as she was involved with the Presidential Petition and thereafter unwell between 25th August to 25th September, 2016. He contended that the intended 1st Respondent would not be prejudiced by the extension of time. Further that the voting public would suffer greatly if his petition was not heard due to a procedural technicality on lapse of time within which to file his petition.

At the hearing of the application on 14th October, 2016, Counsel for the Petitioner relied on the affidavit in support of the application.

I have seriously considered the affidavit that was filed in support of the application. I wish to state that there are two law firms on record representing the Petitioner herein. The main issue that arises

for determination, in my considered view is, whether the Petitioner should be granted leave to file his petition out of time.

The Petitioner has conceded that his election petition was filed out of time. He however, contends that in the interest of justice his petition should be heard and should not be dismissed on a procedural technicality. In my considered view **Section 100 (3) of the Electoral Process Act** is as clear as it can be. It simply states that an *election petition 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.*

The use of the word “**Shall**” in **Section 100 (3)** makes this provision mandatory. In short it must be complied with to the letter.

What then is the effect of non-compliance of a mandatory statutory provision? In **Petch V Gurney**, the Court of Appeal had this to say at page 736:

“the question whether strict compliance with a statutory requirement is necessary has arisen again and again in the cases. The question is not whether the requirement should be complied with; of course it should: the question is what consequences should attend a failure to comply... the Court has dealt with the problem by devising a distinction between these requirements which are said to be “mandatory”... and those which are merely “directory”... Where a requirement is

mandatory, it must be strictly complied with; failure to comply invalidates everything that follows.”

I conclude that the requirement of **Section 100 (3)** is mandatory in respect of every election petition. In this petition, it was a mandatory requirement on the party of the Petitioner to present the petition no later than fourteen days after 12th August, 2016 when the election results were declared in favour of the 1st Respondent. The result of the Petitioner having failed to comply, is that this petition is invalidly before this Court. It was not intention of the legislature in **Section 100(3)** of the **Electoral Process Act** to give the court any discretion on the said provision of law.

Accordingly, I find no merit in this application and dismiss it forthwith.

Dated this 14th day of October, 2016.

.....*M. Kapani*.....
Hon. Mrs. Justice M. Mapani-Kawimbe
HIGH COURT JUDGE