

**IN THE CONSTITUTIONAL COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(CONSTITUTIONAL JURISDICTION)**

**2021/CCZ/0010**



**IN THE MATTER OF: ARTICLES 117 (5) OF THE CONSTITUTION OF ZAMBIA,  
AND**

**IN THE MATTER OF: THE PETITION PURSUANT TO ARTICLE 28 OF THE  
CONSTITUTION OF ZAMBIA, AND**

**IN THE MATTER OF: THE CONTRAVENTION OF ARTICLE 45 AND 49 OF THE  
CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016, AND**

**IN THE MATTER OF: THE CONTRAVENTION OF SECTION 3 AND 110 OF THE  
ELECTORAL PROCESS ACT NO. 35 OF 2016, AND**

**IN THE MATTER OF: THE ELECTORAL PROCESS (GENERAL) REGULATIONS,  
2016: REGULATION Nos. 43, 45, 50, AND 53**

**IN THE MATTER OF: THE PETITION PURSUANT TO SECTION 8 (3) OF THE  
CONSTITUTIONAL COURT ACT NO. 37 OF 2016, AND**

**IN THE MATTER OF: ORDER 4 RULE 1 OF THE CONSTITUTIONAL COURT  
RULES, STATUTORY INSTRUMENT NO. 37 OF 2016**

**BETWEEN**

**KALUBA MUSENDA SIMUYEMBA  
(Suing as a Party Leader and Chairperson on behalf of  
Movement for Change and Equality)**

**1<sup>ST</sup> PETITIONER**

**PETER MUTONDO KACHAMA  
(Suing as Deputy Secretary General on behalf of  
Movement for Change and Equality)**

**2<sup>ND</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT**

**ELECTORAL COMMISSION OF ZAMBIA**

**2<sup>ND</sup> RESPONDENT**

**Coram: Sitali, Mulenga and Munalula, JJC on the 18<sup>th</sup> day of May, 2021 and 4<sup>th</sup> June, 2021**

**For the Petitioners : No Appearance**

**For the 1<sup>st</sup> Respondent: No Appearance**

**For the 2<sup>nd</sup> Respondent : Mr. B .M. Musenga, Commission Secretary  
Mr. M. Bwalya, Legal Officer**

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## **R U L I N G**

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**Cases cited:**

- 1. Benjamin Mwelwa v. The Attorney General, The Electoral Commission of Zambia and 3 Others 2020/CCZ/007**
- 2. Attorney General v E.B Jones Machinists Limited (SCZ Judgment No. 26 of 2000)**
- 3. Lloyd Chembo v Attorney General and others Selected Judgment No. 15 of 2018 (2017/CZ/0011)**
- 4. Vincent Chaile v Electoral Commission of Zambia 2021/CCZ/007**
- 5. William David Carlisle Wise v. EF Harvey Limited (1985) Z.R. 179**
- 6. Drummond Jackson v. British Medical Association [1970] 1 ALL ER 1094**
- 7. Richard Mumba v Garry Nkombo and 43 Others 2017/CCZ/005**

**Statutes referred to:**

- 1. The Constitution of Zambia, Act No. 2 of 2016**
- 2. The Constitutional Court Act No. 8 of 2016**
- 3. The Constitutional Court Rules, S.I. No. 37 OF 2016**
- 4. Electoral Process Act No. 35 of 2016**
- 5. Electoral Process (General) Regulations, S.I. No. 63 of 2016**

**Works referred to:**

- 1. The Supreme Court Practice, 1999 Edition (White Book)**
- 2. Black's Law Dictionary, Tenth Edition, Thomson Reuters**
- 3. Dr. P. Matibini, *Zambian Civil Procedure: Commentary and Cases*, Volume 1, LexisNexis, 2017**

**Introduction**

[1] This Ruling is on the 2<sup>nd</sup> Respondent's application to strike out and dismiss the Petition made pursuant to Article 128 (1) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution); section 8 (1) of the Constitutional Court Act No. 8 of 2016; and Order 1 Rules 1 and 2 of the Constitutional Court Rules Statutory Instrument No. 37 of 2016 as read with Order 18 Rule 19 of the Rules of the Supreme Court of England, 1999 Edition (White Book).

[2] The application is based on the following grounds:

- 1. The Petition and Affidavit Verifying Facts do not disclose any cause of action against the 2<sup>nd</sup> Respondent capable of being sustained in this Court and that the Petition is frivolous, vexatious and otherwise an abuse of process of this Court.**
- 2. The Petition is not properly before this Court by reason of want of jurisdiction having regard to the provisions of the Constitution of Zambia Act No. 2 of 2016 and Section 8 (1) of the Constitution of Zambia Act No. 8 of 2016, as the Petitioner is alleging violation of his rights. The enforcement and protection of rights is a preserve of the High Court of Zambia pursuant to Article 28 of**



**the Constitution of Zambia and not within the jurisdiction of this Court.**

### **Background**

[3] The Petitioners filed their Petition on 12<sup>th</sup> April, 2021 under Article 128 (1) alleging a violation or contravention of Articles 45 and 49 of the Constitution and under Article 28 seeking redress for the contravention. The Petitioners alleged that there were possibilities of electoral rigging in view of gaps in the Electoral Process Act No. 35 of 2016 (Electoral Process Act) and Regulations and that the electoral system was inconsistent with international best practices. The Petition mainly **outlined various** provisions of the Constitution and the Electoral Process Act and Regulations.

[4] As regards the facts relied upon in support of the Petition, the Petitioners stated that they wished to tender a forensic interrogation of the result management process and tools for 2021 General Elections with emphasis on the possibilities of electoral rigging in view of gaps in the Electoral Process Act and its regulations and that the said system was inconsistent with international best practices. The particular subject matters of contravention as outlined in paragraph 7 of the Petition stated briefly are:

- i. The failure by both Respondents to ensure that the result management process and tools for the 2021 General Elections are devoid of all possible deviousness amounting to electoral rigging.
- ii. The failure by the 2<sup>nd</sup> Respondent to put safeguard measures for a fair and free election in order to ensure that comprehensive and strict electoral dispute mechanisms are put in place.
- iii. The failure by the 2<sup>nd</sup> Respondent to ensure that voters registers, in terms of coding of respective Polling Districts/Stations, are linked to the Ward, Constituency, District, Province and National Results Centre to reflect the cumulative nature of each respective election.
- iv. The failure by the 2<sup>nd</sup> Respondent to ensure that the serial numbers put on the Ballots match or tally with the respective polling district/stations in view of results for Councillor in a Ward and Member of Parliament in a Constituency.
- v. The failure by both Respondents to ensure that the electoral laws and regulations put in place are complied with in order to avoid the making of administrative decisions.

[5] The Petitioners outlined in paragraph 9 of the Petition the reliefs sought pursuant to Article 128 of the Constitution as:

- (a) **An order (of Mandamus) that this Petition be allowed.**
- (b) **That it may be determined and ordered that the 1<sup>st</sup> Respondent should ensure that strict measures are put in place before, during and after elections to prevent malpractice, fraud, electoral violence and rigging of elections.**
- (c) **An order to compel the 2<sup>nd</sup> Respondent to ensure the timely delivery of adequate polling materials to all areas so that voters are not inconvenienced by delays in disenfranchisement.**
- (d) **That it may be determined and ordered that the 2<sup>nd</sup> Respondent should ensure that electoral dispute mechanisms are enhanced before, during and after the elections and a timely delivery of sufficient prescribed forms.**
- (e) **That it may determined and ordered that the 2<sup>nd</sup> Respondent be compelled to make the following changes in the electoral regulations:**
  - 1. **To allow for result verifications to be done at Polling Stations before transmission; at Tallying Centres upon receipt of transmitted results from polling stations; and after collation/tallying of results at Constituency Tallying Centers for Local Government Elections of Mayors/Council Chairpersons and Councillors and National Assembly election for Member of Parliament; and at National Result Centre upon receipt of results from various Constituency Tallying Centers and after tallying/collation of Votes in a Presidential Election for Office of President and Vice President.**
  - 2. **To allow for transmission of results to be done physically all the way from the Polling Station to the Constituency Tallying Centre and to the National Result Centre.**



3. **To allow for transmission of results to be done electronically from the Polling Station to the Constituency Tallying Centre, and from Polling Station to the National Results Centre.**
  4. **To allow that declarations of winners should only be done after items of paragraph (e), 1, 2 and 3 above have fully been exhausted.**
- (f) **That it may be determined and ordered that the voters registers in terms of coding of respective Polling Districts/Stations be linked to the Ward, Constituency, District, Province and the National Result Centre should incorporate ascending coding and numbering systems to reflect the cumulative nature of each respective election and in order to prevent fraud of votes counted.**
  - (g) **An order that the serial numbers put on the Ballot Papers should match/tally with the respective polling districts/stations in view of results for Councillors in a ward, Member of Parliament in a Constituency, Mayor, Council Chairperson in a District and the President at the National Result Centre.**
  - (h) **An order that the prescribed forms under Regulations 43, 45 and 53 be modified to take the format provided under Regulations 49 and 50 of the Electoral Process (General) Regulations, 2016.**
  - (i) **Any other remedy that the Court may deem just and necessary for the sake of defending the Republican Constitution from its illegal contravention and abrogation.**
  - (j) **The costs of and occasioned by this Petition be borne by the Respondents.**

[6] On 23<sup>rd</sup> April, 2021 the 2<sup>nd</sup> Respondent filed this application to dismiss the Petition for non disclosure of a cause of action against the 2<sup>nd</sup> Respondent and lack of jurisdiction for alleging a violation of their rights

and seeking enforcement of the said rights pursuant to Article 28 of the Constitution.

## **2<sup>nd</sup> Respondent's affidavit and submissions**

[7] In the affidavit in support of the application, deposed to by Kryticous Patrick Nshindano, the 2<sup>nd</sup> Respondent's Chief Electoral Officer, the deponent averred that neither the Petition nor the Affidavit Verifying Facts disclose any alleged violation of the Constitution on the part of the 2<sup>nd</sup> Respondent. He stated that it was the mandate of the 2<sup>nd</sup> Respondent to implement the electoral process and conduct elections under the Constitution, the Electoral Process Act and the Electoral Process (General) Regulations Statutory Instrument No. 63 of 2016.

[8] It was further averred that the Petition and Affidavit Verifying Facts do not meet the requirements of actions to be brought before this Court. Furthermore, that the Petition was wrongly before this Court as it alleged a violation of the Petitioners' rights under Article 28 of the Constitution which ought to have been taken before the High Court.

[9] The 2<sup>nd</sup> Respondent, in the skeleton arguments in support of the application, contended that the Petition and Affidavit Verifying Facts did not disclose any cause of action against the 2<sup>nd</sup> Respondent capable of being



sustained in this Court and that the Petition is frivolous, vexatious and an abuse of the court process. It was submitted that for a party to competently approach this Court, such a party must set out the violations of the Constitution that are alleged to have been committed and how the said violations were committed or the constitutional provisions thereof that require interpretation. Regarding this argument, the 2<sup>nd</sup> Respondent relied on Order 18 Rule 19 of the Rules of the Supreme Court 1999 Edition (White Book) which provides for striking out of any pleadings which do not disclose a cause of action or are frivolous and vexatious.

[10] It was contended that while the Petition makes general allegations, it was devoid of any particulars of the provisions which were allegedly violated by the 2<sup>nd</sup> Respondent and how they were violated. It was submitted that Order IV rule 1 (2) of the Constitutional Court Rules was instructive on what should be contained in a Petition to include the facts relied upon and the constitutional provision allegedly violated. That in this case, the Petitioners alleged that the 2<sup>nd</sup> Respondent was likely to contravene or violate Articles 45 and 49 of the Constitution and made general allegations which do not clearly outline a cause of action which was capable of being sustained in the Court. The case of **Benjamin Mwelwa v**

**The Attorney General, The Electoral Commission of Zambia and 3 Others**<sup>1</sup> was then cited in which this Court stated, *inter alia*, that it is not enough to merely allege a constitutional or statutory breach without setting out sufficient details of the facts and basis of the reliefs sought.

[11] It was submitted that the Petitioners had failed to demonstrate how the 2<sup>nd</sup> Respondent had breached or was likely to breach Article 45 and 49 of the Constitution as alleged and the connection between the process of the result management and coding of respective polling districts to the alleged breach of Article 45 and 49 of the Constitution. Further, that the entire Petition was premised on alleged violations of the powers contained in subsidiary legislation and did not disclose constitutional issues for this Court's determination.

[12] The 2<sup>nd</sup> Respondent further posited that it had the mandate to implement the electoral process and conduct elections under the Constitution, the Electoral Process Act and the Electoral Process (General) Regulations. Therefore, that the Petitioners could not stop the 2<sup>nd</sup> Respondent from performing its statutory function on the ground that their rights would be infringed. The case of **Attorney General v E.B Jones**

**Machinists Limited**<sup>2</sup> was cited in support wherein the Supreme Court held *inter alia* that:

**Where a statute enacted for the benefit of a section of the public imposes a duty of a positive kind the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory function.**

[13] In concluding on the first preliminary issue, the 2<sup>nd</sup> Respondent urged this Court to take judicial notice that the Constitution and the Electoral Process Act provide redress mechanisms for parties not satisfied with the outcome of an election and that it was therefore premature to allege rigging or challenge the results management process prior to holding an election.

[14] As regards the second preliminary issue, that the Petition was improperly before this Court for want of jurisdiction, it was submitted that the Petition in paragraph 2 seeks redress under Article 28 alleging a violation of Articles 11 to 26 of the Constitution contrary to Article 128 on the jurisdiction of this Court. It was argued that enforcement of Article 28 is the preserve of the High Court. A number of this Court's decisions were cited including that of **Lloyd Chembo v Attorney General and others**<sup>3</sup> wherein this Court dismissed an action at the preliminary stage for want of



jurisdiction and non disclosure of a cause of action. It was concluded that the Petition should be struck out and dismissed with costs.

[15] At the hearing of the application on 18<sup>th</sup> May, 2021, learned Counsel for the 2<sup>nd</sup> Respondent, Mr Musenga, in augmenting the skeleton arguments submitted that Order 18 Rule 19 of the White Book was categorical on the powers of the Court where a petition does not disclose a cause of action. Counsel contended that the entire Petition had not disclosed a single violation of the Constitution. However, that on the contrary, the Petition had cited a number of alleged breaches of subsidiary legislation such as the Electoral Process Act and regulations made thereunder. Counsel added that paragraph 8 of the Petition had not demonstrated how Article 45 had been violated by the 2<sup>nd</sup> Respondent. He contended that Article 49 relied upon by the Petitioners only provided that the system of administering elections should be prescribed in subsidiary legislation.

[16] In augmenting the 2<sup>nd</sup> Respondent's arguments on the second preliminary issue, Mr. Musenga submitted that since the Petition, as stated in paragraph 4 and in the heading, was premised on Article 28 of the Constitution it was outside the jurisdiction of this Court. He further cited the

case of **Vincent Chaile v Electoral Commission of Zambia**<sup>4</sup> and stated that we guided in that case that the jurisdiction of this Court can be invoked when a party completely sets out the provisions of the Constitution that are alleged to be violated and how the violation was committed.

### **Petitioners' affidavit and submissions**

[17] The Petitioners opposed the application through the affidavit in opposition sworn by Peter Mutondo Kachama, the 2<sup>nd</sup> Petitioner. It was deposed that the 2<sup>nd</sup> Respondent had failed to comply with the provisions of Articles 45 and 49 of the Constitution by failing to come up with a proper result management process, in particular, the aspect of transmission of results from a Polling Station to the National Results Centre.

[18] It was averred that Articles 45 and 49 of the Constitution read together with Section 3 of the Electoral Process Act were not complied with by the 2<sup>nd</sup> Respondent before, during and after the polls are held and as a result, there had always been electoral malpractice leading to violence, intimidation, fraud and vote tampering. It was the 2<sup>nd</sup> Petitioner's position that the contents of paragraph 7 of the Petition give clear indication why this action was commenced. In particular, that the 2<sup>nd</sup> Respondent had

constitutional and statutory duties to ensure that comprehensive regulations in compliance with the provisions of Articles 45 and 49 of the Constitution were put in place for purposes of implementing the electoral management process so as to have a free and fair election.

[19] In addressing the second preliminary issue, it was stated that this Court's jurisdiction begins with Article 1 (5) of the Constitution which requires that a matter relating to the Constitution should be heard by this Court and that Article 128 was the substantive provision on jurisdiction as read with section 8 of the Constitutional Court Act. The 2<sup>nd</sup> Petitioner added that the core of the Petition was not seeking to enforce fundamental rights but was grounded on the prescription and implementation of the results management process. Therefore, that the Petitioners wished to expunge Article 28 of the Constitution where it appeared in the Petition and other accompanying documents. He urged the Court to hear the matter on its merits.

[20] The Petitioners, in their skeleton arguments in opposition, cited the Supreme Court's definition of a cause of action in the case of **William David Carlisle Wise v EF Harvey Limited**<sup>5</sup> as facts which are necessary for a party to prove, if traversed, to support his right to judgment. The case



of **Drummond Jackson v British Medical Association**<sup>6</sup> was also relied upon in which the Court of Appeal of England was said to have stated that the mere fact that a cause was weak and not likely to succeed was not a ground to strike it out.

[21] It was contended that a cause of action is disclosed when a claimant sets out facts that entitle him to the reliefs sought in the endorsement. That accordingly, the cause of action is set out in the main body of the Petition which then gives rise to the reliefs or remedies sought. The Petitioners argued that they had elaborated, in line with the format provided under Order IV rule 1 (2) of the Constitutional Court Rules, that Articles 45 and 49 of the Constitution had not been complied with by the 2<sup>nd</sup> Respondent whenever elections are held. It was the Petitioners' further submission that the 2<sup>nd</sup> Respondent lamentably failed to implement the results management process before, during and after the polls as guaranteed under Articles 45 and 49 of the Constitution.

[22] The Petitioners proceeded to outline the provisions of Article 45 (2) of the Constitution and argued that the same had not been properly effected in past elections. It was posited that the Petitioners would provide evidence through expert witness statements and would require the 2<sup>nd</sup> Respondent

to provide documents to help their matter to substantially succeed and show that the 2<sup>nd</sup> Respondent had failed in its duties to prescribe and implement the electoral management system.

[23] It was submitted that the 2<sup>nd</sup> Respondent's application to strike out and dismiss the Petition based on Order 18 rule 19 of the White Book was an attempt to divert from real issues to be traversed at trial. That the 2<sup>nd</sup> Respondent's argument that the Petition was apparently premised on alleged violations of subsidiary legislation was misconceived because the Petition was in the format required by the Constitutional Court Rules and evidence would be adduced at trial to prove that Articles 45 and 49 of the Constitution were not complied with. It was added that the Constitution confers powers on the 2<sup>nd</sup> Respondent to prescribe regulations but that the 2<sup>nd</sup> Respondent had been caught napping under Articles 45 and 49 of the Constitution and had therefore violated the constitutional provisions by failing to perform its obligation accordingly. That failure to adhere to the provisions of Articles 45 and 49 was a serious cause of action.

[24] In opposing the second preliminary issue, the Petitioners submitted that the reference to Article 28 of the Constitution should be expunged from the Petition and their other documents. That this was for avoidance of

doubt that the reliefs sought were premised on Articles 45 and 49 and were not for enforcement of fundamental rights under Article 28. The Petitioners placed reliance on Order XVIII of the High Court Rules and Order 20 rule 7 of the White Book to the effect that a court could correct a defect so that the main issue in controversy is determined. Further reliance was placed on Article 118 (2) (e) and (f) of the Constitution that justice should be administered without undue regard to procedural technicalities and that the values and principles of the Constitution should be protected and promoted. It was the Petitioner's further submission that the alleged contravention of Articles 45 and 49 was within the jurisdiction of this Court under Article 128 of the Constitution and section 8 of the Constitutional Court Act and hence the Petition should be heard on its merits. Finally, that the 2<sup>nd</sup> Respondent's application should be dismissed with costs.

### **Decision**

[25] We have considered the application, the respective affidavits and arguments by the parties. The 2<sup>nd</sup> Respondent's application has raised two issues of non disclosure of a cause of action and lack of jurisdiction. We wish to immediately deal with the second issue of lack of jurisdiction because the Petitioners conceded that it was the High Court that had



jurisdiction to determine matters brought under Article 28 of the Constitution which deals with Part 3 regarding the Bill of Rights. The Petitioners stated that they were not seeking to enforce any fundamental rights and prayed that the offending portions be expunged from the Petition and Affidavit Verifying Facts.

[26] In view of the position taken by the Petitioners, we will not proceed to consider the arguments by the parties on this issue of jurisdiction. Suffice to state that the Petition sought to rely on both Articles 28 and 128 of the Constitution and we note that if the portions relating to Article 28 were expunged, the portions relating to Article 128 of the Constitution would still survive. As the Petitioners conceded that this Court has no jurisdiction to deal with matters brought pursuant to Article 28 of the Constitution, the second preliminary issue succeeds and is upheld.

[27] We now proceed to consider the first preliminary issue alleging that the Petition and Affidavit Verifying Facts **did** not disclose any cause of action against the 2<sup>nd</sup> Respondent that can be sustained in this Court.

[28] The application to strike out and dismiss the Petition has been made pursuant to various provisions including Article 128 (1) of the Constitution and section 8 (1) of the Constitutional Court Act which both provide for the jurisdiction of this Court. Order IV rule 1 (2) of the Constitutional Court Rules was also relied upon which provides that:

**(2)A Petition shall disclose –**

- (a) the petitioner's name and address**
- (b) the facts relied upon**
- (c) the constitutional provision allegedly violated; and**
- (d) the relief sought by the petitioner.**

[29] The application was further made pursuant to Order 18 rule 19 of the White Book which provides that:

**(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or indorsement of any writ in the action, or anything in any pleading or in the indorsement on the ground that –**

- (a) it discloses no reasonable cause of action or defence, as the case may be; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of process of the Court;**

**and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.**

**(2) No evidence shall be admissible on an application under paragraph (1) (a).**

**(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.**

[30] The main contention is that the Petition does not disclose a cause of action against the 2<sup>nd</sup> Respondent capable of being sustained before this Court. The learned authors of Black's Law Dictionary, Tenth Edition, define 'cause of action' as:

**a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.**

Dr. P. Matibini in **Zambian Civil Procedure: Commentary and Cases** on page 140-141 cites A. Singh, Code of Civil Procedure Act No. 5 of 1908, 16 on what constitutes a cause of action as follows:

**Equally important to note is that a cause of action does not comprise every piece of evidence which is necessary to prove every fact, but every fact which is necessary and proved. In other words, a cause of action is a bundle of essential facts which are necessary for a plaintiff to prove before he can succeed in the action. The term 'cause of action' is often confused or employed interchangeably with the 'right of action'. There is however a distinction between 'a cause of action' and 'a right of action'. A right of action is a right to enforce a cause of action, a remedial**



**right affording redress for the infringement of a legal right belonging to some definite person. A cause of action is the operative fact which gives rise to such right of action, and may for instance be taken away by the running of statute of limitations or through an estoppel or by other circumstances which do not affect the cause of action.**

[31] We agree with these definitions. Indeed, a cause of action comprises facts and the nature of the claim made upon which a party seeks the reliefs. It also serves the useful purpose of disclosing or showing the class of action and the basis for the response of the other party. The disclosure of a cause of action is therefore cardinal to sustain any action or matter before any court of competent jurisdiction. In the case of **Richard Mumba v Garry Nkombo**<sup>4</sup> we stated as follows:

**Our short answer is that a citizen seeking authoritative interpretation must abide by the constitutional and statutory provisions as well as the rules of court as regards the appropriate mode of action and the court from which to obtain the relief sought.**

**Even in constitutional matters, the cases must be competently before the Court before they can be considered. In fact, this Court has in the past dismissed some actions at the preliminary stage on account of want of jurisdiction or non disclosure of a cause of action such as *Lloyd Chembo v The Attorney General* and *Dora Namasiku Likukela v The Attorney General and Others*.**

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A clear cause of action also serves the purpose of assisting the other party to appropriately respond to the allegations of contravention.

[32] The main issue for our determination is whether the Petition sufficiently discloses a cause of action against the 2<sup>nd</sup> Respondent capable of being sustained in this Court.

[33] The 2<sup>nd</sup> Respondent contended that the Petitioners had not shown how Articles 45 and 49 of the Constitution had been breached or were likely to be contravened. Further, that the Petition and Affidavit Verifying Facts relate to the result management process and coding of respective polling districts which were premised on and are the subject of subsidiary legislation. The Petitioners on the other hand have argued that they have shown that Articles 45 and 49 of the Constitution had been violated or breached by the 2<sup>nd</sup> Respondent.

[34] We have perused the Petition which alleges that the 2<sup>nd</sup> Respondent had breached Articles 45 and 49 of the Constitution in relation to the election result management process and the coding of respective polling districts. Articles 45 and 49 of the Constitution provide as follows:

**45.(1) The electoral systems provided for in Article 47 for the election of President, Member of Parliament or Councillor shall ensure –**

- (a) that citizens are free to exercise their political rights;**
- (b) universal adult suffrage based on equality of a vote;**
- (c) fair representation of the various interest groups in society; and**
- (d) gender equity in the National Assembly or council.**

**(2) The electoral process and system of administering elections shall ensure –**

- (a) that elections are free and fair;**
- (b) that elections are free from violence, intimidation and corruption;**
- (c) independence, accountability, efficiency and transparency of the electoral process;**
- (d) a simple and practical system of voting and tabulating votes; and**
- (e) timely resolution of electoral disputes.**

**49. The system of administering elections shall be prescribed.**

[35] We note that Article 45 prescribes the principles of electoral systems and process while Article 49 provides that the system for administering elections shall be prescribed. These constitutional provisions are the basis for the enactment of the Electoral Process Act No. 35 of 2016 and regulations such as the Electoral Process (General) Regulations Statutory Instrument No. 63 of 2016 which provide for the result management systems, among other issues. The Petitioners' position was that the



provisions of Article 45 (2) had not been properly effected in past elections. Paragraph 7 of the Petition which is headed as 'subject matters of this Petition' does not provide the particulars of contravention of Articles 45 and 49 of the Constitution. Instead, as outlined above, paragraph 7 contains general statements regarding the results management system and does not give sufficient particulars of the alleged contravention. There are also no specific allegations as to which particular provisions of the Electoral Process Act No. 35 of 2016 and the Regulations contravene Articles 45 and 49 of the Constitution. The Petitioners have not demonstrated in what respect the 2<sup>nd</sup> Respondent has breached Articles 45 and 49 of the Constitution.

[36] Order IV rule 1 (2) of the Constitutional Court Rules prescribes what is to be contained in a petition. It has been argued by the Petitioners that the Petition meets the requirements of Order IV rule 1 (2) of the Constitutional Court Rules. We however wish to state that a petition must not only meet the requirements as to the format but the details or particulars in the petition must also meet the requirements as to the substance to reveal a clear cause of action. The case of **Benjamin**

**Mwelwa**<sup>1</sup> is instructive on the requirement for sufficient details to be provided in petitions. In that case we stated that:

**We hold the firm view that it is not sufficient to allege a breach of a statutory or constitutional provision without setting out the facts, in sufficient detail, which are the basis of the claim against the Respondent and entitle the Petitioner to the reliefs sought.**

**In view of the foregoing, we come to the conclusion that the Petition does not reveal sufficient details to warrant the existence of a cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents or how they have allegedly breached Article 60 (2)(d) of the Constitution and Section 18 of Act No. 1 of 2016 to justify this Court's intervention.**

[37] As prescribed in Order IV rule 1 (2) of the Constitutional Court Rules, the constitutional provision alleged to have been breached must be outlined in clear and concise terms as well as details of the alleged violation. However, in this current case, there is a general allegation that the principles of electoral systems and process and the provision for prescribing the system of administering elections in Articles 45 and 49, respectively had been breached by the 2<sup>nd</sup> Respondent.

[38] The Petitioners' further argument was that they would provide evidence at trial through expert witness statements and would require documents from the 2<sup>nd</sup> Respondent to assist their matter to substantially succeed in proving the failure to prescribe and implement the electoral

management system. This argument does not assist the Petitioners' case in the absence of the Petition sufficiently showing a cause of action or facts on which the matter is anchored and therefore requiring to be proved at trial.

[39] In the circumstances, the case of **Drummond Jackson v British Medical Association**<sup>6</sup> cited by the Petitioners does not aid their case as what is in issue is whether the Petition discloses a cause of action and not whether the cause of action is weak or not likely to succeed.

[40] We reiterate that it is not enough to merely allege a breach of a constitutional provision without setting out relevant facts in sufficient detail that would entitle a party to the reliefs sought. This also applies in cases where particular legislation is alleged to contravene the Constitution as the facts should be set out in sufficient detail.

[41] Having considered the contents of the Petition, it is our considered view that the same does not sufficiently reveal a cause of action against the 2<sup>nd</sup> Respondent that can be sustained in this Court. We therefore find merit in the 2<sup>nd</sup> Respondent's application to strike out and dismiss the Petition for non disclosure of a cause of action against the 2<sup>nd</sup> Respondent. The first



preliminary issue succeeds and is upheld. The Petition is accordingly struck out and dismissed as prayed.

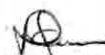
[42] Each party is to bear their own costs.



.....  
**A. M. Sitali**  
**Constitutional Court Judge**



.....  
**M. S. Mulenga**  
**Constitutional Court Judge**



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**M. M. Munaiua**  
**Constitutional Court Judge**