IN THE CONSTITUTIONAL COURT OF ZAMBIA **2022/CCZ/0024**

HOLDEN AT LUSAKA

(CONSTITUTIONAL JURISDICTION)

IN THE MATTER OF: **THE CONSTITUTION OF ZAMBIA, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **THE INTERPRETATION OF ARTICLE 52 (4) OF THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA AS AMENDED BY ACT NO. 2 OF 2016**

BETWEEN:

BERNARD KANENGO **APPLICANT**

AND

THE ATTORNEY GENERAL **1ST RESPONDENT**

ELECTORAL COMMISSION OF ZAMBIA **2ND RESPONDENT**

Coram: Mulonda, Mulenga and Mulongoti, JJC,
on 13th October, 2022 and 20th October 2022

For the Applicant: **Mr. C. Magubbwi of Magubbwi and Associates.**

For the 1st Respondent: **Mr. M. Muchende SC, Solicitor General,**
Mr. J. Simachela, Chief State Advocate,
Mr. C. Mulonda, Principal State Advocate
Mr N. Mwiya Assistant Senior State Advocate
Mr. O. Lubumbe State Advocate
Mr. C. Mulumbwa State Advocate of Attorney General's Chambers.

For the 2nd Respondent: **Ms. T. Phiri and Mr. M. Bwalya, In-House Counsel Electoral Commission of Zambia.**

J U D G M E N T

Mulongoti, JC delivered the Judgment of the Court.

Cases referred to:

1. **Isaac Mwanza v Attorney General – 2021/CCZ/0045.**
2. **Jonas Zimba v Attorney General – 2022/CCZ/007.**
3. **Steven Katuka and Law Association of Zambia v Attorney General and Ngosa Simbyakula and 63 others, CCZ Judgment No. 29 of 2016.**
4. **Gift Luyako Chilombo v Biton Manje Hamaleke – 2016/CCZ/0045; Appeal No. 2 of 2016.**
5. **Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu, Inonge Wina, Electoral Commission of Zambia and Attorney General, Ruling No. 33 of 2016; 2016/CCZ/0031.**
6. **Sylvester Musonda Shipolo v Attorney General – 2020/CCZ/0016.**
7. **Institute of Law, Policy Research and Human Rights v Attorney General – 2021/CCZ/0023.**
8. **Zacharia Okoth Obado v Edward Akong'o Oyugi and 2 Others [2014] eKLR.**

Legislation referred to:

1. **The Constitution of Zambia (Amendment) Act No.2 of 2016,**
2. **The Electoral Process Act No. 35 of 2016**

3. **The Electoral Process (General) (Amendment) Regulations, 2021, Statutory Instrument No. 39 of 2021**
4. **The Constitutional Court Rules, Statutory Instrument No. 37 of 2016**

Introduction

[1] By Originating Summons taken out on 29th September, 2022, the applicant herein seeks this Court's determination of the following questions:

1. **Whether pursuant to Article 52 (4) of the Constitution, the prescribed period of 21 days within which to hear a challenge relating to nominations of a candidate can stop running by virtue of a stay of proceedings.**
2. **Whether pursuant to Article 52 (4) of the Constitution, the prescribed period of 21 days within which to hear a challenge relating to nominations of a candidate can be enlarged by any person or authority or Court for that matter.**

Applicant's case

[2] Facts leading to this action are as stated in the Affidavit in Support of Originating Summons dated 29th September, 2022 and sworn by Bernard Kanengo, the applicant herein. The applicant deposed that he was adopted as parliamentary candidate in the Kabushi constituency by-election slated for the 15th September, 2022 under

the United Party for National Development (UPND) ticket. That this followed the nullification of elections for Kwacha and Kabushi Constituencies by the High Court as the court of first instance and upheld by the Constitutional Court on appeal.

[3] That the Electoral Commission of Zambia, the 2nd Respondent herein, had, consequent to the nullification of the Kabushi and Kwacha parliamentary seats, set 25th August, 2022 as date forfiling nominations and 15th September, 2022 as date of by-election for the said Constituencies. However, when the candidates for Kwacha and Kabushi Constituencies whose seats had been nullified, namely, Joseph Malanji and Bowman Chilosha Lusambo respectively, presented their nomination papers on the set date of 25th August, 2022, the 2nd Respondent rejected their nomination papers purporting that they were disqualified under Article 72 (4) of the Constitution of Zambia.

[4] Following rejection of their nominations, the two petitioned the High Court under Cause No. 2022/HP/1327, challenging the 2nd Respondent's decision to reject their nomination papers. In its ruling dated 13th September, 2022, the High Court stayed the by-elections

slated for 15th September, 2022, and ruled that it had jurisdiction, derived from Article 52 (4) of the Constitution as read together with Regulation 18 (7) of the Electoral Process (General) Amendment Regulations, 2021, Statutory Instrument No. 39 of 2021, to determine a petition anchored on Article 52 (4). Exhibited as **"BK3"** is a copy of the said ruling.

[5] It was further deposed that the High Court, in its ruling dated 15th September, 2022 and exhibited as **"BK4"**, referred the matter to the Constitutional Court. The 1st respondent, being dissatisfied with the High Court ruling of the 15th instant, applied to the Court of Appeal for leave to appeal the said ruling referring the matter to the Constitutional Court. On 16th September, 2022, a single judge of the Court of Appeal, granted an ex parte order staying proceedings in the High Court. A copy of the ex parte order was exhibited marked **"BK5"** and in an ex tempore ruling dated 17th September, 2022, the single Judge of the Court of Appeal declined to discharge the stay on the basis that time had stopped running. A copy of the said ruling was exhibited and marked **"BK6"**. That by a ruling dated 22nd September, 2022, the full Court of Appeal

granted the 1st respondent leave to appeal and confirmed the ex parte order of the single judge for stay of the High Court proceedings. Produced and marked **"BK7"** is a copy of the said ruling.

[6] That the applicant now seeks an interpretation as to whether pursuant to Article 52 (4) of the Constitution, the prescribed period of 21 days within which to hear a challenge relating to nominations of a candidate can be enlarged by any person or authority or Court for that matter.

[7] In support of the originating summons, the applicant also filed skeleton arguments, in which it submitted that the jurisdiction of the Constitutional is Court to interpret provisions of the Constitution as provided by Article 128 (1) (d) of the Constitution. On the propriety of the Originating Summons as mode of commencement it was submitted that this was correct and in line with Order 4 rule 2 (2) of the Constitutional Court Rules, Additionally, the cases of **Isaac Mwanza v The Attorney General**[1] and **Jonas Zimba v Attorney General**[2] were relied on wherein we held that where a person seeks

interpretation of the provisions of Constitutions an originating summons is the correct mode of commencement.

[8] It was the further submission of the applicant that this Court has held in several cases like **Steven Katuka and Law Association of Zambia v The Attorney General and Ngosa Simbyakula and 63 Others**[3] and **Jonas Zimba v The Attorney General**[2] that all relevant provisions must be brought to bear in interpreting the Constitution and that the ordinary meaning of words used should be adopted. However, that if the ordinary meaning of words leads to absurdity, the purposive approach should be resorted to. The applicant argued that a natural and ordinary reading of Article 52 (4) shows that a person aggrieved with a nomination may challenge such nomination before a court or tribunal. And that, such a challenge should be lodged within seven (7) days of the close of the nomination and that the court shall hear it within 21 days.

[9] On authority of the case of **Gift Luyako Chilombo v Biton Manje Hamaleke**[4], it was argued that no person or authority or court has the power to enlarge time as stipulated in the Constitution. The case of **Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar**

Chagwa Lungu, Inonge Wina, Electoral Commission of Zambia and Attorney General[5] was called in aid to reinforce the rigidity in time frames that are prescribed by the Constitution.

[10] In conclusion it was argued that a stay of proceedings cannot stop the 21 days-time frame as prescribed by Article 52 (4) of the Constitution, nor can it be enlarged by any person, authority or court.

1st Respondent's case

[11] The 1st respondent filed an affidavit in opposition and skeleton arguments in opposition, even though it is in agreement with the applicant's case. In its skeleton arguments, the 1st respondent submitted that the said questions were ripe for interpretation owing to what had transpired in the impending Kwacha and Kabushi by-elections.

[12] Further that the Constitution is the supreme law as provided by Article 1 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and that all persons, State Organs and institutions, as well as the judicature, were bound by the Constitution.

[13] As regards the questions raised for determination, it was submitted that a stay of proceedings does not stop time from running and further that no person, authority or court can enlarge time within which to hear a challenge under Article 52 (4). Of the constitution.

[14] Referencing the case of **Steven Katuka and Law Association of Zambia v Attorney General and Ngosa Simbyakula and 63 others**[3] also cited by the applicant, it was argued that in order to understand the plain and ordinary meaning of the words used in Article 52 (4), all relevant provisions relating to this Article must be read together. In support of this proposition, the case of **Jonas Zimba v Attorney General** was called in aid in which this Court stated that:

> **"This Court has on numerous occasions spelt out the need, when interpreting the Constitution, to bring to bear all the relevant provisions. We will therefore, begin with a consideration of all the relevant provision[5]."**

[15] The 1st respondent agreed with the Applicant's submission that Article 52 (4) gives a mandatory requirement for the challenge to be heard within 21 days and its reliance on our decision in **Gift Luyako Chilombo v Biton Manje Hamaleke** in which this Court stated that

"shall", is a word of command with a compulsory meaning and intended to show obligation.

[16] Regarding the case of **Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu, Inonge Wina, Electoral Commission of Zambia and Attorney General** in which this Court stated that the period for hearing the Presidential Election Petition was prescribed by the Constitution itself, making it a rigid time frame and not giving the Court discretion to enlarge it. Thus, it is argued that irrespective of any Order of Court granting a stay of the proceedings, time under Article 52(4) cannot be enlarged or stopped.

[17] By way of drawing contrast and comparison, we were referred to Article 259 of the Kenyan Constitution which provides as follows:

> **(9) If any person or State organ has the authority under this Constitution to extend time prescribed by this Constitution, the authority may be exercised either before or after the end of the period, unless a contrary intention is expressly mentioned in the provision conferring the authority.**

[18] In light of the above provision in the Kenyan Constitution, the 1st respondent submitted that the Zambian Constitution does not

have a similar article which denotes authority to a person or State organ to extend a period of time prescribed by the Constitution. Thus, if the framers of the Constitution intended to denote authority to a person or State organ to extend time prescribed by the Constitution, the same could have been expressly provided for as envisaged in the Kenyan Constitution.

2nd Respondent's case

[19] Equally, the 2nd respondent filed an affidavit in opposition to the Originating Summons but does not oppose the application and therefore, left the determination of the questions posed, to the Court.

Hearing

[20] At the hearing of the matter on the 13th October, 2022, learned counsel for the applicant, Mr. Magubbwi, submitted that they would rely on the Originating Summons, accompanying affidavit and skeleton arguments. He argumented that what they were seeking before this Court was interpretation of Article 52(4) in relation to the questions that had been posed as per the Originating Summons.

[21] Counsel beseeched this Court to take into consideration the intention of the Legislature, which is that, matters of elections are strictly bound by time.

[22] The Solicitor General, Mr. M. Muchende, SC, who appeared for the 1st respondent submitted that the facts supporting the Originating Summons tended to suggest that they were unable to hold a different view from that of the Applicant.

[23] He submitted that Article 118 of the Constitution states that the Judiciary is subservient to the will of the people of Zambia and that the people of Zambia had categorically stated that a challenge to a nomination should be heard within 21 days. Therefore, no decree by the Executive, no piece of legislation by the Legislature and no order of Court couched in any particular manner, whether by stay, injunction or extension of time that would stand in the teeth of Article 52 (4) of the Constitution. Further that, such an order, law, or a decree, would be null and void to the extent of its inconsistency with Article 52 (4).

[24] The learned Solicitor General further submitted that he had found persuasive value in the Kenyan case of **Zacharia Okoth Obado v Edward Akong'o Oyugi and 2 Others**[8], which is to the effect that a court can stay things allowed by the Constitution but it cannot prolong the stay. On the facts of this case the ineluctable conclusion was that the moment the order of stay granted in the High Court exceeded 21 days, it became null and void, otiose and had no effect.

[25] The 2nd respondent did not file any skeleton arguments and therefore, they had nothing to augment at the hearing.

Determination

[26] We have considered the parties' respective affidavits, skeleton arguments and oral submissions. The applicant moved the court seeking interpretation of Article 52 (4) of the Constitution of Zambia. In so doing the applicant has posed two questions for our determination as follows:

1. **Whether pursuant to Article 52 (4) of the Constitution, the prescribed period of 21 days within which to hear a challenge relating to nominations of a candidate can stop running by virtue of a stay of proceedings.**

2. Whether pursuant to Article 52 (4) of the Constitution, the prescribed period of 21 days within which to hear a challenge relating to nominations of a candidate can be enlarged by any person or authority or Court for that matter.

[27] The two questions are integrally linked and we will therefore, tackle them simultaneously. As we see it, the cardinal issue that the questions raise is whether the 21 days stipulated in Article 52(4) of the Constitution for the court to hear a nomination challenge can be stopped or enlarged by order of court or any authority.

[28] It is clear that the background facts as stated in the affidavit in support sworn by the applicant show that they are based on what transpired in the two causes in the lower courts as summarized. The first cause was filed in the High Court via a petition under cause number **2022/HP/1327.** This cause was a nomination challenge under the same Article 52(4) in which two aspiring candidates for Kabushi and Kwacha Constituencies by-election, namely Bowman Chilosha Lusambo and Joseph Malanji's nominations were rejected by the Electoral Commission of Zambia (ECZ) the 2nd respondent herein).

[29] The applicant in casu was also an aspiring candidate in the said by election for Kabushi constituency. The said cause **2022/HP/1327**

was filed in the High Court on 30th August 2022 and in line with Article 52(4) was due to be heard within 21 days. Meanwhile the 15th of September 2022 was set as the poll day for the by elections in the two constituencies. On 13th September, 2022 the High Court stayed the 15th September by-elections until its determination of the matter.

[30] The High Court also made ruling referring some constitutional questions to this Court. Dissatisfied with this ruling the Attorney General (the 2nd respondent herein) filed an appeal in the Court of Appeal under cause number **CAZ/08/385/2022.** Subsequently, on 16th September, 2022, a single judge of the Court of Appeal stayed proceedings in the High Court under 2022/HP/1327, pending determination of the appeal before that Court. And in an ex-tempore ruling of 17th September, 2022, he declined to discharge the stay when the petitioners approached him on the premise that the 21 days were running and the High Court would run out of time to deal with their petition. In declining to discharge the stay of proceedings the single judge reasoned that time had stopped running. A panel of

three judges of the Court of Appeal later confirmed the stay of proceedings granted by the single judge.

[31] In brief this is what prompted the applicant to frame the two questions subject of these proceedings.

[32] Article 52(4) of the Constitution which is at the core of this matter is couched thus:

> **52 (4) "A person may challenge, before a court or tribunal, as prescribed, the nomination of a candidate within seven days of the close of nomination and the court shall hear the case within twenty-one days of its lodgment."**

[33] For us to answer the questions, it is imperative for us to first interpret the provisions of Article 52(4). We have had occasion to pronounce ourselves on the rules of interpretation in several of our decisions which have been cited by counsel in *casu* such as **Steven Katuka and Law Association of Zambia** v **Attorney General and Ngosa Simbyakula and 63 others[3] and Jonas Zimba v Attorney General[2]** that all relevant provisions must be brought to bear in interpreting the Constitution and that the ordinary meaning of words used should be adopted. However, if the ordinary meaning of words leads to absurdity, the purposive approach should be resorted to.

[34] The ordinary or literal meaning of Article 52 (4) reproduced above is simply that all cases filed before a court of competent jurisdiction should be concluded within 21 days. The article is clear and unambiguous in its terms. It makes provision for a person to challenge a nomination before a court or tribunal. The Electoral Process Act designates the High Court as the court of competent jurisdiction to hear a nomination challenge under Article 52(4). Article 52(4) further provide that the person challenging a nomination under Article 52 (4) should do so within seven (7) days of close of nomination. It does not stop there, but goes to further provides that the court before which the nomination is brought, shall hear the case within twenty-one (21) days of the lodgment of the petition.

[35] The use of the word **"shall"** in relation to the court hearing the case in 21 days, leaves the court with no discretion to enlarge time to go outside the prescribed time of 21 days. We elucidated in the case of **Hakainde Hichilema**[5] on the import of Articles 101 (5) and 103 (2) which provide for hearing of the Presidential Election Petition within 14 days of its filing, as follows:

"As article 101(5) and 103 (2) of the Constitution limit the period within which a presidential Election Petition must be heard by this Court to 14 days the court cannot competently hear a petition outside this period .....

"... where the time for hearing the petition is limited by the Constitution, the Court is bound to enforce the time limit. This means that if this Petition were to be heard outside the 14 days period, the proceedings will be a nullity".

Furthermore, that:

The purposive approach to the interpretation of the Constitution does not assist in this case as the time frame for the hearing of the Petition is stated in mandatory terms. As Articles 101 (5) and 103 (2) of the Constitution limit the period within which a Presidential election petition must be heard by this Court to 14 days, the Court cannot competently hear a petition outside this period. Our position is that the petition stood dismissed for want of prosecution when the time limited for its hearing lapsed.

[36] When a nomination challenge is properly before the High Court it should be concluded within 21 days. Additionally, our decision in the **Hakainde Hichilema** case is that the 21 days for hearing a nomination challenge is limited by the Constitution and it does not stop running.

If anything, Article 52(4) does not envisage appeals on nominations challenge hence the time being limited to 21 days as those cases are to be expeditiously handled.

[37] And going by the **Hakainde Hichilema** case, once the 21 days expires the High Court is divested of jurisdiction rendering the matter before it nugatory and an academic exercise. Additionally, we cannot even employ the purposive approach to interpret Article 52(4) to extend time for the High Court to conclude nomination proceedings before it as the time frame of 21 days is fixed by the Constitution and is stated in mandatory terms.

[38] We have equally been persuaded by the Supreme Court of Kenya case of **Zacharia Okoth Obado v Edward Akong'o Oyugi and 2 others** referred to us by the Solicitor General where it was stated thus:

> **"All statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by**

the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized.

[39] Similarly, the High Court has jurisdiction which jurisdiction must be exercised within the 21 days' time frame given by the Constitution under article 52(4).

[40] In sum to answer the two questions the 21 days in Article 52(4) cannot be stopped or enlarged by any court or authority.

[41] In obiter we wish to state that the Court of Appeal does not have jurisdiction to hear appeals to cases whatsoever dealing with Article 52(4) of the Constitution. Nevertheless, that stay order had it issued had to be obeyed even though erroneously issued and remains in force until discharged or set aside. Thus, the High Court had to abide the Court of Appeal stay order and ran out of time as the 21 days have since expired.

[42] In the circumstances of this case, we make no order as to costs.

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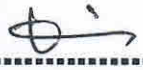
P. MULONDA

CONSTITUTIONAL COURT JUDGE



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M. S. MULENGA

CONSTITUTIONAL COURT JUDGE

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J. Z. MULONGOTI

CONSTITUTIONAL COURT JUDGE