

**IN THE CONSTITUTIONAL COURT
AT THE CONSTITUTIONAL REGISTRY
HOLDEN AT LUSAKA**
(Appellate Jurisdiction)

2022/CCZ/A005

IN THE MATTER OF:

THE CONSTITUTION OF ZAMBIA
CHAPTER 1, OF THE LAWS OF ZAMBIA, AS
AMENDED BY ACT NO. 2 OF 2016.

AND

IN THE MATTER OF:

ARTICLES 48, 52, 153 AND 159 OF THE
CONSTITUTION OF ZAMBIA
(AMENDMENT ACT NO. 2 OF 2016)

AND

IN THE MATTER OF:

THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF:

SECTIONS 33, 98 AND 99 OF THE ELECTORAL
PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF:

THE LOCAL GOVERNMENT ELECTIONS
TRIBUNAL RULES STATUTORY INSTRUMENT NO.
60 OF 2016

AND

IN THE MATTER OF:

THE ELECTIONS FOR LOCAL GOVERNMENT
COUNCIL CHAIRPERSON FOR LUSANGAZI
DISTRICT OF EASTERN PROVINCE OF ZAMBIA
HELD ON THE 4TH NOVEMBER, 2022.

AND

IN THE MATTER OF:

THE DECISION BY POLICE OFFICERS WHO ARE
AGENTS AND SERVANTS OF THE STATE TO
BLOCK AND PREVENT PATRICK BANDA FROM
FILING IN NOMINATION PAPERS TO CONTEST
THE ELECTIONS OF COUNCIL CHAIRPERSON
FOR LUSANGAZI DISTRICT

AND

IN THE MATTER OF:

THE DECISION BY POLICE OFFICERS WHO ARE
AGENTS OF THE STATE TO PREVENT PATRICK
BANDA FROM VOTING AT THE ELECTION FOR
COUNCIL CHAIRPERSON FOR LUSANGAZI
DISTRICT



BETWEEN

PATRICK BANDA

APPELLANT

AND

**THE ELECTORAL COMMISSION OF ZAMBIA
THE ATTORNEY GENERAL
BLACKSON TEMBO**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

**CORAM: MUNALULA PC, MUSALUKE AND MULIFE JJC, ON 17TH MAY, 2023 AND
2ND OCTOBER, 2023.**

For the Appellant:	Mr. J. Zimba - Messrs. Makebi Zulu Advocates.
For the 1 st Respondent:	Mr. M. Bwalya - In-House Counsel.
For the 2 nd Respondent:	Mr. P. S. Phiri, Senior State Advocate- Attorney General's Chambers.
For the 3 rd Respondent:	Mr. Butler Sitali - Messrs. Butler and Company Legal Practitioners.

JUDGMENT

Mulife, JC delivered the Judgment of the Court.

CASES REFERRED TO:

1. Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba v Frederick Jacob Titus Chiluba (Constitutional Jurisdiction) (1998) Z.R.49 (S.C).
2. Anderson Kambela Mazoka, Lt. General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, the Electoral Commission of Zambia and Attorney General (2005) Z.R. 138 (S.C).
3. Shamwana and Seven Others v The People (1985) Z.R 41 (SC).
4. Josephat Mlewa v Eric Wightman (1996) S.J. 1 (S.C.).

5. Jere v Ngoma (1969) Z.R. 106.
6. Liambo v Mututwa 1974/HP/EP/2 unreported.
7. Azhar Hussein v Rajiv Gandhi', Appeal Civil No. 2774 of 1985.
8. Stanley Mwambazi v Morester Farms Limited (1977) Z.R. 108.
9. George Muhali Imbuwa v Electoral Commission of Zambia, 2021/CCZ/A/001.

LEGISLATION REFERRED TO:

1. The Constitution of Zambia as amended by the Constitution of Zambia (Amendment Act) No. 2 of 2016.
2. The Electoral Process Act No. 35 of 2016.
3. Statutory Instrument No. 60 of 2016 (Local Government Elections Tribunals Rules, 2016).

[1.0] INTRODUCTION

[1.1.] This is an appeal against the Judgment of the Local Government Elections Tribunal for the Lusangazi District Council Chairperson by-election that was delivered on 10th December, 2022.

[2.0.] BACKGROUND

[2.1.] The events leading to the Appeal are as follows: on the 1st of December, 2021, a Local Government Elections Tribunal (Tribunal) nullified the election of Patrick Banda (the Appellant), as Chairperson of the Lusangazi District Council. This was under Cause Number 2021/LGET/14, a Petition that was filed by Fred Banda who was one of the candidates in that election. The

election was nullified on grounds that the Appellant had contested the election on the basis of a forged Grade 12 School Certificate.

[2.2.] Following the nullification, the Electoral Commission of Zambia (1st Respondent), intimated that a by-election for the District Council, would be held on 4th November, 2022. The Appellant expressed interest to re-contest the vacant seat but, on 13th October, 2022, he was prevented by agents of the 2nd Respondent, the Zambia Police Service, from filing his nomination papers with the 1st Respondent. This was on grounds that the Appellant intended to contest the election on the strength of the forged Grade 12 School Certificate, which led to the nullification of the election in Cause Number 2021/LGET/14 mentioned above in paragraph 2.1. The 2nd Respondent's agents also confiscated the Appellant's national registration and voter's cards.

[2.3.] Further, the Appellant together with his Election Agent, were removed from the nomination centre, arrested and later arraigned before the Subordinate Court at Petauke District, for the criminal offence of personating the person named in the

stated Grade 12 School Certificate, contrary to **section 390 of the Penal Code, Chapter 87 of the Laws of Zambia**. The nominations proceeded in the absence of the Appellant with, the Patriotic Front Party on whose ticket the Petitioner sought to stand, fielding another candidate.

[2.4.] On 17th October, 2022, the Appellant filed into Court a Petition under Cause Number 2022/LGET/01 claiming that by their foregoing actions, the police had unlawfully prevented him from contesting the vacant Council Chairperson seat and voting in the by-election. That in the result, the aforesaid nominations, should be nullified and an order for fresh elections, be made.

[2.5.] In its Judgment dated 7th November, 2022, the Tribunal dismissed the Petition on grounds that the Police, acted within their legal mandate when they prevented the Appellant from filing his nomination papers. They had received a report that the Appellant was in possession of a forged copy of a Grade 12 School Certificate and that therefore, the impugned nominations were validly conducted.

[2.6.] The Tribunal informed the Appellant of his right of appeal to this Court, in accordance with **Rule 24 of the Local Government Elections Tribunals Rules of 2016 (Tribunals Rules)**. He however did not appeal the Judgment.

[2.7.] On 18th November, 2022, the Appellant filed the Petition which is subject of this appeal, under Cause Number 2022/LGET/02, re-asserting that by their forestated actions, the police had unlawfully prevented him from contesting the vacant Council Chairperson seat and voting in the by-election. That in the result, the by-election, which was subsequently held on 4th November, 2022, and in which the 3rd Respondent was declared winner and Chairperson of the Lusangazi District Council, be annulled and an order for fresh elections, be made by the Tribunal.

[2.8.] In its Judgment, which is the subject of this appeal, the Tribunal dismissed the Petition on grounds that the Appellant's complaints were res judicata as they were determined under Cause Number 2022/LGET/01 referred to under paragraph 2.4. Further, that the Appellant failed to link the actions of the 2nd Respondent's agents, which prevented him from participating in

the by-election, to the 1st and 3rd Respondents. That this is in view of **Section 97 of the Electoral Process Act Number 35 of the Laws of Zambia** (the ‘**Electoral Process Act**’) which prescribes that a parliamentary or council election can only be annulled based on breaches committed by the Electoral Commission of Zambia (the 1st Respondent in the present appeal) or a Respondent or his or her agents, in the petition.

[2.9.] The Tribunal also held that the Appellant did not demonstrate how his single vote which he did not cast, would have altered the overall outcome of the by-election. The Appellant was condemned in costs on grounds that he had been instituting unmeritorious actions in the Tribunals. He was informed of his right of appeal.

[3.0.] GROUNDS OF APPEAL

[3.1] Dissatisfied with the afore-stated Judgment, the Appellant launched the present appeal based on the following grounds:

- (i) That the Honourable Tribunal erred in law and fact when it held that the police officers who prevented the Petitioner from filing in his nomination papers on 13th October, 2022, acted within the law;

- (ii) That the Honourable Tribunal erred in law and fact by ignoring the cogent evidence proving that the Petitioner had not committed an offence relating to elections or otherwise and that the actions of the police officers amounted to an interference in the electoral process;
- (iii) That the Honourable Tribunal erred in law and fact by relying on the Judgment in cause no. 2022/LGET/01, without taking into consideration that the Petition was based on a different cause of action from that adjudicated in Cause No. 2022/LGET/01;
- (iv) That the Honourable Tribunal erred in law and fact by holding that the Petitioner failed to satisfy the provisions of Section 97 of the Electoral process Act, when the Petition was not brought forth under the provisions of Section 97 of the Electoral Process Act;
- (v) That the Honourable Tribunal erred in law and fact by holding that the Petitioner needed to link the actions of the Police on 13th October, 2022, to the 3rd Respondent;
- (vi) That the Honourable Tribunal erred in law and fact when it discounted the cogent evidence and testimony by RW1 that the letter that the police officers relied upon to detain the Petitioner on 13th October, 2022, was neither on a

letter head nor stamped, and that no evidence was adduced to prove its authenticity;

- (vii) That the Honourable Tribunal erred in law and fact when it held that the Petitioner failed to demonstrate how his one vote could have affected the outcome of the elections of 4th November, 2022; and,
- (viii) That the Honourable Tribunal erred in law and fact when it condemned the Petitioner to pay costs to the Respondents in order to prevent him from bringing forth future court actions.

[4.0.] HEADS OF ARGUMENT

[4.1.] The Appellant filed heads of argument into Court, on 17th February, 2023 whereas the 1st, 2nd and 3rd Respondents filed theirs on 9th May, 2023, 27th April, 2023 and 8th May, 2023, respectively.

[4.2] Regarding Ground 1 of Appeal, the Appellant, contends as follows: that the Police actions which prevented him from participating in the by-election, are illegal because they were triggered by a complaint contained in an unauthentic letter

appearing at pages 69 -70 of the Record of Appeal, purporting to have been authored by the Examinations Council of Zambia.

[4.3.] That the stated letter is unauthentic because it is neither on that Institution's letter head nor date-stamped by the Zambia Police Service as is the requirement for official correspondence. That as such, the Tribunal erred in law and fact when it held that the Police acted within their legal mandate.

[4.4.] Turning to Ground 2 of Appeal, the Appellant contends that the subject by-election was not free and fair because the 1st Respondent ignored the actions of the Police, which unlawfully prevented him from participating in the election. That under the circumstances, the 1st Respondent breached its constitutional mandate bestowed on it by the **Electoral Process Act**, read with **Article 229 of the Constitution (Amendment Act) No. 2 of 2016** (the **Constitution**), to conduct a free and fair by-election.

[4.5.] Further, that by **Article 52 (2) of the Constitution**, the power to sift through candidates' nomination papers, is vested in the Returning Officer of the 1st Respondent and not the Police. That in the result, the Tribunal erred in law and fact when it

ignored the Appellant's evidence that he did not commit any electoral offence or otherwise and that the actions of the Police amounted to interference with the electoral process.

[4.6.] Concerning Ground 3 of Appeal, the Appellant contends that **Section 98 of the Electoral Process Act and Rule 8 (1)(a) of the Local Government Elections Tribunals Rules, 2016**, empowered him to institute Cause Number 2022/LGET/02, despite having initially instituted Cause Number 2022/LGET/01, because the two Causes relate to different disputes namely, a petition in respect of an election and a petition in respect of a nomination of a candidate to an election, respectively. That therefore, the Tribunal erred in law and fact when it relied on the Judgment it delivered in Cause Number 2022/LGET/01, in deciding Cause Number 2022/LGET/02.

[4.7.] The Appellant argued Grounds 4 and 5 of Appeal together to the effect that the 3rd Respondent did not commit any electoral breach but that he was joined to Cause Number 2022/LGET/ 02, solely on grounds that he would have been affected by the outcome.

[4.8.] For avoidance of repetition, we shall not recite the arguments relating to Ground 6 of Appeal because they are similar to those under Ground 1 of Appeal.

[4.9.] As regards Ground 7 of Appeal, the Appellant submitted that being a registered voter and without any legal disqualification, by **section 44 of the Electoral Process Act** read with **sections 45 and 47 of the same Act** as well as **Article 159(3) of the Constitution**, he was entitled to vote in the by-election in issue. That due to the aforesaid, the Police violated his right to vote when they unjustifiably confiscated his national registration and voter's cards, as that prevented him from voting.

[4.10.] Relating to Ground 8 of Appeal, the Appellant submitted that an award of costs in legal proceedings, lies in the sole judicious discretion of the Court. That this notwithstanding, the Tribunal erred when it condemned him in costs as it could have adopted the practice laid down in the cases of **Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba v Frederick Jacob Titus Chiluba¹ and Anderson Kambela Mazoka, Lt. General Christon Sifapi Tembo, Godfrey**

Kenneth Miyanda v Levy Patrick Mwanawasa, the Electoral Commission of Zambia and Attorney General,² where parties were directed to bear their respective costs.

[4.11.] At the hearing on 17th May, 2023, Mr. Zimba, Counsel for the Appellant, informed the Court that he would rely on and augment the Appellant's written Heads of Argument. Counsel's augmentation however was a recital of the said Heads of Argument.

[4.12.] In conclusion, the Appellant urged us to uphold the appeal.

[4.13.] The Respondents contested all the Grounds of Appeal in a similar manner and order. On behalf of the 1st Respondent, Grounds 1,2 and 6 of Appeal were argued together as follows: that the Tribunal did not err when it relied on its Judgment in Cause No. 2022/LGET/01 by holding, under Cause No. 2022/LGET/02, that the 2nd Respondent's agents acted within their legal mandate, as enforcers of law and order; that in any event the Appellant is only disputing the form and not the

contents of the letter, which triggered the impugned Police action.

[4.14.] Based on the foregoing, we were urged to dismiss Grounds 1,2 and 6 of Appeal.

[4.15.] Ground 3 of Appeal was argued next, to the effect that the ground should be dismissed as the Tribunal was on firm ground when it held that the issues raised under Cause No. 2022/LGET/02, are res judicata on account of being the same issues that were raised and determined under Cause No. 2022/LGET/01. And, that on the authority of the case of **Shamwana and Seven Others v The People**,³ the Tribunal correctly took judicial notice of its holding in Cause No. 2022/LGET/01, when determining the subject Cause No. 2022/LGET/02, since both causes arose from the same set of facts.

[4.16.] Grounds 4, 5 and 7 of Appeal were argued together to the effect that the Tribunal was on firm ground when it relied on **section 97(2) of the Electoral Process Act**, in declining to nullify the subject election. That, this was so because **Section**

97(2) of the Electoral Process Act, is the provision that provides for the nullification of local government and parliamentary elections.

[4.17.] We were accordingly urged to dismiss Grounds 4, 5 and 7 of appeal because the Appellant did not prove any of the conditions set by **section 97(2) of the Electoral Process Act**.

[4.18.] Ground 8 of Appeal was argued last to the effect that it should be dismissed because by **Rule 26 of the Local Government Elections Tribunals Rules**, the Tribunal had the discretion to make the order for costs. That albeit, the Tribunal had justified its order for costs.

[4.19] At the hearing, Counsel for the Respondents similarly relied on the Respondents' arguments, save that on behalf of the 1st Respondent, Mr. Bwalya submitted that the Appellant had not contested the manner in which the impugned election was conducted by it. Further, that the impugned police actions took place outside the nomination centre. That therefore, the Appellant had not established the conditions prescribed under

Section 97 of the Electoral Process Act, needed for an election to be nullified.

[4.20] The 2nd and 3rd Respondents' Heads of Argument are similar to those for the 1st Respondent. For avoidance of repetition, they shall not be recited.

[5.0.] REPLY

[5.1.] The Appellant filed consolidated Heads of Argument in Reply on 16th May, 2023. They are substantially a replica of his earlier submissions, save for the following: that preventing a candidate from participating in an election, as did the Police in this case, is proscribed and renders the ensuing election a nullity, according to the cases of **Josephat Mlewa v Eric Wightman**,⁴ **Jere v Ngoma**⁵ and **Liambo v Mututwa**⁶ (**unreported**). That under the circumstances, the present election must similarly be nullified.

[5.2] Regarding Grounds 4 and 5 of Appeal, that the issue for consideration is not about the Appellant demonstrating the conditions prescribed by **section 97 of the Electoral Process**

Act. Rather, that it is the fact of the Police having prevented the Appellant from participating in the election in issue. Further, that the 3rd Respondent participated in a void election as the majority of the voters were prevented from voting for their preferred candidate. That the election was rendered void by virtue of the Appellant having been prevented from participating in the election, as outlined already.

[5.3.] Turning to Ground 7 of Appeal, it was argued that the issue for consideration, is not about the effect of the absence of the Appellant's vote from the election in issue. Rather, that it is about the Court's duty to protect the sanctity of elections and the Appellants' right to vote in the election. For this proposition, the Appellant cited the Supreme Court of India's holding in the case of **Azhar Hussein v Rajiv Gandhi**⁷.

[5.4.] Turning to Ground 8 of Appeal, the Appellant added that the Tribunal's Order for costs against the Appellant should be set aside because it is intended to bar him from enforcing his right which has been violated. In support of this proposition, the Appellant cited the case of **Stanley Mwambazi v Morester Farms Limited**.⁸

[5.5.] Submitting orally, Mr. Zimba, Counsel for the Appellant, urged us to dismiss the Respondents' argument that issues in Cause No. 2022/LGET/02, are res judicata for having been determined under Cause No. 2022/LGET/01. He justified his argument, and correctly so, by citing the case of **Muhali George Imbuwa v Electoral Commission of Zambia**,⁹ in which we held that there is no appeal against petitions for nomination of candidates to an election. Thereby, we quashed **Order XI of the Constitutional Court Rules**, which permits appeals in challenges against nomination of candidates to an election.

[5.6.] Further, that the issues in the two Causes are different in the sense that whereas Cause No. 2022/LGET/01, being a challenge of nominations, was brought pursuant to **Article 52 (4) of the Constitution**, the subject Cause No. 2022/LGET/02, was made pursuant to **sections 33, 98 and 99 of the Electoral Process Act**.

[5.7.] Mr. Zimba also submitted that the Police should have first allowed the Appellant to file his nomination documents as there was nothing urgent with the arrest.

[6.0.] CONSIDERATION AND DECISION

[6.1.] We have considered the Grounds of Appeal, the proceedings in the Tribunal, the Tribunal's Judgments in Cause No. 2022/LGET/01 and Cause No. 2022/LGET/02 as well as the parties' written and oral submissions.

[6.2.] The following are not in dispute:

- (i) That on 13th October, 2022, there was filing in of nomination papers by candidates for the Lusangazi District Council Chairperson by-election;
- (ii) That the Appellant intended to contest as a candidate in that by-election;
- (iii) That the Appellant was prevented from filing his nomination papers by the Police in their inquiry into the authenticity of his Grade 12 Certificate, which he intended to file as one of his nomination documents. Further, that during the same inquiry, the Police confiscated the Appellant's national registration card and voter's card.
And,
- (iv) That resulting from the foregoing Police inquiry, the Appellant has since been arraigned before the

Subordinate Court at Petauke, for an offence relating to his alleged Grade 12 certificate.

[6.3.] For convenience, we shall handle Grounds 4, 5 and 7 of Appeal, first and simultaneously because they relate to the same issue, namely, whether or not **Section 97 of the Electoral Process Act** is applicable to the present matter. Ground 8 shall be handled subsequently.

[6.4.] For reasons to be stated in the due course, Grounds 1, 2, 3 and 6 shall not be considered.

[6.5.] Regarding Grounds 4, 5 and 7 of Appeal, as highlighted already, they assail the Tribunal's consideration of **Section 97 of the Electoral Process Act** in its Judgment when, according to the Appellant, the requisite Petition is not anchored on the provision. Rather, that it is anchored on **sections 33, 98 and 99 of the Electoral Process Act**.

[6.6.] We have examined Cause Number 2022/LGET/02 whereupon we have found that **Section 97 of the Electoral Process Act**, is indeed not one of the provisions pursuant to

which the subject Petition was launched. The Cause, according to page 95 of the Record of Appeal, was launched pursuant to **Articles 48, 52, 153 and 159 of the Constitution** as well as **sections 33, 98 and 99 of the Electoral Process Act**.

[6.7.] Relevant to the present matter, **Article 48 of the Constitution** stipulates that the electoral process for electing a councillor, among others, shall be prescribed. That prescription is the Electoral Process Act. Accordingly, Part IX of the Act is devoted to election petitions.

[6.8.] **Article 52 of the Constitution** relates to the nomination of a councillor, among others. **Article 153** provides for the election of councillors as well as the composition and tenure of councils. Among others, **Article 159** establishes local government election tribunals and their jurisdiction namely, to hear election petitions relating to councillors. The provision further prescribes that an appeal against a decision of a local government tribunal lies to the Constitutional Court.

[6.9.] **Sections 33 of the Electoral Process Act** provides for the nomination of candidates to local government elections. **Section 98 of the Act** provide for persons with locus standi to

present an election petition whereas **section 99** provides for reliefs in an election petition.

[6.10.] With that said, two pertinent questions arise. First, it is whether or not **section 97 of the Electoral Process Act**, is applicable to this matter. The question has been triggered by the Appellant's dissociation of this matter from the stated provision. Flowing from the foregoing, the second question is if a matter, such as the subject Cause, which is not anchored on **section 97 of the Electoral Process Act**, qualifies to be an election petition.

[6.11.] The answer to the first question lies in the sole purpose of the matter, namely to annul the election of the 3rd Respondent as Chairperson for the Lusangazi District Council. As emphasised already, election petitions are provided for under Part IX of the Electoral Process Act. An examination of this Part discloses that **section 97 of the Electoral Process Act**, is the sole provision that prescribe the mode of impugning the election of a council chairperson. The provision also lists grounds upon which an election can be avoided namely, electoral breaches committed by the Electoral Commission of Zambia as an entity that is mandated to conduct elections, and, breaches attributed

to the petitioned candidate or his or her agents. Further, that in either case, the majority of voters were or may have been prevented from electing their preferred candidate.

[6.12.] For completeness, we set forth the relevant portions of **section 97 of the Electoral Process Act**, as follows:

97. (1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall not be questioned except by an election petition presented under this Part.

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this

Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election...

[6.13.] We have as well directed our minds to the provisions upon which the subject Cause is anchored. Save for **sections 98 and 99 of the Electoral Process Act**, all the provisions anchoring the Cause, fall outside Part IX of the Electoral Process Act, which as stated already, is the only segment which provides for election petitions. With this background coupled with the Appellant's emphasis, we have anxiously and circumspectively examined the stated **sections 98 and 99 of the Electoral Process Act**, whereupon we have found that much as they relate to election petitions, they are not standalone provisions. Rather, they must of necessity, be read together with **section 97 of the Electoral Process Act**. We are of this view because both provisions do not provide for grounds upon which an election can be avoided. Grounds upon which an election can be avoided, as stated already, are provided for in **section 97 of the Electoral Process Act**. This implies that an election cannot be avoided except by a

petitioner moving the court and satisfying the threshold prescribed by **section 97 of the Electoral Process Act**.

[6.14.] With that said, we underscore that an election petition, is not tenable without recourse to **section 97 of the Electoral Process Act**. We thus answer the first question in the affirmative namely that **section 97 of the Electoral Process Act**, is applicable to the present matter and the Tribunal was on firm ground when it invoked the provision.

[6.15.] Turning to the second question, we have no hesitation in stating that having not been instituted pursuant to **section 97 of the Electoral Process Act**, Cause Number 2022/LGET/02 is not an election petition or appeal as envisaged and provided for in the Constitution and Part IX of the Electoral Process Act. This is in view of our finding that it is not tenable to avoid an election without having recourse to **section 97 of the Electoral Process Act**. We accordingly find that Cause Number 2022/LGET/02 was incompetently before the Tribunal and should not have been considered on the merits. Instead, it should have been dismissed outrightly. For the same reason, the merits or demerits of the matter shall not be considered by this Court.

[6.16.] We thus dismiss Grounds 4,5 and 7 of Appeal for lack of merit. And, resulting from the foregoing, a discussion of Grounds 1,2,3, and 6 of Appeal has been rendered otiose because they relate to the merits of the purported Appeal. The Grounds are consequently dismissed.

[6.17.] Concerning Ground 8 of Appeal, it is settled law that an award of costs lies in the judicious discretion of the court. Against this background, we are inclined to direct parties to bear their respective costs. This is in view of the clarity the matter has established in terms of what constitutes a local government election petition.

[6.18.] We accordingly find merit in Ground 8 of Appeal.

[7.0.] CONCLUSION

[7.1.] We underscore that a local government election cannot be avoided without recourse to **section 97 of the Electoral process Act**. Therefore, failure to move a Tribunal on the basis of **section 97 of the Act** is fatal as the action would not qualify to be an election petition.

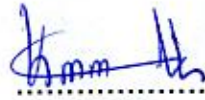
[7.2.] In conclusion, we dismiss Grounds 1 – 7 of Appeal for lack of merit. We however uphold Ground 8 of Appeal and thereby direct parties to bear their respective costs.



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PROF M. M. MUNALULA (JSD)
PRESIDENT OF THE CONSTITUTIONAL COURT



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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



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K. MULIFE
CONSTITUTIONAL COURT JUDGE