IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

CIVIL APPEAL NO. 115 OF 2011

(CORAM: OTHMAN, C.J., MBAROUK, J.A., And BWANA, J.A.)

KATANI A. KATANI .....APPELLANT
VERSUS

1. THE RETURNING OFFICER
TANDAHIMA DISTRICT
2. ATTORNEY GENERAL ..... RESPONDENTS
3. NJWAYO J. ABDALLAH

(Appeal from the ruling of the High Court of Tanzania at Mtwara)

(Lila, J.)

dated the 28th day of April, 2011

in

Misc. Civil Cause No. 5 of 2010

JUDGMENT OF THE COURT

11th June & 2nd July, 2012

MBAROUK, J.A.:

Before us is an appeal arising from Misc. Civil Cause No. 5 of 2010 at the High Court of Tanzania at Mtwara (Lila, J). The matter concerned an election petition. The genesis of the matter arose from a preliminary objection raised by the learned State Attorney who

represented the 1st and 2nd Respondents. The objection was to the following effect:-

> *"That the petition is bad in law as it contravenes section 111(3) of the National Elections Act, Cap. 343 [R. E. 2002] which mandatoriiy requires the petitioner to make an application for determination of the amount payable as security for costs."*

The High Court upheld the preliminary objection. Undaunted, the appellant preferred this appeal.

Only one ground of appeal has been preferred by the appellant in this appeal, which states as follows:-

> *" The court erred in law in holding that the appellant's act of depositing shillings fifteen million (Tshs. 15,000,000/=) as security for costs for three respondents was illegally and improperly done and equating it with what appellant not to have deposited any security for costs at all."*

At the hearing Mr. Twaha Taslima, learned advocate represented the appellant. Mr. Obadia Kameya, learned Principal State Attorney represented the 1st and 2nd respondents. Whereas, Mr. Mashaka Mfala represented the 3rd respondent.

Mr. Taslima started by submitting that, the appeal centers on the interpretation of **section 111 of the National Elections Act, Cap. 343 (the Act).** He claimed that, the ruling of the High Court was not in favour of the Appellant for the reason that he deposited security for costs without first making an application for determination of the amount payable as security for costs in his election petition as per **section 111 (3) of the Act.** Mr. Taslima further contended that, there was no reason for the appellant to have filed an application for the determination of the amount payable as security for costs because he had paid the maximum amount payable as security for costs so as to expedite the hearing of the petition. He added that, **section 111 (2)** was meant only for a petitioner who intend to apply for the reduction of the amount stated

in **section 111(3) of the Act** and not for those who are able to pay a maximum amount of Tshs. 5,000,000/= as the appellant has done.

Mr. Taslima further submitted that, the petition before the High Court was decided on technicalities only, not on merit. He urged us to invoke **Rule 2 of the Court of Appeal Rules, 2009 and Article 107A (2) (e)** of the Constitution of the United Republic of Tanzania and to allow the appeal. In support of his submission, he cited to us the decision of this Court in the case of **Martha Michael Wejja Vs The Attorney General and three others** [1982] T. L. R. 35, where it was held that no election petition shall be dismissed only because of procedural irregularity unless such irregularity has resulted or is likely to result into miscarriage of justice.

Furthermore, Mr. Taslima submitted that in interpreting the provisions of **section 111(3), section 111** in its entirety has to be read as a whole. However, he agreed that **section 111 (3)** is couched in mandatory terms, but according to his interpretation a petitioner has a discretion to pay directly without applying to the court for determination of the amount payable as security for costs if

he is able to pay the maximum amount stated in **section 111(2) of the Act** (i.e. Tshs. 5,000,000/=).

On his part, Mr. Kameya started by pointing out that the record shows that, the appellant payed the security for costs after the fourteen days time prescribed by the law. Worst still, he said the payment of security for costs was made by the appellant without an order of the court as prescribed by **section 111 (3) of the Act.**

Mr. Kameya further brought to the attention of this Court that, payment of security for costs was made by the appellant on 6/1/2011, well after the State Attorney representing the 1st and 2nd Respondent filed his preliminary objection on 31/12/2010. He urged us to find that the said payments of security for costs was made so as to defeat the preliminary objection already filed in court earlier on. He added that, the act done by the appellant was an abuse of the court process which amounted to negligence and non-action by not acting on the mandatory provisions of **section 111 (3) of the Act.**

Mr. Kameya agreed with Mr. Taslima that for an interpretation of **section 111 (3) of the Act**, it is necessary to read **section 111** as a whole.

Mr. Kameya further submitted that, **section 111 (2)** clearly states that the Registrar shall not fix a date for the hearing of an election petition unless the petitioner has paid into court security for costs of an amount not exceeding Tshs 5,000,000/= for each respondent. He added that, all the time since the petitioner filed his petition on 30/11/2011 up to 21/12/2011 when they filed their preliminary objection, the appellant took no further steps to comply with **section 111 (3)**.

He further submitted that under the plain rule of interpretation, **section 111(3)** contained no ambiguity whatsoever. The same requires, **first** the petitioner to make an application to the court for determination of the amount payable as security for costs. **Second**, the court is required to determine such application. Mr. Kameya stressed that, **section 111(3)** has used the word 'shall' which is functional. Hence, he said, there is no need to here

recourse to any other law as the said provision by itself is clear enough without any ambiguity.

Mr. Kameya then emphasized that, the appellant should have made an application even if he was able to pay the maximum amount of Tshs. 5,000,000/= for each of the three respondents so as to comply with the mandatory requirements of **section 111 (3) of the Act.** He said, non-compliance with the mandatory requirements of **section 111(3)** may lead disorder in the procedure of determining the amount payable as security for costs. He further contended that as **section 111 (3)** imposes no discrimination to those who have sufficient funds as against those who do not have the same in compliance with **section 111(2) of the Act.** He said **section 111 (3)** is a general provision which applies to all petitioners.

On the issue of technicalities, Mr. Kameya submitted that the preliminary objection before the High Court was an important matter for consideration by the Court and not a simple technicality. Therefore, **Article 107A (2) (e)** cannot apply. In support of his

submission, he cited to us the decision in the case of **Judge in Charge High Court Arusha V. N. I. N. Munuo Ng'uni**, Civil Appeal No. 45 of 1998 (unreported) quoted earlier by the High Court.

Mr. Kameya proceeded by submitting that, **section 111 (3)** vested the court and not the petitioner the mandate to determine the amount to be paid as security for costs. He added that, a petitioner has no discretion to make payment for security for costs even if he is able to pay the maximum amount. Finally, Mr. Kameya prayed for the appeal to be dismissed with costs.

Mr. Mfala, learned advocate for the 3rd respondent briefly, and concisely submitted that, the act of the petitioner of making payment of security for costs after the filing of the preliminary objection was an afterthought. He also submitted that, there is no ambiguity found in the wording of **section 111 (3) of the Act,** because it is clearly stated that, it is a court not a petitioner which has been vested with the power to determine the amount of security for costs to be paid before the Registrar fixes a hearing date of an

election petition as stated in **section 111(2) of the Act**. A petitioner has no such power, Mr. Mfala added.

He further submitted that, as there is no ambiguity in the wording of **section 111 (3),** there is no need to seek for any further clarification from the Parliament. All in all, he urged us to find the appeal with no merit, and to dismiss it with costs.

In his brief rejoinder, Mr. Taslima reiterated that **section 111 (3)** confers powers to a petitioner to make direct payment of security for cost.

Having examined the rival submissions in this appeal, we are of the considered opinion that our main task now is to determine whether the trial High Court erred in law in holding that the appellant's act of depositing shillings fifteen million (Tshs. 15,000,000/=) as security for costs for the three respondents without lodging an application for the determination of the amount payable as security for costs in his election petition was against the requirements of the provisions of **section 111(3) of the Act.**

At this juncture, it prudent to give a brief historical background to the enactment of the current provisions on security for costs in the **National Elections Act Cap. 343 R.E. 2010.** Prior to the enactment it was mandatory for every petitioner in an election petition irrespective of his/her ability, to deposit into court Tshs. 5,000,000/= as security for costs before the hearing of an election petition. Following the land mark decision of this Court in the case of **Julius Ishengoma Francis Ndyanabo V. Attorney General [2004]** TLR 14, the situation changed. In **Ndyanabo's** case **(*supra*)** it was held that a petitioner who fails to deposit the mandatory Tsh. 5,000,000/= as security for costs is denied access to justice to the courts to have his complaint against illegalities and irregularities in the conduct of a parliamentary election to be heard in the main petition.

Following that Court of Appeal decision in **Ndyanabo's** case *(supra)* , other amendments were made but finally the provisions governing security for costs were broadened to ensure that all those seeking access to justice through election petitions even those who

are unable to raise Tshs. 5,000,000/= are given a chance to be heard.

As correctly submitted by the Mr. Taslima and approved by Mr. Ndjike and Mr. Mfala, this appeal centres on the interpretation of **section 111,** which must be read as a whole.

In support of the argument that **section 111** and its sub sections (1) to (9) are interdependent, and has to be read in its entirety, we subscribe to the views of G. P. Singh in his book **Principles of Statutory Interpretation**, Tenth Edition, 2006 when he stated at page 31 as follows:-

> " when the question arises as to the meaning of a certain provision in statute, it is not only legitimate **but proper to read that provision in its context.** The content here means, the statute as a whole, **the previous state of the law** other statutes *in pari materia*, **the general scope of the statute**

and the mischief that it was intended to remedy." (Emphasis added).

See also **R. S. Raghunath V. State of Karnataka** A.I.R. 1992 SC 81 at page 89, **Powdrill V. Watson** (1995) 2 ALL ER 65 at page 79 and **R. V. Secretary of State for the Home Department, *exparte* Daly** (2001) 3 ALL ER 433 at page 447.

We also associate ourself with the view of the Supreme Court of India in the case of **Madanlal Fakirchand Dudhediya V. Respondent: Shree Changdeo Sugar Mills LTD** [1962] A.I.R. 1543, where it observed that:

> *"The first rule of construction which is elementary, is that the words used in the section must be given their plain grammatical meaning. Since we are dealing with two sub-sections of* ***section 76, it is necessary that the said two subsections must be construed as a whole "each portion throwing light, if need be, on the rest." The two sub-sections must be read as***

parts of a integral whole and as being inter-dependent; *an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy. If repugnancy cannot possibly be avoided, then a question may arise as to which of the two should prevail. But that question can arise only if repugnancy cannot be avoided." (Emphasis added).*

We think, at this juncture, it is also appropriate to examine how section 111 of the Act has broadened the access to every petitioner in an election petition. The relevant **sub sections are (2), (3), (4), (5) and (7) of section 111 of the Act,** provide as follow:-

(1) .....

(2) The Registrar shall not fix a date for the hearing of any election petition unless the petitioner has paid into the court, ***as security for costs, an***

amount not exceeding five million shillings in respect of each respondent

(3) ***The petitioner shall within fourteen days after filing a petition, make an application for determination of the amount payable as security for costs, and the court shall determine such application*** *within the next fourteen days following the date of filing* ***an application for determination of the amount payable as security for costs.***

*(4) Where any person is made a respondent pursuant to an order of the court, the petitioner shall within fourteen days of the date on which the order directing a person to be joined as a respondent was made, pay into the court a further amount not exceeding three million shillings****, as shall be directed by the court in respect of such person****.*

(5) Where on application made by the petitioner, the court is satisfied that compliance with the provisions of subsection (2) or (4) will cause considerable hardship to the petitioner, it may direct that-

a) The petitioner give such other form of security the value of which does not exceed five million shillings, as the court may consider fit; or

b) The petitioner be exempted from payment of any form of security for costs.

(6) .....

(7) ***In the event of security for costs not being paid into the court within fourteen days from the date of determination by the court of the amount payable as security for costs, no further proceedings shall be heard on the petition.***

(8) .....

(9) .....

It is not in dispute that **section 111** is the key provision governing security for costs in election petitions. In the construction of statutes, a court is required to ascertain the intention of the legislature and the object and purposes of an enactment. To begin with, we now examine closely the requirements of the relevant sub sections of **section 111**.

Starting with **sub section (2) of Section 111**, we think that there is no dispute that on the issue of the amount payable as security for costs, the amount stated therein is **an amount not exceeding five million shillings in respect of each respondent.** As rightly stated by the learned trial High Court Judge and we subscribe to his view that, **section 111 (2) of the Act** does not set an exact amount to which a petitioner is required to deposit as security for costs. It simply sets the limit or maximum amount to be deposited whereas that amount should not exceed five million shillings in respect of each respondent. By the use of the expression "**an amount not exceeding**" in that sub section, that

means a petitioner is not in a position to know how much he/she is required to deposit as security for costs unless and until the court determines the amount payable. This is because, under **section 111(2)** what the petitioner is required to deposit as security for costs can be any amount from one cent or a shilling to five million shillings (Tshs. 5,000,000/=).

Then follows the provisions of **sub section (3) of section 111 of the Act** which was strongly contested by the advocate for the appellant. Mr. Taslima was of a firm view that as far as the petitioner has sufficient funds to deposit into court as security for costs (shillings five million) as required by **section 111(2) of the Act,** then there is no need for such a petitioner to make an application for determination of the amount payable as security for costs. He insisted that **section 111(3)** is reserved for those without sufficient funds. With respect, we do not subscribe to the view taken by Mr. Taslima. Rather, we fully agree with Mr. Kameya and Mr. Mfala to the effect that **section 111(3),** does not impose any sort of discrimination between those who have and those who do not have sufficient funds. See the background to the enactment of

the **National Elections Act. Cap. 343** we have given earlier on in this judgment.

We think, the reasons given by the High Court are clear and valid in that every petitioner regardless of his monetary status, whether he has sufficient funds or not, is required to make an application for the determination of the amount payable as security for costs as provided by **section 111(3) of the Act**. This is because, **firstly**, **section 111 (3)** is couched in mandatory terms: "**the petitioner shall**". On the word "shall", **section 53 (2)** of the Interpretation of law Act [Cap1R.E.2002] states as follows:

> " ***Where a written law the word shall is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."***
>
> (Emphasis added).

We have found nowhere in that provision where it is stated or indicated that the same is reserved for those petitioners with

insufficient funds as Mr. Taslima wants us to believe. **Secondly**, we are of the considered opinion that by the use of the words " **an amount not exceeding**" five million shillings **section 111(2) of the Act** as demonstrated earlier, that sub section does not show the exact amount to be deposited as security for costs by a petitioner.

Thirdly, taking the history of that provision, we think that the legislature's intention was to the effect that the court should determine the amount of security for costs instead of imposing a fixed amount as was the position before **Ndyanabo's case**. Hence **section 111** has been enacted with a view to an orderly and timely determination of election petitions including how, when and where an application for the determination of the amount payable as security for costs to has to be made by all petitioners, whether he has or has no sufficient funds.

Fourthly, in support of the view that **section 111** is also aimed at ensuring the orderly and timely determination of election petitions it is our considered opinion that the **time frame** for the

determination of security for costs, payment and hearing date of the election petitions clearly stated therein serve that purpose. **Section 111 (3) of the Act**, it has been mandatorily stated that:

> (1) the petitioner shall with fourteen days after filing the petition make an application for determination of the amount payable as security for costs.
>
> (2) Thereafter, the court shall determine such application within the next fourteen days following the date of filing an application for determination by the amount payable as security for costs.

Furthermore, **section 111(7) of the Act** also mandatorily states that no further proceeding shall be heard on the petition if within fourteen days after the determination of the amount payable as security.

Even if we were to agree with Mr. Taslima, which we do not, the appellant under **section 111(2)** could pay the maximum amount payable anytime he desired within the limitation period prescribed for the determination of election petitions by the High Court, we do not see why Parliament should have fixed the limitation period for a petitioner and the court under **section 111(3)** and the consequences thereof under **section 111(7)** and on the other hand accord to other petitioners such as the appellant an elastic period in which to pay for security for costs. With respect we do not think the Parliament could have intended such a course which would be at odds with the legislature's desire for the time bound disposal of election petition reflected in **section 111(3)and (7)** of the Act. To strengthen our view, G.P. Singh in his book **Principles of Statutory Interpretation** (*supra*) states that:

> *"If statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature, in other words*

the 'legal meaning' or 'true meaning' of the statutory provision."

Also see **Black Clawson International Ltd V. Papierwerke Waldhof Aschaffenburg AG** (1975) 1 ALL ER 810 p.814 (H.L) **R. V. Hinks,** (2000) 4 All ER 833 p. 839 (HL).

In the instant case, it is clear that the petitioner did not comply with the mandatory requirements of **section 111(3) of the Act.** The consequence for such non-compliance is that, what was deposited as security for costs by the appellant without making an application for the determination of the amount payable as security for costs was illegally deposited and the same was improper. We do not agree with Mr. Taslima that, such non-compliance of the mandatory provision of the law was a mere technicality. As **section 111(3) of the Act** is couched in mandatory terms, the petitioner has no choice but to abide by the law.

Another important provision to be examined is **section 111(5) of the Act,** which provides that when the petitioner has made an application, and when the court is satisfied that **sub**

sections (2) and (4) have been complied with and the court is satisfied that considerable hardship will be occasioned to the petitioner, then **sub section (5) of section 111** directs that the petitioner may give such other form of security that has the value which does not exceed five million shillings, as the court may consider fit. The court has also been given powers to exempt the petitioner from payment of any form of security for costs.

What we have gathered from our reading of section 111 as a whole is that, generally the intention of the legislature in the current **National Elections Act**, is to broaden the provisions governing security for costs to ensure that each and every petitioner regardless of his monetary status get access to justice in hearing his/her election petitions.

We fully agree with the High Court, the learned Principal State Attorney who represented the 1st and 2nd respondents and with Mr. Mfala to the effect that the provisions of **section 111(1) to (9)** are inter-dependant and have to be read as a whole. We are of the considered opinion that the compliance with the provisions of

section 111(1) to (9) is necessary so as to maintain an orderly procedure for filing and the payment of security for costs in election petitions. Non-compliance with the provisions of **section 111(2) to (9) of the Act** may occasion injustice.

In this judgment, we examined and interpreted **section 111 sub sections (1) to (9).** By that approach the Parliamentary intention of **section 111** in its entirety is most captured.

As demonstrated herein above, the petitioner did not comply with the statutory mandatory requirements of **section 111(3) of the Act,** by his failure not to make an application for the determination of the amount payable as security for costs. He deposited into court shillings fifteen million (Tshs. 15,000,000/) without having filed an application for the determination of the amount payable as security for costs to the court. Whereas **section 111(2)** mandatory requires that such an application is to be made within fourteen days from the date the petition was filed, and the petitioner failed to do so.

Having examined all the above, we are of the considered opinion that, such non-compliance with **section 111(3) of the Act** is fatal. The High Court was entitled to the conclusion it arrived at in determining the preliminary objection. Hence, we have no other option but to find this appeal with no merit.

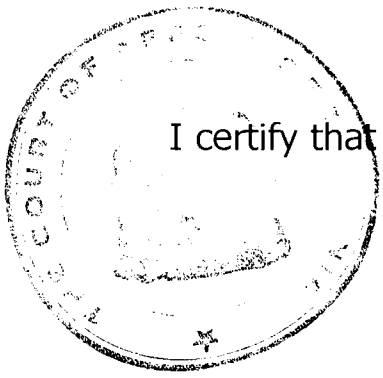
In the event, we hereby dismiss the appeal with costs.

DATED at **MTWARA** this day of 22nd June, 2012.

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL



I certify that this is a true copy of the original.

MBUYA R. M.
DEPUTY REGISTRAR