IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY AT DAR ES SALAAM)

MISCELLANEOUS CIVIL CAUSE NO. 2 OF 2001

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977

AND

IN THE MATTER OF A PETITION TO ENFORCE CONSTITUTIONAL BASIC RIGHTS UNDER THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, 1994

AND

IN THE MATTER OF A PETITION TO CHALLENGE AS UNCONSTITUTIONAL SECTION 111(2), (3) AND (6) OF THE ELECTION ACT, 1985

JULIUS ISHENGOMA FRANCIS NDYANABO.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

DISSENTING RULING
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KIMARO, J:

I have read the majority decision of my Brother Judges but I hold a different opinion for reasons which will be explained in this minority decision.

The background to the petition shows that this petition has been prompted by the mandatory requirement of a deposit of T.shs.5,000,000/= as security for costs before any election petition can be fixed for a hearing.

The petitioner has given three grounds for seeking for redress.

i) Section 111(2) of the Elections Act 1985 hereinafter referred to as the Elections Act is patently unreasonable for creating a pre-condition for deposit of T.shs.5,000,000/= as security for costs because the sum is excessive hence curtailing the citizens right to a fair hearing.

ii) Section 111(2) and (3) of the Elections Act is discriminatory for creating inequality in access to justice in enforcing a basic right by a natural person and the office of the Attorney General.

iii) Section 111(2) of the Elections Act is unfair and restrictive for making a deposit of T.shs.5,000,000/= a mandatory pre-condition for access to justice.

The learned Senior State Attorney Mr. Mwidunda who is representing the Attorney General on the other hand, is far from being convicted that the said provisions are unconstitutional. His firm stand is that the provisions are reasonable, sound and valid and is in line with Article 30(2)(a) and (f) of the Constitutional of the United Republic of Tanzania 1977 hereinafter referred to as the Constitution. His argument is that the provisions are reasonable, sound and valid constitutionally.

The learned State Attorney also holds a firm stand that the petition should be dismissed because the petitioner has failed to address pertinent issues which would have assisted the court to reach a proper decision. According to him the said issues are:

i) The rationale for costs in civil litigations generally and in particular security costs.

ii) the legislative and policy background of the provisions of Section 111 of the Election Act.

and

iii) Whether Section 111 of the Election Act passes the test of constitutionality.

The learned State Attorney has made a prayer to have the petition dismissed because.

(a) The Parliament validly exercised the powers conferred by Article 30(2) (a) and (f) of the Constitution to amend the Elections Act by providing for sections 111(2) and 111(3) in order to ensure that the rights and freedoms of the petitioners are not misused to prejudice the individual rights of the respondents in terms of costs in election petitions by filing frivolous and vexations petitions.

(b) Section 111(2) and 111(3) of the Elections Act is saved by Article 30(2) of the Constitution because it meets the two requirements given by the Court of Appeal in the case of KUKUTIA OLE PUMBUN & ANOTHER v. ATTORNEY GENERAL [1993] TLR 159.

(c) Section 111(2) and 111(3) of the Election Act is constitutionally valid and does not violate the basic human rights guaranteed under Article 13(1)(3) and (6) of the Constitution.

(d) The prescribed amount of security for costs is realistic, justified and reasonably necessary to achieve the legitimate objective of Security for costs is election petitions.

(e) Rule 11(3) of the Elections (Election Petitions) Rules 1971 GN 66 of 1971 hereinafter referred to as the Election Rules provides for an adequate and effective

safeguards as it confers judicial discretion to the Court to direct the petitioner to give such other security as the Court may consider fit.

The proceedings will show that the court opted to receive evidence by affidavit under Section 12 of the Basic Rights and Enforcement Act 1994 and proceeded to hear the petition by written submission. Both parties submitted elaborative submission which are exhaustive and they are commended for the job which was well done.

Let me start with the Election Rules. The argument which was put forward by the Learned State Attorney and which was not exhaustively replied by the petitioner is that since the Elections Act has wholly saved the Election rules, then Rule 11(3) can be used by the court in ordering the petitioner to deposit something else as Security for costs where he/she fails to pay the sum of T.sh.5,000,000/= as required by Section 111(2) of the Election Act.

We greatest respect to the Learned State Attorney I do not think that this is a correct preposition. A statute is always superior to

a subsidiary legislation A recourse cannot be made to a subsidiary legislation where the Statute itself is very clear. Section 11(2) of the Elections Act is clear. A petition cannot be fixed for hearing if the petitioner has not deposited the sum of T.shs.5,000,000/= as Security for costs. There is no proviso in the said provision which confers jurisdiction on the court to look for an alternative way in case the petitioner fails to comply with the mandatory requirement of depositing T.shs.5,000,000/= as security. The alternative cannot lie in a subsidiary legislation which is made under the very statute which spells out the requirements. The argument made by the learned State Attorney in this respect is a misconception and a misdirection.

It is important to point out that there is no dispute at all that the requirement to have the petitioner deposit security for costs before the petition is heard has been in existence since 1970. This is evident in the Election Rules, rule 11. However, the mere fact that such a requirement has been in existence for years and no one has come forward to challenge it, is not in itself proof of the constitutionality of Sections 111(2) and 111(3) of the Elections Act 1985.

Let me look at the grounds for filing this petition. The argument given by the petitioner in support of ground one is that in a democratic country which complies with the doctrine of the rule of law, the Parliament cannot enact laws which go contrary to the Constitution. Such laws cannot be valid. Where the doctrine of law guarantees certain fundamental rights, then actions of the state affecting the rights and life of individuals in the society should confirm strictly to the procedures and limitations prescribed by the Laws and powers must be exercised within the boundaries prescribed by the law.

Making reference to Article 30(3) of the Constitution read together with Section 4 of the Basic Rights and Duties Enforcement Act, 1994 the petitioner argues that the said provisions give a person the right to sue where his/her rights which are provided for under Article's 12 – 24 of the Constitution have been infringed.

The petitioner is of the view that the requirement of a deposit of T.shs.5,000,000/= as security for costs prior to fixing a date of hearing of an Election petition as given in Section 111(2) of the

Elections Act, 1985 is patently unreasonable and unjustified because it curtails the citizens rights to a fair hearing which is guaranteed by Articles 13(1), (2) and 6(a) of the Constitution.

Section 111 of the Elections Act 1985 gives a category of persons who can file election petitions. Among the category is any eligible voter who voted and has been aggrieved by the results and needs to file a petition. The petitioner observes that a low income earner cannot file an Election petition because the deposit of T.shs.5,000,000/= is excessive and would be beyond his/her income. The consequences then will be curtailing their access to a fair hearing.

While the petitioner appreciates that the purpose of the law in requiring deposit of security for costs is to protect the defendant/respondent in the event of success from difficulties in realizing his costs, he is of a firm view that the purpose of the law should also be to ensure that bonafide claims of paupers/petitioners are addressed in a court of law and so all groups should have access to redress without undue or unjustified pecuniary limitations.

In reply to the first ground the learned Senior State Attorney looks at the definition of costs and security for costs in Blacks Law Dictionary 6th Edition p.346 and argues that civil litigations are expensive and in election petition cases the expenses may be considerable. Because of this financial aspect, a successful party should not suffer financial detriment resulting from litigation. Courts are empowered to make an order for payment of costs to the successful party.

Digesting on what Section 20(1) of the Civil Procedure Code, 1966 provides on the power of the court to order payment of costs, Mr. Mwidunda said the discretion of the Court to order costs flows from the general rule that costs follow events and so the successful party must be awarded costs unless there are good reasons for depriving him/her costs.

The learned State Attorney submitted that the discretion of the Court to award costs goes with the discretion to award interest and normally the rate does not go beyond 7%. With respect to the

learned State Attorney this is not the position. The award of interest is based on the decretal amount and not on costs.

Mr. Mwidunda also relied on Order xxv rule 1 of the Civil Procedure Code 1966 which empowers the court to order the defendant to pay security for costs before the case is heard to emphasize the position that payment of security for costs is not something new. It has been in existence for a long period.

In conclusion Mr. Mwidunda says that sections 111(2) and 111(3) are necessary to protect the respondents in the **COSTLY** election petitions litigations in terms of costs to the litigation. There is also a contention by the learned State Attorney that the petitioner has not deponed in his affidavit that he failed to pay the amount required for security for costs. He also refers to Rule 11(3) of the Elections Rules but I have expressed my views on the Elections Rules.

Article 13(1) of the Constitution guarantees all persons equal protection before the law. Article 13(6)(a) guarantees a fair hearing by the court to all persons who come before the court. Article 13(2)

on the other hand bars the Legislature from enacting laws which are either discriminatory or have the effect of discrimination.

The principle of equality before the law in essence means that all persons must have free access to courts and must be equally protected before the law.

It was submitted by Mr. Mwidunda that the prescribed amount of security for costs in Section 11(2) is **realistic**, justified and reasonably necessary to achieve the legitimate objective of securing costs of the respondents in election petitions and that the amount of costs has been increased in order to ensure that the rights of the freedoms of petitioners are not misused to prejudice the individual rights of the respondents in terms of costs in election petitions by filing frivolous and vexations petitions.

This arguments creates a presumption that all petitions which are filed in court are frivolous and vexations and so the petitioners should be deterred from doing so. The way in which they can be deterred is by imposing a requirement of a deposit of security for

costs of T.shs.5,000,000/=. A question which arises immediately is; even if the petitions are frivolous and vexation who is to determine this question? Is it the Parliament or the court?

Section 111 of the Elections Act gives a category of persons who have a right to sue. Among them are the ordinary citizens who have voted but have been aggrieved by the election results.

The court takes judicial notice that the majority of Tanzanians are poor. The amount of T.shs.5,000,000/= which is required to be paid as security for costs is excessive. There is no doubt about this. The increase from T.shs.500/= to T.shs.5,000,000/= when addressed in terms of who has fixed the amount lacks reasonable explanation.

Mr. Mwidunda submitted that it is not deponed by the petitioner in his petition that he failed to pay. But, the issue which is being raised by the petitioner is not whether or not petitioner is able to pay or not.

Articles 107A(1) and 107(2)(a) of the Constitution which was introduced into the Constitution by the recent amendments to the Constitution must always be read together with any other article of the Constitution or law depending on the issue which is before the court. The court is required to address the issues before it and not to look at the personalities of the individuals in the litigations.

The articles are very clear on the role of the courts and what they should address and what should be disregarded. What the court should always address is the issue brought before it and in doing so must be guided by the Constitution and other laws and not the personalities involved or feelings of other state organs.

My views are that the amount being required to be deposited as security for costs being excessive, it is only few people who can afford to pay. This means that the right to sue though given by the Constitution and the law concerned, will be curtailed. Accessibility to justice will be open to only those who can afford to pay for security for costs.

It is not clear to me why consideration for costs has been given a priority while costs are awarded at the end of the trial depending on the circumstances of each case. The requirement for prior deposit of (T.shs.5,000,000/=) as security for costs of contravenes Article 13(1), of 13(3) and 13(6) of the Constitution.

The argument given by the petitioner in support of the second ground of the petition is that section 111(3) which exempts the Attorney General from the requirement of the deposit of T.shs.5,000,000/= where the Attorney General is the petitioner is discriminatory because it creates inequality in the enforcement of a basic right by a natural person and the office of the Attorney General. The reason given is that if the petitioner is the Attorney General there is no justification why the respondent should not be protected if the intention of having the deposit of T.shs.5,000,000/= is to bar frivolous and vexatious petitions. The petitioner contends that the office of the Attorney General is manned by natural persons and so the possibility of filing frivolous and vexatious petitions cannot be ruled out. In this respect there is not justification of putting the Attorney General above that possibility and so the implementation of Section 111(2) read

together with Section 111(3) is discriminatory in nature. The case of KUKUTIA OLE PUMBUN & ANOTHER VS. ATTORNEY GENERAL [1993 TLR 159] was cited as supporting authority.

The reply given by Mr. Mwidunda is that the office of the Attorney General appears in all civil suits under the Government Proceedings Act 1967 as amended and so a successful party against the Government applies for a certificate of payment under Section 15 of the Government Proceedings Act 1967 against the Paymaster General and so his payment is guaranteed. This means that Section 111(3) is not discriminatory.

Going by Articles 13(1), (2) and (3) of the Constitution, Section 111(3) is discriminatory for creating inequality between parties who appear in court. I have already demonstrated what Articles 107A(1) and 107 (2)(a) requires the court to do. There is no need for me to make repetitions. It suffices to say that the section is discriminatory. The case of KUKUTIA OLE PUMBUN & ANOTHER VS. ATTORNEY GENERAL & ANOTHER [199 TLR 159 3] elaborates on this point.

On the ground of unfairness and restrictive nature of section 111(2) of the Elections Act the argument given is that the petitioner who fails to deposit T.shs.5,000,000/= will not have his/her case heard although the petitioner has been given the right to sue. This is not withstanding the fact that the period of limitation for finalization of election cases is two years. In this respect the effect of section 111(2) is to give and take away the right which is given and this is what makes the provision restrictive hence violating Articles 13(1) and 13(6). Reference was again made to the case of KUKUTIA OLE PUMBUN.

In Mr. Mwidunda`s submission, he seems to suggest that the co-existence of section 111(2) and rule 11(3) of Elections rules saves the problem and for this matter the petitioner was not required to file this petition. He had an option of making resort to rule 11(3). My views on co-existence of Section 111(2) and 111(3) of the Election Act and Rule 11(3) of the Elections Rules has been expressed. Rule 11(3) cannot be invoked to fill in any gap left by Section 111(2) and 111(3) because the rules are inferior to the statute and so the subsidiary legislations cannot be used. The statute prevails.

Let me go a step further to illustrate another aspect which shows the unconstituonality of section 111(2) of the Elections Act.

It is common knowledge that the Parliament is the organ of the state which make the Laws. This is what Article 64 of the Constitution provides. The composition of the Parliament is given in Article 66. Among members who constitute of the Parliament are the successful candidates for Parliamentary elections in the constituencies. The Elections Act 1985 was enacted by the Parliament and the respondents who are focused in the provisions which are being challenged are the successful Parliamentarian in their constituencies. They are the ones who are to be protected in the event that any petitioner wishes to challenge the results of the elections which declared them successful candidates. The Parliament is the one which has made up its mind that the petitioners petitions are frivolous and vexatious and so any petitioner wishing to challenge their success must first deposit T.shs.5,000,000/= before the court can hear their cases.

In this circumstances the Parliament is a judge of its own cause. Following the decision of the Court of Appeal in the KUKUTIA OLE PUMBUN Sections 111(2) and 111(3) cannot be said to have passed the Constitutionality test.

By any standard the provisions of Sections 111(2) and 111(3) have been made arbitrarily and the limitations imposed in the law cannot be said to be reasonably necessary for achieving a legitimate objective. The impression created by the provisions in that they are safeguards of interests of few people.

It is unlike the provisions which are contained in the Elections Rules. The Election rules were made by the Chief Justice. Under the circumstances in which they were made they don't portray a picture of the Parliament, being the judge of its own course.

In view of the reasons given in this minority decision, I would allow the petition. In terms of Section 13(2)(a) of the Basic Rights and Duties Enforcement Act I will not declare the provisions of section 111(2) and 111(3) of the Elections Act 1985 unconstitutional.

Instead, I allow the Parliament a period of nine months to address the issues raised in this ruling and to take the necessary steps to have the position rectified.

N. P. Kimaro
JUDGE.

23/06/2001