

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

ELECTION PETITION APPEAL NO. 01 OF 2021

PHILIPO MHAGAMA APPELLANT

VERSUS

ATTORNEY GENERAL..... 1ST RESPONDENT

THE RETURNING OFFICER

FOR LILAMBO WARD 2ND RESPONDENT

THE ASSISTANT RETURNING OFFICER

FOR LILAMBO WARD 3RD RESPONDENT

JUDGMENT

Date of Last Order: 3/6/2021

Date of Judgment: 24/06/2021

BEFORE: S. C. MOSHI, J.:

This appeal originates from the Resident Magistrates' Court of Songea at Songea in Election petition No. 1 of 2020 where the appellant prayed the trial court to declare the following; that the act of second and third respondents to declare that Yobo Xavery Mapunda a winner of the election is unlawful, that the petitioner is a lawful winner of the election and therefore the council elect of Lilambo Ward. Before the Petition was heard, the first respondent raised a preliminary objection

orally that the appellant who was the petitioner did not comply with a legal requirement of payment of security for costs, as the security for costs was not paid within a prescribed time. The point was opposed by appellant's counsel who on the other hand, contested that the trial court had no jurisdiction to deal with the issue of security for costs. After hearing both sides the trial court sustained the preliminary objection and dismissed the case for being incompetent. The appellant was aggrieved; hence he filed the present appeal on five grounds, to wit: -

- 1. That the trial Magistrate erred in law by dealing with the matter while it is not in her jurisdiction, by taking administration powers and function of the Registrar and at the same time overruled the previous decision of the same.*
- 2. That, the trial Magistrate erred in law by dealing with the matter whiles the parties' counsels' especially the counsel of the petitioner herein the appellant prayed for hearing in order to prepare himself in order to defend the matter.*
- 3. That the trial Magistrate erred in law by dealing with the matter prematurely whiles there are other issues which were pending to be determined.*

4. That the trial Magistrate erred in law and facts by pronouncing the judgement while no parties were given right to submit their issues rather the trial magistrate pronounced the ruling from his own mind alternatively no right to be heard to the parties through their counsels.

5. That the trial Magistrate erred in law by dealing with the matter prematurely while the matter before her was to decide whether she has the power to deal with the raised issue at that moment or not but instead the trial magistrate came up with the new issue which was not presented before her and dismissed the matter.

During hearing of the appeal, the appellant was represented by Mr. Zuberi Maulid whereas the respondents were represented by Mr. Abubakari Mrisho, Principal State Attorney and Egiddy Mkolwe, State Attorney.

Mr. Zuberi adopted the petition of appeal and argued ground no. 2, 3, 4, and 5 together. Starting with the first ground; he submitted that the matter before the Resident Magistrates' Court concerned security for costs. It is a legal requirement under section 110 of Local Government Authorities [Elections Petitions], Cap. 292, that security for costs must be paid before fixing a hearing date. Section 110(2) of the cited law

requires a registrar, and if it is in the Resident Magistrates' Court, the Resident Magistrate in charge who is the administrator to deal with it. Determination of costs whether has been paid as per requirement of the law has to be determined by the Deputy Registrar before fixing a date of hearing. However, the security for costs issue was raised during hearing before the trial magistrate. The proceedings show that the issue of security for costs was raised before the Resident Magistrate in charge, he fixed a hearing date, however for unknown reasons, he re – assigned the case to Honorable Jembe.

He said that there is no dispute that the matter was ready for hearing before the trial magistrate; if there was any issue of security for costs, should have been determined by the Resident Magistrate in charge before fixing a hearing date.

He argued that, the trial magistrate did not satisfy herself of her jurisdiction. Advocate's petitioner raised the issue of jurisdiction as seen in the trial court's proceeding starting from page 11.

Regarding second, fourth and fifth grounds he said that, the court erred in law for determining the issue without giving parties an opportunity to address it. Page 11 and 12 of the proceeding shows that the petitioner's advocate, after State Attorney raised the issue of security, prayed to be given an opportunity to prepare and be given a

chance to be heard; on whether security was paid, to what extent and whether it was paid as required by the law or whether part payment may render dismissal of the suit. He said that, this violated a constitutional principle, in this regard he cited the case of **Christian Makongoro Vs. The Inspector General of Police and another**, Civil Appeal No. 40 of 2019, Court of Appeal sitting at Mwanza (Unreported).

He contended further that, at page 14 of the ruling the trial magistrate said that the petitioner delayed to furnish security for costs for all respondents but the record shows that one of them paid the security for costs timely.

He argued that the trial magistrate did not consider that R.35 of the Local Authorities (Election Petition) Rules of 2020 forbids dismissal of the matter just because of some irregularities unless such irregularities affect rights of parties. The court should have allowed security for costs to be paid instead of basing on mere technicalities.

In reply Mr. Abubakari stated that, the trial magistrate did correctly decide basing on the law. He supported the Resident Magistrates' Court decision which dismissed the petition because the petitioner failed to comply with section 110 of the Local Authorities (Election Petitions) Act, Cap. 292 that requires deposit of security for

costs. He added that the trial court had jurisdiction to determine the issue of security before hearing of the petition that is why the counsel for respondent at that time raised that concern, because it's a legal requirement; the court has to determine whether security has been paid or if there is exemption. The court heard and found that the petitioner deposited T.shs. 500,000/=, and that a payment receipt was annexed as proof. The issue was raised, because the law requires that security for costs should be paid for each respondent. The appellant Deposited T.shs. 500,000/= whilst the respondents were three. Furthermore, there was no any application for exemption. Therefore, the trial court did properly determine the issue.

He further submitted that, Appellant's advocate mis – directed himself by saying that it was Resident Magistrate in charge who has jurisdiction to hear matters regarding security for costs. He pointed out that, there are 2 scenarios, *One*, if the petitioner is able to deposit the amount, there is no need for Resident Magistrate in charge to hear the application. In this case it shows that the petitioner was eligible to pay that amount by depositing 500,000/=. Therefore, the second scenario, which is applying for exemption doesn't apply.

Whether it wasn't proper for the court to hear the matter of security for costs while the Resident Magistrate in charge had set it for

hearing; he argued that this was a misconception. The security for costs must be determined before hearing; fixing a hearing date of petition doesn't legalize or doesn't do away with the requirement to determine the security for costs. Determination of costs is within the jurisdiction of the court; it may be raised at any time before ruling.

As far as ground No. 2, 3, 4 and 5; where the appellant's advocate emphasized on the right to be heard and contended that the petitioner didn't get a proper right to be heard, therefore it was violation of constitutional right, he argued that, the right to be heard was afforded to both parties. He said that, this is evidenced at page two of the ruling; first the appellant was represented by Mr. Eliseus Ndunguru. whereas the respondent was represented by Egidy Mkolwe, State Attorney. At paragraph two the magistrate said that both parties raised an issue which need to be resolved by the court. The State Attorney said that, the petitioner hasn't complied with a legal requirement of payment of security for costs within prescribed time. Petitioner's advocate said that the court had no jurisdiction to entertain the matter concerning payment of security for costs. These two stands, led the court to make a ruling. The court made a decision basing on both parties' submission.

He said that, the advocate asked for adjournment, he was given a right to be heard where he stated that if the court finds his argument is

not water tight then he be given time (page 11 and 12 of the typed proceeding). He contended that, this is an afterthought, it is not acceptable. The advocate could have asked for adjournment before submission but not after making a submission. He submitted that, he was given a right to be heard, thus the constitutional right was not violated. Therefore ground 2, 3, 4 and 5 have no merit.

He stated that, the provision of law giving direction on costs payment, prescribes time limit for the petitioner to deposit security for costs, that is within 14 days after filing the Petition. In this regard he cited section 110 of the Local Authorities Election Petition and Rule 12 (3) Local Authorities (Election Petitions) Rules, 2020.

He argued further that, since the petitioner was able to pay security for costs, then he was to deposit the costs within 14 days after filing a petition. If he wasn't able, he was supposed to file an application. In this case, he deposited insufficient amount that is T.shs. 500,000/= within time and later on he paid T.shs. 1,000,000/= after more than 66 days. He submitted that, that doesn't amount to a mere technicality, it is a mandatory legal requirement which even oxygen principle does not apply. In this respect, he cited the case of **Mondorosi Village Council and two others V.R Tanzania**

Breweries Ltd and 4 others, Civil Appeal No. 66 of 2017, Kwariko, Justice of Appeal.

He said that the court can't grant a relief that you haven't requested and therefore the court did properly dismiss it. Rule 35 of the Local Authorities (Election Petitions) Rules, 2020 goes against his submission. Also, the appellant paid T.shs. 500,000/= only which didn't specify the respondent who was covered by the T.shs. 500,000/=.

In rejoinder, Mr. Zuberi said that, the cited case of **Mondorosi** is distinguishable from the circumstances of the case at hand because as far as Election petitions are concerned, the Rules direct what should be done when there is non compliance of procedural requirements. In the present case there was non compliance of Rule 35. Therefore, the remedy was not to dismiss the petition rather it should have ordered rectification and direct compliance.

On the right to be heard; he argued that, the issue was raised but hearing of submission on the issue that was raised is another thing. Parties raised concern but parties were not given a right to submit. Had they been heard; the court wouldn't have dismissed the petition.

The issue to be determined is whether the appeal has merits. The grounds of appeal can be grounded into three issues, this can be gathered from the submissions made by the parties. Firstly, is the issue

of security for costs, secondly is on the jurisdiction of the trial court in relation to the issue of security for cost and lastly is whether the parties were afforded a right to be heard on the issue of jurisdiction of court in determining security for costs.

It is a mandatory legal requirement that the petitioner in Election petition must pay security for costs to the tune of 500,000/= before the commencement of hearing of the suit, it should be paid within fourteen days after filing a petition if the petitioner is financially able. If he is not able, he is to make an application for determination of the amount to be paid as security for costs which is to be determined within the next fourteen days following the date of filing an application for determination of the amount payable as security for costs. See section 110 (2) (3) of the Local Authorities (Elections Petitions) Act Cap. 292 R.E 2015 and Rule 12(1) and (3) the Local Authorities (Election Petitions) Rules, 2020.

Mr. Zuberi was of the view that since the trial Magistrate was not a Registrar, she had no mandate to deal with the issue of security for costs as raised by the respondents' counsel. Section 110(2) of the Local Authorities (Election Petitions) Act, Cap. 292 R.E 2015, provides that the registrar should not fix a date of hearing of a petition unless the petitioner has paid into court security for costs. He was of the view that

the trial court being a Resident Magistrate Court where there is no Registrar, and since the administrative functions are performed by the Resident Magistrate in charge, then determination of security for costs should be done by a Resident Magistrate in charge. I have passed through the laws dealing with election petitions and their rules together with the Magistrates Courts Act Cap. 11 R. E 2019, it is apparent that a Resident Magistrate with a title of a Registrar does not sit in the Resident Magistrates' court. In this respect, I am persuaded by Maige J, as he then was in the case of **Abubakar Kapera vs. Maganiko Ngaka**, Civil Appeal No. 26 of 2019 that whatever rule of interpretation may be employed the provision of section 110(2) of the Local Authorities (Election Petitions) Act Cap. 292 R.E 2015 cannot be construed to have amended the Magistrates' Court Act as to include a judicial Officer in the Resident Magistrate Court with the title of Registrar and if the legislature intended this provision to be used in subordinate court could have put it very openly in the provision or even in the interpretation section. It is my opinion that the phrase fixes a date of hearing of the case is used in relation to the general administrative powers of the Registrar of the High Court to control civil registries of subordinate courts. It does not have anything to do with the judicial powers of the court of Resident Magistrate Court to determine a date,

time and place of hearing. Therefore, I find that the trial Magistrate did correctly determine the issue of security for costs.

It is apparent that the appellant did not comply with the law which sets a mandatory requirement of depositing a security for costs. He only paid T.shs. 500,000/= timely whereas there are three respondents, and the remaining one million shillings was paid 66 days after filing of the petition. The law as stated above requires the petitioner to pay security for cost within fourteen days after filing the petition except where he is exempted or if he has made an application for determination of security for cost. In the case at hand the appellant was neither exempted from paying the security for costs, nor did he make an application for determination of the same.

Mr. Zuberi submitted that, the court was required to observe Rule 35 of the National Elections (Election Petitions) Rules, 2020 which provides that petitions are not to be dismissed for reasons of irregularity. However, Rule 12 (3) reads thus: -

"Where a petitioner is financially able and willing to deposit five million shillings which is the maximum amount of the security for costs provided for under section 111(2) of the Act, he shall not be required to make an application for determination of the amount payable as security for costs under section 119(3) of

*the Act but **he shall, within fourteen days of filling petition deposit that amount.***" (Emphasis is mine).

The above bolded part is phrased in mandatory term, it is mandatory for the petitioner who is eligible to pay security for costs to pay it, therefore it is not a mere procedural requirement; hence Rule 35 cannot be invoked. Furthermore, there are three respondents, it was not stated the shilling five hundred was for which of them.

The last complaint was about a right to be heard; reading through the trial court's records I have noticed that both counsels were heard, see page 11 to 13 of the typed trial court's proceeding. The case cited by Mr. Zuberi, that is the case of **Christian Makondoro vs The Inspector General of Police and the Attorney General (supra)** is distinguishable from the case at hand. In **Christian Makondoro's case (supra)** the issue of pecuniary jurisdiction was raised by the court *suo motu* and determined by the trial judge in the course of composing her judgement.

In the final result therefore, the appeal is dismissed with costs.

It is so ordered.

Right of Appeal explained.




S. C. MOSHI

JUDGE

24/06/2021