

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CIVIL APPEAL NO. 2 OF 2021

(Originating from Urambo District Court in Election Petition No. 1/2020)

GEMBE KEFA @ EMMANUEL.....APPELLANT

VERSUS

**1. RETURNING OFFICER, URAMBO
DISTRICT COUNCIL**

**2. ASSISTANT RETURNING OFFICER OF
IMALAKOYE WARD**

3. BARAKA SAIDI CHATUMU

4. THE ATTORNEY GENERAL

.....RESPONDENTS

JUDGMENT

Date: 18/8/2021-5/11/2021

BAHATI,J.:

The appellant herein, **Gembe Kefas @Emmanuel** is aggrieved by the ruling of the trial court dismissing the Election Petition No. 1/2020 before Hon. H. Momba, SRM, appeals to this court against the whole decision on the following grounds:-

- 1. That, while the Appellant paid the maximum amount of security of cost prescribed by the law which amount he was so informed by the trial court to pay then the learned trial magistrate erred in law and fact to uphold the 1st, 2nd, and 4th Respondent objection and dismiss the appellant's election petition.*
- 2. In the alternative since the appellant is able person to pay security for costs then the learned trial magistrate erred in law and fact to dismiss the appellant's election petition instead of ordering him to pay the unpaid balance (if any) of the security for costs.*

The Appellant prays before this honourable court for Judgement and Decree against the Respondents as follows:-

- 1. That, this appeal be allowed and the trial court decision dismissing the appellant's election petition and orders thereto be quashed.*
- 2. The appellant's election petition be restored and proceed where it ended.*
- 3. Alternatively, this honorable court be pleased to order the appellant to pay the unpaid balance (if any) of security for costs and the election petition proceed where it ended.*
- 4. Costs both in this appeal and the trial court be provided for.*

5. Any other reliefs the court deem fit to grant be provided for.

The brief facts of the case can be narrated as follows; that the appellant Gembe Kefas @Emmanuel, a resident of Imalamakoye Ward in Urambo District, contested under Chama cha Mapinduzi (CCM) for the political post of a councilor for Imalamakoye Ward in Urambo District sued the 1st and 2nd respondents who were the returning officer and assistant returning officer for Urambo District Council and Imalamakoye Ward respectively, 3rd respondent Baraka Said Chatum who contested under Chama cha Demokrasia na Maendeleo (CHADEMA) and who was declared on 28/10/2020 by the 1st and 2nd respondents to be the Councilor of Imalamakoye Ward. The fourth respondent is the Attorney General of the United Republic of Tanzania. The appellant claimed against the respondents that the election of the 3rd respondent held on 28/10/2020 was to be declared null and void due to irregularities leading to the same not being a free and fair election.

During the hearing of the application at the District Court, the first, second, and fourth respondents filed a preliminary objection claiming that the petition was incompetent due to lack of depositing security for costs, in accordance with section 110 (2) of the Local Authorities Election Act, Cap. 292 [R.E 2019] and the petition was bad in law for containing an incurably defective verification clause that did not

disclose the source of information contrary to the provision of Order VI Rule 15(1) and 2 of the Civil Procedure Code, Cap 33 [R.E 2019]. The trial court consequently dismissed the petition.

When the matter came for hearing, Mr. Musa Khasimu, learned counsel appeared for the appellant, whereas the 1st, 2nd, and 4th respondents were represented by Ms. Mariam Matovolwa, learned State Attorney, and the 3rd respondent was represented by Kanisius Ndunguru, learned counsel.

Submitting on the first ground of appeal, Mr. Khasim Musa stated that after filing Election Petition Form No. 1, the appellant paid TZS 500,000/= on 10/12/2020 via exchequer receipt ERV No. 2977670. The payment was made in accordance with Rule 12(3) of the Local Authorities (Election Petitions) Rules of 2020 GN 783 of 2000, which states:

"Where the petitioner is financially able and willing to deposit five hundred thousand, which is the maximum amount of security for costs provided for under section 110(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 110(3) of the Act, but he shall within fourteen days of filing the petition deposit that amount."

Surprisingly, the Magistrate who heard the Preliminary Objection dismissed the case on the ground that the appellant was supposed to pay TZS.500, 000/= per respondent as a security for costs.

He further submitted that the learned Magistrate applied section 110 of the Local Authorities Election Act, Cap 292 [R.E 2019], which provides that ;

"The registrar shall not fix the date of the hearing of a petition unless the petitioner has paid into the court as security for costs, an amount not exceeding five hundred thousand shillings in respect of each respondent."

He argued that from the wording above, the catchword "not exceeding 500,000/=" means any amount of money between zero shillings and five hundred shillings.

He cited Rule 13 (3) of the GN. 783 of 2000, which states unequivocally that the amount due is 500,000/=, the maximum. He submitted that it was a mistake and misinterpreting the provision of the law to dismiss the application since the appellant complied with the law.

As to the second ground of appeal, he submitted that should this court find they truly were supposed to pay, it may be correct and order them to pay the difference. He claimed that court fees are assessed by the

court in accordance with the law. After being assessed, a party is given a control number by the court to make such a payment where the appellant was assessed at TZS. 500,000/= and was given control Number 49931 and paid according to GN 187 of 2015, which is Court Fees Rules; Rule 5 (1), hence the duty of assessment is done by the court officer.

Besides, he argued that if it was a fault, it was not a mistake of the appellant to pay that amount which was not correct. To reinforce his argument, he cited the case of **Liberates Laurent Mwang'onde Vs. AG, Haroon Mullah, Pilmohamed, and the Returning Officer of Mbarali Parliamentary Constituency**, Civil Appeal No. 45 of 2016, where the Court of Appeal of Tanzania dealt with the question of whether the Judge was entitled to strike out the petition anyway. The Court stated that:

"In our view, there was every reason for the trial judge to have been inspired by the provisions of rule 32 (1) of the Election Petition Rules and she should have restrained herself from striking out the petition for non-compliance or irregularities which, even if they were there, would not have resulted in a miscarriage of justice."

He submitted that it was not proper to dismiss the case. He stated that there is no law which allows dismissal of the case for failure to pay security for costs. He prayed this appeal be allowed and the case be re-admitted for hearing.

In adversary response to the first ground, the learned State Attorney for the 1st, 2nd and 4th respondents submitted that the amount that was paid by the appellant was not in accordance with the law. Section 110 (2) of the Local Authorities Elections Act, Cap. 292 provides for the petitioner to pay the amount which is not less than TZS 500,000/= for each respondent. She argued that if the petitioner was able to pay, he was supposed to pay TZS. 500,000/= times the number of respondents, who were four, equals TZS 2,000,000/= The Local Authority Election Act, Cap.292 [R.E 2019] gives procedures on how the appellant can make an application for determination of the amount payable if he is unable to pay such security.

Section 110 (3) (supra) gives the petitioner 14 days to send a formal application to the court where he will file his petition for determination of payment for security for costs.

The counsel further submitted on the court fees. She argued that security for cost is not a court fee. The cited fees are not relevant and thereafter the officer of the court has no duty to assess the amount to

be paid for security for costs except the amount will be determined upon special application by a petitioner in court and both parties will be heard by the court.

Furthermore, she submitted that this is elaborated under section 110 (5) of the Local Authorities Election Act, Cap. 292. In his appeal, there is nowhere he filed in the court where he said it was proper for him to pay for security for costs. The learned counsel placed heavy reliance on the case of **Benedicto Mutachoka Mutungirehi Vs. Innocent Sebba Bilakwate and others**, Misc. Civil Application No. 43 of 2015, where the High Court held that:

"The availability of such right notwithstanding, the law was enacted to introduce the requirement of the applicant to deposit security for costs, which was correctly pointed out by the learned counsel for the first respondent was meant to serve a number of purposes. Among them include: curbing unreasonable and vexatious petitions by some bodies as well as ascertaining anyone, who has been a respondent to a petition that, in case the petition against him fails, he will be adequately refunded the costs that he has incurred in prosecuting the petition that has been lodged against him."

On the second ground of appeal, Ms. Matovolwa submitted that it was not the duty of the court. The court could not order on its own motion; instead, a formal application was needed. Since he never applied for such remedy, he did not comply with the law of paying security for costs within 14 days.

She contended that the Local Election Act, Cap.292 under section 110 (7) provides that if security for costs is not paid, no proceedings will proceed in the said petition. Therefore, it was right for the trial magistrate to dismiss it.

The petitioner's failure to pay such security for costs will result in a denial of justice to the respondents. This is very substantive. To reinforce her position, she referred the court to the case of **Raymond Roberg Vs. Elisa Marcos**, Civil Application No. 571/02 of 2017. She submitted that the District Court was right to dismiss the petition of the appellant. He prayed this court to dismiss the appeal with costs.

As to the counsel for the 3rd respondent, Mr. Kanisius Ndunguru objected to the appeal since the Local Authority Election Act, Cap.292 under Section 110 (2) requires the petitioner to deposit the amount, but he deposited only 500,000/= He was supposed to file a formal application within 14 days.

On the second ground of appeal, he conceded with the first respondent that the law is very clear under Section 110 (3), and that the petitioner was required to inquire. The court fee rule is inapplicable in this case to determine the amount. The petitioner did not consider how they misapprehended the law. He prayed to this court to dismiss this appeal with costs.

In rejoinder, the counsel for the appellant submitted that the petitioner paid security for costs of TZS.500,000/=prescribed by Rule 12 (3) of GN.783 of 2020 as assessed by the court. Security for costs was paid, but the court had seen it was not the correct amount. He submitted that he had come up with an alternative solution to this, since the appellant is an able person to pay security for costs, then he should be ordered to pay the unpaid balance, if any, of the security for costs. He also submitted that the cited case by the respondents is distinguishable in the scenario. The appellant paid the amount. There is nowhere that he stated that he failed to pay. The provision is only used when the person needs mercy. He paid the amount, believing that it was the amount he was supposed to pay since the control number was given by the court. The case of **Mang'ombe** (cited supra) changed the stance. He prayed this appeal be allowed.

I have carefully considered the rival submissions from both parties. Having done so, the main issue is whether the appeal is meritorious. It is important from the outset to cite the laws which cater for election petitions in respect of councilors. The relevant laws are the Local Authorities (Elections) Act, Cap.292 [R.E 2019] and the Local Authorities (Election Petitions) Rules. The former is substantive while the latter is procedural.

To begin with the first ground of appeal as submitted by both parties, it is important at this juncture to reproduce Section 110 (2) of the Local Authorities Election Act, Cap. 229 as hereunder;

2. *The registrar shall not fix the date of the hearing of a petition unless the petitioner has paid into the court, as security for costs, an amount not exceeding five hundred thousand 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 cost, and the court shall determine such application within the next fourteen days following the date of filing the application for determination of the amount payable as security for costs. "*

The provision of section 110 cited above accords the Registrar the right to fix the date for hearing upon payment into the court of a security amount in respect of each respondent.

As correctly ruled out by the trial court, it is a procedure and general rule that the petitioner must be able and capable of complying with the requirements of paying the maximum amount of security for costs. He does not need to apply to the court for a determination of the amount of security for costs.

Though the counsel for the appellant argued that from the wording of section 110 (2), the catchword "not exceeding 500,000/" means any amount of money between zero shillings and five hundred shillings, and it was a mistake and misinterpretation of the provision of the law to dismiss the application since the appellant complied with the law.

Having intensely examined the matter before me, it is my view that section 110 (2) of the Local Authorities (Election) Act, Cap 292 [R.E 2019] has to be looked at as a whole. Therefore, looking at the section as a whole, especially on the security for costs, it is evident that the Registrar cannot fix a date for hearing of a petition unless a petitioner pays an amount not exceeding TZS 500,000/= as a security for costs.

Section 110(2) of the Local Authorities (Election) Act, Cap. 292 [R.E 2019] to this extent, it is self-sufficient, self-sustaining, and independent.

Other sections suggest that the subsection applies to a petitioner who does not need a determination of the amount payable as security for costs. Subsections 3, 4, 5, and 7 thereto create a separate and distinct regime in that they apply to indigent petitioners who depend on the court's discretion in determining the amount payable as security for costs.

Thus, failure by the appellant to fulfill the stipulated conditions under section 110(2) led to the dismissal of the petition. The respondents submitted that the counsel for the appellant misinterpreted the law since the Local Authority Election Act, Cap .292 gives guidelines on how one can apply.

Applying the above guidelines before me, in my view, the provision stipulates clearly how the petitioner was supposed to pay the amount so required.

As to the second ground, it is my considered view that the objects and reasons behind the enactment of section 110 proceeded on the general premise that every petitioner has to pay the prescribed amount of

money as security for costs, but where it is difficult for him to pay, he has to make an application for determination of the amount of money payable as security costs. In this sense, it goes without saying that a willing and able petitioner does not have to make an application to the above effect.

The said provision requires that the petitioner deposit five hundred thousand shillings for each respondent in the petition as observed above. In the instant petition there are four respondents, which means the petition ought to have deposited sums of two million shillings.

For those reasons, therefore, I agree with the counsel for the respondents that the omission, in the circumstances, was a mere inaccuracy which cannot be ignored without causing any failure of justice. Therefore, the appeal is dismissed with costs.

Order accordingly.



A handwritten signature in blue ink, appearing to read "Bahati", with a stylized flourish.

A.A. BAHATI

JUDGE

05/11/2021

Date: 5/11/2021

Coram: Hon. G. P. Ngaeje Ag, DR

Applicant: Represented by Advocate Mussa Kassim.

1st Respondent: }
2nd Respondent: } All Absent.
3rd Respondent: }
4th Respondent: }
B/C Grace Mkemwa, RMA

Mr. Musa Kassim: The case comes for judgment.

Court: Ruling is ready.

Court: Judgment delivered in presence of the Applicants counsel, Mr. Musa Kassim appellant's counsel in absence of the respondent in the open court.


G. P. NGAEJE

Ag. DEPUTY REGISTRAR

5/11/2021

Court: Right of appeal fully explained.




G. P. NGAEJE

Ag. DEPUTY REGISTRAR

5/11/2021