

IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

ELECTION PETITION NO. 1 OF 2020

**IN THE MATTER OF ELECTION PETITION UNDER THE NATIONAL ELECTION
ACT CAP 343.**

AND

THE NATIONAL ELECTION (ELECTION PETITION RULES 2020)

BETWEEN

BONIFACE ANYISILE MWAMBUKUSIPETITIONER

AND

ATUPELE FREDY MWAKIBETE.....1ST RESPONDENT

THE RETURNING OFFICER BUSOKELO CONSTITUENCY.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Date of last order: 23.09.2021

Date of ruling: 06.10.2021

Ebrahim, J.:

The Petitioner in this matter had on 19.11.2020 lodged in this court Election Petition No. 1 of 2020 to avoid the election results. Along with the petition, the Petitioner filed Miscellaneous Application No. 61 of 2020 for assessment of security for costs in terms of **section 111 of the National Elections Act, Cap 343 RE 2015**. This court on 17.12.2020 ordered the Petitioner to pay a total of Tshs. 12,000,000/- within 14 days from the date of the ruling. Dissatisfied with the order of the High Court, the Petitioner preferred an appeal at the Court of Appeal where on 18.12.2020, he lodged notice of appeal. On its sitting of 02.09.2021, the Court of Appeal struck out the appeal of the Petitioner with costs for failure to apply for leave at the High Court or Court of Appeal before filing the appeal and failure to serve notice of appeal to the Respondents within the requisite time set by law.

Unsuccessful at the Court of Appeal, the Petitioner, appearing in person, has come back to this court praying for withdrawal of the Petition. He notified the Registrar of his intention to withdraw the petition under **section 33(1) and (2) of the National Elections (Elections**

Petitions) Rules, 2020. He told the court that his decision to withdraw the petition has come in consideration of his health and time. He prayed for the court to consider his prayer and allow the withdrawal without costs.

Ms. Ntulo, learned Senior State Attorney, appeared for the 2nd and 3rd Respondents. She vigorously resisted the prayer for withdrawal on the ground that on 29.04.2021, they raised a point of preliminary objection. She thus wanted the Petitioner to concede to the preliminary objection instead of praying for withdrawal. She pressed for costs.

The 1st Respondent was represented by advocate Caroline Mseja. Ms. Mseja had nothing substantive to add on the issue pertaining to the withdrawal. She simply told the court that the case was coming for hearing of preliminary objection and she pressed for costs as well.

With respect to both Counsels, the matter was scheduled for mention so that the court could issue directives as per the order of 19.08.2021 and not hearing of the preliminary objection.

The above notwithstanding, the court availed opportunity to the Petitioner to respond on the issue raised by Ms. Ntulo that the Petitioner is required to concede to the preliminary objection instead of opting to withdraw the petition.

In response, the Petitioner argued that the preliminary objection has been prematurely brought because the same would have been relevant if the Petition was coming for hearing. He submitted further that **Rule 33(1) and (2) of the National Elections (Elections Petitions) Rules, 2020** allows the Petitioner to withdraw the application. As for the costs, he argued that the Solicitor General has offices in Mbeya, hence they could have mitigated the costs as there was no need for a person to come all the way from Dar Es Salaam. He reiterated his prayers for waiver of costs.

Ms. Ntullo rejoined by referring to **section 111(7) of the National Election Act** which state that if the security for costs is not paid, no proceedings shall continue. She stressed that the preliminary

objection is valid because an appeal to the Court of Appeal does not operate as an automatic stay.

I have followed the submissions by both parties and I can hurriedly say that the argument by the Counsel for the 2nd and 3rd Respondent is a misconception save for the prayer for costs as I intend to explain below.

Section 111 of the National Election Act, Cap 343 RE 2015 provides for the procedure for deposit of security for costs. **Section 111(2)** of the Act provides clearly that the Registrar shall not fix a hearing date unless security for costs has been paid to the Court.

Further, **section 111(7) of the Act** states as follow:

*"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**"*
[emphasis is mine].

Counsel for the 2nd and 3rd Respondents while aware that the Petitioner immediately after the assessment of security for costs by this

court lodged an appeal at the Court of Appeal to contest the assessed amount; she is of the firm view that the Petitioner was required to apply for stay pending the decision of the Court of Appeal which would stop time from running from the date of the ruling of the High Court. She relied on the Court of Appeal decision in the case of **The Honourable Attorney General Vs Reverend Christopher Mtikila**, Civil Appeal No. 45 of 2009.

I must state on the outset that the learned Senior State Attorney has seriously misconceived the principle stated in the above cited case. In the cited case, the Court of Appeal talked about stay on the basis that rights of parties have already been adjudicated and matter has already been decided to the finality. i.e. the High Court has already conferred rights to any eligible person to contest as an independent candidate. The law as it is, a filing of stay presupposes that rights have already been adjudicated upon and conferred to a party. However, I would firmly state here that, the concept brought by the learned Senior State Attorney that the Petitioner ought to have applied for stay, of which I have failed to comprehend as to which stay in

consideration of the fact that there is no right that has been conferred by any court. In this case, the Petitioner appealed against the assessment of security for costs which as per the above quoted provisions of the law, there would be no hearing unless the same has been paid. More-so, incase the Petitioner fails to pay the same within the prescribed time set by the law, then the intended Election Petition dies by operation of the law.

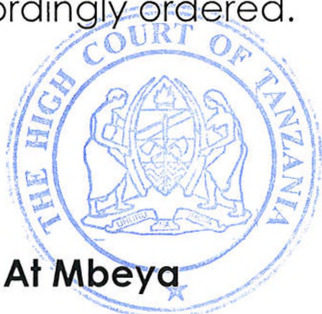
As intimated earlier, the Petitioner was aggrieved by the assessment done by the High Court, therefore, time for the deposit for costs would run after the decision of the Court of Appeal in either allowing the appeal or otherwise. More-so, be as it might have been, there would be no election petition hearing unless security for costs has been paid. Thus, as it was, even the hearing of the election petition had not been scheduled awaiting the fulfillment of the prerequisite conditions set by law i.e. the decision on the assessment which would tell as to whether the election petition would meet the requirement to qualify for its adjudication and eventually conferring rights.

That being said, I agree with the Petitioner that the preliminary objection was prematurely brought as time for depositing the assessed amount for costs started to run after the decision of the Court of Appeal. Accordingly, I overrule the objection and the argument that the Petition should firstly concede to the preliminary objection.

Coming to the issue of costs, it goes without say that all respondents have exerted their time and resources in arguing the matter before the court as presented by the Petitioner. Now that he wishes to withdraw the same, paying for costs is inevitable.

That being said, the prayer for withdrawal is granted. The Petitioner shall pay the costs.

Accordingly ordered.



06.10.2021

A handwritten signature in blue ink, appearing to read "R. A Ebrahim".

R. A Ebrahim

JUDGE

Date: 06.10.2021.

Coram: Hon. Z.D. Laizer – Ag-DR.

Petitioner: Absent.

For the Petitioner: Mr. Kelvin Kuboja (advocate).

1st Respondent:

For the 1st Respondent: Ms. Caroline Mseja (advocate).

2nd Respondent: Mr. Peter Salama

For the 2nd Respondent:

3rd Respondent:

For the 3rd Respondent: Ms. Caroline Mseja H/B for Mr. Tibaijuka.

B/C: Patrick Nundwe.

Court: Ruling delivered in the presence of Ms. Caroline (advocate) for 1st Respondent Mr. Peter Salama, 2nd Respondent and Mr. Kelvin Kuboja, advocate for Petitioner.



Sgd: Z.D. Laizer

Ag- Deputy Registrar

06/10/2021