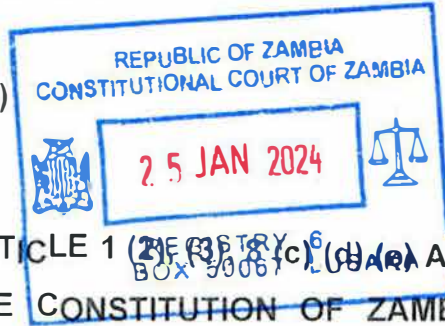


IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CONSTITUTIONAL JURISDICTION)

2023/CCZ/A002



IN THE MATTER OF:

ARTICLE 1 (2) (b) (i) (c) (d) (e) AND 9 (1) (b) OF
THE CONSTITUTION OF ZAMBIA, CHAPTER
ONE OF THE LAWS OF ZAMBIA

IN THE MATTER OF:

ARTICLE 73(1) AND 70(1) OF THE
CONSTITUTION OF ZAMBIA, CHAPTER ONE OF
THE LAWS OF ZAMBIA AS READ TOGETHER
WITH SECTION 96 (1) (a) (c) (i) AND (2) OF THE
ELECTORAL PROCESS ACT No. 35 of 2016

IN THE MATTER OF

ARTICLE 45 (1), (a), 2 (a) (c) (e) AS READ
TOGETHER WITH ARTICLE 52 (4) OF THE
CONSTITUTION OF ZAMBIA, CHAPTER ONE OF
THE LAWS OF ZAMBIA

IN THE MATTER OF

SECTION 97 (1), 2 (b) AND (4) AS READ
TOGETHER WITH SECTION 83 (2) AND 99 (a) OF
THE ELECTORAL PROCESS ACT NO. 35 OF
2016

IN THE MATTER OF

SECTION 98 (a) (b) OF THE ELECTORAL
PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF

SECTION 4 (1) AND (2) (a), (b) AND (c) OF THE
ELECTORAL COMMISSION ACT NO. 25 OF 2016

IN THE MATTER OF

THE NATIONAL ASSEMBLY BY - ELECTIONS
(KABUSHI CONSTITUENCY No. 36 AND
KWACHA CONSTITUENCY No. 22) (ELECTION
DATE AND TIME OF POLL) (NO. 3) ORDER,
2022.

IN THE MATTER OF THE ELECTORAL (CODE OF CONDUCT) REGULATIONS 2011 STATUTORY INSTRUMENT NO. 52 OF 2011

IN THE MATTER OF THE SCHEDULE TO THE ELECTORAL PROCESS ACT NO. 35 OF 2016.

IN THE MATTER OF THE KABUSHI CONSTITUENCY BY ELECTION HELD ON THE 21ST DAY OF OCTOBER 2022.

BETWEEN:

BOWMAN CHILOSHA LUSAMBO

APPELLANT

AND

BERNARD KANENGO

1st RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2nd RESPONDENT

THE ATTORNEY GENERAL

3rd RESPONDENT

Coram: Shilimi, DPC, Chisunka, Mwandenga, Kawimbe and Mulife, JJC on 11th October 2023 and 25th January 2024

For the Appellant: Mr. M. Zulu, Mr. J. Zimba and Mr. E. Phiri of Messrs Makebi Zulu Associates

For the 1st Respondent: Mr. C. Maggubwi and Mr. Chilekwa Maggubwi of Messrs Maggubwi & Associates

For the 2nd Respondent: Ms. T. Phiri and Mr. M. Bwalya – In House Counsel

For the 3rd Respondent: Mr. M. Muchende SC-Solicitor General; Mr. C. Mulonda – Principal State Advocate and Mr. N. Mwiya Principal State Advocate

JUDGMENT

Kawimbe JC., delivered the Judgment of the Court.

Cases Referred To:

1. Gilbert Hamalambo v Zambia National Building Society, SCZ, Appeal No. 64/2013
 2. George Muhali Imbwae v Attorney General and Electoral Commission of Zambia, CCZ Selected Judgment No. 12 of 2018
 3. Isaac Mwanza v Electoral Commission of Zambia and Attorney General 2020/CCZ/008
 4. Mlewa v Wightman (1995-1997) ZR 11
 5. Institute of Law, Policy Research and Human Rights and Two others v Electoral Commission of Zambia, Attorney General and Three Interested Parties, 2022/CCZ/0029
 6. Benard Kanengo v Electoral Commission of Zambia and Attorney General 2022/CCZ/0024
 7. Giles Chomba Yamba Yamba v Kapembwa Simbao, Electoral Commission of Zambia and Others, CCZ, Selected Judgment No. 6 of 2018
 8. Governance Elections Advocacy Research Services Initiative Zambia Limited v The Attorney General and the Electoral Commission of Zambia 2022/CCZ/0020
 9. Peter Chazya Sinkamba, Issac Mwanza v Electoral Commission of Zambia 2022/CCZ/0023
 10. Munir Zulu v Gertrude Pilila Mwanza 2021/CCZ/009
 11. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba, The Attorney General and others SCZ Judgment No. 14 of 1998
 12. Indira Nehru Gandhi (Smt.) v Raj Narain & Anr on 24 June 1975
 13. Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba & Attorney General, CCZ Selected Judgment No. 51 of 2018
 14. Patrick Banda v Attorney General, CCZ, 2022/CCZ/A005
 15. Bizwayo Nkunika v Newton Nyirenda & Electoral Commission of Zambia 2019/CCZ/005
 16. Margaret Mwanakatwe v Charlotte Scott, CCZ, Appeal No. 14 of 2016
 17. Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu, Inonge Wina and Electoral Commission of Zambia 2016/CCZ/003
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18. Sibongile Mwamba v Kelvin M. Sampa and the Electoral Commission of Zambia CCZ, Selected Judgment No. 57 of 2017
19. Allen Banda v Bornwell Matanda & Electoral Commission of Zambia 2021/CCZ/A0025
20. Governance Elections Advocacy Research Services Initiative Zambia Limited v The Attorney General & The Electoral Commission of Zambia 2022/CCZ/0020
21. Zacharia Okoth Obada v Edward Akong'o Oyugi and 2 Others eKLR (2014)

Legislation Referred To:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by The Constitution of Zambia (Amendment) Act No. 2 of 2016.
2. The Electoral Process Act, No. 35 of 2016
3. Regulation 18(7) of the Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016
4. The Rules of the Supreme Court 1999 Edition

Other Works Referred To:

1. African Charter on Human People's Rights adopted by the Organisation of African Unity (now African Union) 1st June, 1981
2. United Nations General Assembly International Covenant on Civil and Political Rights 16th December, 1966
3. General Comment No. 25 of the United Nations Human Rights Committee on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (1) (2) adopted at the 1510th Meeting of the Committee at its 57th Session, 12th July, 1996

[1] INTRODUCTION AND FACTUAL BACKGROUND

- [1.1]** This case raises an important question on the legal principles of vitiating an election, which is alleged to have been conducted in
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contravention of constitutional principles and the electoral laws. It arises from the Appellant's grievance which is traceable to the August 2021 General Election, when he was elected and declared as the Member of Parliament for Kabushi Constituency in Copperbelt Province. The outcome aggrieved the 1st Respondent who petitioned the results of the election before the Ndola High Court, and it subsequently nullified the Appellant's election. The Appellant was dissatisfied with the outcome and appealed the decision before this Court under cause no. 2021/CCZ/A0019. The nullification decision of the High Court was upheld by this Court. The Court did not make any pronouncement on whether the Appellant was disqualified from contesting future elections in Kabushi Constituency.

- [1.2] After our judgment, the 2nd Respondent set new dates for the Kabushi Constituency by-election. The date for filing nominations was announced as 25th August, 2022 while 15th September, 2022 was declared as the election date. On 21st August, 2022 the Patriotic Front Party adopted the Appellant as its parliamentary candidate for the Kabushi Constituency by-election. On 24th August, 2022, the 2nd Respondent issued a statement that it would not accept nominations from candidates whose seats had been nullified by the courts and thereby causing vacancies in the National Assembly. On 25th August, 2022, the Appellant and other candidates filed their nomination
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papers before the 2nd Respondent's agents. The Appellant's nomination papers were rejected on the ground that he was ineligible to participate in the by-election because the court had nullified his earlier election victory.

[1.3] Disgruntled by the 2nd Respondent's action, the Appellant challenged the decision through a petition that was before the High Court in cause No. 2022/HP/1327. He alleged that the 2nd Respondent's action contravened section 98(b) of the Electoral Process Act (EPA) and asserted that neither the High Court nor Constitutional Court judgments disqualified him from participating in the by-election. The Appellant also applied for a stay of the election of 15th September 2022, before the High Court and the prayer was granted.

[1.4] While the stay order was still in operation, one of the candidates, an independent contestant, Mr. Alfred Joseph Yombwe resigned from the election. He later rescinded his decision on 13th September, 2022. According to the Appellant, the 2nd Respondent should have cancelled the nominations of the by-election and called for a fresh process. Before the High Court rendered its decision in the nomination petition, the 3rd Respondent applied for a stay of delivery of judgment before the Court of Appeal. The action was motivated by

the fact that this Court had not determined whether the High Court had jurisdiction to hear the Appellant's nomination petition.

[1.5] On 22nd September 2022, the Court of Appeal granted the 3rd Respondent a stay of the High Court proceedings. Later, on 20th October 2022, we delivered judgment in which we determined that the High Court ran out of jurisdiction to hear the Appellant's nomination petition. In the end, the High Court never delivered a judgment in the Appellant's nomination petition. Subsequently, the 2nd Respondent on 11th October, 2022 announced 21st October, 2022 as the new date for the by-election in Kabushi Constituency. The election was held on that day.

[1.6] The 1st Respondent emerged as winner in the by-election and was declared as the duly elected Member of Parliament for Kabushi Constituency. Dissatisfied with the outcome, the Appellant petitioned the High Court challenging the conduct of the by-election. He claimed that the election was not held in conformity with the law and that he was prevented from participating in the election. In the Appellant's view, the by-election was illegally conducted because there was a stay order that had been granted by the High Court on 13th September, 2023, which was still in force. Further, that the 2nd

Respondent had no authority to call for fresh nominations after the resignation from the election by the independent candidate.

[1.7] The Appellant's petition was heard by Lady Justice Ruth Chibbabbuka of the High Court. She dismissed the petition and aggrieved by the outcome, the Appellant filed this appeal before us.

[2] GROUND OF APPEAL

[2.1] These are stated here below: -

- i) **The lower court erred in both law and fact when it held that the Petitioner's petition failed to adduce any evidence of non-compliance by the 2nd Respondent with the provisions of the Electoral Process Act No. 35 of 2016;**
- ii) **The lower court erred in both law and fact when it held that the election petition was an abuse of court process as the same was used as an appeal mechanism of cause no. 2022/HP/1327;**
- iii) **The lower court erred in both law and fact when it held that the grievances arising out of the rejection of the nomination have already been litigated under cause no. 2022/HP/1327;**
- iv) **The lower court erred in both law and fact when it held that following the decision of Bernard Kanengo v Attorney**

General, the stay or suspension of elections by the High Court was automatically discharged;

- v) The lower court erred both in law and fact when it failed to render the said election null and void following the prevention of the Appellant from contesting the 21st October 2022 by-election by the 2nd respondent.

[3] APPELLANT'S CASE

- [3.1] On behalf of the Appellant, learned counsel filed heads of argument into Court on 10th May, 2023.

Ground 1

- [3.2] Counsel begun his submissions by averring that the people of Kabushi Constituency shunned the by-election of 21st October 2022. This is because their preferred candidate, namely the Appellant, was prevented by the 2nd Respondent from participating in the election. According to counsel the results confirmed his assertion as shown here below: -

Kanengo Bernard	UPND	6, 553
Kalasa Richard	Independent	4, 607
Telela Osias	LM	226
Yombwe Alfred	Independent	81

[3.3] In counsel's view, the representation of voters was way below the number of registered voters in the constituency and the lower Court should have paid attention to this fact including the cogent evidence of the Appellant's witnesses which demonstrated the voter apathy. Hence, the election conducted by the 2nd Respondent was not in conformity with the EPA and particularly section 4 of the Act requiring elections to be free and fair.

Ground 2

[3.4] Under this head, counsel submitted that the lower court erred when it found that the Appellant's case amounted to a multiplicity of actions and an abuse of court process. To support the assertion, our attention was drawn to the case of **Gilbert H. Hamalambo v Zambia National Building Society**¹ where the Supreme Court stated that:

Multiplicity of actions refers to commencement of more than one action on the same facts or transaction. Piece meal litigation is the same as multiplicity of actions; it is litigation that is split and instituted in chapters

[3.5] Counsel next argued that, there were no pending proceedings involving the parties herein before any court. Further, that what was sought under cause no. 2022/HP/1327 was different from this

case. In addition, there was no evidence that the same subject matter involving the same parties had been brought under this appeal seeking the same reliefs as in the Appellant's nomination petition. Thus, the lower court made perverse findings on the contention..

Ground 3

[3.6] Counsel further submitted that no court had dealt with the Appellant's grievances on being prevented from participating in the Kabushi Constituency by-election. This issue lay at the heart of the appeal and before this Court, therefore, no relief was being sought over the Appellant's failed nomination case because this Court had no jurisdiction.

[3.7] For this position, counsel cited the case of **George Muhali Imbwae v Attorney General and Electoral Commission of Zambia**², where we struck out *Order IX Rule 4 of the Constitutional Court Rules* for being unconstitutional. We also held in that case that no appeals in nomination cases can lie from the decision of the High Court as this is contrary to the provisions of the Constitution.

[3.8] Counsel went on to submit that a challenge of an election by way of petition could only be initiated post-election. Thus, the issue whether fresh nominations ought to have been called for or not,

only arose post-election. As such, the Appellant's cause of action only arose after the by-election held on 21st October, 2022.

Ground 4

[3.9] On the stay of elections, counsel submitted that the order granted by the High Court in cause no. 2022/HP/1327 was still in force because it had not been reversed, vacated or terminated. It was predicated by the determination of the nomination petition as what was stayed was the holding of any by-election in Kabushi Constituency and not nominations. Going against the stay order would prejudice the Appellant's position. However, in total defiance of the order the 2nd Respondent purportedly conducted an illegal by-election in the constituency. Based on the submission, the Court was urged to vitiate the election result.

Ground 5

[3.10] Under this head, counsel submitted that the 2nd Respondent's agents did not follow the mandatory provisions of Article 52(6) of the Constitution by preventing the Appellant from recontesting the Kabushi Constituency seat. In addition, the 2nd Respondent's failed to cancel the by-election and call for fresh nominations after the independent candidate resigned from the election. Regarding our decision in the **Isaac Mwanza v Electoral Commission of**

Zambia and Attorney General³ case, on the resignation of candidates from the elections; counsel argued that it did not affect the Appellant's case. This is because it was made post the event herein and after the Appellant's cause of action accrued.

[3.11] Counsel, however, conceded that this Court categorically addressed the issues of resignation and rescission of candidatures in elections. Further, that the Court settled the law in Article 52(6) of the Constitution that it does not provide for rescission of resignation by a candidate in an election.

[3.12] Accordingly, the 2nd Respondent's failure in calling for fresh nominations despite being aware of this Court's decision, amounted to breach of the EPA. Additionally, by deliberately preventing the Appellant from participating in the by-election, the results obtained therein were invalid because of the illegalities committed by the 2nd Respondent.

[3.13] To reinforce the submission, counsel referred us to case of **Mlewa v Wightman**⁴ where the Supreme Court citing with approval the cases of *Jere v Ngoma (1969)* and *Limbo v Mutuwa (1974)* held that it was illegal to prevent a candidate from contesting in an election. In this regard, the Supreme Court stated that:

Where evidence shows that a candidate for election to Parliament was prevented by the misconduct of other persons, from lodging his nomination papers with the returning officer, such misconduct essentially makes the election in the particular constituency void. The election was nullified under paragraph (a) because the petitioner had been prevented by a crowd of people, nothing to do with the respondent, from lodging his nomination paper.

[3.14] We were urged by counsel to uphold the Supreme Court's decision on prevention of candidates and to consequently vitiate the by-election of 21st October, 2022 for being illegal and failing to comply with the law. Further that, the laxity exhibited by the 2nd and 3rd Respondents in failing to comply with the High Court orders and 1st Respondent's willingness to participate in a questionable election, affirmed the position that the by-election was illegal. In concluding, counsel prayed to Court to void the elections with costs to the Appellant.

[4] 1st RESPONDENT'S CASE

[4.1] On behalf of the 1st Respondent, learned counsel filed opposing heads of argument into Court on 3rd October, 2023.

[4.2] He began by attacking ground 5 of appeal contending that Article 52 of the Constitution was self-prescriptive of the remedy that was available to a candidate or indeed any person who was aggrieved

by the results of a nomination process. Counsel then singled out Article 52 (4) of the Constitution, as the remedy, which the Appellant ought to have pursued over his nomination challenge before the High Court.

[4.3] Counsel added that the law did not provide for rejection of a nomination as a basis for challenging an election under sections 97(2) b and (4) of the EPA as submitted by counsel for the Appellant. To his credit, the Appellant invoked the remedy under Article 52(4) of the Constitution but was unsuccessful because his challenge became statute barred. Hence, he had no right to extend his grievances on nomination to section 97 (2) b and (4) of the EPA, through his failed election petition.

[4.4] In support of the argument, counsel cited the case of **Institute of Law, Policy Research and Human Rights and Two Others v Electoral Commission of Zambia, Attorney General and Three Interested Parties**,⁵ where we stated that:

In the petition, the Petitioners alleged that Article 52(6) of the Constitution of Zambia had been violated by the Electoral Commission of Zambia (hereinafter the 1st Respondent) by not cancelling the scheduled by-elections and holding fresh nominations following the resignation of two independent candidates from the scheduled by-election. We cannot fault the 2nd

Respondent for failing to cancel the by-election in Kabushi and Kwacha Constituencies.

[4.5] By our holding, counsel argued that there was nothing illegal about the by-elections and in essence, the Appellant had no case. Counsel next adverted to the case of **Benard Kanengo v Electoral Commission of Zambia and Attorney General**⁶ where we stated that:

... the High Court has jurisdiction which jurisdiction must be exercised within 21 days' time frame given by the Constitution under Article 52(4). In sum to answer the two questions, the 21 days in Article 52 (4) cannot be stopped or enlarged by any Court or authority.

[4.6] On the Appellant's submission that the resignation of the independent candidate should have caused fresh nominations to be called for the by-election; counsel argued that the matter had been overtaken by events. This was for the reason that this Court had given guidance in the cases of **Institute of Law, Policy Research and Human Rights**⁵ and **Benard Kanengo**⁶ on the issues of resignation or recission by candidates in an election. In any event, the Appellant's arguments on his exclusion from the election was baseless because it was grounded on his resuscitated

issue about his nomination in a matter that had become *res judicata*.

[4.7] Referring to the case of **Mlewa v Wightman**⁴, counsel argued that the facts and circumstances therein were distinguishable from the current one. Additionally, that the authorities were pre the 2016 electoral law regime where the grounds for annulling or avoiding an election had changed. With the new law, section 97 (2) of the EPA had introduced new standards on the threshold for voiding elections and the **Mlewa case** was inconsequential.

[4.8] That position notwithstanding, the 1st Respondent had nothing to do with the Appellant's alleged prevention in filing his nomination papers. This is because it was not done with his knowledge and consent, or approval or through his agents. The fact that the 2nd Respondent did not call for fresh nominations did not fall as a ground for voiding the by-election under section 97(2) of the EPA.

Ground 1

[4.9] Under this ground, counsel averred that the Appellant's allegations concerning the breach of the EPA were disclosed in the record of appeal. The allegations were however, debunked by the cases of **Benard Kanengo**⁶, **Institute of Law, Policy Research and Human Rights** and **Two Others**⁵. Thus, it could not be said that

the Appellant's alleged exclusion from the election affected the majority of voters in Kabushi Constituency by failing to select their preferred candidate.

[4.10] According to counsel, the lone evidence of PW3 on his vote, which would have gone to the Appellant in the by-election was of little value compared to the majority voters in the constituency. Counsel further argued that on a balance of probabilities, it would be illogical and fallible to conclude that the mood and decision of the members in Kabushi Constituency, who did not vote, depended on the evidence of the single witness.

[4.11] It was also his argument, considered with the pleadings and evidence, before the lower court, that the Appellant miserably failed to prove his claims against the 2nd Respondent.

[4.12] Counsel argued that it was not demonstrated at all that the 2nd Respondent flouted any provisions of law or procedures in the EPA, that it ought to have followed or adhered to. Instead, the Appellant tried to cross pollinate the 2nd Respondent's rejection of his nomination papers under Article 72(4) of the Constitution as constituting breach envisaged under section 97(2) and (4) of the EPA. This, in counsel's view, turned out to be a futile attempt.

Ground 2

[4.13] Under this ground, counsel averred that the Appellant's appeal oscillated around what he termed as prevention of an eligible candidate from participating in the by-election. He principally stated two factors to support his case namely; that is, the rejection of his nomination by the 2nd Respondent alleged and the latter's refusal to call for fresh nominations after an independent candidate resigned from the contest. In counsel's view, the allegations were baseless because the Appellant failed to prove them before the lower court. The ground, therefore, should not have graced the appeal.

[4.14] In any case, the Appellant had been pursuing cause no. 2022/HP/1327, where he asked the High Court to call for fresh elections. Consequently, the reliefs sought herein and before the High Court were not different and related to the same subject matter or facts involving the same parties before the different courts. In short, the Appellant's appeal was misconceived and he was guilty of abusing the process of court.

Ground 3

[4.15] Under this head, counsel argued that the Appellant deliberately failed to recognise that for one to participate in an election, the

nomination had to be successfully filed in. However, the Appellant's nomination was rejected but this did not amount to preventing him in participating in the election. His remedy was available in Article 52 (4) of the Constitution and he had full recourse under cause no. 2022/HP/1327, despite the fact that the High Court never delivered judgment because it ran out of time.

[4.16] Counsel contended that the Appellant failed to prove the alleged prevention committed by the 2nd Respondent. Fresh nominations were not called for after the independent candidate resigned and according to counsel, the argument was secondary because this Court decided the issue. In any case, Appellant's cause of action arose immediately after the 2nd Respondent announced the election date. Thus, it was up to him to challenge the issue of his nomination. Instead, the **Institute of Law, Policy Research and Human Rights and Two Others**⁵ rose to the challenge and this court settled the matter. It was averred that the Appellant who was privy to this case as an interested party therefore, had no right to resurrect spent arguments through the failed election petition and consequent appeal.

Ground 4

[4.17] Counsel submitted that there was no issue under this ground because our decision in the case of **Bernard Kanengo**⁶ was sound both in fact and law. The Appellant was therefore, precluded from arguing that after the proceedings under cause no. 2022/HP/1327 collapsed, the stay order granted by the High Court remained in force. According to counsel, the argument defied both factual and legal reasoning because it was utterly flawed to insinuate that orders granted for instance in a dismissed action could survive the aftermath. In short, after cause no. 2022/HP/1327 collapsed by effluxion of time, the stay order granted therein lapsed.

[4.18] Counsel concluded with a prayer to Court to dismiss the appeal.

[5] 2nd RESPONDENT'S CASE

[5.1] Learned counsel for the 2nd Respondent filed opposing heads of argument into Court on 3rd October, 2023.

Ground 1

[5.2] Counsel argued that the lower court was on firm ground when it held that the Appellant failed to adduce any evidence of non-compliance by the 2nd Respondent. Instead, the election was held in conformity with the law and on the basis of the record of appeal, the Appellant had failed to demonstrate the 2nd Respondent alleged

wrongdoing. It was further argued that in terms of section 97(2) (b) of the EPA the Appellant failed to meet the burden of proof threshold for voiding an election on **convincing clarity**. This was a requirement of the law and anything short could not be entertained by the court.

[5.3] Counsel averred that the ingredient of non-compliance of the law more importantly, hinged on the results of the election. For the proposition of the law, he cited the case of **Giles Chomba Yamba Yamba v Kapembwa Simbao, Electoral Commission of Zambia and Others**⁷, where we stated that:

It is unequivocal that section 97(2) (b) relates to non-compliance with the provisions of the law in the conduct of elections. It calls for the annulment of the elections in the event that there has been non-compliance with the principles laid down in the Electoral Process Act in as far as the conduct of elections is concerned.

[5.4] Counsel argued that the Appellant failed to demonstrate the non-compliance. In any case, the allegation that the Statutory Instrument issued by the 2nd Respondent for the by-election held on 21st October 2023 was illegal, had not been challenged before any court. Thus, it could not be raised in the present appeal. In addition, counsel dismissed the argument that the 2nd Respondent's failed to comply with the law for not calling fresh

elections after the resignation of Mr. Alfred Yombwe. According to counsel, the High Court had no jurisdiction to interpret the Constitution and was on firm ground when it dismissed the issue.

[5.5] Subsequently, our judgment in the case of **Governance Elections Advocacy Research Services Initiative Zambia Limited v The Attorney General and the Electoral Commission of Zambia**⁸ settled the issue when we held that:

Article 52 (6) does not apply to an independent candidate who files nomination papers for election as a Member of Parliament in accordance with Article 52(1) of the Constitution. We further determine that the framers of Article 52(6) had a political party in mind when they provided that where a candidate resigns after the close of nomination but before the election date, the ECZ must cancel the election and require the filing of fresh nominations by eligible candidates and thereafter hold elections within thirty days of the filing of the fresh nominations.

[5.6] According to counsel, there was no need for the Appellant to insist on the issue of resignation because it was decided by this Court, that a candidate resigning from an election did not apply to an independent candidate. Hence, the candidate who resigned in the Kabushi Constituency by-election being an independent candidate did not invite the provision of Article 52(6) of the Constitution.

Ground 2

[5.7] Counsel argued that the lower court was on firm ground when it held that the Appellant's petition amounted to an abuse of court process. Since counsel adopted similar argument as his learned friends on behalf of the 1st Respondent, his submission shall not be repeated (for the sake of brevity).

Ground 3

[5.8] It was contended that the lower court was on firm ground when it held that the grievances arising out of the Appellant's nomination had already been litigated under cause no. 2022/HP/1327. To support his position, counsel drew our attention to the case of **Peter Chazya Sinkamba, and Issac Mwanza v Electoral Commission of Zambia**⁹ where we declined to grant the declaration that the nominations held by the 2nd Respondent on 25th August 2022, in Kabushi and Kwacha constituencies were invalid as follows:

We further decline to grant the declaration that nominations held by the Respondent on 25th August, 2022 in the Kabushi and Kwacha constituencies are invalid and that any election held based on those nominations contravene the Constitution and are illegal and null and void as the High Court, which has jurisdiction to hear matters relating to a challenge of the nomination of candidates for

parliamentary elections has not made a pronouncement to that effect.

[5.9] Counsel next cited our decision in the cases of **George Muhali Imbuwa**², **Munir Zulu v Gertrude Pilila Mwanza**¹⁰ where we stated that the High Court was the only court that has jurisdiction to hear challenges regarding nominations under Article 52(4) of the Constitution. Hence, the Appellant could not be permitted to further challenge his failed nomination post the by-election in defiance of the constitutional provision.

Ground 4

[5.10] Counsel's short argument was that the lower court was on firm ground when it held that after the decision in the **Bernard Kanengo**⁶ case, the stay or suspension of election granted by the High Court had been effectively discharged.

Ground 5

[5.11] It was averred that the allegation that the 2nd Respondent prevented the Appellant from exercising his right to contest the Kabushi Constituency was highly misconceived. This is because the Appellant's nomination was merely rejected. In support of the argument, counsel cited **Regulation 18(7) of the Electoral Process (General) Regulations, Statutory Instrument No. 63 of**

2016, which prescribes the mode of challenging the Returning Officer's decision as follows:

The determination of the returning officer that a nomination is valid or invalid is final unless challenged through an election petition in accordance with Article 52 (4) of the Constitution.

[5.12] Counsel went on to assert that rejecting nomination papers was not the same as preventing the Appellant from participating in the by-election. For this reason, the Appellant challenged his rejected nomination in the High Court under cause no. 2022/HP/1327 but was unsuccessful. Counsel also argued that the case of **Mlewa v Wightman**⁴, was distinguishable because it concerned a candidate who was prevented from participating in an election by another candidate's supporters and not the 2nd Respondent.

[5.13] Furthermore, the **Mlewa**⁴ case was determined before Article 52(4) of the Constitution, section 97(2) of the EPA and Regulation 18 (7) of the Electoral Process (General) Regulations, were enacted. Thus, in this case, where the Appellant's nomination papers were processed but rejected in accordance with the electoral law, he could not allege prevention. In short, the Appellant's case against the 2nd Respondent was very weak.

[5.14] In concluding, counsel prayed to Court to dismiss the Appellant's appeal.

[6] 3rd RESPONDENT'S CASE

[6.1] Learned counsel for the 3rd Respondent filed opposing heads of argument into Court on 3rd October, 2023.

Ground 1

[6.2] Counsel begun by submitting that the issue for determination before us was whether we had jurisdiction to hear challenges relating to nomination petitions. A perusal of all the grounds of appeal revealed a common thread that the Appellant was in essence, challenging his nomination for the Kabushi Constituency by-election. This was dealt with in the **Peter Chazy Sinkamba**⁹ case.

[6.3] Counsel next cited Article 52(4) of the Constitution on the procedure and forum for challenging nominations. He thereafter argued that the Appellant had run out of time to challenge his failed nomination post the by-election. Additionally, there was evidence on the record of appeal showing that the Appellant had already challenged his failed nomination in the case of **Joseph Malanji and Bowman Lusambo v Electoral Commission of Zambia and**

Attorney General 2022/HP/1327. In this regard, the Court was invited to take judicial notice of the record.

[6.4] In supporting the decision of the lower court, counsel argued that the Appellant failed to prove that 2nd Respondent failed to comply with the EPA in the attacked by-election. The Returning Officer's rejection of the Appellant's nomination papers was done in accordance with Article 72(4) of the Constitution. As such, the key element of non-compliance, in relation to the EPA was not proved. Counsel added that only the EPA could be relied on in voiding elections. Therefore, the Appellants extrapolation of the rejected nomination under Article 72(4) of the Constitution could not be used as ground for breach of the law under the EPA.

[6.5] Counsel referred us to the record of appeal, where the High Court held on the strength of **Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba and Others**¹¹, that the Appellant had failed to prove his case to a fairly high degree of convincing clarity over the 2nd Respondent's disregard of the law.

Ground 2

[6.6] It was further argued that the Appellant's case amounted to an abuse of court process under **Order 19 Rule 19** of the **Rules of the Supreme Court, 1999 Edition (White Book)**. The lower court

properly found that the Appellant had abused court process by instituting an election petition on grounds of nomination. The abuse was compounded by the fact that post-election, the court had no jurisdiction to hear nomination challenges and any proceedings would be asking it to go beyond its scope.

Ground 3

[6.7] Under this head, counsel argued that the Appellant was in essence challenging his failed nomination for the by-election. This is why the lower court stated at page 76 of its judgment that:

This court is bound by the holding of the Superior Court in the above cited case and cannot add to or take away from what the Constitutional Court found in its interpretation of Article 52(6) of the Constitution. To that extent, I agree with counsel for the 2nd and 3rd Respondent's arguments that the grievances arising from the rejection have already been challenged and litigated under cause no. 2022/HP/1327 and cannot be determined under this petition.

[6.8] According to counsel, what the Appellant classified as prevention stemmed out of the rejection of his nomination papers. Thus, he could not erroneously seek to relitigate a matter that was *res judicata*.

Ground 4

[6.9] It was counsel's argument that the High Court order of stay or suspension of elections in the Kwacha and Kabushi Constituencies, respectively under cause no. 2022/HP/1327 ceased when the 2nd Respondent announced the 11th October, 2022 for the by-election. The High Court's jurisdiction ran out on 20th September, 2022, and this position was confirmed by this Court in the **Bernard Kanengo**⁶ case. As at 17th October, 2022, we pronounced that the nominations for the Kabushi Constituency seat held on 25th August, 2022 were valid and, in the circumstances, the Appellant could not rely on cause no. 2022/HP/1327.

[6.10] The action of the 2nd Respondent in issuing Statutory Instrument No. 64 of 2022, was therefore lawful and constitutional because there was no stay order in force. The Appellant's argument was thereby flawed in terms of Article 52(4) of the Constitution.

[6.11] In the alternative, counsel argued that the moment the Court of Appeal stayed the proceedings of the High Court, the stay or suspension of elections was nullified. Counsel cited the Indian Supreme Court case of **Indira Nehru Gandhi (Smt.) v Raj Narain & Anr**¹² where it was stated that:

By sheer force of the first limb of this court's stay order, the judgment and order of the High Court is nullified for the nonce i.e., till the appeal is disposed of.

[6.12] According to counsel, on 16th September, 2022, when a single Judge of the Court of Appeal stayed proceedings in the High Court under cause no. 2022/HP/1327, the order of the lower court was nullified.

Ground 5

[6.13] Counsel went on to argue that Article 52(6) of the Constitution provides for procedure to be adopted by the 2nd Respondent in the event that a candidate contesting in an election dies, resigns or indeed becomes disqualified. According to counsel, it was lucid from the wording of sub-Article (6) that the 2nd Respondent was mandated to cancel the elections and require the filing of fresh nominations by eligible candidates and elections within thirty days of the filing of fresh nominations.

[6.14] Hence, when the 2nd Respondent's agents rejected the Appellant's nomination, the action was not illegal because they had power to either accept or reject the nomination of a candidate according to **Article 52(2) of the Constitution** that:

52 (1) A candidate shall file that candidate's nomination paper to a returning officer, supported by an affidavit stating that the candidate is qualified for nomination as President, Member of Parliament or councillor, in the manner, on the day, and at the time and place set by the Electoral Commission by regulation.

(2) A returning officer shall, immediately on the filing of a nomination paper, in accordance with clause (1), duly reject the nomination paper if the candidate does not meet the qualifications or procedural requirements specified for election to that office.

[6.15] In consequence, the 2nd Respondent acted within its constitutional mandate, by rejecting the nomination of the Appellant. In any case, there was no court pronouncement on the effect of nullifying a Parliamentary seat vis a vis the qualification of a candidate in a subsequent election. Hence, the press statement barring candidates whose seats had been nullified could not be termed to be illegal or a prevention of the Appellant from participating in the election. Instead, the 2nd Respondent merely performed its constitutional mandate in accordance with Article 72(4) of the Constitution.

[6.16] In concluding, counsel prayed to Court to dismiss the appeal.

[7] APPELLANT'S REPLY TO THE RESPONDENT'S ARGUMENTS

[7.1] In reply to the Respondents' arguments, counsel for the Appellant affirmed his reliance on the submissions in the record of appeal. He maintained that the 2nd Respondent's action of preventing the Appellant, an eligible candidate from participating in the by-election was illegal. He urged the Court to deal with the 2nd Respondent's conduct decisively because it undermined the electoral system and process of the country. Counsel then dismissed the 1st Respondent's argument that the lone evidence of PW3 was insufficient to demonstrate that the majority voters were dissatisfied with the 2nd Respondent's actions against the Appellant. He asserted that the results of the by-election were self-evident and therefore, the court had a duty to void the illegal election.

[7.2] We were also implored to uphold the decisions in the **Mlewa** and **Ngoma** cases on prevention, not only because the law was flouted but because court orders were disregarded by the 2nd and 3rd Respondents. On the other hand, the 1st Respondent participated in an election that was illegal. In concluding, counsel reiterated that the elections held on 21st October, 2022 in Kabushi Constituency be voided for the reasons given above.

[8] HEARING

- [8.1]** The parties were all represented by their learned counsel at the hearing of the appeal on 11th October, 2023. Counsel relied on their rival arguments filed herein and reinforced their respective positions with oral submissions.
- [8.2]** Leading the Appellant's case, Mr. Zulu submitted that the lower court erred when it held that evidence of the 2nd Respondent's non-compliance of the law was not provided. In stating his case, counsel referred us to page 721 of the record of appeal showing the testimony of Mr. Bob Musenga (PW5), and later section 97(4) of the EPA, that the 2nd Respondent breached its duty to act in conformity with the law. According to counsel, the Appellant had a right to be nominated and to participate in the by-election. Additionally, that section 98(2) of EPA clothed him with *locus standi* as admitted by PW5 the 2nd Respondent's officer.
- [8.3]** Counsel further submitted that while the by-election may have been free, it was certainly not fair. He dismissed the 1st Respondent's assertion that the Appellant's election petition after the event was targeted at relitigating issues of nomination when section 98 of the EPA entitled him to an opportunity to present an election petition. Mr. Zulu averred that the **George Muhali**
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Imbuwa² case was instructive on nominations and this was not the issue before court. Rather, the Court as one of substantial justice, was being called on to nullify the Kabushi Constituency by-election not for convenience but because it was illegal. Anything short would amount to a diversion of what the Court had stated in a plethora of authorities.

[8.4] In the continuing submissions, Mr. Zimba averred that the lower Court's finding that the Appellant failed to provide evidence of the 2nd Respondent's non-compliance with the law was perverse. Counsel stated that the substance of the breach and non-compliance with the law had been demonstrated in the record of appeal. Hence, it was not the duty of the Court to substitute the evidence with that which was non-existent in arriving at its decision. We were urged to nullify the Kabushi Constituency by-election.

[8.5] Further, on behalf of the Appellant, Mr. Phiri referred us to the judgment of the lower court in the record of appeal. He averred that the court, among others, stated that the by-election in Kabushi Constituency was held in substantial conformity with the law. The statement in his view raised both eye brows because Statutory Instrument No. 64 of 2022 was not legal. A stay order had been in place when the 2nd Respondent issued the instrument. Hence, the

2nd Respondent misconducted itself by defying the court order and the result opened the by-election to nullification.

[8.6] On behalf of the 1st Respondent, Mr. C. Maggubwi strongly opposed the appeal because the Appellant's relief lay in the nomination dispute resolution mechanism under Article 52 of the Constitution and not the EPA. Thus, the Appellant's grievances had no basis because they all pertained to the filing of his nomination papers up to their rejection. On the other hand, Article 52 of the Constitution was self-prescriptive on how a discontented party could seek protection from the law in order to appear on the ballot. The Appellant in this case sought the protection but did not succeed. Accordingly, the by-election was held, was not illegal and the Appellant had no proper basis for clothing himself with the provisions of section 97(2) (b) and (4) of the EPA purporting to have a case before court.

[8.7] Counsel next argued that the by-election in casu was conducted in accordance with the EPA and not any other law. Thus, the Appellant could not cite prevention as a ground for voiding the by-election because his nomination papers were merely rejected. In short, his case did not meet the threshold set out in section 97(2)(b) of the EPA and the appeal was liable to be dismissed.

[8.8] On behalf of the 2nd Respondent, Ms Phiri reiterated that the lower court was on firm ground when it dismissed the Appellant's case. The Appellant failed to prove that the 2nd Respondent failed to comply with the law. Instead, the evidence on record showed that the by-election of 21st October, 2022 was held in conformity with the law.

[8.9] As far as the 2nd Respondent was concerned, for the election of 21st October, 2022, to be nullified, the Appellant ought to have proved the non-compliance on a threshold of a fairly high degree of clarity. Further, that the results of the election were affected according to the cases of **Giles Yambayamba**⁷ and **Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba & Attorney General**¹³. Counsel also referred to our recent decision in the case of **Patrick Banda v Attorney General**¹⁴, where we reiterated the threshold to be met before an election can be nullified. We also stated in that case that an election could not be voided except by the way of a petitioner moving the Court and satisfying the threshold prescribed in section 97 of the EPA.

[8.10] On behalf of the 2nd Respondent, Mr. Bwalya further submitted that under **Regulation 18 Sub Regulation 17 of the Electoral**

Process General Regulations, the determination of an electoral officer on nomination was final unless it was challenged under Article 52 of the Constitution. He cited the case of **Bizwayo Nkunika v Newton Nyirenda & Electoral Commission of Zambia**¹⁵ where this Court said on the 2nd Respondent's mandate in relation to Article 52 of the Constitution, that it can accept or reject nominations based on qualification. According to Mr. Bwalya, the Appellant's submission that the 2nd Respondent did not conduct the election in conformity with the law was incorrect. In any case, he submitted that the Appellant failed to show the Court the law that the 2nd Respondent had breached. In concluding, counsel reiterated the 2nd Respondent's prayer that the appeal be dismissed.

[8.11] On behalf of the 3rd Respondent, Mr. Muchende, SC, the Solicitor-General submitted that the EPA governed the vitiation of elections. Section 97(2) of the EPA was very clear on the factors a court was required to consider in sanctioning such declaration. He cited the case of **Margaret Mwanakatwe v Charlotte Scott**¹⁶ where the provision was addressed.

[8.12] Mr. Muchende, SC, then averred that courts were reluctant to interfere with election results because it was not enough to allege

misconduct. The actual ingredients or elements of misconduct had to be proved, such as in this case, section 97(2)(b) of the EPA. Hence, the Appellant who was deliberately oblivious of the nonchalant requirement proving non-compliance as far as the election results were affected could not rely on the provision.

[8.13] It was further argued that the framers of the EPA slotted in section 97(4) deliberately to show that an election could not be declared void by reason of any act or omission. In this case, what was being challenged was not only in substantial compliance with the Act, but more importantly, there was no evidence presented by the Appellant showing that the results of the by-election were affected. According to counsel, the gravamen of section 98(b) of the EPA spoke to who could file a petition and once filed, the provision of section 97 of the EPA became operational through an election petition. In the Solicitor General's view, a nomination challenge could only be brought under Article 52(4) of the Constitution and not under section 97 of the EPA. Thus, the Appellant's case had been misconceived.

[8.14] On the doctrine of constitutional supremacy provided in Article 1 of the Constitution and on nomination petitions under Article 52(4) of the Constitution, the Solicitor General, contended that an

interpretation of section 98(2)(b) of the EPA to mean that there is another window outside Article 52(4) of the Constitution for nomination challenge would render section 98(2)(b) of the EPA null and void. As such, there being no absurdity in Article 52 of the Constitution, it was clear that the Appellant could only invoke that provision. Hence, once the challenge period lapsed no window was open to the Appellant for a remedy. To fortify his argument on time limits, the Solicitor General cited the case of **Hakaide Hichilema and Another v Edgar Chagwa Lungu and Electoral Commission of Zambia**¹⁷.

[8.15] In further supporting the 3rd Respondent's case, Mr. Mulonda reiterated that section 97(2) of the EPA had been complied with. Mr. Mwiya added that the Appellant's failure in adducing evidence of non-compliance rendered his appeal unmeritorious.

[8.16] In reply to the Respondents' arguments, Mr. Zulu averred that from the record of appeal, and through the evidence of PW5, the 2nd Respondent admitted that the Appellant was treated unfairly in an election that was not conducted in substantial conformity with the law. The breach of the law was as espoused in Article 70 of the Constitution and thereby not only limited to the EPA. Counsel cited Article 45 of the Constitution on the rights of citizens and adult

suffrage. Further, he cited section 3 of the EPA as repeating what is contained in Article 70 of the Constitution. He then contended that an election, which was in breach of the electoral process could not be said to be credible because a qualified person was stopped from participating.

[8.17] Counsel also argued that a breach of the Constitution did not require evidence backed by results. There was evidence through PW3 in the lower court that he clearly wanted the Appellant to continue as his Member of Parliament in Kabushi Constituency. According to counsel, it was inconceivable that the Appellant would be required to bring all the witnesses who preferred his election in the constituency to prove his case. In any case, the 2nd Respondent's Acting Chief Electoral Officer, Mr. Musenga (PW5) independently provided further evidence that the 2nd Respondent failed to comply with the law in the assailed by-election. On lapse of time, counsel contended that the **Hakainde Hichilema**¹⁷ case was distinguishable from the one in casu because the law allowed an aggrieved person to file a petition under Section 98 of the EPA. In any event, the issues raised by the Appellant about the conduct of the by-election only arose post election. Therefore, being a person aggrieved by the election, section 98 of the EPA entitled the Appellant to pursue remedy.

[8.18] Counsel urged the Court not to turn a blind eye to the 2nd Respondent's actions because it failed to abide with section 3 of the EPA. The only recourse was for the election to be nullified not for convenience but for purposes of protecting the Constitution, ensuring credible and transparent elections, in which the rights of citizens were protected and not threatened by the State and its agents.

[8.19] Finally, on behalf of the Appellant, Mr. Zimba submitted that the **Bizwayo Nkunika**¹⁵ case was distinguishable from the present appeal. Further, that in the **Hakaide Hichilema**¹⁷ case, the Court exercised original and final jurisdiction unlike the matter before us, which came by way of appeal. Counsel argued that the breach of the Constitution and sacrosanct rights did not fall under section 97(4) of the EPA. Therefore, the argument that election agents are insulated from unfairness was not covered by any law.

[9] ANALYSIS AND DETERMINATION

[9.1] We have given due consideration to the appeal and rival submissions of learned counsel for the parties, made in support and rebuttal of the issues raised therein. From the outset, we state that our jurisdiction is set out in Article 128 of the Constitution and relevant to this appeal, sub-Article (1) (d) provides that:

(1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear: -

(d) appeals relating to the election of Members of Parliament and councillors;

[9.2] In our view, there are two major issues that fall for determination, in the disposal of this appeal namely: -

- i) **Whether the 2nd Respondent's rejection of the Appellant's nomination papers for the Kabushi Constituency by-election, breached the Constitution and electoral laws on holding fair elections?**
- ii) **Whether in the circumstances of this case, this Court should vitiate the by-election, which was held on 21st October, 2022?**

[9.3] Before we delve into the substantive issues in this appeal, we wish to state that an electoral process is multilayered and comprises different stages. There are broadly broken down into three, namely the pre-voting stage, election and post voting stages. The pre-voting stage includes but is not limited to the delimitation exercise, voter registration, keeping of voters registers, prescribing the procedures for nominations for elections and challenges, campaign activities, the role of presiding officers.

- [9.4] The election stage involves the actual conduct and management/supervision of an election. This includes the opening of polling stations, procedures and management of polling stations, the process of voting, etc.
- [9.5] The post voting election stage breathes life into the role of an election court after the fact of an election. This is one of the means through which, the 2nd Respondent's adherence to electoral laws and the integrity of an election may be assessed. The Court essentially asks if the manner in which, elections were conducted conformed with the electoral laws to ensure that the outcome represents the will of the majority of voters. The election court upon assessment may vitiate election outcomes, which result from maladministration of election laws and procedures.
- [9.6] In our electoral laws, it is not envisaged that the procedures available to parties for ventilating their grievances during the election cycle (stages) are meant to fall under one process. In other words, the manner in which nomination, election or post-election challenges may be assessed by the Courts depends on the stage of the election cycle. Hence, the remedies available to the parties in the different stages will materially be different.
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[10] *Constitutional and Statutory framework on Elections.*

[10.1] The law on the electoral systems and process of our country is set out in **Part V of the Constitution** and the **Electoral Process Act**. The Articles in Part V, of the Constitution guarantee various political rights, beginning with Article 45, which provides:

45 (1) The electoral systems provided for in Article 47 of the election of President, Member of Parliament or councillor shall ensure-

- (a) that citizens are free to exercise their political rights;
- (b) universal adult suffrage based on the equality of a vote;
- (c) fair representation of the various interest groups in society; and
- (d) gender equity in the National Assembly or council.

(2) The electoral process and system of administering elections shall ensure-

- (a) that elections are free and fair;
 - (b) that elections are free from violence, intimidation and corruption;
 - (c) independence, accountability, efficiency and transparency of the electoral process;
 - (d) a simple and practical system of voting and tabulating votes; and
-

(e) timely resolution of electoral disputes.

[10.2] The principles of free and fair elections are further elaborated in section 3 of the EPA, which provides inter alia that:

3. Subject to the Constitution, the principles applied in the electoral system and process shall ensure the following:

(a) equal and universal suffrage;

(b) no discrimination based on gender or disability when providing electoral services;

(c) transparent and credible electoral process.

[10.3] Stated differently, Article 45 of the Constitution and section 3 of the EPA place citizens at the heart of polity by expressly providing that they hold the power to select their leaders. They may also participate in elections either as candidates or through the selection of their preferred leaders. Elections for the National Assembly are based on the principle of first-past-the-post, elaborated in **Article 47 (2) of the Constitution** quoting the relevant Sub-Article as follows:

...(2) Elections to the National Assembly shall be conducted under a first-past-the-post electoral system in accordance with Article 68...

[11.] *International Standards on Political Participation*

[11.1] It must be recognised that the foundational principles of Articles 45 and 47 of the Constitution on the right to participate in the governance of one's country are equally recognized in various international instruments. For instance, **Article 13** of the **African Charter on Human and Peoples Rights (ACHPR)** adopted by the Organisation of African Unity (now African Union) on 1st June, 1981 provides that:

Every citizen has a right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.

[11.2] **Article 25** of the **International Covenant on Civil and Political Rights 1966 (ICCPR)** provides that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
 - (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
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(c) To have access, on general terms of equality, to public service
in his country

[11.3] In elaborating what is entailed in Article 25 of the ICCPR, the Human Rights Committee (HRC) which is the treaty monitoring body of the ICCPR in its **General Comment No. 25 on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service**, adopted at its 1510th meeting on 12th July 1996, 57th Session, (1996) (1) (2), explains *inter alia* that:

Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service... Whatever form of Constitution or Government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects... Article 25 lies at the core of democratic Government based on the consent of the people and in conformity with the principles of the Covenant... The conduct of public affairs, referred to is a broad concept, which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. Participation through freely chosen representatives is exercised through voting processes which must be established by laws... The effective implementation of the right and the opportunity to stand for elective

office ensures that persons entitled to vote have a free choice of candidates.

[12] *Application of International Standards to Zambian context*

[12.1] The State of Zambia being a party to the ICCPR and ACHPR is enjoined to promote democratic principles. So far as has been established, it does this through Part V of the Constitution, the Electoral Process Act and other electoral Regulations. Bearing in mind that the Constitution is the supreme law of the land, this Court has a duty under the national values and principles contained in Article 8 of the Constitution; including but not limited to democracy and constitutionalism under Article 8 (c), to interpret and apply the principles stated in the Constitution, on all persons. This should be done in a manner that promotes its purposes, values and principles in advancing the rule of law and good governance. Additionally, under Article 267 of the Constitution, this Court has a duty to interpret the Constitution in accordance with the Bill of Rights and in a manner that permits the development of the law.

[13] *The Conduct and Supervision of Elections in Zambia.*

[13.1] The responsibility to conduct and supervise general elections in Zambia reposes in the 2nd Respondent, the body established under Article 229 of the Constitution. In the exercise of its powers and

performance of its functions, the 2nd Respondent is not under the direction or control of any person or authority. The conduct and supervision of elections is done under the law, that is the Constitution, EPA and other electoral Regulations such as the Electoral Code of Conduct and attendant Regulations. Suffice to state that the EPA deals comprehensively with the conduct of elections and responsibilities of electoral officers.

[14] *Consideration of Grounds of Appeal*

[14.1] Having set out the law on elections, we shall now proceed to determine the grounds of appeal raised herein. Grounds 1 and 5 which are interlinked will be dealt with at the same time. Thereafter, we shall deal with grounds 4, 3 and lastly ground 2.

[14.2] *Grounds 1 and 5*

[14.2.1] In our view, there is no internationally accepted definition of the term "free and fair elections". What may be assessed in those terms is based on a value judgment. When an election is not free and fair, the political rights of citizens are likely to be materially infringed. The consideration therefore, is what lies at the heart of the Appellant's case, and it is *whether the Kabushi Constituency by-election suffered from defects that would render it not to be fair so as to be vitiated?*

[14.2.2] In analysing this appeal, we will fall back on the position that the Appellant is aggrieved by the manner in which, the 2nd Respondent treated his nomination papers for the by-election. In essence the 2nd Respondent's impugned infraction occurred at the pre-election stage when his nomination papers were rejected by the Returning Officer. The Appellant invoked the provision of Article 52 (4) of the Constitution, and to his credit, instituted proceedings before the High Court in Cause no. 2022/HP/1327. He diligently followed the process, however, the matter was not heard and determined on the merits because the High Court ran out of time.

[14.2.3] In our decision in the **Bernard Kanengo** case⁶, we indeed confirmed the position that the High Court is the only Court empowered to hear nomination challenges. However, as far as the Appellant's nomination petition was concerned, it ran out of time. As such, it had no discretion to enlarge time outside the prescribed case hearing period of 21 days.

[14.2.4] Notwithstanding, the matters referred to in paragraphs 14.2.2 and 14.2.3, the Appellant argues in this appeal that the challenges he faced in his nomination case are not in issue. What we should focus on is how he was prevented by the 2nd

Respondent from participating in the assailed by-election. The consequences were dire because the impugned action interfered with his political rights and thereby deprived him an opportunity to hold a public office. More importantly, the Appellant contended that his exclusion rendered the election illegal and is asking us to vitiate the Kabushi by-election.

[14.2.5] We find it necessary to refer to **Part IX of the EPA** which is specifically dedicated to the dispute resolution mechanism of election disputes for Parliamentary elections. It specifically provides that these may be pursued through election petitions. In particular, **Section 97 of the EPA** states the grounds upon, which an election can be vitiated or annulled and the threshold which a petitioner is required to meet in proving a case against a respondent. In our recent decision in **Patrick Banda**¹⁴, we reiterated the proposition of the law that an election petition is not tenable without recourse to section 97 of the EPA. Accordingly, a petitioner who comes to court in the appearance of an election petition must do so under the provisions of **Part IX of the EPA**. In addition, a petitioner bears the burden of proving his/her case against a respondent on the provided threshold contained in section 97 of the Act.

[14.2.6] On vitiating an election, **section 97** of the **EPA** states that:

97 (1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall not be questioned except by an election petition presented under this Part.

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or tribunal, as the case may be, that –

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid

not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or

(c) the candidate was at the time of the election a person not qualified or a person disqualified for election.

(4) An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.

[14.2.7] Simply put, section 97 (2) (a) of the EPA expresses the position that an election result cannot be vitiated, unless a petitioner proves that the victorious candidate or their agent engaged in proscribed conduct, thereby preventing the majority of voters from electing their preferred candidate. On the other hand, section 97(2)(b) of the EPA, the ground upon which, the Appellant in *casu* has relied on, requires a Court to determine whether during the conduct of an election, the 2nd Respondent and its agents engaged in practices that affected, or disadvantaged a losing party from contesting in an election in conformity with the law. In other words, the loss of a candidate

would be attributed to the 2nd Respondent's failure to adhere to the law.

[14.2.8] We affirmed the position of the law in the cases of **Sibongile Mwamba v. Kelvin M. Sampa and the Electoral Commission of Zambia**¹⁸ and **Allen Banda v Bornwell Matanda & Electoral Commission of Zambia**¹⁹. We said of section 97 (2)(b) of the EPA in the latter case that:

This provision is clear that section 97 (2) (b) is subject to subsection (4) which provides that an election shall not be declared void due to an act or omission by an election officer in breach of his official duties in relation to an election where an election is substantially in accordance with the EPA and where the election result is not affected. The fact that section 97(2)(b) is made subject to subsection (4) means that once the trial court is satisfied on the evidence that the non-compliance with the electoral laws has been proved, the court must further determine whether the act or omission complained of affected the results in line with subsection (4).

[14.2.9] We further guided in the **Sibongile Mwamba**¹⁸ case on what amounts to substantial non-compliance with electoral laws that the threshold is high and the effect of the irregularities should result in the election being so flawed that the defects actually affected the result and it could not reasonably be said to

represent the true free choice and will of the majority of the voters.

[14.2.10] To put it more clearly, the election stage is only concerned with the process of elections, that is how the 2nd Respondent and its agents conduct an election and the outcome. This is critical in establishing whether an election has been held in substantial conformity with the law or not.

[14.2.11] After analysing the facts before us, measured against the electoral laws and standards; and upon proper construction of section 97 (2)(b) of the EPA, we find that the Appellant has failed to prove that the 2nd Respondent failed to comply with the law.

[14.2.12] As can be seen in section 97(2)(b) of the EPA, an allegation of non-compliance with the law on elections requires proof of two elements. Firstly, that there has been a breach or violation of the provisions of the EPA that regulates the conduct of elections. That is to say, the act of non-compliance with the EPA entails a deviation by the 2nd Respondent from the legal framework that governs elections. However, bearing in mind that not every act of non-compliance is sufficient to invalidate an election.

[14.2.13] Secondly, that the non-compliance with the EPA was substantial and affected the result of the election thereby altering the will of the majority of the voters. In both instances, the burden of proof rested on the Appellant to have provided credible evidence of the non-compliance and its impact on the outcome of the election.

[14.2.14] We are called upon as a Court in determining whether the non-compliance with the provisions of the EPA is substantial to examine the evidence presented by the Appellant and the Respondent. Thereafter, to apply relevant legal principles and standards in determining whether the election was conducted in accordance with the EPA or whether the non-compliance affected the result of the election in a substantial way. In so doing, we are supposed to use the fundamentals stated above in a claim of non-compliance with the law.

[14.2.15] Pertinent to this fact, is that the non-compliance with the law (section 97(2)(b) of the EPA) in an attacked election, must have been suffered by the person who participated in the election conducted by the 2nd Respondent and no other person. In casu, it is clear that the Appellant's complaint is based on the outcome of the by-election of 21st October, 2022 and the

evidence clearly shows that he did not participate in the election. Rather, he harboured a lingering belief that if the by-election had been conducted without the deficiencies stemming from his failed nomination, then the result would have been different. As we see it, there is no way of knowing whether the Appellant on the evidence of PW2 and PW3 would have won or lost the by-election.

[14.2.16] Further, there is nothing in the evidence which suggests that the Appellant's non-participation seriously hampered or interfered with the results of the election or the eventual outcome. Therefore, in our assessment of this case against the identifiable standards set out in section 97(2)(b) of the EPA, we are led to find that the Appellant failed to demonstrate the aspects of the election which, established the 2nd Respondent's breach of the law.

[14.2.17] In other words, for a claim of non-compliance to succeed, it must show the nature of irregularities committed by the 2nd Respondent and their impact on the conduct, as well as the result of the election, as far as it can be assessed or measured against electoral laws and standards. In any case, there is a distinction between rejection of nomination papers and

prevention from participating in an election. Hence, the Appellant who was not a participant in the election is not entitled to rely on the provisions of section 97(2)(b) of the EPA.

[14.2.18] In any event, the evidence before us also does not suggest that that the Appellant is challenging the constitutionality of the EPA, which contains the law on the conduct and supervision of elections in this country. Accordingly, we do not accept his contention that his case can be addressed outside the provisions of the EPA. This is on the premise that we have been unable to see the cause and effect on the type of non-compliance his counsel argued and the final result for the attacked by-election. If anything, from our reading of the EPA, the view we take is that the Legislature in enacting the law aimed at ensuring that the Act would be comprehensive enough, to deal with all matters relating to the conduct and supervision of elections in our country, including providing the dispute resolution for all election grievances at the National Assembly and Council level. Additionally, the Legislature in our view, deliberately set the standard and threshold upon which, an election can be vitiated under section 97(2) of the EPA. Anything short would amount to an illegality.

[14.2.19] Consequently, we find no substance in Appellant's arguments that the assessment of his election petition should have been conducted outside the EPA. The cases of **Mwelwa v Wightman**¹⁴ and **Jere v Ngoma** earlier cited in the judgment are inconsequential and have no bearing whatsoever on founding a case of prevention against the 2nd Respondent.

[14.2.20] As we conclude our determination of grounds 1 and 5 of the appeal, we wish to indicate that the issue of withdrawal of a candidate in elections provided in Article 52(6) of the Constitution and section 31 of the EPA was settled in the case of **Governance Elections Advocacy Research Services Initiative Zambia Limited v The Attorney General and The Electoral Commission of Zambia**²⁰. We need not say more.

[14.2.21] Our conclusion on grounds 1 and 5 is that they have no merit and are dismissed.

[14.3] **Ground 4**

[14.3.1] The Appellant contended that at the time that 2nd Respondent held the by-election, the High Court stay of elections was still subsisting and had not been discharged. As such, the 2nd Respondent had no authority to hold the by-election in Kabushi Constituency. He also argued that, our decision in the **Bernard**

Kanengo⁶ case did not affect the stay order granted by the High Court because it was pronounced after the by-election had been conducted in Kabushi Constituency. Thus, at the material time the stay order was still in place and could not be ignored.

[14.3.2] We begin from our assertion that jurisdiction is the lifeline of a Court. In other words, it is the distinctively legal power of a Court to make decisions or orders that will govern the rights and obligations of the parties. Where it runs out, the Court has no other option but to down its tools. We settled this position in the **Bernard Kanengo**⁶ case, when we said that the High Court ran out of jurisdiction. Thus, the fact that our decision was rendered after the by-election does not alter the proposition of the law.

[14.3.3] In our view, a period prescribed by the Constitution cannot be suspended by anything including a statute or court order. In the case of **Zacharia Okoth Obado v Edward Akong'o Oyugi and 2 Others**²¹ which we align ourselves with, the Kenyan Supreme Court on Constitutional Supremacy stated that:

All statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally guided process. What this Court would not do is to extend

time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorised.

[14.3.4] In our jurisdiction, **Article 1 of the Constitution** binds us to constitutional authority by providing that:

- (1) This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.
- (2) An act or omission that contravenes this Constitution is illegal.
- (3) This Constitution shall bind all persons in Zambia, State organs and State institutions.
- (4) The validity or legality of this Constitution is not subject to challenge by or before a State organ or other forum.
- (5) A matter relating to this Constitution shall be heard by the Constitutional Court.

[14.3.5] It flows from the above that, all State organs including all Courts and the laws are subservient to the Constitution. They cannot arrogate themselves power, which would otherwise be in conflict with the Constitution. Hence, we are unable to lend legitimacy to any order that was given by a Court that had no jurisdiction.

[14.3.6] The effect being that any order that is predicated upon a Court that has run out of jurisdiction amounts to a nullity. In more simpler terms, the stay of proceedings in the High Court was contingent on the pending proceedings in that Court. Since the proceedings extinguished by effluxion of time, the stay which was dependent of those proceedings could not survive the main action. Consequently, ground 4 lacks merit and it is dismissed.

[14.4] **Ground 3**

[14.4.1] Under this ground, the issue is whether the lower court erred in holding that the Appellant's grievances arising out of the rejection of his nomination were litigated under cause no. 2022/HP/1327. In responding, we have no doubt whatsoever in our minds that Article 52 (4) of the Constitution as read with Section 31 of the EPA provides the dispute resolution mechanism for contesting nomination challenges, that is within seven (7) days of the close of nomination. Further that a Court or Tribunal must hear and determine such challenges within twenty-one (21) days of lodgment. We stated in the case of **George Muhali Imbuwa**², that the process of hearing election nomination petitions for Parliamentary elections, starts and ends in the High Court.

[14.4.2] Accordingly, we find that it is no longer open to this Court to nurture the Appellant's complaints about the events in cause no. 2022/HP/1327 or indeed the rejection of his nomination papers. While we are mindful that there was no judgment delivered in cause no. 2022/HP/1327, it cannot be said that the issues that were involved in that cause can find life through this appeal. More so that the nomination case grievances manifested in the Appellant's purported subsequent election petition, which in any event failed the threshold test set out in section 97(2)(b) of the EPA. We therefore agree with the lower Court's holding that the issues about the Appellant's case on nomination, which were in issue in cause no. 2022/HP/1327, even though not determined on the merits, are *res judicata*. Accordingly, we find no merit in ground 3 and it is dismissed.

[14.5] Ground 2

[14.5.1] Under this ground, the Appellant complained that the trial court's decision that his election petition was an abuse of court process and was being used as an appeal mechanism for cause no. 2022/HP/1327 was perverse. To place the issue in context, portions of the record of appeal are reproduced here below where the learned trial Judge stated at page 83, lines 1 – 10 thus:

Concluding on this argument counsel for the Respondent argued that this petition was an abuse of court process as the issues raised by the Petitioner have either been determined or are yet to be determined by the Constitutional Court. By way of response, counsel for the Petitioner argued that appearing before numerous tribunals in itself is not necessarily multiplicity of actions. Additionally, counsel for the 3rd Respondent argued that the Petitioner has used this petition as an appeal to challenge the nomination process. The Petitioner in reply to the 3rd Respondent's submissions argued that he was not using this petition as an appeal to challenge the nomination process.

[14.5.2] At page 84 of the record of appeal lines 3-7, where the learned trial Judge said: -

Subsequently, I agree with counsel for the 3rd Respondent's arguments that this petition is indeed an abuse of the court's process as the reliefs claimed cannot be employed in a petition of this nature post elections. Thus, this allegation cannot be the basis upon which the election can be nullified or voided.

[14.5.3] While we find that the learned trial Judge agreed with the 3rd Respondent's submission that the Appellant's election petition amounted to an abuse of court process; we have not found any evidence indicating that the learned Trial Judge made any finding to the effect that the Appellant's petition was used as an

appeal mechanism for cause no. 2022/HP/1327. Instead, the allegation was made by the 3rd Respondent. Notwithstanding, what the Appellant is inviting us to react to, is whether his election petition amounted to an abuse of court process. In the context of our findings thus far in this appeal, we take the view that this assertion is not far from the truth. This is because the Appellant decided to move the Court under section 97(2)(b) of the EPA when he clearly had no entitlement to do so.

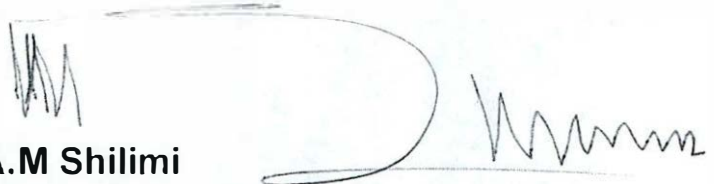
[14.5.4] He was represented by counsel throughout the proceedings, and ought to have advised him of the requirements of the EPA. Instead, he continued to pursue his grievances arising out of his rejected nomination papers as ground for alleging non-compliance of the law by the 2nd Respondent in a futile effort. As if that were not enough, his counsel also attempted to formulate grounds for vitiating the Kabushi Constituency by-election outside the EPA.

[14.5.5] Clearly, these actions amount to an abuse of court process because the Appellant has been trying to obtain a result beyond the Court's jurisdiction using all his arsenal. This conduct is undesirable. For this reason, ground 2 fails and it is dismissed.

[15] FINAL ORDERS

[15.1] Our conclusion is that all grounds of appeal fail and are hereby dismissed.

[15.2] Since this matter raises issues of public interest, notwithstanding the Appellant's transgressions cited in paragraphs 14.5.3 – 14.5.5 of this judgment, we order the parties to bear their own costs.



A.M Shilimi

Deputy President, Constitutional Court



M.K Chisunka

Judge, Constitutional Court




M.Z Mwandenga

Judge, Constitutional Court



M.M Kawimbe

Judge, Constitutional Court



K. Mulife

Judge, Constitutional Court