

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

(Civil Jurisdiction)



08 JUL 2016 **2016/HP/1221**

IN THE MATTER OF:

AN ELECTION NOMINATION PETITION BY
RAPHAEL MANGANI NAKACINDA *(Suing as*
National Secretary for the Movement for
Multi Party Democracy)

AND

IN THE MATTER OF:

ARTICLE 52 (4) OF THE CONSTITUTION
OF ZAMBIA (AMENDMENT) 2016 ACT NO.
OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF:

THE NOMINATION OF MICHAEL
KASHINKA, KAMUTI KAMWENDO AND
ELIZABETH CHITIKA TO CONTEST AS
CANDIDATES FOR THE MOVEMENT FOR
MULTI-PARTY DEMOCRACY AS MEMBERS
OF PARLIAMENT FOR THE LIVINGSTONE,
MONGU CENTRAL AND KAWAMBWA
CONSTITUENCIES RESPECTIVELY FOR
THE SCHEDULED AUGUST 11TH 2016
PRESIDENTIAL AND PARLIAMENTARY
ELECTIONS

BETWEEN:

RAPHAEL MANGANI NAKACINDA *(Suing as*
National secretary for the movement for
Multi party democracy)

PETITIONER

AND

MICHAEL KASHINKA

1ST RESPONDENT

KAMUTI KAMWENGO

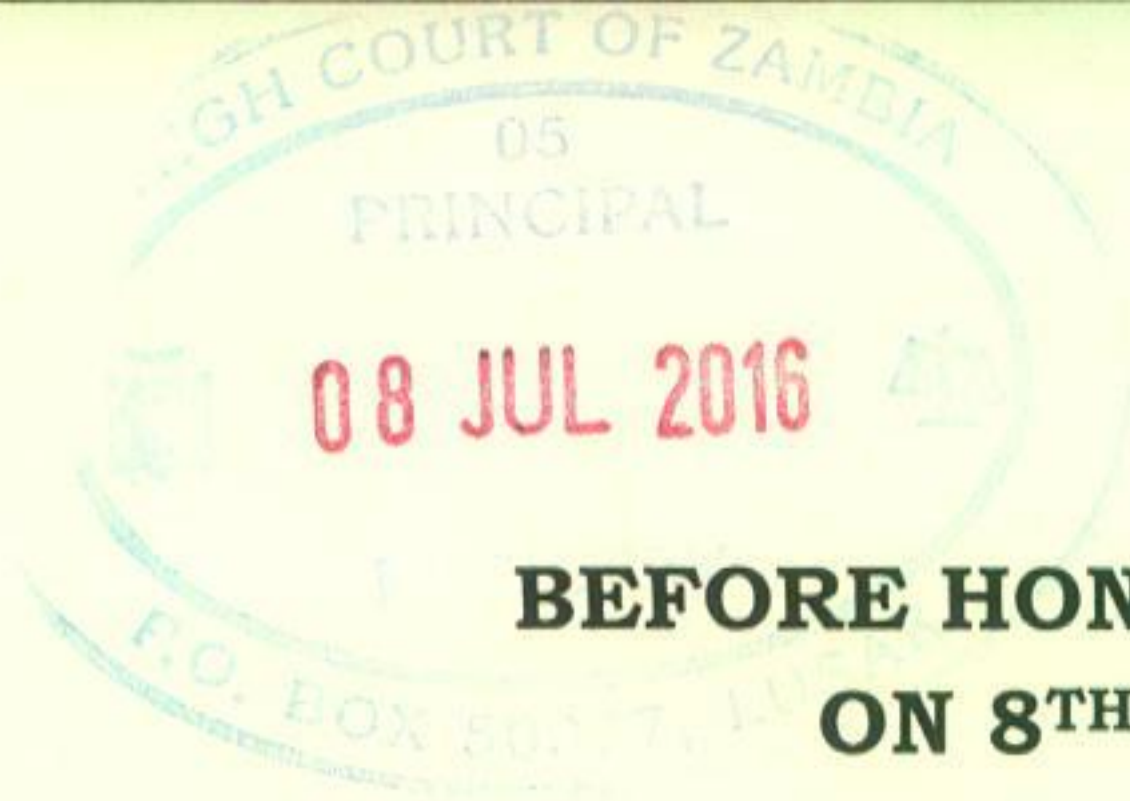
2ND RESPONDENT

ELIZABETH CHITIKA

3RD RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

4TH RESPONDENT



**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 8TH JULY, 2016 - IN CHAMBERS**

For the Applicant : *Mr. Kenneth Khanda – Messrs Central Chambers*
For the Respondents : *Mr. J. Madaika & L.M. Lifunana – Messrs J & M*
Advocates

RULING

The background to these proceedings were that on the 15th June, 2016, the Petitioner Raphael Mangani Nakachinda filed an Election Nomination Petition relating to Livingstone, Mongu Central and Kawambwa Constituencies.

The Petitioner prayed the following:-

- 1. That it may be determined and declared that the first, second and third Respondents herein were not duly nominated as candidates for the MMD to contest in the Livingstone, Mongu Central and Kawambwa Constituency elections respectively.*
- 2. That it may be determined and declared that the nomination of the first, second and third Respondents herein; as candidates for the MMD in the Livingstone, Mongu Central and Kawambwa Constituencies for the forth coming parliamentary elections of the 11th August, 2016 was null and void.*
- 3. That the Petitioner may have such further or relief as may be just.*

Filed on the same day was an affidavit of verification deposed by the same Raphael Mangani Nakacinda. Attached were several exhibits including an order from the Constitutional Court and a letter from the Office of the Electoral Commission of Zambia.

On the 22nd June, 2016 Counsel for the first, second and third Respondents filed a notice of intention to raise preliminary issues pursuant to *Order 33 rule 3 as read with Order 14 A of the Rules of the Supreme Court Volume 1, (1999) Edition.*

The parties were heard on the 1st July, 2016.

Counsel for the Respondents (1, 2, and 3) applied that the petition is statute barred. The court was referred to *Article 52 (4) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.* The Article that Counsel referred to states as follows:

52 (4)

“A person may challenge before a court or tribunal as prescribed, the nomination and the court shall hear the case within 21 days of its lodgement.”

The court was informed that the Electoral Commission of Zambia closed the nomination period on the 31st May, 2016 and that the Petitioner filed their petition on the 15th of June, 2016 exceeding the mandatory seven day required by the law. Counsel submitted that Article 52 Sub Article (4) of the Constitution is

couched in mandatory terms and no provision to extend the period is provided for.

The court was referred to the case of ***United Engineering Group Limited V Mungala and Others Page 30.***

This matter was commenced in the High Court by the Respondents by way of originating Notice of Motion under Order 6 Rule 2 of the High Court rules. The main prayers in the summons were for the court to-

- a) *Determine the test for the various shops at what is called the Lusaka City Market pursuant to Sections 7 (3) and 28 (1) of the Landlord and Tenant (Business Premises) Act Cap 193 and*
- b) *An order for an injunction restraining the Appellant by itself, it's servants or agents or otherwise restraining them from evicting the Respondents from the shops.*

Prior to the matter being considered on its merits, Counsel for the Appellant raised a preliminary objection to the proceedings. The basis of the objection was that since the matter was brought to court pursuant to ***Sections 7 (3) and 28 (1) of the Landlord and Tenant (Business Premises) Act Cap 193***, the matter was wrongly commenced on the following grounds:-

- a) *Section 7 of the Act could not be involved because the Appellant had not given notice to quit as provided under Section 5 of the Act, nor had the Respondent requested for renewal of the lease.*
- b) *Under Section 28 (1) the Respondents were required to move the court within three months of commencement for the tenancy agreement and that on the facts of the case, the Respondents were way out of the three months and that there was no discretion given to the court to extend the period.*

It was held that:

- 1. *“Section 28 (1) of the Landlord and Tenant (Business Premises) Act is not a mere rule stipulating time. The Act is a statute and limitations of actions are not only there that fall or are specifically mentioned in the Limitation Act of 1939.***
- 2. *Any Act of Parliament can provide limitations and a plea of statute bar can be taken as a defence or preliminary point.***
- 3. *Where a tenant does not apply within the time limit; it is inherent jurisdiction in the court to strike out a state claim when there has been no kind of evincing by the Claimant of any ground the obvious time barrier.***
- 4. *The conduct of the Appellant in this case can in no way be said to have provided a waiver and therefore the proceedings were statute barred.***

Counsel pointed out the position of the Constitution as it relates to other laws or rules. Counsel stated that because the time limit is found in the Constitution it becomes even more mandatory and cannot be altered by referring to any lesser Act of Parliament. Counsel submitted that the cause of action dies immediately the limitation period expires. Counsel pointed out

the other limitations contained under Article 52 Sub Article (4) of the Constitution as to when the court must hear and determine such a petition. This should be within 21 days from its filing date and the judgment must be passed no less than 30 days before the election date.

Mr. Khanda in response informed the court that they were aware that this matter was supposed to be brought within the seven day period as contained in the Constitution. Counsel stated that this they did by filing the petition before a court that they still believe had and still has competent jurisdiction. Counsel brought it to the attention of the court that they had filed the petition before the Constitutional Court on the sixth day within the seven day period.

Counsel referred the court to an order that they exhibited signed by Justice Sitali of the Constitutional Court wherein they were granted liberty to proceed to the High Court. This order is dated the 13th June, 2016. The court was referred to Article 18 Sub Article 2 (e) of the Constitution believing that the seven day period as advanced falls within such a technicality.

I agree with Counsel for the Respondent that Article 52 Sub Article (4) is very clear on when a person may challenge before a court or tribunal the nomination of a candidate. In fact Counsel for the Petitioner agrees that it is within seven days of the close of the nomination period. The nominations were closed on the

31st May, 2016. The Petitioner petitioned the Constitutional Court according to Counsel on the 6th day of the seven day period. Meaning the petition was filed on the 6th June, 2016 raising concern over the nomination of the Respondents.

There is a letter that was referred to from the Electoral Commission Of Zambia dated the 3rd of June, 2016 in which letter the Petitioner was informed that they may present their complaint as an election petition before the High Court of Zambia in line with the provisions of Article 52 (4) of the Constitution (Amendment) Act No. 2 of 2016. The Electoral Commission in their letter went on to state that the election petition should be filed within seven (7) days from the date of nomination which date is contained in the letter as the 31st May, 2016.

The Petition was filed and rightfully so on the 15th June, 2016 in the High Court. There is no doubt that in accordance with Section 96 of the Electoral Process Act No. 35 of 2016, the High Court is the right court to hear this petition. If a lawsuit is filed in the wrong court/jurisdiction it would be dismissed and have to be refiled. This was the case in this matter. It was dismissed by the Constitutional Court and refiled in the High Court.

The impact of filing in the wrong court as already stated is that it leads to a matter being dismissed as was in this case with directions to re-file the same in the appropriate court. The other impact of filing in the wrong court is if during the period of the

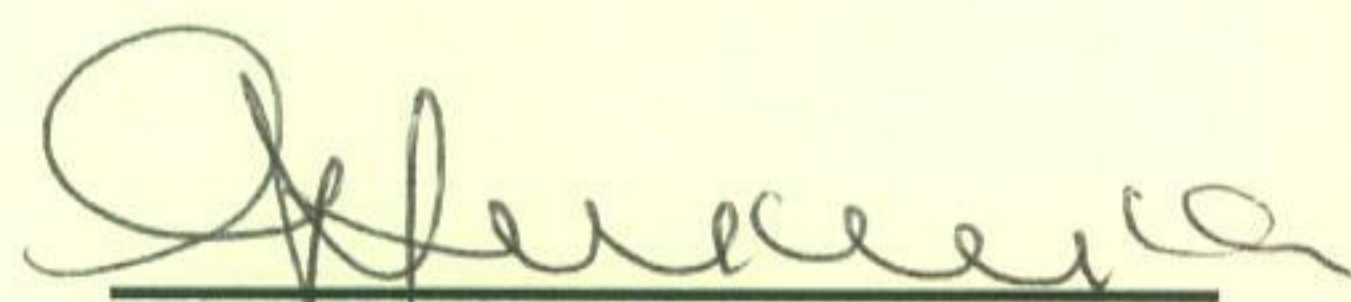
filing and refiling the limitation period is lapsed it affects the adjudication of the same. Once time has started running. Time runs from when an event has happened and is not stopped. In this case the event which was the closing of the nomination happened on the 31st May, 2016. Beyond the seven day period the court has no jurisdiction to entertain the matter.

After the expiration of the limitation period for all intents and purposes the case is closed because the limitation period is provided for by the Constitution and not a mere rule, further there is no discretion given to the court to extend the period. The Petitioner should have heeded the advice of the Electoral Commission contained in the letter already written to. The proceedings are thus statute barred, the Petition is dismissed.

Each party to bear their own cost.

Leave to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 8TH DAY OF JULY, 2016.


G.C. CHAWATAMA
JUDGE