IN THE CONSTITUTIONAL COURT HOLDEN AT LUSAKA

APPEAL NO. 4/2016
PETITION NO. 2 OF 2016

IN THE MATTER OF: PARLIAMENTARY ELECTION PETITION FOR MSANZALA CONSTITUENCY IN THE PETAUKE DISTRICT OF THE EASTERN PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON THE 11TH AUGUST, 2016

AND

IN THE MATTER OF: SECTION 66 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: SECTION 81 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: SECTION 83 AND 89 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: SECTION 96, 97, 98 AND 99 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016.

BETWEEN:

MARGRET ZULU **APPELLANT**

AND

PETER DAKA **1ST RESPONDENT**
ELECTORAL COMMISSION OF ZAMBIA **2ND RESPONDENT**
ATTORNEY GENERAL **3RD RESPONDENT**

CORAM: Mulenga, Mulembe and Munalula JJC on 24th November, 2016 and 11th January, 2017

For the Appellant: Mr. L.M. Mwanabo of LM Chambers
For the 1st Respondent: Mr. K. Msoni of JB Sakala and Company
For the 2nd Respondent: Mr. A. Imonda of Imonda and Company
For the 3rd Respondent: Mr. F.K. Mwale, Senior State Advocate and Mrs D.M. Shamabobo, Assistant Senior State Advocate – Attorney General's Chambers

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JUDGMENT

Mulenga JC delivered the Judgment of the court.

Cases referred to:

1. **Matildah Mutale v Emmanuel Munaile (2007) Z.R. 120 (SC)**
2. **Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138(SC)**
3. **Godfrey Miyanda v The Attorney General (1985) Z.R. 185 (SC)**
4. **C & S Investment Limited and Others v The Attorney General (2004) Z.R. 216 (SC)**
5. **Pontin and Another v Wood [1962] 1 All ER 294**
6. **Access Bank (Zambia) Limited v Group Five and Zcon Business Park Joint Venture (suing as a firm) Judgment No.SCZ/8/52/2014 (unreported)**
7. **Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others 2016/CC/0031 (unreported)**
8. **Kay v Godwin (1830) 6 Bing 576**
9. **Mabenga v Wina and Others (2003) ZR 110 (SC)**
10. **In Re Pritchard (1963) Ch. 502**
11. **Henry Kapoko v The People Selected Judgment No. 43 of 2016 (CC)**
12. **Steven Katuka and The Law Association of Zambia v The Attorney General and Ngosa Simbyakula and 63 Others Selected Judgment No. 29 of 2016 (CC)**
13. **John Oponjo Benjamin Julius Maada Bio and Others v Christian Thorpe National Electoral Commission and Others (SC/2012) Supreme Court of Sierra Leone Judgment of 14th June 2013,**
14. **Nair v Teik [1967] 2 All ER 34**
15. **Absalom v Gillett [1995] 2 All ER 661.**
16. **John Micheal Njenga Mututho v Jayne Njeri Wanjiku Kihara, Christopher L. Ajele and Electoral Commission of Kenya (Civil Appeal No. 102 of 2008)**

Legislation referred to:

1. **Electoral Act No. 12 of 2006.**
2. **Electoral Process Act No. 35 of 2016, section 2, 97, 106.**
3. **The Constitution of Zambia (Amendment) Act No. 2 of 2016 Articles 73, 118, 119, 269.**
4. **The Constitutional Court Rules, Statutory Instrument No. 37 of 2016, Order 2.**
5. **Interpretation and General Provisions Act Chapter 2.**
6. **The High Court Rules Chapter 27 Order 5.**

Works referred to:

1. **Supreme Court Rules of England 1999 Edition (White Book) (RSC) Orders 2 and 20.**

The Appellant filed this appeal on 4th October, 2016 against the decision of the High Court dismissing her parliamentary election petition for being *void ab initio*.

The brief facts of this case are that the Appellant was an independent candidate and one of the contestants of the Msanzala constituency parliamentary seat. The 1st Respondent was declared duly elected after he polled 8,725 votes and the Appellant came out second with 4,762 votes. The Appellant then filed the petition challenging the parliamentary election of the 1st Respondent on Friday, 26th August, 2016 under the repealed law being the Electoral Act No. 12 of 2006. The fourteen (14) days within which the Appellant was required to file a petition expired on 27th August, 2016 which was a Saturday and the Appellant then filed an amended petition under the current Electoral Process Act No. 35 of 2016 on Monday, 29th August, 2016.

At the scheduling conference on 14th September, 2016, the learned High Court Judge raised the issue as to whether there was a petition before him seeing that the petition had been brought under repealed law and gave the parties opportunity to address him. The parties argued the issue on 16th September, 2016 on which date the amended petition surfaced and the Judge referred to its appearance as miraculous as there was no prior mention of its existence by the Appellant's counsel at the previous hearing. After hearing the parties on whether the petition was competently before him, the learned High Court Judge gave the Ruling on 20th September, 2016 dismissing the petition. The main reason for the dismissal was that the

petition was *void ab initio* for having been presented under repealed law and that the invalidity went to the root of the petition and was not a mere irregularity. The relevant portion of the Ruling at pages R14 and R15 reads:

> **"I therefore, agree with the position taken by Mr. Msoni and Mr. Imonda and hold that the effect of filing the Initial Petition of 26th under the repealed law rendered the petition null *and void ab initio* and not irregular as contended by Mr. Banda. That being the case, the said Petition had no life of its own capable of being resurrected by the purported Amended Petition of 29th August 2016. In other words its invalidity goes to the root of these proceedings and could not be cured by an amendment as the Petitioner attempted to do."**

The learned Judge went on to consider the Supreme Court decision in the case of **Matildah Mutale v Emmanuel Munaile**[1] where the petition was dismissed based on the fact that the petition was not signed by the petitioner, which requirement was mandatory. The learned Judge went on to state at page R15 that:

> **"Similarly in this case, as the initial petition was not filed under Part IX of the new Act, it was not a petition at all for its non compliance with the mandatory statutory provisions."**

The learned Judge added that the issue was not a procedural technicality or a rule of procedure but a fundamental principle of law affecting the validity of the process. The learned High Court Judge further held that since the petition had no life of its own, it was incapable of being resurrected by the

purported amended petition and further that the amended petition was not filed within the 14 days period. It is stated at page R17 as follows:

> **"The said amendment was made in the erroneous belief that the initial petition was merely irregular and not void. And yet at law, that petition was *void ab initio* for having been presented under the repealed law whose provisions had no legal effect and therefore could not give birth to any valid petition styled Amended Petition."**

The Appellant being dissatisfied with the High Court Ruling has advanced four (4) grounds of appeal as follows:

1. *The court below erred in law when it held that the petition was void ab initio for being filed under a repealed law and could not be resurrected by an amendment: or*

2. *Alternatively, the Judge below erred in law by failing to deal with the matter fairly and in a manner that upholds the interests of justice when he dismissed the whole petition instead of exercising his inherent jurisdiction and discretion to allow the amendments in the absence of prejudice occasioned to the Respondents despite his holding that the amendment was made under a wrong provision of the law.*

3. *The Court below erred in law and fact when it held that it had no jurisdiction to hear the Amended Petition as it was filed after the expiry of the 14 days statutory period for filing a petition and thereby failed to correctly and lawfully compute the time when the 14 days period expired in this matter.*

4. *The Court below paid too much due regard to technicalities and thereby failed to take into account the guidance given to courts by the Constitution of Zambia to administer justice without*

undue regard to procedural technicalities when exercising judicial authority.

The parties all filed their heads of argument and augmented them with oral submissions at the hearing. These have been summarized in the interest of brevity.

In arguing ground one, Mr. Mwanabo relied on Order 20 of the Supreme Court Rules of England 1999 Edition (RSC). In particular he relied on paragraph 20/8/6 of the RSC that all amendments or correcting any error or defect should be made for the purpose of determining the real question in controversy between the parties so long as no injustice is occasioned to the other party. A passage was highlighted as follows:

"In Tildesley v Harpe (1878) Ch.D. 393 at 396 and 397. Brainwell L.J. said: My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide. Or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment, should be allowed"if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs." (emphasis theirs)

Counsel added that an election petition is a pleading in line with the Supreme Court decision in **Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and Others**[2] and therefore can be amended under

Order 20 of the RSC. He stated that in this case, the amendment was made promptly and some Supreme Court decisions were cited on the need to allow amendments even if they were adding or substituting a cause of action.

Mr. Mwanabo further argued that there was no law which renders a petition commenced by reference to repealed law incurable and that the case of **Godfrey Miyanda v The Attorney General**[3] can be distinguished in that it dealt with accrued rights under repealed law unlike this instant case and that no amendment was made in the **Miyanda case**[3]. Counsel added that in the case of **Matilda Mutale v Emmanuel Munaile**[1] the Supreme Court did not make a general rule that a petition can never be amended or that it was *void ab initio*. This court was urged to take a leaf from the case of **C & S Investment Limited and Others v The Attorney General**[4] where it was held that:

> **"It is well settled that merely a wrong reference to the power under which certain actions are taken by government would not per se vitiate the actions done if it can be justified under some other power under which the government could lawfully do these acts."**

Counsel maintained that reference to repealed law does not render an action null and void.

With respect to grounds two and four, Mr. Mwanabo argued that the court below did not deal fairly with the matter or uphold the interests of justice when it dismissed the whole petition instead of exercising inherent jurisdiction and discretion to allow the amendment despite holding that the amendment was made under a wrong provision. Counsel added that the court had undue regard to procedural technicalities contrary to the direction in Article 118 (2) (e) of the Constitution which magnifies the Court's inherent jurisdiction to allow or order amendments even on its own motion. Further, that the court below should have weighed the options of dismissing the petition and allowing amendments as to which would serve the interest of justice in view of the fact that no prejudice was going to be occasioned to the Respondents. Counsel submitted that this position is further supported by Order 2 of the RSC that failure to comply with the rules on manner, form or content of proceedings should be treated as an irregularity and should not nullify the proceedings. He also argued that the observation of the court below that the amendment miraculously appeared at the next date of hearing was made in bad taste as no verification was done with Principal Registry at Lusaka.

In arguing ground 3, Mr. Mwanabo submitted that the amended petition was not made after the expiry of the 14 days based on Article 269 of the

Constitution and Order 2 rule 3 of the Constitutional Court Rules on the computation of time. They both state that when computing time, if the last day for an action to be done is a Saturday, Sunday or Public holiday, the act will be considered to be in time if done on the next following day. Counsel stated that the 1st Respondent was declared winner on 13th August, 2016 and the 14 days expired on 27th August, 2016 which was a Saturday. The amended petition was filed on Monday, 29th August, 2016 which was the next day not being a Saturday or Sunday, and was thus within the 14 days period. Further, that in terms of Order 20 of the RSC, amendments can be made even after the limitation period has expired. Counsel urged this court to allow the appeal.

At the hearing, the Appellant's counsel, Mr. Mwanabo, augmented the skeleton arguments and cited the case of **Pontin and Another v Wood**[5] as holding that even after the expiry of time, the court can allow an amendment. He added that if this Court agrees with this position, then the issue of how the amendments should be done is procedural which should be considered in light of Article 118 of the Constitution as amended and Order 20 rule 1(10) of the RSC.

In opposing the appeal, the 1st Respondent's counsel, Mr. Msoni argued with respect to ground one that the reference to repealed law was not only in the title to the petition but also formed the body of the petition in paragraphs 8(a) to 8(q) spanning five pages. Counsel stated that the court below was on firm ground in holding that the petition was *void ab initio* with no legal effect and could not be amended. He added that a parliamentary election petition could only derive its effect from the Electoral Process Act No. 35 of 2016 as provided in section 97 and not any other law. Further, that the Interpretation and General Provisions Act Chapter 2 provides that a repealed law ceases to have any legal effect unless the repealing Act says so. Counsel submitted that in this case what the Appellant was required to do was to discontinue the action and commence a fresh one instead of amending the process which was void.

On the issue of the amended petition, Mr. Msoni submitted that the purported amended petition, had no affidavit in support because there was no application for leave or leave granted to amend it as required by Order 5 rule 14 of the High Court Rules Chapter 27. Further, that the certificate of exhibits indicates that it was filed on 26th August while the affidavit bears the date 29th August, 2016. Counsel also argued that the amended petition indeed appeared miraculously in that while it is purported to have been

made on 29th August, 2016, the Respondents were never served with it to date and the Appellant's counsel when appearing for the scheduling conference on 14th September, 2016 did not inform the court that the petition had long been amended.

With respect to ground two, Mr. Msoni submitted that the court below, rightfully and fairly, dealt with the matter as the law required and the Appellant was given opportunity to argue the matter before the ruling was delivered.

Counsel argued ground three by stating that the petition which was *void ab initio* could not be cured by the provisions of Article 118 (2) (e) of the Constitution. He cited the case of **Access Bank (Zambia) Limited v Group Five and Zcon Business Park Joint Venture**[6] in which the Supreme Court stated that the said provision does not mean to oust the litigant's obligations to comply with procedural imperatives in their quest for justice.

Mr. Msoni also opposed the Appellant's prayer that the appeal be allowed and the matter sent back to the High Court for hearing stating that doing so would violate Article 73(2) of the Constitution and section 106 (1) (b) of the Electoral Process Act which require an election petition to be heard within ninety (90) days. He stated that by the time this appeal will be determined,

the 90 days would have expired. The case of **Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others**[7] was cited in support in which this court dismissed the presidential election petition after time for hearing had lapsed.

Mr. Msoni, augmented his heads of argument and submitted that the Appellant was not disputing that the initial petition was null and void and the 1st Respondent's contention was that a petition that is a nullity could not be amended as it had no legal effect. Further, that in light of the defective affidavit and the fact that an affidavit could not have been amended in the manner done by the Appellant, the amended affidavit was not competently before court and showed that the amended petition had no leg to stand on. Counsel concluded that the trial Judge was on firm ground in dismissing the petition and prayed that this Court should uphold the High Court decision.

The 2nd Respondent's counsel, Mr. Imonda, submitted that the court below was on firm ground when it held that the petition was *void ab initio* and could not be resurrected by the amended petition because the invalidity goes to the root of the proceedings. He stated that the word 'repeal' as defined in section 3 of the Interpretation and General Provisions Act means that the Electoral Act No. 12 of 2006 ceased to have effect on 7th June,

2016 when the Electoral Process Act No. 35 of 2016 came into operation. Counsel argued that one cannot amend something which is invalid or non-existent. Further, that the definition or interpretation of the words "petitioner" and "respondent" in section 2 of the Electoral Process Act which ties them to an election petition filed in accordance with section 98 of the Electoral Process Act, clearly shows that there was no Petitioner or Respondent under the Act in the petition filed on 26th August, 2016. The Appellant who signed the petition under repealed law was not a Petitioner in terms of the Act.

Mr. Imonda further submitted that the amended petition was filed outside the statutory 14 days period. He stated that the 14 days expired on Saturday, 27th August, 2016 which was not an excluded day based on section 35 of the Interpretation and General Provisions Act, Article 269 of the Constitution and the Constitutional Court Rules. Counsel argued that the Appellant did not come with clean hands and cannot seek the court's discretionary powers when she filed the petition outside the mandatory statutory period. Counsel added that Article 7 of the Constitution did not list judicial discretion among the laws of Zambia which are to be applied by the Courts as provided in Article 119 (1) of the Constitution.

As regards the quoted parts of the High Court's ruling appearing to suggest malpractice, Mr. Imonda argued that there was reasonable basis for the court to state so because the record showed a breach of fundamental ethics based on three aspects. The first was that the affidavit verifying the petition filed on 26th August, 2016 was not signed by the Appellant but was commissioned in violation of Order 5 rule 20(f) of the High Court Rules. The second was that the signature of the Appellant on a letter dated 16th August, 2016 at page 51 of the record of appeal was different from the signature on the petition, amended petition and amended affidavit verifying the amended petition. The third was that the amended affidavit verifying the amended petition filed on 29th August, 2016 has a certificate of exhibits which has a court stamp dated 26th August, 2016 and the Commissioner for oaths stamp also of even date. Counsel concluded that the appeal should be dismissed with costs.

Mr. Imonda, augmented his heads of argument and submitted that since the petition filed on 26th August, 2016 was not filed under Part IX of the Electoral Process Act No. 35 of 2016 as required, there was no petition in the eyes of the law and therefore, there was nothing to amend. Mr. Imonda added that even the one reference to section 64 of Electoral Process Act No.

35 of 2016 in the initial petition did not assist the Appellant as it did not fall under Part IX of the Electoral Process Act.

The 3rd Respondent's Counsel argued grounds one and two together and relied on the case of **Kay v Godwin**[8] which cited **Odgers Construction of Deeds and Statutes**, 5th Edition page 357 which stated that:

> **"The effect of repealing a statute is to obliterate it completely from the records of parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."**

Counsel submitted that the petition was *void ab initio* as it was based on repealed law. It was added that Order 20 rule 3 of the RSC and the case of **Matildah Mutale v Emmanuel Munaile**[1] were clear that a petition is not a pleading. Counsel further stated that the cases of **Mabenga v Wina and Others**[9] and **Mazoka v Mwanawasa**[2] relied upon by the Appellant that a petition is a pleading cannot assist the Appellant in light of the fact that no amendment could be effected to a petition that did not exist in the eyes of the law. What the Appellant should have done was to file another petition and not an amendment.

On ground 3, Counsel conceded that based on the guiding principles on computation of time in Article 269 of the constitution, the amended petition

was filed within the 14 days. However, that the amended petition was also void because there was no valid petition to be amended as the initial petition was void and non-existent. It was also submitted that allowing the petition would cause a constitutional crisis since Article 73(2) of the Constitution and section 106(1)(b) of the Electoral Process Act require that the petition be heard and determined within 90 days which period expired on 24th November, 2016. Further, that neither this Court nor the High Court have been given discretion to enlarge the time.

In opposing ground four, counsel cited the case of **Access Bank (Zambia) Limited v Group Five/ZCon Business Park Joint Venture**[6] in which the Supreme Court stated that Article 118 (2) (e) of the Constitution does not **"oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."** It is argued that reliance on repealed law goes to the root or foundation of the proceeding and thus the court did not pay undue regard to technicalities.

The 3rd Respondent's counsel, Mr. Mwale, augmented his heads of arguments and added that there was no law called the Electoral Act of 2006 and thus reference to it was fatal. He added that the law cited in the petition was non-existent as such there was no petition. Counsel submitted

that Order 2 rule 2 of the RSC gives options to the court where there are defects including the one to set aside wholly any proceedings. Counsel argued that the case of **In Re Pritchard**[10] relied on by the Appellant was not of assistance because it states that it applies to all defects apart from fundamental ones. The defect in the petition was fundamental and fatal and could not be amended. Mr. Mwale submitted that the holding in the **Access Bank**[6] case was similar to this Court's recent decision in the case of **Henry Kapoko v The People**[11] which interpreted Article 118(2)(e) of the Constitution and stated at pages 29 and 31 that the provision does not oust due regard to technicalities but only undue regard. Further, that the issue is not the amendment but that no amendment could be done as there was no petition in the first place.

As regards the Appellant's submission on section 106(2) of the Electoral Process Act on extension of the 90 days period for hearing, Mr. Mwale stated that Article 73(2) was couched in mandatory terms that the hearing should be within 90 days in the same way as Articles 101 and 103 regarding the presidential petition. In this vein, counsel argued that the Court has no power to extend the constitutional time frames. He added that in the unlikely event that this Court agrees that section 106(2) extends the time, his submission was that this was not applicable as the Appellant failed to

pursue her case diligently in the court below and in this appeal based on the fact that the High Court Ruling was given on 20th September, 2016 but the Appellant only lodged the appeal on the fourteenth day on 4th October, 2016 and the record of appeal was filed on 4th November, 2016. These were all done on the last permitted day of the 14 days and 30 days, respectively and show inertia on the part of the Appellant. Counsel concluded that the appeal be dismissed with costs.

In reply, the Appellant's counsel maintained that the reference to repealed law could be cured by amendment and heavily relied on Order 2 of the RSC and Article 118 (2)(e) of the Constitution and stated that the action should not be defeated by procedural irregularity but be heard on the merits. On grounds two and three, the Appellant's counsel reiterated his earlier arguments based on Order 2 and Order 20 of the RSC and court decisions that all and any amendments should be allowed and ought to be made for purposes of hearing the case on its merits. As regards ground 4, counsel maintained that the court could and should, on its own motion amend pleadings in line with Article 118 (2)(e) of the Constitution and Order 20 of the RSC instead of dismissing the matter without hearing it on its merits. Further, that the issue of the Appellant not signing the affidavit verifying the

petition was never raised in the court below and could not be raised on appeal.

In reply to the issues raised orally by the 1st and 2nd Respondents, respectively, that there was no affidavit in support of the amended petition because the same was not filed with leave of court and that the last page of the first affidavit was not signed, Mr. Mwanabo submitted that these issues were not raised in the court below and therefore ought not to be raised in the appeal. As regards the 3rd Respondent's argument that there would be a constitutional crisis if the matter is sent back for hearing the petition because the 90 days period within which the petition was to be heard had expired, Mr. Mwanabo submitted that section 106(2) of the Electoral Process Act No. 35 of 2016 provides that the matter cannot be dismissed for want of prosecution where the petitioner is actively prosecuting the matter. Counsel added that this provision is different from what applies to presidential election petitions which provides in mandatory terms that the petition shall be heard within 14 days.

Counsel for the Appellant also submitted that the Respondents had not cited any law in support of the assertion that an action commenced with reference to repealed law is a nullity in light of his cited authority that there

is no limit to what can be cured by an amendment. In particular that this matter is not based on accrued rights under the repealed law. Further, that Order 20 rule 8(2) of the RSC provides that an amendment cures the defect and stands as the original. As regards the 3rd Respondent's submission that whether the petition could be amended was not a procedural technicality under Article 118 but an issue of substantive law, Mr. Mwanabo argued that Article 118 was relied on only as relating to the procedure on how the amendment was to be done and the court should have considered which option better served the interests of justice in the matter.

Mr. Mwanabo concluded that the appeal should be allowed and that litigants who seek justice should not always be threatened with costs.

We have duly considered the arguments advanced by all the parties and the authorities cited. The facts are basically common cause and the Appellant conceded that the initial election petition filed on 26th August, 2016 was based on repealed law being the Electoral Act No. 12 of 2006. The repealed law was both on the face of the petition and in the body of the petition providing the particulars. The amended petition was filed on 29th August, 2016 and as also rightly conceded by the 1st and 3rd Respondents, this was done within the 14 days statutory period provided for filing election petitions

based on Article 269 of the Constitution on computation of time. In this case, the 14 days expired on 27th August, 2016 which was a Saturday and thus Monday, 29th August, 2016 was within the 14 days for the purposes of filing. It follows that the amended petition was filed within the 14 days statutory period for filing the petition. Accordingly, ground 3 of the appeal succeeds in part in that the learned High Court Judge did not correctly compute the 14 days.

The Appellant has advanced four grounds of appeal; that the Court below erred in holding that the petition was *void ab initio* and could not be resurrected by an amendment, that the court below should have exercised its inherent jurisdiction and discretion to allow the amendments in the absence of prejudice being occasioned to the Respondents, that the amended petition was filed within the prescribed 14 days and that the court paid too much regard to technicalities contrary to the constitutional guidance. As stated above, ground 3 has succeeded in part.

The grounds of appeal raise similar arguments and we will thus consider them together in order to avoid unnecessary repetitions. The central issues to be resolved are the effect of the petition having been filed under repealed

law and whether this rendered the petition *void ab initio* or was an irregularity that could be cured by the amended petition.

We will first consider the effect of filing an election petition under repealed law. Article 73 of the Constitution provides as follows:

> **"73. (1) A person may file an election petition with the High Court to challenge the election of a Member of Parliament.**
>
> **(2) An election petition shall be heard within ninety days of the filing of the petition.**

The process and procedure for filing parliamentary election petitions is prescribed by the Electoral Process Act No. 35 of 2016 (the Act). Section 97 (1) under Part IX of the Act provides that:

> **"An election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall not be questioned except by an election petition presented under this Part." (emphasis ours)**

This provision is clear that a parliamentary election petition must be filed under Part IX of the Act. This Court had occasion to pronounce itself on the fundamental rule of construction of statutes in the case of **Steven Katuka and The Law Association of Zambia v The Attorney General]and Ngosa Simbyakula and 63 Others**[12] that where the words of the Constitution or statute are precise and unambigious in their ordinary and natural meaning, then no more is required to expound on them. It is only where the strict interpretation gives rise to absurdity that resort can be made to the

purposive approach to remedy the situation by reading words into it if necessary. In this instant case, the provisions of section 97 of the Electoral Process Act are plain and unambigious in prescribing the mode of commencement of an election petition and under what provisions the election petition should be commenced. The provisions of section 97(1) are reinforced when read with the definitions of "petitioner" and "respondent" in section 2 of the Act. The plain meaning of section 97 does not lead to absurdity and does not warrant the Court to resort to the purposive approach in interpreting it.

The Appellant herein filed the petition under the Electoral Act No. 12 of 2006, which is the repealed law. Section 126 of the Act categorically repeals the Electoral Act No. 12 of 2006 and this fact of repealing and replacing the Electoral Act No. 12 of 2006 is also stated in the long title of the Act which came into operation on 6th June, 2016.

The issue for consideration is the effect of the defect of bringing an election petition under repealed law, that is, whether it was curable or fatal in light of the mandatory provisions of section 97 of the Act. In determining whether the defect is curable or fatal, the court must first consider whether the rule or regulation that was breached is mandatory or regulatory. This is

the practice or test that has been applied in different jurisdictions, particularly in the case of election petitions. It is in this vein that we have considered how the issue has been handled in some jurisdictions. In the Sierra Leonean case of **John Oponjo Benjamin Julius Maada Bio and Others v Christian Thorpe National Electoral Commission and Others**[13], Tejan-Jalloh CJ held at page 18 to 19 as follows:

> **"Clearly the rules are mandatory and not directory. We are of the view that because they are mandatory, they ought to be strictly complied with and not to be qualified by expressions such as substantial and/ or effective compliance. ..... We do find that the petitioners/respondents have failed to comply with several of the election petition rules and accordingly we strike out the petition."**

A similar decision was made by the Privy Council in the case of **Nair v Teik**[14] in which the petitioner lodged an election petition within the stipulated time but served it on the respondent out of time. The relevant provision on service was Rule 15 which provided in part that *"Notice of the presentation of a petition, accompanied by a copy thereof, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent."* The Privy Council after restating the need for the speedy hearing of election petitions in the interest of the public, among others, as circumstances which weigh heavily in favour of the mandatory construction, went on to state at page 40 that:

"So the whole question is whether the provisions of r.15 are 'mandatory' in the sense in which that word is used in law, i.e., that a failure to comply strictly with the times laid down renders the proceedings a nullity; or 'directory', i.e., that the literal compliance with the time schedule may be waived or excused or the time may be enlarged by a judge. .....

On the whole matter their lordships have reached the conclusion that the provisions of r.15 are mandatory, and the respondent's failure to observe the time for service thereby prescribed rendered the proceedings a nullity. .....if the proceedings never begin in any real sense by reason of the failure to serve the petition, there seems no compelling reason for any formal order. The election judge must, however, have an inherent power to cleanse his list by striking out or better by dismissing those petitions which have become nullities by failure to serve the petition within the time prescribed by the rules."

The Privy Council then held that:

"Rule 15 of the Election Petition Rules was mandatory, and, as there had been no personal service and the service by advertisement was out of time, the election petition was a nullity."

This holding on the effect of breach of the mandatory provisions or rules was applied in the case of **Absalom v Gillett.**[15] In the **Absalom v Gillett**[15] case, the petitioner in the local government election case petitioned the electoral officer only and did not join the successful candidate as respondent. The Court held that the words '*may be made a respondent*' as stated in the Representation of the People Act 1983 were words of limitation and not permission. Therefore that the word 'may' in that context did not confer discretion on the petitioner but was mandatory in terms of

the requirement for the time frame for service of the petition, which time frame had lapsed. The court then proceeded to strike out the petition as incompetent.

In this instant case, it is apparent that section 97 of the Act which is in issue is not regulatory but is couched in mandatory terms using the word 'shall' and is therefore not optional. We are thus of the firm view that the filing of the election petition on 26th August, 2016 under the repealed Electoral Act No. 12 of 2006 contrary to the mandatory provisions of section 97 of the Act rendered the petition a nullity or incompetent. Hence, we cannot fault the learned High Court Judge in his decision that the petition was null and void or *void ab initio* as he was on firm ground.

We now turn to consider the second issue of whether the defect was curable by way of an amendment. The Appellant argued that the amended petition filed on 29th August, 2016 effectively cured the defect or irregularity in the initial petition of 26th August, 2016. The Respondents' argument on the other hand was that the defect was not curable by the amendment because it was fatal and rendered the initial petition void. Further, that what the Appellant should have done was to withdraw the defective petition and file a fresh one on 29th August and not purport to amend the void petition.

It is trite that commencing an action under repealed law is generally an irregularity. However, in the case of an election petition and in light of the provisions of section 97 of the Act which state in mandatory terms that a parliamentary election petition must be brought under Part IX of the Act, the irregularity is a fundamental one that goes to the root of the petition.

The issue of whether an election petition that has fundamental defects can be cured by an amendment was considered in the Kenyan case of **John Micheal Njenga Mututho v Jayne Njeri Wanjiku Kihara, Christopher L. Ajele and Electoral Commission of Kenya**[16] where it was held as follows:

> **"Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person's election as a people's representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently, if a petition does not contain all the essentials of a petition, furnishing of the particulars will not validate it."**

This position is persuasive. We are of the firm view that where the defect or irregularity in an election petition is fundamental, fatal and renders the petition incompetent and a nullity, such a petition cannot be validated by an amended petition as it is generally not capable of amendment.

The election petition filed on 26th August, 2016 under the repealed law has been found to be defective and which defect was indeed fundamental and fatal as rightly held by the High Court Judge. It follows that once an election petition is a nullity, it cannot be revived by way of amendment because there is no petition capable of being amended. The learned High Court Judge cannot therefore be faulted in deciding as he did that the defect or irregularity was fatal and rendered the petition *void ab initio* and incapable of being validly amended.

The Appellant also raised the issue that the Court below erred in dismissing the petition instead of exercising its inherent jurisdiction and discretion to allow the amendments and paid undue regard to technicalities contrary to the constitutional injunction in Article 118. The Appellant's arguments were based on Order 20 of the RSC which deals generally with amendment of originating process and other documents in the course of proceedings and Order 2 of the RSC on the effect of non-compliance with the rules of practice. Order 2 of the RSC gives discretion to the court, where there is an irregularity, to either grant leave or order the amendment or wholly set aside the proceedings as outlined in Order 2 rule 1 (2) that:

> **"(2) subject to paragraph (3) the court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and**

on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred..... or exercise its powers under these rules to allow such amendments (if any)..... as thinks fit."

Paragraph 2/1/2 under Order 2 of the RSC in part provides that where there is failure to comply with statutory requirements or other improprieties of a serious nature, the proceedings can still be rendered a nullity and not merely an irregularity contrary to the general tenor of Order 2 on the effect of non-compliance. This paragraph 2/1/2 on the effect of the rule on non-compliance states that:

"This rule came into its present form following the decision of the Court of Appeal in the Re Pritchard (decd.) [1963] Ch. 502 and under it the above mentioned distinction between nullity and mere irregularity disappears ..... at any rate in regard to "a failure to comply with the requirements of these rules" though it may still be that there are other failure to comply with statutory requirements or other improprieties so serious as to render the proceedings in which they occur, and any order made therein, a nullity."

The Supreme Court in the **Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture**[6] case had occasion to consider the issue of whether all cases of procedural shortfalls should be allowed and stated that the decision to allow amendments or dismiss has to be made on case by case basis in the exercise of judicial discretion. Both Orders 2 and

20 of the RSC also acknowledge the fact that the courts have to exercise discretion in allowing amendments.

Order 20 rule 7 of the RSC provides for amendment of originating process such as petitions in the manner provided in Order 20 rule 5 on amendment of writ or pleadings with leave. These two rules as read with Order 20 rule 8 clearly provide that in the case of amendment of originating process such as a petition, leave of the court must first be obtained. It is thus clear that Order 20 rule 1 of the RSC on amendment of writ without leave does not apply to petitions. In the current case, no leave of the Court was sought or obtained prior to filing the amended petition. Paragraph 20/8/50 of the RSC emphasizes the aspect that amendments of originating process under rules 5, 7 and 8 must be made with leave of the court. The Appellant also relied on paragraph 20/8/6 of the RSC on the general principles for grant of leave to amend. We must state that this does not assist the Appellant because there was no application for leave to amend the petition of 26th August. Therefore, even if it were possible to amend the petition had the defect not been fatal, the amended petition would still have been incompetent as it was not validly done in line with Order 20 rule 7 of the RSC. The amended petition of 29th August thus had nothing to stand on and was irregular in itself. The Appellant's arguments on this aspect thus have no merit.

The Appellant's further argument was that the Court below paid undue regard to technicalities contrary to Article 118(2)(e) of the Constitution. We had occasion to consider this constitutional provision in the case of **Henry Kapoko v The People**[11] and we stated at page J33 that:

> **"Article 118(2)(e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustified regard to a technicality."**

Rules of procedure are necessary and cannot be said to be mere technicalities that hinder the due process to warrant them to be disregarded in the interest of justice. The rules of procedure relating to election petitions are necessary for the quick and just disposal of the cases. Therefore, adherence to them cannot be said to constitute undue regard. Article 118(2)(e) does not direct courts to disregard technicalities but not to pay undue regard to them in such a way as to obstruct the course of justice.

This constitutional provision of proscribing undue regard to procedural technicalities is one that has to be considered by the courts on a case by case basis. The courts therefore have to take into account all the relevant circumstances and requirements of a particular case and determine the issue conscientiously bearing in mind the object of dispensing substantive

justice to the parties. This is not a one sided consideration but a holistic approach.

In this instant case, it cannot be said that the learned High Court Judge had undue regard to procedural technicalities. The Ruling shows that the learned Judge had due regard to the statutory provisions and the rules and the special nature of election petitions and the facts surrounding the Appellant's petitions before arriving at the decision he made. The Appellant's argument on this aspect clearly has no merit.

We wish to state that it is incumbent upon litigants and their counsel to strictly and diligently comply with the rules relating to the presentation of election petitions and prosecution of election petition appeals as failure to comply has dire consequences on these special proceedings which are also time bound.

In summary, ground 3 has succeeded in part as regards the computation of time for the 14 days statutory period for filing an election petition in the High Court. The rest of the grounds of appeal, that is, grounds 1, 2 and 4 and part of ground 3 have failed and we accordingly dismiss them.

The appeal therefore stands dismissed apart from the one aspect that has succeeded.

In light of the aspect that has succeeded, each party is to bear their own costs.

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M.S. MULENGA
CONSTITUTIONAL COURT JUDGE

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E. MULEMBE
CONSTITUTIONAL COURT JUDGE

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M.M. MUNALULA
CONSTITUTIONAL COURT JUDGE