

TANZANIA / JUDGMENT

fred tungu mpendazoe vs the attorney general others 2011 tzhc 2034 16 september 2011

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TZHCDECIDED
16 September 2011

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY A T DAR ES SALAAM
MISCELLANEOUS CIVIL APPLICATION NO 98 of 2010 FRED TUNGU MPENDAZOE PETITIONER
VS.

1. THE ATTORNEY GENERAL 1st RESPONDENT
2. DR. MILTON MAKONGORO MAHANGA 2nd RESPONDENT
3. THE RETURNING OFFICER, SEGEREA CONSTITUENCY 3rd RESPONDENT

RULING

Date of last Order: 27-07-2011 Date of Ruling: 16-09-2011 JUM A, J.: This is a ruling on the two limbs of a preliminary point of objection, which Hon. the Attorney General (1st Respondent herein) and the Returning Officer for Segerea Parliamentary Constituency (3rd Respondent herein) jointly raised against the third edition of the Election Petition that was filed by Fred Tungu Mpendazoe seeking the avoidance of the election of Dr. Milton Makongoro Mahanga (2nd Respondent herein) as the Member of Parliament representing Segerea Constituency. It is important to briefly reflect back why the Petition (i.e. the Miscellaneous Civil Application Number 98 of 2010) is now in its third edition before this Court. The first edition of the Petition was filed on 10th November 2010 under the provisions of the National Elections (Election Petition) Rules, 1971 and before the National Elections (Election Petition) Rules, GN 447 of 2010 came into operation to guide the conduct of election petitions. On 10 December 2010 this Court directed the Petitioner to file an amended Petition under the guidance of the National Elections (Election Petitions) Rules, 2010 which had earlier on 19th November 2010 been published to guide the conduct of petitions. The Petitioner duly complied on 15th December 2010 when he filed his second edition of the petition (Amended Petition). The third edition of the Amended Petition which the Petitioner filed on 20th June 2011 was an outcome of the upholding of preliminary points of objection contending that paragraphs 7.4, 7.5, 7.6, 7.7, 7.10 and 7.12 of the second edition of the amended petition were vague, unspecific, lacking in material sufficiency and carried with them the potential to prejudice, embarrass and delay the fair trial of

the petition. In my order dated 6th June 2011, I directed the Petitioner to amend the second edition of his petition to comply with my Ruling. The two points objecting the third edition of the Amended Petition were noticed in the Reply to the Amended Petition which the 1st and 3rd Respondents filed on 30th June 2011. The objection and the Reply to the Amended Petition was drawn and filed by Mr. D. Z. Kakwaya, the learned State Attorney from the Attorney General's Chambers. Contending that the third edition of the petition introduced a new allegation contrary to the order of this Court; Mr. P.K. Ntwina the learned Principal State Attorney, submitted that Paragraph 7.9 of the second edition of the Petition corresponds with paragraph 7.7 of the third edition with both recounting an arrest that took place at Arnotoglou Vote Counting Station. According to the learned Counsel, this arrest under paragraph 7.7 of the third edition is described as "individual was arrested" and that 'individual' was also questioned and charged by the police. What concerns Mr. Ntwina is that in paragraph 7.9 of the earlier second edition the same person who was first described as "an individual was arrested" but later in the same paragraph the 3 description becomes the 'officer' was questioned and charged by the police." Mr. Ntwina asserts that the change in the reference from an 'officer' in paragraph 7.9 to an 'individual' in paragraph 7.7 of the third edition amounted to introduction of a new ground or at least a new allegation of fact, both being inconsistent with previous pleadings in terms of Order VI Rule 7 of the Civil Procedure Code, Cap. 33. Mr. Peter Kibatala for the Petitioner opposed the two points of preliminary objection. Responding to the ground of objection that the Petitioner introduced a new allegation contrary to the order of this Court, the Counsel for the Petitioner submitted that the third edition of the Petition has not introduced any new allegation or new cause of action to embarrass or prejudice the Respondents in their defence. In Mr. Kibatala's view, the alleged replacement of a single phrase "Officer" with the phrase "individual" did not amount to introducing new allegation or new cause of action embarrassing to the Respondent's defences. Mr. Kibatala urged this Court to dismiss the first limb of the Preliminary point of objection. With regard to the second limb of the Preliminary Objection contending that the particulars in paragraphs 7.6 and 10 of the third edition of the petition are imprecise, uncertain and lack coherence, Mr. Ntwina submitted that paragraph 7.8 of the second edition of the Petition contained the same wording as paragraph 7.6 in the third edition. In view of the learned Principal State Attorney both paragraphs 7.8 (second edition) and paragraph 7.6 (third edition) make reference to what is averred in paragraph 7.7 of the second edition (which was struck out by this Court). Mr. Ntwina submitted that after this Court had on 6th June 2011 struck out paragraphs 7.6, 7.7 and 7.12 of the second edition, the third edition should have had paragraphs 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 7.7, 7.8, 7.9, 7.10, 7.11 and 7.12. In his responding submissions regarding the second limb of preliminary regarding particulars of paragraphs 7.6 and 10 of the third edition of the Petition being imprecise, uncertain and lack coherence, Mr. Kibatala the learned Counsel for the Petitioner submitted that re-arrangement of the paragraphs in the amended petition neither amounted to a failure to comply with this Court's Order, nor do they lead to impreciseness, uncertainty or incoherence alleged by the learned Principal State Attorney. Mr. Kibatala went on to submit that after the court had struck out some paragraphs, some semblance of re-arrangements of the remaining paragraphs was necessary to comply with the Court's Order; and this is what the Petitioner did. According to the learned Counsel, compliance with the

Court's Order does not require the Petitioner to reproduce every comma or full stop that was in the paragraphs that were not struck out following the Ruling of this Court. I have carefully considered the submissions by the two learned Counsel with their respective illustrations of supporting authorities which they cited to support their respective positions. I have similarly paid judicial regard to the Order of this Court arising from the Ruling dated 6th June 2011 wherein several paragraphs of the second edition of the Petition were amended and some were struck out. From the broad perspective of the law governing compliance with the order of this Court; three main issues stand out for my determination from the two points of objection. The first issue is whether the third edition of the Amended Petition complied with the order of this court dated 6th June 2011. The second issue calling for my determination is whether a change in the description of 'officer' in the second edition to that of an 'individual,' in the third edition was surreptitious introduction by the Petitioner of a new ground or claim that was not before this Court in the second edition of the Petition. The third issue is whether re-arrangements of the paragraphs took the third edition of the petition outside the Ruling and Order of this court. I have closely scrutinized both the second and third editions of the Amended Petition. I have no doubt whatsoever that the Petitioner complied with the order of this Court dated 6th June 2011. Several matters are clear from my scrutiny. First, paragraph 7.6 of the second edition which was struck out by the order of this court dated 6th June 2011, was not reproduced as any part of paragraphs making up the third edition of the Amended Petition. Secondly, this Court did not strike out paragraph 7.8 of the second edition which the Petitioner has included in his third edition of the Amended Petition as his paragraph 7.6. My third observation is to the effect that paragraph 7.6 of the second edition of the Amended Petition which this court struck out on 6th June 2011 is not the same as paragraph 7.6 which the Petitioner has included in his third edition of the Amended Petition. From the foregoing it is my finding that paragraphs 7.8 of the second edition of the Amended Petition and paragraph 7.6 of the third edition of the Amended Petition are similar in object and content. It therefore follows that having found that there was nothing wrong with paragraph 7.8 of the second edition, this Court inevitably also finds that there is nothing wrong with paragraph 7.6 appearing in the third edition of the Petition. Petitioner's claim under paragraphs 7.8 (second edition) and 7.6 (third edition) are both not tied in any way to the references to polling stations of Tabata but they refer to a specific incident involving a person who is clearly identified in both paragraphs as one Imelda Kafanabo. The question whether this person was an election officer or not should be left to the evidence which parties to this petition will offer. It is my finding that paragraph 7.8 of the second edition which the Petitioner reproduced as paragraph 7.6 in the third edition of the Amended Petition discloses a very clear claim by the Petitioner which is distinct and different from the unclear claims which were made under Paragraph 7.7 of the second edition which this Court struck out on 6th June 2011. There is no doubt in my mind that the claim that is made by the Petitioner under paragraph 7.6 of the third edition of the Amended Petition is clear enough to enable the Respondents to prepare their defence without any semblances of embarrassment or prejudice. As I have said earlier, I did not in my Ruling and resulting Order of 6th June 2011 strike out paragraph 7.8, the Petitioner was therefore within his legal rights to reproduce paragraph 7.8 (second edition) as his paragraph 7.6 in the third edition of the Amended Petition. From the foregoing, it is my holding that the

Petitioner complied with the order of this Court dated 6th June 2011. 8 Mr. Ntwina has contended that the change of description from “ officer” in paragraph 7.9 of the second edition of the Petition to that of “an individual” in paragraph 7.7 of the third edition of the Petition, introduced either a new ground or a new allegation contravening the order of this Court. I will with due respect disagree with the learned Principal State Attorney that the change of description from “officer” to an “ individual” introduced a new ground within the meaning of Order VI Rule 7 of the Civil Procedure Code, Cap 33 which states: “ No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.” I do not agree that an opportunity available to the Respondents to muster up evidence and fend off claims over acts of “an officer” will be lost when the reference is changed to refer to the acts of “ an individual.” It is my holding that the change in the reference from that of an “ Officer” in paragraph 7.9 to that of “an individual” in paragraph 7.7 of the third edition did not amount to introduction of new ground or new claim within Order VI Rule 7 of the Civil Procedure Code. Regarding the effect of re-arrangements of the paragraphs of the third edition of the Petition, I am of the opinion that the order of this Court directing the deletion of paragraphs from the second edition of the Amended Petition did not extend to requiring the Petitioner to observe any pattern of re-numbering of the paragraphs. Renumbering of the paragraphs of the Petition did not take the third edition of the Petition outside the purview of the order of this Court dated 6th June 2011. Re-numbering of the paragraphs did not prejudice interests of substantive justice which are underscored by Rule 32 (1) of the National Elections (Election Petitions) Rules, 2010 GN 447 of 2010. This Rule provides in very clear terms that no petition should be dismissed for reason of procedural irregularity unless the court is of the opinion that such irregularity has resulted or is likely to result in a miscarriage of justice. This Rule is further fortified by the guidance of Art. 107 A (2)

- (e) of the Constitution of United Republic of Tanzania which oblige courts in Tanzania not to rely too much on technicalities to the extent of denying justice to parties. Justice to parties will best be served if they are heard in the main petition. I should perhaps proceed to address myself to the contention by the learned Principal State Attorney that paragraph 7.6 of the third edition of the petition is imprecise to the point of being incoherent thus prejudicing Respondents' defence. The relevant paragraph 7.6 states: 10 7.6 That further to the averments in 7.5 above, the Tabata Ward Executive Officer who was also the election officer responsible for Tabata Ward, one Imelda Kafanabo was apprehended in possession of fake and doctored election results forms {Forms No. 21B}, and subsequently charged at Central Police Station, Dar es Salaam. Reference shall be made to a copy of a Video Tape recorded at the material time showing the suspect' s arrest, initial questioning and subsequent hand-over to the Central Police Station as Annexure FM-3, for which leave is hereby craved to refer to it as part of this petition. There is nothing in this paragraph that is imprecise, uncertain or incoherent. This paragraph does not in my opinion offend Order VI Rule 3 of the CPC directing need for conciseness and clarity of pleadings:

3. Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively; and dates, sums and numbers may be expressed in figures. ii Order VI Rule 3 of CPC, in essence elaborates Rule 5 (1) and (2) of the National Elections (Election Petitions) Rules, 2010 which identifies the basic particulars that are required to be clearly set out in any petition. It is my finding that paragraph 7.6 of the third edition of the amended Petition is clear enough to enable the Respondents to appreciate the particular facts of Petitioner's case. The paragraph in addition is clear enough and enables this Court to appreciate what is really at issue between the Petitioner and the Respondents. I will from the foregoing hold that Paragraph 7.6 of the third edition of the Petition has neither infringed the order of this Court nor does it prevent the Respondents from appreciating the claim lodged by the Petitioner. In the end, the Preliminary Objection raised by the 1st and 3rd Respondents is overruled with costs to the Petitioner. It is so ordered. -jL I.H. Juma JUDGE 16-09-2011 Delivered in presence of Mr. Kibatata (Advocate) for the Petitioner, Mr. Mboya (SS. Attorney) for the 1st Respondent and 3rd Respondent and Mr. Msemwa (Advocate) for the 2nd Respondent. I.H. Juma JUDGE 16-09-2011

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Prepared on 14 October 2026 · Esheria