

TANZANIA / JUDGMENT

ezeziel kabonge mshingo vs the national election commission nec and 4 others 2021 tzhc 3787 28 june 2021

COURT
TZHCDECIDED
28 June 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE DISTRICT REGISTRY OF KIGOMA) AT KIGOMA (APPELLATE JURISDICTION) MISC. CIVIL CAUSE NO. 2 OF 2021 IN THE MATTER OF AN APPLICATION FOR ORDER(S) OF CERTIORARI AND PROHIBITION AND IN THE MATTER OF LAW REFORM (FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS) ACT, [CAP. 310 R.E. 2019] AND THE LAW REFORM FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS (JUDICIAL REVIEW PROCEDURE AND FEES) RULES, 2014 AND IN THE MATTER OF AN APPLICATION TO CHALLENGE THE DECISION OF THE NATIONAL ELECTION COMMISSION (NEC), THE MINISTER OF REGIONAL ADMINISTRATION AND LOCAL GOVERNMENT, THE PERMANENT SECRETARY MINISTRY OF REGIONAL ADMINISTRATION AND LOCAL GOVERNMENT, AND THE DISTRICT EXECUTIVE DIRECTOR (DED) FOR KASULU DISTRICT TO DECLARE THE COUNCILOR SEAT FOR KAGERA NKANDA WARD IN KASULU DISTRICT VACANT AND CALL FOR A BY-ELECTION BETWEEN EZEKIEL S/O KABONGE MSHINGO..... APPLICANT AND THE NATIONAL ELECTION COMMISSION (NEC)..... 1st RESPONDENT 1 THE MINISTER RESPONSIBLE FOR REGIONAL ADMINISTRATION AND LOCAL GOVERNMENT..... 2nd RESPONDENT THE PERMANENT SECRETARY MINISTRY RESPONSIBLE FOR REGIONAL ADMINISTRATION AND LOCAL GOVERNMENT..... 3rdRESPONDENT THE DISTRICT EXECUTIVE DIRECTOR FOR KASULU DISTRICT..... 4thRESPONDENT THE ATTORNEY GENERAL5th RESPONDENT

RULING

28th & 28th June, 2021 A. MATUMA, J. With the leave of this Court dated 28th April, 2021, the applicant filed the instant application seeking for Prerogative writs of certiorari and prohibition against the respondents herein. The background to this application is that the applicant was a councilor elect for Kagera-Nkanda Ward within Kasu'u District in Kigoma Region during the 2020 general election. He was however on the 14th April, 2021 informed by the 4th respondent that his councilor seat was declared vacant by reason of citizenship as declared by the 3rd respondent after having been informed that the applicant was a none-citizen. In that respect the 1st respondent was also informed as such and started election process to fill in the vacant seat an act

which aggrieved the applicant hence this application. At the hearing of this application the applicant was present in person and had the service of three learned advocates namely; Mr. Fortunatus Muhalila, Mr. Ignatius Kagashe and Mr. Hamisi Kimilomilo. The respondents on the other hand had the services of Mr. Allan Shija learned State Attorney assisted by Mr. Emmanuel Ladislaus learned Solicitor for the 4th Respondent. Mr. Fortunatus learned advocate submitting on behalf of his fellow brethren for the applicant adopted their affidavit and Statement in support of the application. In addition thereof, he submitted that the decision by the respondents to declare the Applicant's councilor seat vacant and calling for by-election is illegal because the same was made at the time the applicant was still a sitting councilor and yet to be informed of the decision. He referred me to the letter dated 14/04/2021 which was also annexed to the application with clear words that the councilor seat was vacant as from such 14/4/2021 while the 1st respondent had already declared the seat vacant as from 09/04/2021. The learned advocate cited to me section 13 of the Local Government 3 Elections Act to the effect that a councilor seat cannot be declared vacant while there is a valid councilor. He also sported some errors/defects he considered to be fatal in the 3rd respondent's letter which declared the seat vacant. These are; that such letter which is dated 12/04/2021 show that the intended Ward was Kagera-Nkinda and not Kagera-Nkanda and thus the 4th Respondent erred to deal with the Applicant's ward which was not referred in the said letter. He also faulted the allegations that the applicant is a none-citizen, the basis of which his political position (seat) was cancelled submitting that according to the immigration report at the District level the applicant was heard but he was not found guilty of immigration offences. But at the Immigration on the National level the applicant was not heard and thus a breach of the right to be heard. But again, that the National Immigration Report is confusing itself since it refers to one Yohana Mshita and the applicant at the same time. It is therefore not certain as to who it was referring as a none-citizen between the said Yohana Mshita and the Applicant herein. According to him such report had no evidential value upon which the respondent's could rely in their respective decisions to the detriment of the applicant. 4 The learned advocate finally submitted that in law it is the chairman of the Council who is empowered to inform the minister responsible for local government that a councilor seat is vacant and not the minister of Home Affairs as happened in this case hence the whole process towards declaring the seat vacant was illegal, null and void. Responding to the applicant's submission, Mr. Allan Shija learned State Attorney argued that the election law for local government cannot be read in isolation. The same should be read with section 40 of the Local Government District Authorities Act which provides that whenever there is change of circumstances the elected member of the council may be disqualified as happened in this case after it was discovered that the applicant was not a citizen of Tanzania at the time of the election. About issues of Kagera-nkinda and Kagera-nkanda, the learned state attorney argued that the same was a mere slip of the pen and irrelevant in the circumstances of this matter because the subject matter of the problem was the applicant himself being a none citizen and not the Ward. About the allegation that the applicant was not heard by the Immigration Inquiry team, the learned state attorney argued that he was accordingly heard from the District, level to the last level referring me to some pages of the report to the effect that the applicant was heard and even submitted some documents in defence of his citizenship. Having heard the parties for and

against this application, I am of a settled view that this application should fail. The applicant's advocates have concentrated on technical trivial issues relating to typing errors, improper proof reading of the letter for correction of correct names, lack of the channel of communication between the Chairman of the Council and the Minister for Local Government leaving out the core issue relating to the nationality of their client which was the subject matter leading to his losing councillorship in the instant dispute. This is because with the annexures in both the Applicant's affidavit and the respondent's counter affidavit, it is obvious that the applicant's citizenship was dealt by the Immigration authority which finally concluded that he was a none-citizen but a Rwandese. It was the Immigration who inquired for the citizenship of the applicant and he himself has not disputed to have been examined on his citizenship except that he alleges to have been so inquired at the District level only. Be it as it may, in the immigration report titled "TAARIFA YA UCHUNGUZI WA URAIA WA BW. EZEKIEL KABONGE MSHINGO" it was concluded that; "BW. Ezekiel Kabonge Mshingo siyaji wa Tanzania".⁶ It is from the same report, the Inquiry team suggested the applicant's political positions to be cancelled; 'Kwa kuwa mtuhumiwa Bw. Ezekiel Kabonge Mshingo siyo raia wa Tanzania, ambaye anafanya kazi za kisiasa kama Diwani wa Kata ya Kagerankanda na vile viie ni Mwenyekiti wa Kitongoji cha Katoto, time ya uchunguzi inapendekeza kuwa mamtaka husika zimfutie nafasi hizo za kisiasa kwa kuwa hana sifa kwa mujibu wa sheria'. In the circumstances, the 3rd respondent acted on the advice of the relevant authority responsible for citizenship affairs to direct the 4th respondent to inform the applicant of his political status and to call for the 1st respondent to fill in the vacant seat. Since the Immigration authority and the Ministry for Home Affairs who worked on the nationality status of the applicant and finally declared him a non-citizen are not parties to this application, their findings in relation to the citizenship status of the applicant cannot be disturbed nor challenged by reasons of the basic principle that no body should be condemned unheard whether or not their findings were good in law. The applicant was aware that his citizenship was at query and admitted so through his counsel to have been summoned by the immigration authority at the District level. Therefore⁷ When he was finally informed⁷ by the 4th respondent that his councilor seat was vacant by reason of nationality, he ought to have made a follow up of the decision relating to his nationality and challenge such nationality findings before protesting for his councillorship as nationality is the primary qualification for a political position like the councillorship. In the like manner, if the immigration findings that the applicant is a none-citizen of the united Republic remains unchallenged, then there would be unjustifiable reason to disturb the decision of the 2nd and 3rd respondent for their declaration that the councilor seat was vacant for obvious reason that under section 39(2)(a) of the Local Government (Elections) Act, Cap. 292 R.E. 2015, one is not qualified for election in the local authority unless satisfies that he is a citizen of the United Republic of Tanzania. Being a councilor or having been at one time a councilor or having held any political position in the United Republic and the fact that the applicant is a holder of the certificate of birth No. 1677849 and Citizenship National Identification Number 19731216473150000226 are all irrelevant in the instant matter because before me it is not a citizenship or immigration dispute but a Miscellaneous cause relating to Cancellation of Councillorship and an election process for fulfilling the stated vacant seat. That is why the relevant authorities relating to citizenship affairs as herein above stated have not been made

parties to contest against the applicant's citizenship, nor the relevant law relating to the immigration disputes were cited to that effect. I am therefore not better positioned to declare the applicant a citizen/national of Tanzania so that I can rule out that he is still a valid councilor. Likewise, I am not better positioned to declare him a none-citizen because the relevant parties are not before me. Nationality of the applicant has not been seriously and accordingly brought before the court. Rather it has been brought by the applicant as a mere course for his councillorship being annulled. His citizen status remains as decided administratively by the relevant authorities unless properly challenged and determined. The applicant is at liberty to challenge such decision in accordance with the law and not through this application as herein above stated. Having said all these, this application is hereby dismissed. In that respect my previous order dated 28th April, 2021 restraining the respondents from continuing with the "By-election" process has come to an end today and they can justifiably continue as such. No orders as to costs. Right of appeal is fully explained subject to the requirements of the relevant laws governing the matter. 9 It is so ordered. A uma Judge 28/06/2021 10

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