

EP 7/2018

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NO.1

IN THE HIGH COURT OF SIERRA LEONE
(GENERAL CIVIL DIVISION)

GENERAL PARLIAMENTARY ELECTIONS FOR CONSTITUENCY 130, WESTERN
URBAN DISTRICT IN THE WESTERN AREA OF THE REPUBLIC OF SIERRA LEONE
HELD ON THE 7TH DAY OF MARCH 2018

THE PETITION OF ABDUL SULAIMAN MARRAY-CONTEH OF CONSTITUENCY 130,
WESTERN URBAN DISTRICT, WHOSE NAME IS SUBSCRIBED.

BETWEEN

ABDUL SULAIMAN MARRAY-CONTEH
26 Highbroad Street
Murray Town
Freetown

- PETITIONER

AND

OSMAN ABDAL TIMBO
Highbroad Street
Murray Town
Freetown

- 1ST RESPONDENT

AND

THE NATIONAL ELECTORAL COMMISSION
Tower Hill
Freetown

- 2ND RESPONDENT

AND

THE NATIONAL RETURNING OFFICER
THE NATIONAL ELECTORAL COMMISSION
Tower Hill Freetown

- 3RD RESPONDENT

AND

THE WESTERN URBAN DISTRICT RETURNING OFFICER -
THE NATIONAL ELECTORAL COMMISSION
Western Area
Tower Hill
Freetown

4TH RESPONDENT

COUNSEL:

M. MEWA ESQ, I KANU ESQ, J KALLON ESQ, JJ CAMPBELL ESQ, FOR THE PETITIONER
A. SESAY ESQ, B KOROMA ESQ, R.A. NYLENDAR ESQ, FOR THE 1ST RESPONDENT
B.E.T. CUMMINGS ESQ, FOR THE 2ND 3RD, 4TH RESPONDENT

JUDGEMENT DELIVERED ON THE 31ST DAY OF MAY 2019

The Petitioner filed a petition against the Respondent in respect of the General Parliamentary Elections for constituency 130 Western Urban District in the Western Area of the Republic of Sierra Leone held on the 7th day March, 2018 and prays for the following reliefs:-

- i. Declaration that OSMAN ABDAL TIMBO of the ALL PEOPLES CONGRESS was not duly elected or returned as member of Parliament for constituency 130 aforesaid.
- ii. That the petitioner herein be declared the winner of parliamentary elections held in constituency 130 on the 7th March 2018.
- iii. That the 1st Respondent's declaration as winner by the National Returning Officer be a nullity as his candidature to run for election on same was illegal ab initio.
- iv. An intercountry injunction restraining all statutory and other authorities and/or officials from swearing in the said OSMAN ABDAL TIMBO as member of Parliament or take up his seat in Parliament until the hearing and determination of this petition.

Proceedings in this trial was conducted by way of affidavit evidence pursuant to section 35 (1) of the Election Petition Rules 2007 which state.

"Subject to this rule, all evidence which would otherwise have been given viva voce at the trial of an election petition shall be by affidavit."

THE PETITIONER'S CASE

Learned Counsel for the petitioner M. Mewa Esq, argued that the gravamen of the Petitioners complain could be found in the pleadings, particularly paragraph 2 of same, which state that the 1st Respondent did not resign his position within twelve months and as such contravenes section 76 sub section 1(b) of the Constitution of Sierra Leone Act No. 6 of 1991. He stated that, paragraphs 4, 5 and 6 of the affidavit in support show that the 1st Respondent was a Public Officer attached to the office of the Chief of Staff. Counsel referred to exhibit B the resignation letter of the 1st Respondent, exhibit C salary receipt, of the 1st Respondent, exhibit D showing that he was also a member of the Board of National Commission for Privatization. Counsel submitted that it is trite law that where qualification or disqualification is based on the Constitution proof of same suffices. He further referred to exhibit C to show that the 1st Respondent received salaries in the sum of Le15,830,364 (Fifteen Million Eight Hundred and Thirty Thousand Three Hundred and Sixty Four Thousand Leones) throughout the month of 2016 and January and February 2017 in his capacity as legal adviser in the office of Chief of Staff. Also that he received the sum of Le6,290,197 (Six Million Two Hundred and Ninety Thousand One Hundred and Ninety Seven Leones) up to March 2017. Counsel relied on the case of **ROGERS WRIGHT, AND SAM MCARTHY V. ANSU LANSANA**. He also relied on the case of **HON. MOHAMED SAMSU ALWA'U**, to argue

that where there is a constitutional infraction the Respondent's declaration must be declared null and void abinitio.

REPLY FOR THE 1ST RESPONDENT

Learned Counsel A.S. Sesay Esq, relied on the affidavit of Osman Abdal Timbo sworn to on the 19th day of April 2018. Attached to same are several exhibits.

Exhibit OAT1 is a copy of the announcement and declarations of the results which declared the 1st Respondent as having the highest number of votes.

Exhibit OAT2 is a copy of the declaration.

Exhibit OAT3 is a copy of the press release stating the date for the election.

Exhibit OAT4 is a copy of the endorsed list of APC parliamentary candidates.

Exhibit OAT5 is a copy of the gazette, name, and occupation of each parliamentary candidate so nominated.

Exhibit OAT6 is a copy of the RR form.

Counsel also relied on the affidavit of Samuel Abioseh Davies and the exhibits attached thereto. He argued that the date for the election was only announced on the 15th February 2018 and that the 1st Respondent resigned on the 6th March 2017. Counsel argued that the petitioner slept on his right and submitted that he ought to have taken advantage of section 63 sub sections 1, 2, 3, 4, 5, and 6 of the Public Elections Act 2012 by raising an objection which he did not do. Also he argued that the Petitioner has no authority to approach this court as a court of first instance but rather on appeal against the decision of the returning officer. He also argued that there is no evidence to show that NCP falls within the definition of public service.

REPLY FOR THE 2ND, 3RD AND 4TH RESPONDENTS

B.E.T.Cummings Esq, learned Counsel for the 2nd, 3rd and 4th Respondents relied on the affidavits sworn to by Zianab Sankoh and Mahoney Ansue. Attached to same are exhibits. She argued that there is no legal basis for this Petition on the grounds that the Petitioner ought to have utilized section 63 Sub Section 1 and Sections 3, 4, and 5 of the Public Elections Act No. 4 of 2012. She said what ought to be Petitioned is the decision of the Returning Officer and that the Petitioner ought to have objected to the nomination of the 1st Respondent, at the nomination stage and not now.

IN ANSWER

Learned Counsel for the Petitioner, M. Mewa Esq., submitted that the 1991 constitution cannot be subjected to the dictate of the Public Elections Act. He further stated that acts regarding the right of the Petitioner is not subjected to any appeal and that there is no law to the contrary. He submitted that Section 63 of the Public Elections Act No.4 2012 is directory and not mandatory. He prays that the court invokes, Section 147 of the Constitution.

ISSUE FOR DETERMINATION

The issue for determination in this trial can be effectively narrowed down as to whether there was any constitutional violation or infraction by the 1st Respondent at the time of his nomination?

The main trust of the Petition hinges on section 76 Sub Section 1(b) of the constitution of Sierra Leone Act No. 6 of 1991. It Provides:

"No person shall be qualified for election as a member of Parliament. If he is a member of any commission established under this constitution, or a member of the Armed Forces of the Republic, or a Public Officer, or an employee of a Public Corporation established by an Act of parliament, or has been such a member, ~~officer~~ or employee within twelve months prior to the date on which he seeks to be elected to parliament."

There is uncontroverted evidence that the 1st Respondent was working as legal Adviser to the Public Private Partnership Unit in the office of the Chief of Staff. He resigned that position on the 6th March 2017. There is also evidence that 1st Respondent was Board Member of National Commission for Privatization. However do these positions held by the 1st Respondent amount to him being a Public Officer as referred to in the grund norm (the constitution).

Sections 171 Sub Section 1, 3 and 4 of the said constitution gives a clear picture as to who a public officer is as referred to in Section 76 Sub Section 1 (b) of the constitution. The said provisions are:

Section 171 (1) "Public Officer means a person holding or acting in a Public Office' In my view public service is not only limited to those referred to in section 171 Sub Section 3. It also includes those who receive "emoluments attaching to which are paid directly from the consolidated fund or directly" out of monies provided by parliament. However sections 171 Sub Section 4 clearly excludes those who should not be affected by section 76 Sub Section 1(b) of the constitution in provides.

"In this constitution the public service does not include service in the office of the President, Vice President, Speaker, Minister, Deputy Minister, Attorney General and Minister of Justice, Deputy Speaker, member of parliament, or any member of any commission established by this constitution or any member of any council, board, panel, committee or other similar body

(whether incorporated or not) established by or under any law, or in the office of any Paramount Chief, Chiefdom Councillor or member of a local court".

The 1st Respondent was legal adviser in the office of Chief of Staff to the Public Private partnership attached at State House. Such a position in my view does not fall under the office of the President. In fact, it is not every office that is established or created at State House that enjoy the privilege of being excluded and therefore will not be caught by the provisions of section 76 Sub Section 1(b) of the Constitution. The 1st Respondent conceded to this in paragraph 3 of his affidavit in opposition sworn to on the 11th day of September 2018 when he averred.

"That before contesting for elections, I was legal adviser to the private partnership , a position I resigned from on the 6th March 2017 and last received salary on the 29th of February 2017 in line with the requirements of the constitution of Sierra Leone."

I have read in extensio the case of ABUBUKARR CONTEH AND SOLOMON EKUMA BEREWA AND ANOTHER AND CHARLES FRANCIS MARGAI AND SOLOMON EKUMA BEREWA INTITULED SC1/2007 AND SC2/2007. There is a glaring distinction between those cases and the instant case, in that the Respondent in those cases, was the Vice President who is covered by Section 171 sub section 4 of the Constitution, unlike the Respondent in the instant case who cannot seek refuge under the said provision of the

Constitution, as he is not covered by it. Also there is affidavit evidence that the 1st Respondent was a Board member of the National Committee for Privatization and received salaries within the twelve months period to the elections. Such evidence is also uncontroverted be though as it may it was not pleaded by the petitioner but was however sworn to in the affidavit in support of the petition. It is evident that the Respondent is a Public Officer in the Public service that is disqualified pursuant to Section 76 Sub Section 1(b) of the Constitution. He ought to have resigned his position twelve months from the date of nomination. This is so because election is a process which starts with the nomination itself.

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The Counsel for the Respondent placed heavy reliance on sections 63 sub section 1,3,4, and 5 of the Public Elections Act No. 4 of 2012 to argue that the Respondent ought to have appeal against the decision of the Returning Officer before approaching the court and also that the Petitioner ought to have objected during the nomination process and not at a latter date. It is relevant to state these provisions relied upon. They are:63(1) "A voter of the electoral area in which a candidate intends to contest an election may at any time up to five O'clock in the afternoon of the last appointed day for the receipt of nominations object to the nomination of that candidate on any of the grounds set out And the returning officer shall decide on the validity of the objection".

63(3) *"The Returning Officer shall give his decision on an objection to a nomination paper as soon as practicable after it is made....."*

63 (5) *A candidate aggrieved by the decision of the Returning Officer as to the validity or other wise of a nomination paper may appeal to the elections commission, which may uphold the decision of the Returning Officer or reverse it".*

These provisions relied on in no way preclude an aggrieved party from approaching the court by way of an election petition. In fact where a party alleges a constitutional infraction or breach, as in the instant case he cannot be prevented from approaching the court to seek redress, except so prevented by the Constitution or any other law which is not so in this case. It is important for me to state that the sanctity of the Constitution is sacrosanct and cannot in any way be undermined by any subsidiary legislation. It is the grund norm and cornerstone upon which all other laws or bodies derive their authority or legitimacy. Any infraction or violation of the constitution must be treated seriously.

The importance and supremacy of the constitution is well recognised by Section 171 Sub Section 15 of the Constitution of Sierra Leone Act No. 6 of 1991 thus:

"The constitution shall be the supreme law of Sierra Leone and any other law found to be inconsistent with any provision of this

constitution shall to the extent of the inconsistency be void and of no effect".

In the instant case the provisions cited are in no way repugnant to any provision of the constitution. Also I must emphasise that if the intention of the drafters of the Public Elections Act 2012 wanted to preclude persons from approaching the court at any time that would have been stated unambiguously in the provisions of the Act.

The Respondent resigned on the 6th of March 2017 but last received salary on the 28th of February 2017. I have looked at exhibit OAT2 and all other exhibits in this matter.

It is clear in my mind that the 1st Respondent ought to have resigned twelve months before the date of nomination. That is not so in this case. The 1st Respondent from a computation of the date of nomination to his date of resignation is about eight months far short of the twelve months required by Section 76 Sub Section 1(b) of the Constitution. He was in clear breach of the said Constitution at the time of his nomination and his subsequent election. The evidence against the 1st Respondent as stated is overwhelming and this court is under a sacred duty to protect and unreservedly uphold provisions in the Constitution and not to undermine same.

In the matter of RE AN ELECTION PETITION AND RE ROGERS-WRIGHT (CIVIL CASE NO. 318/48 ALR judgement delivered on 6th December 1948, it was held that where a contestant is disqualified by virtue of any statute even where he wins such elections shall be declared void by reason of the undue return of a disqualified person.

I wholehearted endorse the said position of the law and apply same mutatis mutandis.

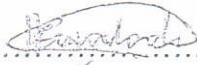
I shall also mention the case of HONOURABLE MOHAMED SALISU A. ALWA'U AND PEOPLES DEMOCRATIC PARTY V ABBAS M. YAKUBU AND OTHERS CA/K/EP/SHA/30/2003-Weekly Reports of Nigeria 26th January 2004, to buttress the fact that once an aspirant or Respondent as in the instant case, is disqualified by virtue of a legislation, his election ought to be declared void abinitio. In essence where such disqualification exists there is nothing the court can do other than to declare the 1st Respondent's election null and void abinitio.

It is relevant to underscore the fact that that in parliamentary election political parties in particular and the contestants should know that they are under a duty to ensure full compliance with the laws.

I have also averted my mind to the case of HON SAM MAY LAMIN MACARTHY V. ANSU B. LANSANA AND OTHERS C.C.267/12 in which the High Court set a precedent that in situations where a candidate is in breach of any law or orders of the court there shall be no need for a rerun of that election but that the candidate who pulled the second highest vote should be declared the winner. I am not bound by the said ruling or judgment but however due to the principle of binding precedent I shall adopt the said principle in this case.

In view of the overwhelming evidence before the court in favour of the petition, I hereby order as follows:-

1. That the 1st Respondent Osman Abdal Timbo was not duly elected or returned as Member of Parliament for Constituency 130 Western Urban District in the Western Area of the Republic of Sierra Leone on the 7th day of March 2018.
2. That the 1st Respondent's declaration as winner by the National Returning Officer is hereby nullified as his candidature to run for election on same was illegal ab initio.
3. That the Petitioner herein is declared the winner of parliamentary elections held in constituency 130 Western Urban District in the Western Area of the Republic of Sierra Leone on the 7th day of March 2018.
4. The 1st respondent shall pay salary, allowances, emoluments received as Member of Parliament into the consolidated fund within Thirty days of this order and evidence of such payment shall be submitted to the Master and Registrar of the High Court.
5. The Master and Registrar shall forward receipt of such payment to the court.
6. Costs of this petition to be borne by the 1st Respondent and such to be taxed.

SIGNED: 

HONOURABLE JUSTICE KOMBA KAMANDA J.