IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO 2B OF 1999

IN THE MATTER OF THE CONSTITUTION OF MALAWI

AND

IN THE MATTER OF THE PRESIDENTIAL AND PARLIAMENTARY ELECTIONS ACT

AND

IN THE MATTER OF THE ELECTORAL COMMISSION ACT

BETWEEN

WAMBALI MKANDAWIRE (*Representing himself & Other eligible voters who could not Register)*.....*PETITIONERS*

AND

THE ATTORNEY GENERAL .....1ST RESPONDENT

THE MALAWI ELECTORAL COMMISSION.....2ND RESPONDENT

THE UNITED DEMOCRATIC FRONT.....3RD RESPONDENT

CORAM : HON. JUSTICE NYIRENDA, J.

Mr Munlo *SC*; Counsel for the Petitioners
Mr Mhango; Counsel for the Petitioners
Mr Kaliwo; Counsel for the Petitioners
Mr Matenje; Counsel for the lst Respondent
Mr Chisanga; Counsel for the 2nd Respondent
Mr Latif; Counsel for the 3rd Respondent
Mr Sambo; Court Interpreter.

RULING

NYIRENDA, J.

In July this year I made two rulings in this matter, one on the 8th and the other on the 12th. It is upon a cumulative effect of those rulings that the three respondents herein, in a joint application, seek that the petition should be dismissed for want of prosecution.

In ruling on the application I will stray a long way to give a background to the matter so as to present the matter in perspective. In this quest I find no better way of doing so than by reciting my ruling of the 8th of July in extenso. My analysis of events in that ruling was as follows:-

> ***"Wambali Mkandawire has filed a petition in this court wherein he says he represents himself and other eligible voters who could not register for the Parliamentary and Presidential elections held on the***

15th of June, 1999 in this country.

The petition was set down for hearing in open court on the 25th of June, 1999 but on that day and before the matter went into hearing, another party, The United Democratic Front, applied to be added as a third respondent in view of the allegations in the petition and the nature of the relief's sought which were likely to affect the interests of that party.

The application was granted by the court upon being satisfied that the applicant has sufficient interest in the matter.

The case could not proceed to hearing because the third respondent sought time to be properly served and prepare for the hearing. The case was adjourned to the 12th of July, 1999 for hearing.

In the meantime the petitioner has applied to amend the petition and before me are the proposed amendments.

It is not of argument in my view that the petitioner has changed the group that he now wishes to represent. The original petition states;

"Wambali Mkandawire (representing himself and other

eligible voters who could not register.)"

The proposed amendment states:

"Wambali Mkandawire (petitioning on his behalf and on behalf of all members of M.C.P./AFORD Alliance, particularly those who did not register to vote and/or who did not vote on 15th June, 1999 General Elections."

The amendment proposes to bring in that class of persons who registered but were not able to vote. Although the proposed amendment narrows the group of petitioners to those of the MCP/AFORD alliance, it none the less brings in a new class petitioners.

It also comes to my attention that paragraphs 2, 4 and 5 have been altered to accommodate this new class of petitioners.

Mkandawire's petition is supported by his own affidavit. The affidavit has an important feature contained in paragraphs 2 and 3 which state as follows:-

"2. That in this petition I present Efrida Mwale Mwangongo of Katoloka Village T/A Kyungu,

Kepton Simwaka of Phaniso Village, T/A Kilupula both of Karonga;

3. *That I also represent Elen K. Vinkhumbo of Chanthombwa Village, T/A Muzimkulu of Mzimba District."*

The language in these paragraphs is simple and clear. I have difficulties in giving them any other meaning than what they are saying. If these two paragraphs were intended to carry any other meaning than what is clear on their face, such hidden meaning can only be blamed on the petitioner himself. What is clear from these two paragraphs is that Mr Mkandawire has particularised which unregistered voters are parties in the present petition.

The obversvations I make above are important to the issue I now turn to consider.

When this petition was first presented before court it was not clear under what provision of the electoral law it was based. In the course of preliminary applications for expedited hearing it started unfolding that perhaps the application was under section 100 of the

Parliamentary and Presidential Elections Act. In open court on the 25th of June, 1999 Mr Mhango, counsel for the petitioners, came out very clearly and presented the matter as one under section 100. I quote Mr Mhango as saying:-

> *"My Lord, you will appreciate that petitions of this nature are brought within 48 hours after the results have been announced. So parliament has considered already the importance of dealing with these matters speedily so that issues of elections can be brought to final settlement. To allow the prosecution, your Lordship did consider and made an order that we proceed with the hearing today. The question of two clear days does not apply. In fact the lawmakers have actually put the time bar of 48 hours. They were aware that even the respondent need time to consider the issues."*

Mr Mhango was responding to the respondents' application for an adjournment. If there were any doubts regarding the province of the petition, Mr Mhango shed light on the matter. It occurs to me that counsel for the respondents were given that same picture. It is on this understanding, no doubt, that counsel for the 3rd

respondent vehemently objects to the amendments arguing that the amendments are intended to circumvent the 48 hour time limitation in section 100.

In arguing for the amendments Mr Mhango has made a shift from his original position. He now says the petition is by way of appeal.

I notice that even in the heading of the proposed amended petition the words: "Being By way of Appeal" have been added, in this way, shifting the petition from section 100 to section 114 of the Parliamentary and Presidential Elections Act. For clarity let me set out the relevant parts of the two sections.

Section 100(1) provides as follows:-

> *"A complaint alleging an undue return or an undue election of a person as a member of the National Assembly or to the Office of President by reason of irregularity or any other cause whatsoever shall be presented by way of petition directly to the High Court within forty-eight hours, including Saturday, Sunday and a public holiday, of the declaration of the result of the election in the name of the person(a) claiming*

to have had a right to be elected at that election; or (b) alleging himself to have been a candidate at such election."

Section 114(1) provides as follows:

"An appeal shall lie to the High Court against a decision of the Commission confirming or rejecting the existence of an irregularity and such appeal shall be made by way of a petition, supported by affidavits of evidence which shall clearly specify the declaration the High Court is being requested to make by order."

It is trite that different procedural and evidential considerations will apply under each of the two provisions. The capacity of the parties is different, the mode of commencing the petitions would, in my view, be different, the mode of hearing and determining the petitions would be different. While there is room for oral evidence under section 100, such might not be the case under section 114 where the petition rests on affidavit evidence. Most importantly the 48 hour limitation period only relates to petitions under section 100.

I can well understand the complaint by counsel for the respondents

when they say it has been difficult to respond to the petition. It is because of the manner in which the petition has been presented coupled with the amendments that are being sought.

The petitioners have to decide. In this regard there are two options open to them, either to proceed under section 100 or to proceed under section 114 of the Parliamentary and Presidential Elections Act with due consideration of the provisions of those sections. If they chose to proceed with the original petition which this court has taken to be under section 100, then the petition will proceed with only the original parties who presented their petition within 48 hours namely: Wambali Mkandawire, Efrida Mwale Mwangongo, Kepton Simwaka and Elen Vinkhumbo. The additional parties are disallowed. The other amendments, to which the respondents do not object, are allowed.

If the petitioners chose to proceed under section 114 as they now wish to be heard then the way is to file a fresh petition under that provision."

It says in the ruling, at the time of making the ruling the petition had

already been set down for hearing on the 12th of July 1999. On the 12th of July it became obvious that hearing would not proceed in view of the ruling of the 8th of July. The petitioners sought an indefinate adjournment which the court considered unreasonable in the circumstances of the case and granted an adjournment for 21 days only. In granting the adjournment this is what I said:-

> ***"The case is already in process. It would not be fair under these circumstances to the respondents to leave the case hanging on their head for an indefinate period. The adjournment is therefore for 21 days only. This to me gives the petitioners sufficient time to return to this court be it to seek further order. If the petitioners fail to comply with the above order the matter will be struck off the list."***

The petitioners returned to court on the 29th of July 1999 with a document headed ***"FRESH PETITION"***. It is the petitioners case that this document was filed in compliance with the court orders in the two rulings.

That this document was filed within the prescribed 21 days is not the contest. Where the parties disagree is whether by filing this document, which is accompanied by a considerable amount of affidavits and exhibits,

the petitioners have complied with the rest of the prescriptions of the two rulings.

In submitting in support of the application the respondents draw attention to a number of issues which they consider to amount to failure on part of the petitioners to comply with the court orders.

The most part of defence counsels' submission is that the course which the petitioners have taken is indecisive and embarrassing to the respondents. The argument is that the respondents cannot tell from what the petitioners have presented before court whether this is the original action under section 100 but amended, or a new action under section 114 of the Parliamentary and Presidential Elections Act. It is submitted that what is now before court settles nothing. It is further submitted that the petitioners have now introduced a multiplicity of actions all of which are not in compliance with the court orders apart from making it impossible for the respondents to offer a response. The respondents are tempted to submit that the petitioners are moving towards abandoning the original action under section 100 without formally withdrawing or discontinuing the action for fear of the obvious implications.

The petitioners, on their part, say they have complied with the court orders in that they have filed a fresh petition as authorised by this court in the rulings. In their submission the court ruling allowed them to consult and come back to this same court in the manner they have done. It is felt by the petitioners that the respondents are conciously and capriciously slowing down these proceedings demonstrated by the fact that they have not attempted to respond to any of the petitions but have constantly raised procedural objections since the process begun.

It is against this background and on these arguments that I now turn to consider the present application.

On the outset I must confess to the greatest difficulty I have in reconciling the confusion that comes with the arguments now before me, with any of my previous rulings.

This case was adjourned on the 12th of July 1999 to enable petitioners consultation. It is clear from my ruling of the 12th of July that the petitioners were requesting the court for time to consult. The order of this court allowed for ***time*** for consultation. It was not and could not have been an order commanding the petitioners to consult. I refer to the first

paragraph of my ruling of the 12th of July which reads:-

> ***"The purpose of today's sitting is primarily to discuss the adjournment of this matter in view of this court's ruling delivered on the 8th of July 1999 which ruling has no doubt affected the petitioners' position. It is for that reason that the petitioners wish to reconsider what would be the best course to take after consultation amongst themselves and/or with other interested parties."***

To turn to the more important question, what did this court order on the 8th of July 1999.

In that ruling the court first resolved the question of the identity of the petitioners and dismissed attempts by the petitioners to bring in more petitioners. The court also observed that the petitioners were being shifty in their approach in that they were tottering between section 100 and 114 which made it difficult for the respondents to respond to the petition. The court found that the reality was that the petition was under section 100 of the Parliamentary and Presidential Elections Act.

Having so found, but realising that the petitioners were undecided the court commanded the petitioners to decide on their course of action in order not to continue embarrassing the respondents. The relevant paragraph in the ruling starts with the sentence ***"The petitioners have to decide"*** The decision required is that of the petitioners and not of the court. It is axiomatic that it is not in the tradition of courts of law to dictate to litigants what course of action to take.

The petitioners were to decide either to proceed with the petition under section 100, the parameteres of that petition having been defined in the ruling, or to file a fresh petition under section 114. Somehow the expression ***"filing a fresh petition"*** has become polemic. The petitioners contend that they understood that expression as allowing them to merely amend the existing petition and change it into a petition under section 114.

Let me begin by pointing out that it is not without significance that in that same ruling the court is at pains rejecting informal amendments. The court went further to explain that an action under section 100 cannot just flip into an action under section 114. Despite that explanation, the petitioners have returned to court interpreting the expression ***"fresh petition"*** to mean exactly what the court said could not be done. I might

just add that under section 100 the action is at first instance while under section 114 it is by way of appeal. I am unwilling to think that one can just be turned into the other, and just like that, without any formality.

On the true and ordinary construction of the expression ***"fresh petition"*** even without the guiding remarks which I gave it in my ruling, it means a ***"new action."*** and not ***"amended proceedings"***. In practice the expressions fresh proceedings, fresh action and new action have been used interchangeably. Fresh petition is used in the instant case because the action is by way of petition. Please refer to the use of these expressions in the following cases:-

Emeris v Woodward (1890)43 CH 185
Ainsworth v Wilding (1896)1 CH 673
Wilding v Sanderson (1897)2 CH 534
Bhima v Bhima (1971-72)MLR 427

The other point is that the principles by which effect is given to amendments are well within the knowledge of the court and all eminent counsel before me. It would be obstinate in the wrong on part of the court, of it own motion, to allow a matter to completely change course without

any representations from the parties. This observation is per incuriam because this court did not allow for further amendments. If the petitioners were desirous of further amendments to *civil cause No 2B,* the ruling of the 12th of July clearly welcomed them to come to court to seek such orders. There has been no such attempt.

In my order of the 12th of July 1999 I adjourned *civil cause No 2B* for 21 days only, failing which the matter would be struck off the list. The respondents are asking the court to go beyond this order and dismiss the action for want of prosecution.

I am mindful that the rules and practice of court devised in the public interest to promote the expeditious dispatch of justice must be adhered to. I am equally mindful however that a litigant should not, in the ordinary way, be denied an adjudication of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate.

In my judgment it would be punitive on the events so far to dismiss the petition. I am however of the clear view that the petitioners are undecided on what to do with *civil cause No 2B of 1999*. I have not been

asked for an extension of time for them to decide even at this stage. I have little choice but to envoke my order striking off the action. I therefore make an order striking off the action with costs to date to the respondents.

MADE in Chambers at the High Court at Lilongwe this 18th and day of October 1999.

A.K.C. Nyirenda
JUDGE