

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NO. 53 OF 2002

IN THE MATTER OF THE PARLIAMENTARY BY ELECTION
IN CHIRADZULU WEST CONSTITUENCY

and

IN THE MATTER OF SECTION 40 OF THE PARLIAMENTARY
AND PRESIDENTIAL ELECTIONS ACT

BETWEEN:

MALAWI ELECTORAL COMMISSION.....PLAINTIFF

and

MR EDWARD YAKOBE SAWERENGERA.....DEFENDANT

and

MISCELLANEOUS CIVIL CAUSE NO. 52 OF 2002

IN THE MATTER OF THE PARLIAMENTARY BY ELECTIONS
IN SALIMA NORTH CONSTITUENCY

and

IN THE MATTER OF SECTION 40 OF THE
PARLIAMENTARY AND PRESIDENTIAL ELECTIONS ACT

BETWEEN:

MALAWI ELECTORAL COMMISSION.....PLAINTIFF

and

MR ALLAN GIDEON THARA.....DEFENDANT

CORAM: THE HON. MR JUSTICE F.E. KAPANDA

Date of hearing : 6th May 2002
 Date of ruling : 27th May 2002

Kapanda, J**DRAFT RULING****Introduction**

There are two applications before this court. They were commenced by way of Originating Summons, being Miscellaneous Civil Cause No. 52 and 53 of 2002. In both originating summonses the Plaintiff is the Malawi Electoral Commission whilst the Defendants are Allan Gideon Nthara in Misc. Civil Cause No. 52 of 2002 and Edward Yakobe Sawerengera in the other Cause No. 53 of 2002. In these two

applications the Plaintiff seeks the court's determination of a question in respect of the status of the Defendant's candidature in By-Elections which were supposed to be held in Chiradzulu West Constituency and Salima North Constituency. Since both applications are dealing with a similar question the court has decided to deliver one ruling which will answer the questions in the two applications. It is trusted that this approach is the most convenient way of dealing with the matters raised in the two applications.

The matters in both applications arise out of the Plaintiffs' Returning Officer's decisions contained in correspondence to the Defendants. The Returning Officers of Chiradzulu and Salima District Assemblies, in their letters of 1st April and 2nd April 2002 respectively, intimated to the Defendants that they were going to deem the two as not having been nominated on the ground that the two obtained their nominations by false pretences and that the two had violated the electoral laws of this country.

The Originating Summons

The Plaintiff, in the Originating Summonses which were issued out of this court on 11th April 2002, was seeking the determination of the Registrar of the High Court on the following question, namely:-

Whether the Defendants did obtain their nominations for the by elections by false pretences contrary to Section 40 (1)(a) of the Parliamentary and Presidential Elections Act as read with Section 17 of the Political Parties (Registration) Act by reason of the fact that having obtained their nominations as independent candidates, the Defendant profess to be members of the National Democratic Alliance (NDA) and their campaigns are conducted on their behalf by the said National Democratic Alliance.

The Plaintiff was further seeking a declaration by the Registrar nullifying the Defendants' nominations in the said by-elections.

Procedural issues

In view of the fact that these applications are brought in terms of Section 40(1)(a) of the said Parliamentary and Presidential Elections Act No. 31 of 1995, the court wishes to note that the reliefs that are being sought can only be obtained from the High Court and not the Registrar as was being prayed in the Originating Summons. As a matter of fact a reading of Section 40 of the said Parliamentary and Presidential Elections Act, will show that the office of the Registrar of the High Court is only the repository of the documents that are supposed to be lodged in respect of an application under Section 40 of the said Parliamentary and Presidential Elections Act. In so far as the hearing and the determination of questions under the said Section is concerned it is a Judge of the High Court that is seized with that responsibility. If the legislature had intended

to give jurisdiction to the Registrar of the High Court I am sure it could have said so in clear terms without enacting that documents should be lodged "to the Registrar of the High Court for hearing and decision by the High Court--" This conclusion, *viz* that the words "the High Court" as used in the said Parliamentary and Presidential Elections Act, 1993, means a Judge of the High Court is premised on the enlightening legal commentary by the learned authors of the Supreme Court Practice vol. 2 para. 4604 who state, *inter alia*, that the words "the High Court", if used in an Act of Parliament do not include a Master or Registrar in our case: (See also the instructive cases of **J. Manyozo -vs- F. Maganizo Mchawa** Civil Cause No. 371 of 1992 [unreported] and **General Tinsmith -vs- The Munch Hut and Fast Foods Limited** Civil Cause No. 293 of 1993 [unreported]. It is, therefore, this court's finding that it was wrong for the Plaintiff to seek these reliefs from the Registrar of the High Court. The proper forum ought to, and must, be before a Judge of the High Court.

Since the matter was eventually brought before me it was thought that, in the interest of justice, this application should be heard and disposed of without due regard to the procedural errors mentioned. The dispensation of substantive justice could not be delayed because of technicalities. It is trusted that members of the bar have been reminded of the above mentioned procedural requirements and will now be guided accordingly.

It is now proposed that we should move on to deal with the substantive issues in this matter. Before doing that I wish to give a brief history of the events that led to the applications herein. These are only those events as are obtaining in the records of Miscellaneous causes already mentioned above. Further, I have found it necessary to have recourse to the case record in Miscellaneous Cause No. 44 of 2002 where the Plaintiffs in that case (the Defendants in the applications before me) intended to bring Judicial Review proceedings against the Malawi Electoral Commission.

Back ground information

By letter dated 26th March 2002 the Plaintiff's Chief Elections Officer wrote Mr Edward Sawerengera, the Defendant in Miscellaneous Cause 53 of 2002, in the following manner:-

"Mr Edward Sawerengera

P.O. Box 59

Chiradzulu

Dear Mr Sawerengera

DISQUALIFICATION

I am writing to advise that at its meeting of the 26th March 2002, the Commission resolved to disqualify you from contesting in the Chiradzulu West Constituency By-election.

- 2. This decision has been made because there is evidence that you have continued associating with the National Democratic Alliance (NDA), despite our earlier warning against such behaviour. The Commission had advised you that National**

Democratic Alliance should not be electioneering on your behalf since this is contrary to Section 17(2) and (3) of the Political Parties (Registration and Regulations) Act which states that:

“(2) A political party or any other combination of persons shall not electioneer, or authorize any person to act on its behalf, in connection with an election in which political parties contest unless it is a registered political party.

(3) No person shall act on behalf of, or represent himself as acting on behalf of, a political party or any other combination of persons in connection with or for the purpose of a specified election unless-

(a) the political party or combination of persons is a registered political party; and

(b) the person is a member of, and has been authorized in writing to act on behalf of, the registered political party.”

3. The Commission’s decision is based on the following evidence it has gathered:-

- (i) During a meeting with the Commission held on 27th February, 2002 at Chiradzulu Boma, you openly declared that you are a member of the National Democratic Alliance.
 - (ii) During some of your meetings, you were seen using National Democratic Alliance emblems: flags and slogans.
 - (iii) Notable National Democratic Alliance personalities, Hon. J. Makhumula and Mr S. Masangwi, have been seen addressing your campaign meetings.
 - (iv) Senior officials of National Democratic Alliance, Mr W.N. Shaba, Mr Viva Nyimba, Mr L.L. Nawena, Mr A. Makhalira and others, have represented you in various meetings organised by the Commission.
 - (v) We have evidence that you are a current member of the Central Executive of the National Democratic Alliance.
4. Your conduct indicates that you represented yourself as acting on behalf of a combination of persons for the purpose of a specified election in Chiradzulu West Constituency when

the combination of persons are not a registered political party.

- 5. The decision of the Commission may be challenged in the High Court within seven days of receipt of this letter, failing which the Commission will proceed to declare the other candidate duly elected.**

Yours sincerely

G.R.E.K. Chimwaza

CHIEF ELECTIONS OFFICER

**cc : The Returning Officer
Chiradzulu District Assembly"**

Another letter, whose tenour was the same as the one quoted above, was also sent to the other Defendant in this matter (Mr Allan Gedion Nthara). It was written by the said Chief Elections Officer and is dated 26th March of the same year. He wrote:-

**"Mr Allan Gideon Nthara
C/o The Returning Officer
Salima District Assembly
Private Bag 15
Salima**

Dear Mr Nthara

DISQUALIFICATION

I am writing to advise that at its meeting of the 26th March, 2002, the Commission resolved to disqualify you from contesting in the Salima North Constituency By-election.

- 2. This decision has been made because it has been brought to our attention that the National Democratic Alliance (NDA) has been electioneering on your behalf, contrary to Section 17(2) and (3) of the Political Parties (Registration and Regulations) Act which states that:-**

"(2) A political party or any other combination of persons shall not electioneer, or authorize any person to act on

its behalf, in connection with an election in which political parties contest unless it is a registered political party.

(3) No person shall act on behalf of, or represent himself as acting on behalf of, a political party or any other combination of persons in connection with or for the purpose of a specified election unless-

(a) the political party or combination of persons is a registered political party; and

(b) the person is a member of, and has been authorized in writing to act on behalf of, the registered political party."

3. The following is the evidence the Commission has gathered:-

(i) During your campaign meeting held on 18th March, 2002 in the constituency, Hon. B. Mpinganjira openly introduced you as a candidate supported by the National Democratic Alliance.

(ii) Notable National Democratic Alliance personalities, Hon.

J. Makhumula, Hon. B. Mpinganjira and Hon. P. Chupa, have been seen addressing your campaign meetings.

(iii) Your campaign programme was conducted by the National Democratic Alliance and headed by Mr Phiri as the Campaign Director.

4. Your conduct indicates that you represented yourself as acting on behalf of a combination of persons for the purpose of a specified election in Salima North when the combination of persons are not a registered political party.
5. The decision of the Commission may be challenged in the High Court within seven days of receipt of this letter, failing which the Commission will proceed to declare the other candidate duly elected.

Yours sincerely

G.R.E.K. Chimwaza

CHIEF ELECTIONS OFFICER

cc : The Returning Officer
Salima District Assembly"

It would appear that these letters prompted the Defendants herein to apply to the High Court for leave to take out Judicial Review Proceedings. This they did on 29th March 2002. The court granted them permission to apply for Judicial Review. By consent of both parties, as is appearing in the Consent Order in Miscellaneous Cause No. 44 of 2002 dated 2nd May 2002, the Judicial Review proceedings were withdrawn and the injunction that was obtained in those proceedings was vacated.

It is also important to note that, whilst the Defendants were awaiting for the substantive hearing of the Judicial Review proceedings, the Plaintiff's Returning Officers for the Chiradzulu and Salima District Assemblies, on 1st April 2002 and 2nd April 2002 respectively, wrote the Defendants in connection with their nominations.

As regards Mr Edward Yakobe Sawerengera the following is the letter that was written to him:-

"1 April 2002

ELC/20178

Mr Edward Sawerengera

Box 59

Chiradzulu

Dear Mr Sawerengera

**YOUR NOMINATION IN THE CHIRADZULU WEST
PARLIAMENTARY BY-ELECTION**

I have observed that having been nominated as an Independent Candidate in the above-mentioned by-election, you have been conducting your campaigns together with the National Democratic Alliance (NDA) and that the NDA has been actively involved in campaigning for you.

Further, it has been observed that in your campaigns you claim to be representing the NDA (in which organisation you hold an executive post). It is noted that the NDA is not registered as a political party although it has a political agenda hence your conduct and that of the NDA have been contrary to Section 17(2) and (3) of

the Political Parties (Registration and Regulations) Act 1993
which state as follows:-

- “(2) A political party or any other combination of persons shall not electioneer, or authorise any person to act on its behalf, in connection with an election in which political parties contest unless it is a registered political party.**
- (3) No person shall act on behalf of, or represent himself as acting on behalf of, a political party or any other combination of persons in connection with or for the purpose of a specified election unless:**
- (a) the political party or combination of persons is a registered political party and**
 - (b) the person is a member of and has been authorised in writing to act on behalf of the registered political party.**

We are of the view that you obtained your nomination by falsely representing yourself that you were an Independent Candidate when in fact you were, contrary to Section 17 of the Political Parties (Registration and Regulations) Act 1993, a representative of a combination of persons with a political agenda. Pursuant to the

Electoral Commission's duty under Section 76 (2)(d) of the Constitution, I hereby notify you of your violation of Section 40(a) of the Parliamentary and Presidential Elections Act by reason of the conduct mentioned herein.

If I do not hear from you by Friday 5th April 2002 we will deem you as not to have been nominated.

Yours sincerely

S. Moyo

Returning Officer

CHIRADZULU DISTRICT ASSEMBLY"

In respect of Mr Allan Gedion Nthara the Returning Officer for Salima District Assembly wrote this:-

"2nd April 2002

ELC/20178

Mr Allan Gedion Nthara

C/o Returning Officer

Salima District Assembly

Salima

Dear Mr Nthara

**YOUR NOMINATION IN THE SALIMA NORTH
PARLIAMENTARY BY-ELECTION**

I have observed that having been nominated as an Independent Candidate in the above-mentioned by-election, you have been conducting your campaigns together with the National Democratic Alliance (NDA) and that the NDA has been actively involved in campaigning for you.

It is noted that the NDA is not registered as a political party although it has a political agenda hence your conduct and that of the National Democratic Alliance have been contrary to Section 17 (2) and (3) of the Political Parties (Registration and Regulations) Act 1993 which state as follows:-

- “(2) A political party or any other combination of persons shall not electioneer, or authorize any person to act on its behalf, in connection with an election in which political parties contest unless it is a registered political party.

(3) No person shall act on behalf of, or represent himself as acting on behalf of, a political party or any other combination of persons in connection with or for the purpose of a specified election unless:

- (a) the political party or combination of persons is a registered political party and
- (b) the person is a member of and has been authorised in writing to act on behalf of the registered political party.

We are of the view that you obtained your nomination by falsely representing yourself that you were an Independent Candidate when in fact you were, contrary to Section 17 of the Political Parties (registration and Regulations) Act 1993, a representative of a combination of persons with a political agenda. Pursuant to the Electoral Commission's duty under Section 76 (2)(d) of the Constitution, I hereby notify you of your violation of Section 40(a) of the Parliamentary and Presidential Elections Act by reason of the conduct mentioned herein.

If I do not hear from you by Friday 5th April 2002 we will deem you as not to have been nominated.

Yours sincerely

B. Muva (Mrs)

Returning Officer

SALIMA DISTRICT ASSEMBLY"

As will be observed from the two letters mentioned above the Returning Officers concluded by inviting the two Defendants to make representations by the 5th of April 2002 or else their nominations were going to be considered as not having been made. The Defendants, through their Legal Representatives, made their representations.

The representations were made, through letters dated 4th April 2002, to the Returning Officers of the said Chiradzulu and Salima District Assemblies. In the two letters, among other things, the Legal Representatives of the Defendants contended that the allegation by the Returning Officers that the two Defendants obtained nomination papers by false pretences was not supported by facts. The Returning Officers were then,

inter alia, requested to draw up and sign a statement of facts for transmission to the Registrar of the High Court so that the matter could be dealt with as required by the provisions of Section 40 of the said Parliamentary and Presidential Elections Act, 1993.

The Plaintiff's Returning Officers did prepare the Statement of facts as requested by the Defendants. The statements, and supplementary statements, of facts were sworn on 8th April 2002 and 6th May 2002 respectively, and were thereafter lodged with the Registrar of the High Court. There are several affidavits and documents attached to the said statements, and supplementary statements, of facts. On 24th April 2002 the Defendants, in response to the statements of facts, made by the Returning Officers, swore affidavits in opposition. The said affidavits in opposition were lodged with the Registrar of the High Court on the 29th day of April 2002.

The statements of facts and affidavits in opposition

Statement of facts by Returning Officers

The fuller details of the statements, and supplementary statements, of facts of the Returning Officers are on record. It will be observed from the records that there are several affidavits and nomination papers exhibited to the statements, and supplementary statements, of facts. The affidavits being referred to are those sworn by Mr Sipho Moyo and the Mrs Bridget Muva, the District Commissioners of Chiradzulu and Salima districts respectively. There are also the affidavits of M/s Harris Potani and Robert Bester Mdala the Electoral Services Officer and Regional Elections Officer (South), respectively, of the Plaintiff Commission. Further, M/s Wellington Kumtsokwe Mwale and Deverious Mkanthama swore affidavits in respect of the case against Mr Allan Gideon Nthara. In the premises, I do not intend to set out in full the

contents of the said affidavits and nominations papers but I will only give a sketch of what is contained in same. I will now move on to set out the facts stated in the said statement, and supplementary statement, of facts; the affidavits and the nomination papers.

Stripped to their bare essentials the following facts emerge: it is averred on behalf of the Plaintiff that the Defendants were seen campaigning in the company of National Democratic Alliance Officials. Further, it is deposed that the National Democratic Alliance was electioneering on behalf of the Defendant. In particular it was given in the statement of facts in respect of Mr Allan Gideon Nthara that on 18th March 2002, at a political meeting addressed by Mr Brown Mpinganjira in the Salima North Constituency, the people gathered were told to vote for the said Mr Allan Gideon Nthara. Regarding Mr Edward Yakobe Sawerengera it was averred that on 28th February 2002, at a meeting convened by the Plaintiff at Chiradzulu Boma, Mr Sawerengera openly declared himself

to be a National Democratic Alliance member. It was also deposed that on 24th March 2002, at a political meeting which Mr Sawerengera attended, an official of National Democratic Alliance actively campaigned for the said Mr Sawerengera. The Plaintiff, through its Returning Officer for Chiradzulu District Assembly, further averred that at one occasion, a date of which was not given, Mr Sawerengera was cautioned against using National Democratic Alliance slogans during his campaign meetings and that he apologized and promised to desist from such conduct. It is observed that what the Plaintiff is alleging above happened after the Defendants nominations had been accepted.

The Returning Officers further stated that, at the time the Defendants went to present their nomination papers, the latter were accompanied by officials of the National Democratic Alliance pressure group. It is pertinent to note that the officials of the National Democratic Alliance that are mentioned as having accompanied the Defendants do not appear as the

electors of the Defendants and/or as the people who nominated the Defendants as Independent candidates for their respective Constituencies.

It is common cause, as shown in the supplementary statements of facts of the Returning Officers, that upon presentation of their nomination papers as Independent candidates both Defendant's nominations were accepted. The two were accepted as Independent candidates. Mr Sawerengera's nomination was accepted on 12th February 2002 whilst that of Mr Nthara was acknowledged on 5th March 2002.

Affidavits in opposition

The Defendants, as mentioned earlier, are disputing the the averments made on behalf of the Plaintiff. Their denials are contained in their affidavits sworn on 24th April 2002 and filed on 29th April 2002. In their said affidavits the Defendants

state that they were and are still Independent candidates. They both deny that they are actively supported by the National Democratic Alliance. The Defendants refute that their campaigns are being conducted on their behalf by the National Democratic Alliance pressure group. Both Defendants deny obtaining their nominations by false pretences.

The two Defendants further deposed that, if at all the National Democratic Alliance has been campaigning on their behalf, which is denied, the National Democratic Alliance has been doing so out of its mandate to which both Defendants are not parties. It is further stated in the affidavit of Mr Nthara that he is not an agent of the National Democratic Alliance. He further denies being brought to the office of the Returning Officer by officials of National Democratic Alliance. As regards Mr Sawerengera he also deposed that he is not an agent of National Democratic Alliance. He further denied using the slogan of the said National Democratic Alliance at any of his campaign meetings.

The above are, in the main, the prominent facts obtaining in the matter before me as is revealed in the statements, and supplementary statements, of facts and the affidavits and exhibits attached and annexed thereto; and the affidavits in opposition sworn by the Defendants. It is obvious that there are issues that have been raised and same will have to be resolved by this court. At this point in time it is necessary that the questions for determination should be set out.

Questions for Determinations

As I see it, the principle question that must be answered has been set out in the Originating Summons filed by the Plaintiff on 11th April 2002 which may be summarised as follows: whether the Defendants obtained their nominations for the by elections by false pretences. The other issue that this court must address its mind to, when answering the question posed above, is whether the Plaintiff has made out a case requiring this court to make the declaration it seeks of

nullification of the Defendants' nominations in the said by elections. I wish to point out that as I am dealing with the issues set out above it will become inavoidable to deal with other ancillary questions although same have not specifically been mentioned in this ruling.

I will shortly start considering the issues that have arisen in this matter but before that let me express my sincere gratitude to both Counsel for their lucid written skeleton arguments and the oral submissions which they made at the request of the court. I found same helpful and I am so indebted to them for their arguments of the law which they have invited me to apply to this case. Any clarity in this ruling is largely due to their efforts. I will not, however, refer to each and every aspect of their arguments. If an attempt was made to incorporate, in this ruling, all the arguments made this opinion would unnecessarily be made long. For this reason I will give a synopsis of the arguments of Counsel and the law that Counsel have requested me to apply to the applications.

At this juncture I will now move on to set out the said arguments that have been advance by the parties.

Arguments of the parties

It is the Plaintiff's argument, as submitted by Mr Kaphale learned Counsel for the Plaintiff, that the Defendants obtained their respective nominations by false pretences in that whilst they declared themselves to be Independent candidates they are in fact candidates for the unregistered pressure group, the National Democratic Alliance. Mr Kalekeni Kaphale invited this court to determine this question in light of the provision of the Political Parties (Registration and Regulation) Act No. 15 of 1993 and the Parliamentary and Presidential Elections Act of No. 31 of 1993. Learned Counsel for the Plaintiff has further put it to this court the particular provisions that this court should make reference to when deciding the issue set out above. Mr Kaphale went on to contend that there is evidence in this matter that shows that the cases against the Defendants have been made

out. It is his further argument that this court should order the Returning Officers to reject the Defendants' nomination under Section 40(4) of the said Parliamentary and Presidential Elections Act.

As regards the arguments made on behalf of the Defendants it is observed that they are contending that for there to be false pretences, the false representation purportedly made by the Defendants should be the representation that was made at the time the two Defendants presented their nomination papers or some past representation. The cases of **Pindeni -vs- R** [1923-60] ALR Mal. 824 and **Rex -vs- Mamjaule** [1923] ALR Mal. 186 were cited in support of this argument. It is the further submission of Messrs Ralph Kasambara and Chifundo Ngwira, learned Counsel for the two Defendants, that the only representation that the two Defendants made are those contained in the nomination papers, to wit, that they were Independent candidates. Mr Kasambara has further submitted that the mere alluding to the

provisions of Section 17 of the said Political Parties (Registration and Regulations) Act is not enough in so far as the giving of the particulars and/or the nature of the false pretence the Plaintiff is alleging. It is the further contention of the Defendants, through their learned Counsel, that if there has been any breach of Section 17 of the said Political Parties (Registration and Regulation) Act the solution lies in having a prosecution of those in breach and once the conviction is secured then the next step to be taken ought to be the disqualification of the candidate as provided for in Section 51(2) of the Republic of Malawi Constitution. Pausing here I wish to observe that learned Counsel for the Plaintiff has argued that the offence stipulated in Section 17 of the said Political Parties (Registration and Regulation) Act is a misdemeanor. As such, Mr Kaphale contends, there is no legal duty, at common law, to prosecute and obtain a conviction against the Defendants first before proceeding with a civil action against them. The following English case authorities have been referred to the court in aid of the foregoing argument

by Mr Kaphale: **Oloro and Another -vs- Ali** [1965]3 All. E.R. 829, **Wells -vs- Abrahams** [1872]L.R. 7 Q.B. 554 and **Smith -vs- Selwyn** [1914-15]All. E.R. Rep. 229.

Turning back to the arguments of the Defendants, Mr Kasambara has further contended that there can only be disqualification of the Defendants, under Section 51(2)(g) of the said Republic of Malawi Constitution, if there is a conviction against them in relation to any law relating to election of the President or election of members of Parliament. It is the further argument of learned Counsel for the Defendants that firstly, there has never been prosecution and conviction of the Defendants in relation to the above mentioned electoral law. Secondly, Mr Kasambara contends that there can be no question of disqualification of the Defendants because the alleged violation of Section 17 of the said Political Parties (Registration and Regulation) Act is not in relation to a law relating to election of Members of Parliament or Presidents but rather a law regulating the registration and conduct of political

parties. Indeed, it was also argued by learned Counsel for the Defendants that it is not the responsibility of the Plaintiff to administer the Political Parties (Registration and Regulation) Act. Mr Kaphale, on the other hand, has submitted that in terms of Section 76(d) of the Constitution of the Republic of Malawi the Plaintiff has a duty to ensure compliance with the provisions of the said Constitution and any other Act of Parliament and thus the Electoral Commission is empowered to police the said Political Parties (Registration and Regulation) Act.

Having given a sketch of the arguments of Counsel on the question posed above this court must now make its decision on same. I must admit that, as put by Mr Kaphale, there is no quick way of answering this question. In this regard the court proposed to first make determinations on some auxiliary question that will go along way in assisting to answer the main issue enumerated above.

Consideration of the issues

Candidates alleged association with National Democratic Alliance Officials

It would appear that the Plaintiff has taken issue with the fact that the Defendants were seen in the company of National Democratic Alliance officials at the time of presentation of nomination papers and at campaign meetings. As I shall soon demonstrate, I do not see why this could be a problem in light of the provisions of Section 40 of the Constitution. There was no need for the Plaintiff to question the Independent candidate status of the Defendants.

In my view a candidate does not lose his status as an independent candidate just by the mere fact that he is seen in the company of, or associates with, officials of a party or a group of people or an association that is not registered as a party. Actually, as I understand it, an Independent candidate

may be a member of a political party who stands as an unofficial candidate of his party or as is defined in Section 3 of the Parliamentary and Presidential Elections Act, 1993. It is also advisable, by way of analogy, to note that not so long ago some candidates stood as Independent candidates after failing to get nomination at their party's primaries.

Furthermore, the said Political Parties (Registration and Regulation) Act, or the said Parliamentary and Presidential Elections Act or any other Act does not provide for how an Independent candidate, whose nomination has been accepted as such Independent candidate, should conduct his campaigns. Given the lack of other legal regulations or laws, providing for the way an Independent candidate should conduct his campaign, the only relevant thing is thus how the candidate registered himself or herself at the time his nomination was accepted. Indeed, the situation of an Independent candidate who associates with a political party or an association is analogous to a situation where there is a

coalition of political parties. As the law stands now if there was a pre-election coalition between parties I am sure the Malawi Electoral Commission would not be entitled to interfere in the pre-election activities of political entitles. Moreover, the legislature indeed did not provide that the Malawi Electoral Commission should interfere, by means of public law, in the creation of election coalitions. Both the said Political Parties (Registration and Regulation) Act and the Parliamentary and Presidential Elections Act do not tie any legal consequences for a participating party to such actions. The creation of a coalition is under present laws - a voluntary act i.e. a manifestation of two or more political parties to create an election coalition which is not subject to any act of approval or review by State bodies. Why should an Independent candidate then be stopped from associating with a group of people and create some loose coalition with those people when same would not cause a disqualification of a party candidate whose party is in coalition with another party.

**Constitutional framework as read with Section 17
of Political Parties (Registration and
Regulation) Act**

Further, the scheme of our Constitution in Section 65 seems to suggest to me that an Independent does not lose his seat as a Member of Parliament after he later joins a political party, or an association or organization whose objectives or activities are political in nature, that did not nominate him as its candidate. This fortifies my view that if you are nominated as an Independent candidate you do not lose your status as an Independent candidate merely by associating with a party or an association or organization whose objectives or activities are political in nature.

Furthermore, a reading of Subsections (1) and (3) of Section 40 of the Constitution of the Republic of Malawi will show that the actions of the Plaintiff in wanting to disqualify the Defendants bordered on interfering with the Defendants'

fundamental rights. Section 40(1) and (3) of the said Constitution provides:-

“(1) Subject to this Constitution, every person shall have the right-

- (a) to form, to join, to participate in the activities of, and to recruit members for, a political party**
- (b) to campaign for a political party or cause**
- (c) to participate in peaceful political activity intended to influence the composition and policies of the Government; and**
- (d) freely to make political choices---**

(3) Save as otherwise provided in this Constitution every person shall have the right to vote, to do so in secret, and to stand for election for public office. (emphasis supplied by me)

Now one of the offices that a person has a right to stand for election is that of a Member of Parliament. It is also

important to bear in mind that Section 51 of the Republic of Malawi Constitution has given the qualifications that one must have if he/she is to be nominated or elected as a Member of Parliament. The said Section 51 also provides for the situations which would disqualify a person from being nominated or elected as a member of Parliament. The said Section 51 of the said Constitution stipulates as follows:-

“(1) A person shall not be qualified to be nominated or elected as a member of the Parliament unless that person-

(a) is a citizen of the Republic who at the time of nomination has attained-

(i) the age of twenty-one years, in the case of the National Assembly; and

(ii) the age of thirty-five years, in the case of the Senate

(b) is able to speak and to read the English language well enough to take an active part in the proceedings of Parliament; and

(c) is registered as a voter in a Constituency;

(2) Notwithstanding Subsection (1), no person shall be qualified to be nominated or elected as a member of Parliament who-

(a) owes allegiance to a foreign country;

(b) is, under any law in force in the Republic, adjudged or otherwise declared to be mentally incompetent;

(c) has, within the last seven years, been convicted by a competent court of a crime involving dishonesty or moral turpitude;

(d) is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in the Republic;

(e) holds, or acts, in any public office or appointment, except where this Constitution provides that a person shall not be disqualified from standing for election solely on account of holding that office or appointment or where that person resigns from that office in order to stand;

- (f) **belongs to, and is serving in the Defence Forces of Malawi or the Malawi Police Force; and**
- (g) **has, within the last seven years, been convicted by a competent court of any violation of any law relating to election of the President or election of members of Parliament.** (Emphasis supplied by me)

In the above quoted provision it does not say that a candidate will be disqualified to be nominated if the Malawi Electoral Commission is of the opinion that the candidate obtained his nomination by fraud or false pretence. It was therefore wrong for the Plaintiff, in its letter of 26th March 2002, to write the Defendant that it was disqualifying the Defendants. Further, Section 51(2)(c) and (g) of the said Constitution clearly indicates and/or presupposes that before disqualification there must have been, within the last seven years, a conviction of the candidate either of the offence involving dishonesty or moral turpitude, or the candidate must have been convicted of any violation of law relating to election of President or members of

Parliament. Following from what this court has just observed above if a candidate is to be disqualified for nomination, on the ground that the candidate was electioneering with an unregistered entity, using the provisions of Section 17 of the Political Parties (Registration and Regulation) Act, then there should be first a conviction of the candidate. Moreover, it is my considered view that if the Defendants' nominations are to be rejected, under Section 17 of the said Political Parties (Registration and Regulation) Act, for electioneering on behalf of an unregistered political association, then in terms of the said Section 51(2)(g) of the Constitution the Defendants should have been convicted first if their nominations were to be rejected. As shall be demonstrated later, even if it is accepted that you do not need a conviction first before disqualification but this court will still have to consider the prospects of the Plaintiff, if its allegations were taken before a court of law, in succeeding to show that the nominations were obtained by false pretence. The allegation of obtaining nomination by false pretence, and the facts purportedly in support of the allegation, will have to

be measured against the elements of the offence that must be there before a competent court can enter a conviction in respect of the offence of obtaining by false pretence.

Further, it is also important to remember that the Political Parties (Registration and Regulation) Act 1993 was assented to by the then President on 2nd July 1993. The Parliamentary and Presidential Election Act, 1993, was assented to by the said then President on 13th December 1993 followed by its publication on 31st December 1993. As will be observed from the dates the Acts were assented to and promulgated it will become clear that at the time the Political Parties (Registration and Regulation) Act was passed by Parliament the Legislature never thought of the fact that five months later they would provide that Independent candidates would also be allowed to contest in elections. Thus when reading the provisions of Section 17 of the said Political Parties (Registration and Regulation) Act one must bear in mind that it was not envisaged at that time that an Independent candidate would be allowed

to contest in elections and that such a candidate would have to be permitted to electioneer. I will come back to the question of electioneering later in this ruling.

Moreover, the Plaintiff can not be allowed to use Section 17 of the said Political Parties (Registration and Regulation) Act where the Constitution has a specific stipulation providing for disqualification of a candidate for nomination. The court is of this view because although generally Section 40(1) of the Parliamentary and General Elections Act No. 31 of 1993, allows for rejection of nomination that provision was enacted in 1993 well before the current Constitution came into force on 18th May 1994. The provisions of the said Parliamentary and Presidential Elections Act, in particular the said Section 40(1), can not be allowed to override the specific stipulation in the Constitution where it specifically provides the situations where a person would be disqualified for nomination as a candidate. The Constitution, in Section 51(2)(c) and (g), provision says that there must be a conviction first and the conviction must have

been entered within the last seven years. Moreover, if Section 17 of the said Political (Registration and Regulation) Act 1993 is to be construed the way learned Counsel for the Plaintiff was suggesting, i.e. without regard to human rights rhetoric, such construction will have the effect of restricting the exercise of a fundamental right. The right to be elected to an office of member of Parliament, which is a fundamental right, should not be made meaningless and unexercisable by an Act of Parliament that was enacted before our current Republic of Malawi Constitution. This court is obliged to guard against such an interpretation. In making this observation I am mindful of the instructive dicta of Lord Diplock in **Attorney General of Gambia -vs- Jobe** [1985]L.R.C. (Constitution)556 at page 565 where he said:-

“ A Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are entitled is to be given a generous and purposive construction---”

It therefore follows that this court's recourse to constitutional provisions and the giving of those stipulations a generous and purposive construction should not in any way be taken to mean, as suggested by Mr Kaphale, that the court is avoiding the main issue.

Before leaving this discussion on the constitutional framework I wish to point out that this court was referred to the **Tanzanian** case of **Rev. Christopher Mtikila -vs- Attorney General** [1995]T.L.R. 31 (High Court). I found this case authority very instructive, albeit not in all respects, in view of the fact that the High Court of Tanzania was, *inter alia*, construing constitutional provisions dealing with political rights. This court is aware that the High Court of Tanzania was interpreting a different provision altogether. In Tanzania they proscribed the participation of Independent candidates in elections. In our case there is no law against the participation of Independent candidates in elections or by elections. The provision in Section 17 of the said Political Parties (Registration

and Regulation)Act, 1993, does not say that those not belonging to political parties should not contest. In our jurisdiction Independent candidates are allowed to contest but it would appear that the statutory provision is saying that they will not be allowed to electioneer. It is in this respect that this court observed that the case of **Rev. Chistopher Mtikila -vs- Attorney General** (supra) is not instructive in all respects. Indeed, in our jurisdiction the requirements of Section 17 of the said Political Parties (Registration and Regulation)Act may be said to be procedural as the totality of the electoral law allows Independent candidate to contest in elections. Be that as it may I found the case of **Rev. Christopher Mtikila -vs- Attorney General** (supra) enlightening when the High Court of Tanzania said, and adopted the statements of Lord Diplock in **Attorney General of Gambia -vs- Jobe** (supra), that the provision of a Constitution should always be given a generous and purposive construction.

Furthermore, this court found the following dicta and analogy of Lugakingira, J in **Rev. Christopher Mtikila -vs- Attorney General** (supra) at page 65A-B very instructive:-

“---it is illogical for a law to provide that no person shall be compelled to belong to a political party and in the same breath to provide that no person shall run for office except through a political party. If it were the intention of the Legislature to exclude non-party citizens from participating in the government of their country, it would easily have done so---”

As rightly submitted by learned Counsel for the Defendants, it is illogical for our Constitution and the Parliamentary and Presidential Elections Act not to compel any person to belong to a political party in order for him or her to run for an office, or indeed to allow him/her run for office as an Independent candidate, and in the same breath have Political Parties (Registration and Regulation) Act provide that no person shall electioneer unless through a registered political party. It is the view of this court that if an Independent candidate is to run

and win an election or by election he/she must, as of necessity involve other people than himself. Thus electioneering is a necessary evil that goes with elections or by elections. If one were to generously and purposively construe the provisions of Section 40 of the Constitution the position is that as at now, and not the one obtaining at the time the Political Parties (Registration and Regulation) Act was enacted, is that every person is entitled to participate in the government of the country and such person does not have to be a member of a Registered Political Party or association or organisation.

As mentioned earlier, on 5th July 1993, when the Political Parties (Registration and Regulation) Act came into being the Legislature never thought of the fact that in future Independent candidates would be allowed to contest in elections or by elections. It is, therefore, not surprising that the Legislature then enacted that there should be no electioneering by a group of people who have not registered themselves as a political party. On 31st December 1993 the Legislature, through the

enactment of Parliamentary and Presidential Elections Act, authorised the participation of Independent candidates in elections and by elections. In my judgment, by allowing the participation of Independent candidates the Legislature should be taken to have impliedly repealed the requirement, in Section 17 of the Political Parties (Registration and Regulation) Act, of electioneering by registered political parties only or the requirement that unless a political party or any other combination of persons is registered it can not electioneer in connection with an elections in which political parties are contesting.

If the problem is that National Democratic Alliance is electioneering on behalf of the Defendants, or that it is representing itself as a registered combination of persons, without the former being registered as a political party, and thereby committing an offence under Section 17 of the said Political Parties (Registration and Regulation) Act, then the Registrar of Political Parties should invoke the provisions of the

Act and bring to court, those members of National Democratic Alliance, who are electioneering so that they are dealt with according to law. If criminal proceedings are commenced against the Defendants and they are found guilty, and convicted accordingly, then the relevant provisions of Section 51 of the said Republic of Malawi Constitution will be applied but until that is done the nominations of the Defendants can not be faulted.

Finally, let me make an observation about Mr Kasambara's argument that in compliance with the stipulation in Section 5 of the Republic of Malawi Constitution, Section 17 of the said Political Parties (Registration and Regulation) Act should be declared invalid for being inconsistent with the provisions of the said Constitution that allows people to enjoy the right to political activity. I do not accept learned Counsel's argument that the purported offending Section 17 of the Political parties (Registration and Regulation) Act should be declared and/or considered invalid. In coming to this

conclusion the court has been guided by the following instructive dicta, made by the court of Appeal of Tanzania in

Attorney General of Tanzania -vs- W.K. Butambala

[1993]T.L.R. 46, and which was cited with approval by

Lugakingira, J. in **Rev. Christopher Mtikila -vs- Attorney**

General (supra) at pages 62H and 63A-B:-

"We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really serious occasion--- It is not desirable to reach a situation where we have 'ambulance courts' which go round looking for situations where we invalidate statutes---"

This court will take heed of this warning and will refrain from proceeding to make a declaration as suggested by learned Counsel for the Defendants. As a matter of fact, in the Originating Summons before this court, there is no question for the court's determination in respect of the validity or otherwise of the postulation in Section 17 of the said Political Parties

(Registration and Regulation) Act, 1993. Indeed the Defendants, in their affidavits in opposition, did not seek declaration along the lines their Counsel is seeking in his argument. This court is mindful of the observation of the Malawi Supreme Court of Appeal in **Fred Nseula -vs- Attorney General and Malawi Congress Party** MSCA No. 32 of 1997 where at pages 5-6 The Honourable the Chief Justice stated following which must be borne in mind:-

"We would now like to deal with the findings of the learned judge in the Court below. We find it difficult to understand the judge's statement when he says that his own finding and that of the Hon. Mr Speaker were *otiose*. The issue before the learned judge as crystallised by the pleadings was for him to find whether Mr Nseula had indeed "crossed the floor" in terms of the provisions of Section 65(1) of the Constitution. It was his judicial responsibility to determine that issue. In a publication called "*Current Legal Problems*" Sir Jack Jacob emphasised the importance of pleadings at page 174 in the following manner:-

'As the parties are adversaries it is left to each one of them to formulate his case in his own way, subject to the basic rules

of pleadings for the sake of certainty and finality each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon an inquiry into the case before it other than to adjudicate upon the specific matter in dispute which the parties themselves have raised by their pleadings. Indeed the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves or any rate one of them might well feel aggrieved; for a decision given on a claim not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.'

Indeed in the case of **Blay -vs- Pollard & Morris** [1930]1K-B. 628 Scrutton L.J. makes the same point when he says at page 634:-

'Cases must be decided on the issues on record and if it is desired to raise other issues they must be placed on record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course.'

In our Judicial System it is the parties themselves who set out the issues for determination by the court through their pleadings and both of them must strictly adhere to the pleadings. In the present case although the Judge stated that he had invited Counsel to address him on the effect of the provision of Section 88(3) of the Constitution the matter was not raised on the pleadings by either party. In our view it was perfectly open to him to express his opinion by way of *obiter*, on what he felt was the effect of the provision of Section 88(3) of the Constitution. It was therefore wrong for the Judge to decide on a matter which has not been raised by the parties on their pleadings and he should not have made it the definitive basis of his decision."

The issues for determination by this court are those contained in the Originating Summons herein and those that have incidentally arisen from the statements and the affidavits. It is

well to remember that it would appear that the question of invalidity of the provisions of the purported offending Act was meant to be determined in the judicial review proceedings that were withdrawn by consent of both parties. On the authority of **Fred Nseula -vs- The Attorney General and Malawi Congress Party** (supra) this court will be reluctant to make the specific declaration that Mr Kasambara, learned Counsel for the Defendants, wants this court to make in respect of the said Political Parties (Registration and Regulation) Act No. 15 of 1993. This court must only decide the question in the Originating Summons for to do otherwise would entail surprising the Plaintiff who came to court thinking that the court will make a determination on the question it set out in its Originating Summons. This notwithstanding the court has made, and will make, its observation on what its views are of the Acts in issue in this matter. The **Fred Nseula** case (supra) allows this court to do that.

Moreover, the question that is posed in both Originating Summonses can easily, and must, be decided on some other basis without necessarily declaring Section 17, of Act No. 15 of 1993 invalid. In this respect the court is alive to the illuminating dicta of Georges, C.J. in the Zimbabwean case of **Minister of Home Affairs -vs- Hicke and Others** [1985]L.R.C. (Const)755 when he stated at page 758H:-

“The court will not normally consider a Constitutional question unless the existence of a remedy depends upon it, if a remedy is available to an applicant under some Legislature provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been, an addition, a breach of declaration of rights---”

As shall be seen shortly, this court has formed the opinion that it is not necessary to proceed to make a declaration as regards the validity or otherwise of Section 17 of the said Political Parties (Registration and Regulation) Act No. 15 of 1993 in order for it to make a determination of the main question i.e. whether

the Defendants obtained their nominations by fraud or false pretences.

Did the Defendants obtain their nominations by false pretences?

As a starting point in answering this question let me observe that it is settled law that for there to be obtaining by false pretence it must be shown that there was false representation and the representation was in respect of a matter of fact either past or present: **Rex -vs- Mamjaule** (supra). Further, it is important to note that the representation must be that made at the the time of the obtaining of a thing or at time of the obtaining the subject matter of the allegation of obtaining by false pretence.

This court has noted that the statements, and the affidavits annexed to the statements, do not demonstrate as to when the Defendants joined and/or became members of the

National Democratic Alliance. By reason of the foregoing observation one can not say for sure that, at the time of presentation of nomination papers, the Defendants falsely represented to the Returning officers that they were Independent candidates when they were in fact not Independent candidates. The Plaintiff wants this court to assume that their having been accompanied by National Democratic Alliance officials means that the Defendants were National Democratic Alliance members. It is wrong, and these courts are slow, to condemn a Defendant basing on his/her association with a known wrong doer. At law there is no room for finding a person guilty by reason of mere association. This court noticed that there was no cogent evidence offered by the Plaintiff to prove the fact that at the time the Defendants presented their nomination papers, as Independent candidates, they were in point of fact members of National Democratic Alliance pressure group and that they did not disclose this fact to the Returning officers. It is a matter of evidence if one is to be found to have been fraudulently been nominated and

accepted by the Malawi Electoral Commission as an Independent candidate. I wish to repeat my earlier observation that the electors of these Defendants were not the officials of National Democratic Alliance pressure group that the Returning officers contend accompanied the Defendants. Moreover, it has not been suggested by the Plaintiff that the electors of the two candidates are members of National Democratic Alliance pressure group.

For the reasons given above, and on the facts obtaining in this matter, it can not be said that there was any false representation at the time the Defendants presented their nomination papers. This court therefore finds and concludes that the Defendants did not obtain their nominations by false pretences. I must add that the evidence that was offered, through the statements of fact and the affidavits attached thereto, do not go anywhere near satisfying the legal elements of the offence of obtaining by false pretences.

Conclusion

To sum up let me make the following observations. You will excuse me for doing this for I will appear as if I am repeating myself. It is necessary that these remarks be made so as to make clear the determination, and the reasons thereof, of this court.

My view is that Section 40 of the Parliamentary and presidential Elections Act is triggered, inter alia, when the Returning Officer is of the opinion that a candidate has **obtained nomination by fraud or false pretences** (my emphasis). The question that must be posed is when does a candidate obtain nomination? It has to be when the candidate lodges the nomination papers with the Returning Officer and the nomination is accepted. The question whether a nomination has been obtained by fraud or false pretences is a matter of evidence to be proved by he who alleges that there was fraud or false pretence. In the instant case the Returning

Officers are of the opinion that there was such false pretence at the time of the lodging of nomination papers. It is for them to establish that fact before the court can direct, as they wish, that they should reject the nomination papers.

It is alleged that the Defendants obtained their nominations in the company of named officials of National Democratic Alliance. That cannot of itself be material. The law does not specify who should accompany a candidate to obtain nomination or the party they should or should not belong to. If the presence of the National Democratic Alliance officials is supposed to imply that the candidates were sponsored by National Democratic Alliance I am afraid this court does not agree with that proposition. It is not said that the said officials are the ones that nominated them. They were there just like, I would want to believe, many others who might have been there. Why pick out the National Democratic Alliance members and not the rest? For there to be the inference of sponsorship there has to be more than mere presence. In this court's view there has to

be some overt/covert act, on top of the presence, from which one can infer unmistakably that the candidate was a sponsored one.

The court fails to appreciate the relevance of the fact that National Democratic Alliance was campaigning for the candidate post - nomination. The issue as correctly put by the Plaintiff is whether the candidates obtained their nomination by false pretences or not. If the answer be yes of what use is the fact that some party registered or not is campaigning for the candidate? Similarly if the answer be no of what use is the fact that some party registered or not is campaigning for the candidate? If a candidate is validly nominated as an independent he does not become a non independent just because somebody is campaigning for that candidate. Campaigns subsequent to the nomination, in this court's view, have nothing to do with the independence of a candidate. They might be the subject of a prosecution if the campaigning is done by an unregistered party which is not in issue here.

As already mentioned, one's membership of a political party registered or not is not a bar to one's wish to run as an independent. There have been instances where people have run as independents after failing in party primaries. You are an independent if you are not sponsored by a political party and not if you are not a member of any political party registered or not. The fact the Defendants declared themselves, post nomination, that they are members of some political group registered or not is of no legal consequence.

Further, Section 17 of the Political Parties (Registration and Regulation) Act must be of limited relevance herein if any. Subsections 2, 3 and 4 seem to refer to post nomination activities. The issue here is the nomination itself. Secondly, it also appears to this court that the evil Section 17 of Act No. 15 of 1993 seeks to prevent is nonregistered political parties taking part in elections. If we were to interpret that section to mean that no group of persons can electioneer on behalf of an independent candidate then the results would be absurd. An

independent candidate, like a party sponsored candidate, goes into the race because he wants to win. In order to get more votes he must amass more votes i.e. numbers than the other candidates in the race. To do that he must have people who must, as of necessity, electioneer (meaning campaign) on his behalf. These people must as of necessity organize themselves. The candidate himself/herself must hold meetings with them by way of campaign. These people might belong to a party or various parties or no party at all. In my view it matters not which of these categories they belong to. They do not thereby flout Section 17 aforesaid if they electioneer. If we were to say they do then we would in effect be telling the independent candidate to register and stay at home in the hope that people would vote for him. That is not politics. What is wrong, if there is anything unlawful, is for the unregistered party to voluntarily/overtly campaign/electioneer for the candidate.

On the other hand we should also remember that the constitution guarantees freedom of association. The courts in

other jurisdictions have interpreted that to guarantee the right not to join an association: See the case of **Young, James and Webster -vs- United Kingdom** (1981)4 EHRR 39 interpreting article 11 of the European Convention on Human Rights. This case was cited with approval in **The Queen on the Application of Mrs Dianne Pretty -vs- Director of Public Prosecution and Secretary of State for the Home Department** [2001]UKHL 61 delivered on November 29th 2001 and also by the European Court of Human Rights on Appeal (**Pretty -vs- UK Application No. 2346/02**) in a judgment delivered on 29th April 2002. It appears to me that to force any supporters of the independent candidate to form and register a political party would in effect be to force the independent candidate to form and join an association.

Fraud and false pretences are words long associated with the criminal law. Whatever they should mean herein should be referable to the criminal law.

The Plaintiff seems to be confusing the National Democratic Alliance's participation in the elections with that of the candidates. The law is clear that National Democratic Alliance cannot take part because it is not registered. To do so constitutes, in my view, an offence. In so far as that offence is concerned the candidate can only aid or abett. That however is not the issue before this court. If the relevant authorities feel so constrained they can, at an appropriate time, prosecute National Democratic Alliance. The candidates on the other hand, can only be stopped if it is shown that they obtained their nominations by fraud or false pretences. That, as already seen, must be after convictions are entered against them. If it cannot then it matters not what the candidates do after their nominations. In my view, the law does not prevent them from associating with anyone.

In view of the observations and findings made above, this court determines the question presented in the Originating Summons in the negative. For the avoidance of any doubt, it

is this court's determination that the Defendants did not obtain their respective nominations by fraud or false pretences. This court, therefore, refuses to nullify the nominations of the Defendants.

Further, in terms of Section 40(4) of the Parliamentary and Presidential Elections Act No. 31 of 1993, this court directs the Returning Officers, for Salima and Chiradzulu District Assemblies, to accept the nominations of the Defendants as Independent candidates.

Costs

The Plaintiff shall bear the costs of, and occasioned by, this application. This order of costs is made on the ground that the Defendants have successfully defended the Plaintiff's applications.

Made in Chambers this 27th day of May 2002 at the
Principal Registry, Blantyre.

F.E. Kapanda

JUDGE