

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO.99 OF 2007

BETWEEN

HONOURABLE ULADI MUSSA, MP, OF MALAWI
PEOPLE'S PARTY-----PLAINTIFF/APPLICANT

AND

MINISTER RESPONSIBLE FOR THE PROTECTED
FLAG, EMBLEMS AND NAMES ACT ----- 1ST RESPONDENT

THE REGISTRAR OF POLITICAL PARTIES----- 2ND RESPONDENT

CORAM: HON. JUSTICE SINGINI, SC

Maulidi, of counsel for the Plaintiff/Applicant

Nyamirandu, Chief State Advocate, Attorney General's Chambers
of counsel for the Respondents

Gonaulinji, Court official

Mrs. Namangonya, Court Reporter

JUDGMENT

The proceedings in this case will on record appear to have been protracted and I have had to make a few interim rulings before the case reached the stage of hearing on the substantive questions for decision in the case. The case was commenced on 7th February, 2007, when it was filed in the High Court at Lilongwe District Registry. Hearing on the interim matters took place in chambers, but I finally heard the case in open court on 3rd April, 2007. I wish to state early in my judgement that in the end I have come to the conclusion that the plaintiff's case turns to be determined on the single issue of whether the word "Malawi" is a "protected name" under the Protected Flag, Emblems and Names Act (Cap. 18:03 of the Laws of Malawi).

In my judgement I need to state certain matters of fact about the plaintiff that are in the public domain which, as court, I have had to take judicial notice of. The plaintiff, Honourable Uladi Mussa, is a well known politician in this country. He is a long serving Member of Parliament having been re-elected in the last parliamentary election of 2004. He was elected on the banner of a political party, namely, the United Democratic Front, which was also the party of the President in the same parliamentary and presidential election. The current parliamentary and presidential term ends in 2009. After the election of 2004, events within the United Democratic Front resulted in the President leaving the party. The President later formed his own political party, the Democratic Progressive Party. Honourable Uladi Mussa afterwards became First Vice President of the Democratic Progressive Party. He was also a member of Cabinet in the President's government. He was later relieved of his Cabinet membership in a

Cabinet reshuffle, and at the time he was Minister of Agriculture and Food Security. He also left his membership of the Democratic Progressive Party while in the position of First Vice President. Honourable Uladi Mussa therefore has a background in political parties in his participation in the political leadership of this country. After these events, Honourable Uladi Mussa decided to form his own political party with him as the leader of the party. He chose for his party the name Malawi People's Party. It is the inclusion of the word "Malawi" that has resulted in this action. And from this point I will refer to Honourable Uladi Mussa simply as the plaintiff.

On 22nd January this year the plaintiff submitted an application under the Political Parties (Registration and Regulation) Act (Cap. 2:07) to the office of the Registrar General which is the public office also designated under that Act as the Registrar of Political Parties. The plaintiff acted through the agency of counsel, Mr. Maulidi of Maulidi and Company, who is also his counsel in this action. The Registrar of Political Parties responded to the plaintiff's application in a letter dated the very following day, 23rd January, by advising the plaintiff to first seek and obtain the permission of the Minister of Government responsible for the administration of the Protected Flag, Emblems and Names Act (Cap. 18:03) to include as part of the name of the political party the word "Malawi". In the letter of response the Registrar of Political Parties spelt "Malawi" as "Maravi" with an "r" in place of "l". Although this became a contentious matter I accepted the affidavit of the Registrar of Political Parties that the spelling with an "r" was an error and that his letter should have spelt it with an "l" as Malawi.

The letter of the Registrar of Political Parties, addressed to the plaintiff's counsel, stated that "Further to your application to register "Maravi People's Party" I wish to advise you to first confirm with the Office of the President and Cabinet (OPC) the availability of the word "Maravi" in view of its likeness to the protected word/emblem "Malawi" under the Protected Flag, Emblems and Names Act". The Registrar of Political Parties thus implied that Malawi was or could pass as a "protected name" within the meaning of the Protected Flag, Emblems and Names Act, the use of which in connection with or in furtherance of any trade, business, calling or profession was prohibited by the Act except if done with the written permission of the Minister. Ministerial responsibility for the Protected Flag, Emblems and Names Act is exercised by the President through the Office of the President and Cabinet (OPC).

The next day, 24th January, counsel for the plaintiff wrote to the Chief Secretary to the Office of the President and Cabinet seeking permission of the Minister for the use of the word "Malawi" in the name of the plaintiff's political party, but stated in the letter that this was on the advice of the Registrar of Political Parties although they did not agree that "Malawi" was a protected name under the Act.

The Chief Secretary did not immediately send a reply to the plaintiff's counsel. Instead he redirected the letter to the Registrar of Political Parties with his own handwritten remarks on the letter advising that the Registrar should first seek the legal opinion of the Attorney General in the matter. The Chief Secretary's handwritten remarks bore the date of 25th January. The Registrar of Political Parties did seek the Attorney General's opinion in a memorandum shown in the case file to have been undated, but which counsel for the plaintiff became aware of and followed

up with his own letter to the Attorney General dated 31st January demanding a response from the Attorney General as to what was the position of the Government.

In the letter, counsel for the plaintiff reiterated the view that “Malavi” was not a protected name under the Act and stated that if the position of Government on the matter was not known within four days of the date of his letter his client would consider instituting court proceedings to seek court interpretation. As it happened, there was no response from the Attorney General within the period as demanded by counsel for the plaintiff.

As earlier stated, the plaintiff commenced this action on 7th February. He seeks several declarations by this court that-

- “(a) The name “Malavi” is not a protected name in terms of the Protected Flag, Emblems and Names Act;
- (b) The Registrar of Political Parties should and must register Malavi People’s Party without the permission of the Minister in the Office of the President and Cabinet responsible for the Protected Flag, Emblems and Names Act and in compliance with section 40 of the Malawi Constitution;
- (c) The Registrar of Political Parties has no legal grounds or reasons to refuse or withhold or delay the registration of the Malavi People’s Party under the Political Parties (Registration and Regulation) Act;
- (d) The Registrar of Political Parties was wrong to refuse the registration of Malavi People’s Party on the ground that the Applicant/Plaintiff should first confirm the availability of the name “Maravi” because of its likeness to the protected name “Malawi” under the Protected Flag, Emblems and Names Act when the Applicant did not apply for registration of Maravi People’s Party;
- (e) The Minister in the Office of the President and Cabinet responsible for the Protected Flag, Emblems and Names Act has no valid grounds for withholding or refusing or delaying consent or permission for the Applicant/Plaintiff to register his party, namely, “Malavi People’s Party”.

The plaintiff’s action joins the Minister responsible for the Protected Flag, Emblems and Names Act as 1st Respondent and the Registrar of Political Parties as 2nd Respondent. They are represented by the Attorney General. The Attorney General, represented by the Chief State Advocate, Mr. Nyamirandu, strongly opposed the action by written skeleton arguments and by submissions during hearings in chamber and in open court. The Attorney General’s opposition is essentially on two fronts, first, by advancing the view that the word “Malavi” is indeed a protected name within the meaning of the Protected Flag, Emblems and Names Act the use of which requires the permission of the Minister and secondly that there has not been any decision on the part of the Minister or the Registrar of Political Parties against which the plaintiff’s action could lie.

I can at once dispose of the second point. By stating that in his view the word “Malavi” is a protected name under the statute, the Registrar of Political Parties has raised a legal issue for judicial interpretation, especially that the plaintiff may be denied registration of his political party under the name of choice if the Minister does

not give the plaintiff permission to use that word. The right of individuals to freely form political parties is guaranteed under section 40 of the Constitution. In terms of the language of section 40, the right is in part to enable individuals together with others to use the machinery of political parties to form the government of the Republic or to influence policies of government; and indeed the machinery of political parties is the commonly anticipated democratic way of forming governments.

Under section 17 of the Political Parties (Registration and Regulation) Act, electioneering by a political party is prohibited unless the political party is registered under the Act. Subsection (2) of section 17 is in the following terms-

“(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”.

Further, in applying for registration of a political party, it is a requirement under section 5(2)(a) of the Act to specify the name of the party. The right to freely form a political party must extend to freely choose the name of the party, subject only to restrictions imposed by the Act or by any other law. It was therefore within the constitutional right of the plaintiff in the instant case to seek legal redress to challenge the prospect of being denied registration of his political party under the preferred name of choice. Therefore an action in law did lie to the plaintiff as an applicant for the registration of a political party against the interpretation by the Registrar of Political Parties of a law as imposition statutory restrictions on the name of choice of the plaintiff's political party.

I now turn to what I have stated to be the single legal issue on which the case of the plaintiff turns to be determined, which is whether the word “Malawi” is a protected name within the meaning of the Protected Flag, Emblems and Names Act. This is the issue posed in paragraph (a) of the declarations as outlined above that the plaintiff is seeking in his application to this court. Upon determining this issue the rest of the issues posed in paragraphs (b) to (e) must perforce fall away.

The Protected Flag, Emblems and Names Act was enacted in 1967 with the objective, as stated in its long title, as-

“An Act to safeguard the dignity of the Head of State, the National Flag, the Armorial Ensigns and the Public Seal and to prevent the improper use of the National Flag, the Armorial Ensigns, the Public Seal and of certain emblems, colours, names, words and likenesses for professional, commercial and other purposes and for matters incidental thereto and connected therewith”.

Clearly, the Act has the very noble overall objective of protecting and respecting the symbols of the statehood of Malawi. The Act establishes and prescribes these symbols of nationhood and defines a few selected words, expressions, terms and names for protection against their improper or unauthorized use. The Act creates the administrative machinery for granting government authorization in appropriate cases for their use.

Among the matters protected under the Act are words and expressions which the act classifies as “protected names” and has this definition-

“protected names” means the national name of Malawi, and any names or words specified in Part III of the Second Schedule, and includes any abbreviation of any such name or word”.

What are listed in the Part III of the Second Schedule are: President; the names, styles and titles of the President; Unity and Freedom; National; Republic; and University. Therefore by statutory definition, together with the national name of Malawi, there are six listed terms that come within the meaning of “protected name”.

The Registrar of Political Parties makes reference to the word likeness in relating the word “Malawi” to the protected name “Malawi”. It is acknowledged that the Act does also protect certain imageries or likenesses which it refers to as protected likenesses, but defines a “protected likeness” (using the word “means”) as “any photograph, drawing, painting, sculpture, or other pictorial or visual representation of the person for the time being holding any of the offices or dignities specified in Part II of the Second Schedule”. The only office or dignity so specified is that of the President. Clearly therefore likeness or protected likeness as defined in the Act has no relevance to the word Malawi as used in the proposed name of the plaintiff’s political party.

It is the plaintiff’s case that the word “Malawi” is not a protected name within the meaning of the Protected Flag, Emblems and Names Act and that it was wrong in law for the Registrar of Political Parties to require the plaintiff first to obtain the permission of the Minister for his party to be registered by the name carrying that word, the Malawi People’s Party.

In submissions opposing the plaintiff’s action, the Attorney General invites this court to take a purposive approach to interpreting the Act so as to give meaning to the intended sanctity of its broad objective. Mr. Nyamirandu has made a very strong presentation to the court in which he urges the court to uphold the interpretation that the word “Malawi” is a protected name under the statute requiring the permission of the Minister for it to be used for the purpose intended by the plaintiff as part of the name of the plaintiff’s political party. Mr. Nyamirandu argues that with reference to Malawi, what is protected under the statute is not only the word “Malawi” but the national name of this country. He presented in evidence different variations of the way the name of this country is spelt in some sixteen major world languages and was able to demonstrate that in six of those languages, namely, the Russian, Japanese, Arabic, Spanish, Greek and Portuguese languages, the name of this country is spelt with variations of the standard spelling of the country’s name as “Malawi”. Notably, in the Portuguese language, this country’s name is spelt as “Malavi” as used or adopted by the plaintiff in the proposed name of his political party. Mr. Nyamirandu argued that within the territorial jurisdiction of the Act (that is, in this country), all these variations needed to enjoy the protection under the Act against improper usage that would otherwise demean the dignity of country’s name.

Besides the point about language variations in the spelling of the country's name, Mr. Nyamirandu has dwelt on the pre-colonial history of the people of this country among whom was a major group described as belonging to the Malavi or Maravi Kingdom and he exhibited historical literature to buttress the submission that the name of the country has its root to the earlier inhabitants known as the Malavi and that therefore the word "Malavi" as used in the name of the plaintiff's political party should be regarded as a protected name within the meaning of the Act.

I have given my most serious consideration to what are very forceful submissions by Mr. Nyamirandu. However, I have not been persuaded to adopt any canon of statutory interpretation that would lead me to extend the interpretation of the expression "protected name" in the Protected Flag, Emblems and Names Act beyond the list of words and expressions specified in the definition provided by the Act, which I consider to be a closed definition. That definition does include the national name of this country as one of the protected names. The Act has territorial application only in this country, and the national name of this country as recognized in this country and which the courts would properly take judicial notice of is "Malawi", so spelt with a "w" and not a "v" even in the Act itself. The Act creates offences for unauthorized use of a protected name. The law under the Act therefore needs to be certain as to what it protects against improper use that would attract an offence under the Act or any other law. An interpretation that seeks to stretch the ambit of the country's name, as a protected name under the Act, beyond its standard written form as known in this country would render the law rather uncertain and should not be upheld by the courts.

In my judgement therefore I find that the word "Malavi" is not a protected name within the meaning of the Protected Flag, Emblems and Names Act and its use by the plaintiff as part of the name of his political party, the Malavi People's Party, does not require the permission of the Minister responsible for the administration of the Act. The plaintiff's action therefore succeeds.

As to the question of costs in the cause, I consider that there was a public interest element in the legal position that was advanced by the Attorney General on the main issue for the court's determination. Additionally, the Attorney General had been very constructive in resolving a number of procedural issues during the preliminary stages of these proceedings. I therefore consider it proper for each party to bear own costs, and I so order.

PRONOUNCED in open court at the Lilongwe District Registry this 16th day of May, 2007.

HONOURABLE JUSTICE E.M. SINGINI, SC.

JUDGE