IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

MISCELLANEOUS CIVIL CAUSE NUMBER 61 OF 2007

BETWEEN

THE STATE

-AND-

THE SPEAKER OF THE NATIONAL ASSEMBLY --------- 1ST RESPONDENT
HONOURABLE YUNUS MUSSA
AND 40 OTHERS---------- 2ND RESPONDENTS
EX-PARTE: UNITED DEMOCRATIC FRONT AND
HONOURABLE NGA MTAFU, MP---------- APPLICANTS

CORAM : SINGINI, SC, J.

: Kasambara, Assani, Kaphale, of counsel for the Applicants Ottober, Mwale, Chalamanda, Kauka of counsel for 2nd Respondents
: Nyamirandu, Liabunya, Banda, Chilenga, Chinula for the Attorney General of counsel for the 1st Respondent
: Kaferaanthu, Court Clerk

RULING

This ruling is on the application by the United Democratic Front and Honourable Nga Mtafu to be joined as parties to a matter of judicial review. In order to put this ruling in context, I need to repeat the opening paragraphs of my earlier interim ruling on the same application which I delivered on 4th July, 2007.

On 28th June, 2007, sitting as the motion Judge of the week, I heard an ex- parte application in chambers of Honourable Yunus Mussa, Member of Parliament, joined by 40 other Members of Parliament, for an

order to grant them leave to apply for judicial review over the decision of the Speaker of Parliament in acting upon the petitions the Speaker had received seeking the seats of the concerned Members of Parliament to be declared vacant under section 65 of the Constitution averring that those Members had crossed the floor within the meaning of that section. The action of the Speaker consisted in his sending letters to the Members of Parliament asking them to respond to the petitions. The application of the Members of Parliament also sought a consequential order of an interlocutory injunction restraining the Speaker from proceeding with his action until the determination of the matter for judicial review.

Upon hearing the application and considering the affidavits in support of the application, I proceeded on the same day and on the record to grant the Applicants the order of leave for them to apply for judicial review and the consequential order of interlocutory injunction.

On the next day, 29th June, the United Democratic Front, one of the political parties represented in Parliament that had petitioned the Speaker against some of the concerned Members of Parliament including Honourable Yunus Mussa, joined by the Party's leader in Parliament, Honourable Nga Mtafu MP, filed before the Court three applications, viz, for an order that they be joined as parties to the proceedings commenced by the Members of Parliament; for an order to vacate the order of leave for judicial review; and for an order to vacate the interlocutory injunction. I agreed with counsel that I first had to hear the application for the joinder of parties before I could hear the other two applications. Only in the event that I had granted the order for joinder of parties would the court proceed to hear the other two applications. I heard counsel in chambers on the application for joinder of parties. After hearing counsel I made an interim

ruling which I delivered on 4th July, directing that the application for the joinder of parties be made inter-parte and served on the applicants for judicial review and on the Speaker of Parliament.

The application for the joinder of parties as I have outlined has been made under Order 15, r.6 (2) (b), and in their submission before me counsel were able to explain that the application was being made in terms of both subparagraphs (i) and (ii) of the rule. I reproduce the provision, together with subrule (3), thus:

> "(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application-
> (b) order any of the following persons to be added as a party, namely-
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon,
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.
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> (3) An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in

dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him any party to the cause or matter."

As explained in note 15/6/8 to the rule, which is on intervention by persons who are not parties, generally in common law a person who has a cause of action against another person is entitled to pursue his remedy against that other person alone. He cannot be compelled to proceed against other persons whom he does not desire to sue. However, the note also explains that the scope of the rule is such that a person who is not a party may be added as defendant even against the wishes of the plaintiff either on the application of the person sued as defendant or on his own application to intervene or by the Court on its own motion. The addition of such intervening party is entirely at the discretion of the Court.

Hearing on the inter-parte application for joinder of parties was before me held in chambers and all parties were represented by counsel. I wish to acknowledge that counsel for each party has made detailed submissions of supporting affidavits and skeleton arguments and also made detailed and eloquent presentation during chamber hearing.

In applying to be joined as parties the united Democratic Front and honourable Mtafu state that their interest in the matter "relates not only to the questions and issues raised in the matter for judicial review, but also the remedies or reliefs sought since it is the United Democratic Front that lodged the petition with the Speaker and is interested to see to it that the petition is fairly and justly disposed of", as appears at paragraph 11 of counsel's skeleton arguments. That short statement squarely brings the application for joinder of parties within both paragraph (i) and (ii) of rule

15/6/2. They have also argue that since their petition is against some Members of Parliament, among whom are Cabinet Ministers and Deputy Ministers, including Honourable Henry Phoya who exercises ministerial responsibility and control over the office of Attorney General, it is not possible that an incumbent Attorney General can perform the functions of that office independent of the executive branch of Government in representing the Speaker in court in the matter of judicial review brought up by individual members of the executive and it will be necessary therefore that the united Democratic Front is allowed to be joined as a party in the judicial review matter in the pursuit of its application.

The applicants for judicial review and separately the Attorney General oppose the application for by the United Democratic Front and Honourable Mtafu to be joined as parties to the proceedings.

The applicants for judicial review the application for joinder of parties on two grounds. First they submit that the application for joinder of parties has been wrongly brought under Order 15/6/2 which they argue is the procedure for joinder of parties in general suits or actions and has no application to motions in matters of judicial review. Rather, it is rules under Order 53 that constitute the applicable procedure for all motions relating to applications for judicial review. They also oppose the application for joinder of parties on the ground that even if Order 15/6/2 were the applicable procedure, their application for judicial review does not raise any question or issue that this Court can fail to determine without the United Democratic Front and Honourable Mtafu being joined as parties and that in any event the two have not specified what that question or issue is in their pleadings filed before this Court.

The Attorney General's opposition to the application for the joinder of parties, could be said briefly to be based on the principle of constitutional and administrative law that judicial review lies against public authorities and public bodies as a procedure for the courts to check excesses, unreasonableness and unfairness in their decisions and actions towards citizens and subjects of the State. The Attorney General contends as apolitical party the United Democratic Front is not a public authority or public body and cannot be the subject of judicial review.

I have reviewed the submissions by counsel. I find that the pleadings raise questions for my determination for me to reach my decision in this matter.

First, there is the question whether the procedure under Order 15/6/1 is the correct procedure for applications by interested persons to be joined as parties in matters of judicial review. In the oral presentations in chamber counsel for applicants for joinder of parties made attempts to present the application as being made under Order 53/6/2 as read with Order 53/9 and in terms of what counsel referred to as inherent powers of this Court. In the bundle of pleadings filed in court, counsel has made only a passing reference to Order 53/9 and it is clear from the pleading that the application for joinder of parties was being pursued exclusively from the authority Order 15/6/2. I would observe that as a general principle of law the enabling rule of procedure for commencing any class of motion must be specified in the pleadings in order to guide the proceedings for such motion particularly where the law prescribes the procedure that shall apply. The discretion of the Court in varying rules of procedure must, for obvious reasons of control, be exercised within the prescribed rules justified on the interests of justice in the particular case.

In my judgement, the correct and applicable procedure, specifically with regard to seeking to oppose an application for judicial review, is that under Order 53/9(1) in providing that "any person who desires to be heard in opposition to the motion or summons" for judicial review may be so heard if the court determines that he is a proper person to be heard. To my mind this is a much simplified and more permissive provision than even the procedure under Order 15/6/2 and must apply exclusive of and in conjunction with the procedure under Order 15/6/2. It however does not take away the requirements of the person seeking to be heard to satisfy the Court with appropriate reasons for seeking, and this is borne out of the phrase "and appears to the Court to be a proper person to be heard". I would also be prepared in my judgement to consider and hold, as the submission by counsel for the judicial review applicants, that Order 53 provides for the full and comprehensive procedure for dealing with all matters relating to applications for judicial review. This is what comes out of the introductory note 53/0/2 in stating that the rules under this Order "constitute a uniform, flexible and comprehensive procedural code for the exercise by the Court of its supervisory jurisdiction by way of judicial review over the proceedings and decisions of inferior courts, tribunals or other persons or bodies which perform public duties or functions.".

Having ruled that the correct rule for bringing motions or applications for joinder of parties in judicial review proceedings is rule 53/ 9(1), I have, in the interest of ensuring that substantial justice done and not unjustifiably denied to those seeking to be heard, considered exercising my judicial discretion to correct the error in having had the application brought under Order 15/6/2. The question therefore is whether

the United Democratic Front and Honourable Mtafu can be joined as parties in the matter for judicial review as if they had made an application properly under Order 53/9(1) to be so joined be heard in the matter. In determining this question I have been greatly assisted by the case authorities cited by to me counsel for all the parties and I have found the Malawi case authorities particularly instructive on this question. This question is to be determined not as a procedural matter but on a point of substantive constitutional and administrative law.

The majority of case authorities uphold the principle that judicial review is a remedy that lies against public authorities and public bodies to redress any wrongs that emanate from the processes they engage in exercising or performing their public functions or duties towards the citizens or subjects of the law. The respondent is the public authority or public who has acted in the manner complained of. A private person or body cannot answer for the actions of a public authority or a public body. That is the settled principle of law which I would uphold in my judgment. See the decisions in the cases of *The State and The Attorney General, Mapeto Wholesalers Faizal Latif,ex-parteThe Registered Trustees of Gender Support Network Programme(Civil Cause No256 of 2005, unreported); The State v. The Attorney General, ex-parte Dr. Cassim Chilumpha (Miscellaneous Civil Cause No.302 of 2005, unreported); O'Reilly v. Mackman [182]3 All ER680; Council of Civil Service Unions v. Minister for the Civil Service [1984] All ER935*.

I do not see therefore how the United Democratic Front and Honourable Mtafu would qualify to join proceedings for judicial respond to matters that question the actions of the Speaker of Parliament performing his public functions. On the questions that have been raised

against the Speaker in the judicial proceedings against him, he the Speaker is adequately placed to answer for himself.

Returning to Order 15/6/2 if I had held that it was the applicable rule for bringing applications for joinder of parties in judicial review proceedings, I would have to determine if allowing the United Democratic Party and Honourable Mtafu would be necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon by the court as provided in paragraph (i) of the rule or what question or issue raised arising in the cause or matter or what relief or remedy claimed in the cause or matter would require the presence of the two to ensure a just and convenient determination by the Court as provided by paragraph (ii) of the rule. There is no doubt that the United Democratic Front has an interest in the outcome the petitions the party has presented to the Speaker. As counsel, submits in the event the petitions results in the declaration of any vacancy, the Party could retake the seat in a by election and that is a significant interest. However, the decision to declare the seat of a Member of Parliament vacant remains to be exercised by the Speaker and it would be wrong simply to proceed on the basis of the general interest of the party and then to join the Party to the proceedings. The possibility I have referred to that the Party could retake the seat in a by election remains just that- a possibility and mere speculative. I do not consider that speculative interest should result in a justiceable matter sufficient to allow such interested party to be joined in the proceedings.

I have considered the issue of costs in these proceedings. I am satisfied that there is a major element of public interest in this litigation. As costs are awarded in the discretion of the Court, upon consideration of

the public interest involved, I make an order for each party be bear own costs.

I also grant leave to appeal, if any party may desire to do so.

MADE IN CHAMBERS at the Lilongwe District Registry this 16th day of July, 2007.

E.M. SINGINI, SC
J U D G E