JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLENEOUS CIVIL CAUSE NUMBER 1 OF 2009

BETWEEN:

MALAWI ELECTORAL COMMISSION ……RESPONDENT

-AND –

EX – PARTE: RALPH KASAMBARA ……..……1ST APPLICANT
CONGRESS OF DEMOCRATS ……2ND APPLICANT

CORAM: THE HONOURABLE MR JUSTICE J. S. MANYUNGWA
Mr Kara., of Counsel, for the applicant
Mrs Kanyuka, Chief State Advocate, for the respondent
Mr Manda – Official Interpreter

R U L I N G

Manyungwa, J

INTRODUCTION:

On 2nd January, 2009 this court granted to the applicants herein leave ex – parte to move for judicial review in respect of the respondents' decision fixing the new Parliamentary and Presidential nomination fees at MK100,000.00 and MK500,000.00 respectively. In the said application for leave to move for judicial review the two applicants had sought amongst other reliefs which were then granted, an Order of this court staying the decision of the respondents and an Order of injunction restraining the respondents from demanding the said sums of MK100,000.00 and MK500,00.00 as Parliamentary and Presidential nomination fees

respectively. The court refused to grant the Orders of Stay and injunction, but instead ordered that if the applicants were desirous of pursuing the same, then an inter – parties summons had to be filed returnable on Wednesday 7th January, 2009. On the said date by some strange reason the application was not heard having initially being set down before the motion judge, who was indisposed, and so the matter was finally heard on Friday 9th January, 2009, and I reserved my order. I now proceed to make my order.

The 1st applicant Mr Ralph Kasambara, is an aspiring Presidential and Parliamentary candidate in the forthcoming May, 2009 General Elections whilst the second applicant, namely Congress of Democrats, is a duly registered political party headed by the 1st applicant and intends to sponsor the 1st applicant as its presidential candidate and various other aspiring parliamentary candidates. I shall in the course of this ruling refer to Mr Kasambara and Congress of Democrats as the 1st and 2nd applicants respectively. The respondents are a body mandated under the Constitution, the Electoral Commission Act[1] and the Parliamentary and Presidential Elections Act[2], to amongst other things, manage and conduct Presidential and Parliamentary elections in the country.

FACTUL BACKGROUND:

1. **THE APPLICANTS CASE:**

   By way of a letter dated 5th December, 2008 the respondents wrote to the 2nd applicant in which they advised the 2nd applicant that the revised nomination fees deposit for aspiring Presidential and Parliamentary candidates for the May, 2009 General Elections effective that date were MK500,000.00 and MK100,00.00 respectively. The applicant exhibited exhibit "RK1" and attached document 1, which is a copy of a letter dated 3rd December, 2008 from the respondents and addressed to the Secretary General of the 2nd applicant. The said letter read as follows:-

[1] Electoral Commission Act, No. 11 of 1998
[2] Parliamentary and Presidential Elections Act, Chapter 2:01 of the Laws Malawi

Malawi Electoral Commission
Private Bag 113
Blantyre
3rd December, 2008

Ref. ELC 40/138

The Secretary General
Congress of Democrats
Blantyre

Dear Sir/Madam

REVISION OF NOMINATION FEES FOR 2009 PARLIAMENTARY AND PRESIDENTIAL CANDIDATES

I would like to inform you that the Malawi Electoral Commission in terms of Parliamentary and Presidential Elections Act; has determined the following nominations fees for 2009 Parliamentary and Presidential Elections.

Presidential Candidates MK500,000.00
Parliamentary Candidates MK1000,000.00

However, the money is refundable once candidates get 5% of the total valid votes cast.

I hope this information will be communicated to your candidates to enable them to prepare for presentation on nomination papers on dates to be announced by the Commission;

Yours faithfully

Signed

Justice A.S.E. Msosa, SC
CHAIRPERSON

Further, the applicants contend that during the last General Elections in 2004, the nomination fees for aspiring Presidential candidates and Parliamentary candidates were MK50,000.00 and MK5, 000.00 respectively. The revised nomination fees respectively therefore represents 1000% and 2000% increases from the 2004 amounts. The applicants also contend that since 2004, the Malawi Kwacha has not been devalued and the inflation rate has been a single digit and that in 2008 it was pegged at 8.1%, while the Gross Domestic Product commonly known as GDP is US$3.8 billion and the per capita GDP and GN1 are US$800.00 and US289.50 respectively. The majority of Malawians are rural based whereas only 17% are urban based. The applicants also tabulated comparative monthly wages (net pay) ranging from a Teacher [MK17,203.00] down to a security Guard [MK5000.00]. The applicants also tabulated a comparative table of election deposits in other jurisdictions like the Solomon Islands, Australia, New Zealand, Papua New Guinea Tonga, Fiji and the United Kingdom which ranged from SBD 500 (Solomon Islands), and 350 to GB500 [United Kingdom Pound Sterling].

Further the applicants contend, that the average cost of living for an average family of six in the City of Lilongwe is MK49,225.00 monthly and that it accordingly follows that only a small number of eligible people can actually afford to pay the deposit. The applicants also contend that newly fixed nomination fees deposit was simply announced and that no political party was consulted on the subject. Upon receipt of the letter referred to above a political party known as PETRA wrote to the respondents challenging the respondents' decision and invited the respondents to reconsider their decision and that todate the respondents have stuck to their guns. Further, that all political parties represented in Parliament issued a Press Release protesting the revised election deposits and requested the respondents to reconsider its decision and that so far the respondents have not announced the date(s) when aspiring Members of Parliament should to submit their nomination papers together with the newly fixed nomination fees. It is further contended that prior to the announcement of the said revised nomination fees, the 2nd applicant had already advised its aspiring Parliamentary candidates that it would pay for those that were indigent but chosen by the Party Members in their respective constituencies. And that in view of the said announcement, the 2nd applicant is not in a position to pay for all those that are indigent as the amounts would run into Millions of Kwachas; thereby depriving serious and worthy would - be parliamentary candidates from exercising their Constitutional rights(s) to stand for public

office. In view of the foregoing the applicants therefore pray that there is need to maintain the ***status quo*** which can only be effected by way of stay order and injunction and that the balance of convenience lies in favour of granting the interim relief orders, and that damages would not, in this instance, be sufficient, as the matter herein involves constitutionalism, rule of law and fundamental human rights.

2. **THE RESPONDENTS' CASE:**

In his affidavit in opposition to the application for stay, Mr David Bandawe, Chief elections Officer at the Malawi Electoral Commission, deposed as follows: That the respondents increased the nomination fees for the 2009 Parliamentary and Presidential Elections to MK100,000.00 and MK500,000.00 respectively, as is evident from exhibit "DB1" which is a copy of the minutes of the Fifth Meeting of the Fourth Commission held on 24th November 2008 in the Commission's Boardroom. The deponent further deposed that the aforementioned increase in fees was duly communicated to the applicants by the respondents' letter of 3rd December, 2008, which has also been exhibited in the applicants' affidavit marked "RK1". The deponent contends that the respondents revised the nomination fees under the powers conferred on them by the Republican Constitution, the Electoral Commission Act and the Parliamentary and Presidential Elections Act. Further, the deponent contended that any injunctive order or stay therefore applied herein, if granted, would affect:

a. The receiving of nomination papers which is scheduled to take place from the 26th to the 30th of January, 2009.
b. The electoral calendar and particularly the printing of ballot papers to suit the calendar of holding the elections on 19th May, 2009, which the respondents can not change. The deponent contends further that since the respondents are conferred with powers by the Constitution, the Electoral Commission Act and the Parliamentary and Presidential Elections Act to fix the nomination fees, it can therefore not be said that the respondents' decision reviewing the nomination fees is unconstitutional, ***ultra vires*** or unreasonable nor can it be said that the said decision is invalid to the extent that it is inconsistent with the Constitution or that the said decision is

unlawful. In these circumstances therefore the deponent prayed before this court that the application for an order of injunction and an order of stay that the applicants are seeking be dismissed with costs.

ISSUES FOR DETERMINATION:

The main issues for the determination in this matter is whether to grant to the applicants, an order of injunction and an order of stay against the decision of the respondents as prayed for by the applicants and their legal practitioners, or whether to dismiss with costs the applicants summons for an injunction and order of stay as prayed for or submitted by the respondents and their legal practitioners.

SUBMISSIONS:

Both Mr Kara, Counsel for the applicants and Mrs Kanyuka, Chief State Advocate, for the respondents presented to the court their written submissions which if I may add were not only enriching but well researched and enlightening. So too, during the hearing of this summons, Counsel made powerful and eloquent oral submission, which but for reasons of brevity the court is unable to recite in full. However, I wish to place the court's gratitude on record for counsel's effort and whilst the court spared no effort in looking up the law on the said submissions, it is not practically possible due reasons of brevity to recite all that they said in their said submissions in the course of this ruling suffice to say that I shall however endeavour to bear them in my mind, throughout this ruling.

THE LAW:

The position at law is such that an order of interlocutory injunction can be obtained in judicial review proceedings pending the determination of the substantive judicial review applications, or, if the urgency of the case justifies it, pending the hearing of the leave application. The learned authors of the ***Supreme Court Practice***[1] at practice note 53/14/49 have stated that the approach to applications for interlocutory injunctions in judicial review

[1] The ***Supreme Court Practice,*** 1999 Edition Vol. 1

proceedings is similar to that adopted in the case of applications under Order 29 of the ***Supreme Court Practice*** [supra] in an ordinary action. In the case of ***R V Kensington 8 Chelsea Royal London Borough Council ex – p Hammell***[1], the court of Appeal held as follows:-

1) The jurisdiction to grant interim relief in judicial review proceedings arises on the grant of leave to move for judicial review. An application for an interlocutory or other interim relief can be made ex – parte with the application for leave. In deciding whether to grant interlocutory relief at the ex – parte stage, the judge should consider whether the urgency and the other circumstances of the case warrant the grant of ex – parte relief and should have regard to the approach adopted in the case of applications under Order 20 for ex – parte relief. Unless the judge is satisfied that the urgency and other circumstances of the case justify the grant of an ex – parte relief, he should adjourn the application for interlocutory relief for the inter – parties hearing.
2) With a view to avoiding two hearings the ex – parte applicant should give notice to the respondent(s) of any ex – parte application for interim relief so that the respondents can consider whether to attend the ex – parte hearing and make representations.

It must be understood that the power to grant an interlocutory injunctions or other interim relief in judicial review proceedings is ancillary to the application to move for judicial review. The judge can grant an interlocutory injunction or other interim relief on granting leave to move for judicial review or subsequent to the grant of leave.

Similarly, if an interlocutory injunction or other interim relief is granted by the judge, a respondent can apply to the court below for the discharge of the that order (if it was made ex – parte) or appeal to the Court of Appeal or in our case, to the Supreme Court (if the Order was made inter – partes). See order 53/14/46 of the Supreme Court Practice.

Previously, at least in England it used to be thought that injunctions generally and interlocutory injunctions in particular could not be granted

[1] ***R V Kensington & Chelsea Royal London Borough Council ex – parte Hammell***[1989]1AllER 1202

against Ministers and Crown servants but the case of ***M V Home Office***[1] changed this thinking when it held that injunctions, including interlocutory injunctions can be granted against Ministers.

This is what Lord Woof in delivering his judgement in the House of Lords in the above case, said:

> "[T]he language of Section 31 being unqualified in its terms, there is no warrant for restricting its application so that in respect of ministers and other officers of the Crown alone remedy of an injunction, including an interim injunction, is not available. In my view the history of prerogative proceedings against officers of the Crown supports such a conclusion. So far as interim relief is concerned, which is the practical change which has been made, there is no justification for adopting a different approach to officers of the Crown from that adopted in relation to other respondents in the absence of clear language such as that contained in Section 21(2) of the 1947 Act. The fact that in any event a stay could be granted against the Crown under Order 53 r 3(10) emphasises the limits of the change in the situation which is involved. It would be most regrettable if an approach which is inconsistent with that which exists in community law should be allowed to persist if this is not strictly necessary".

This departure from the earlier position that injunctions could not be granted against ministers and Crown servants followed considerable debate in England both in the House of Lords, and the courts below. The cases of ***R V Secreatry of State for the Home Department ex – parte Herbage***[2], and ***R V Licencing Authority ex – parte Smith Kline French Laboratories***[3] had initially held, before the emergency on the scene of the decision in ***M V Home Office***[supra], that in judicial review proceedings injunctive relief could be granted against officers of the Crown. These two decisions were overruled by the House of Lords in ***Factortame Ltd V Secretary of State for Transport***[4]. Following that decision, the European Court of Justice held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of

[1] ***M V Home Office*** [1993] 3 WLR 433: [1993] 2 AllER 537
[2] ***R V Secretary of State for the Home Department ex – parte Herbage*** [1987] Q. B. 872
[3] ***R V Licencing authority ex – parte Smith Kline & French Laboratories Ltd No. 2*** [1990] Q. B. 574
[4] ***Factortame Ltd V Secretary of state for Transport*** [1990] 2 A. C 85

community law [EU Law] by withholding from a national court the power to set aside national legislative provisions which might prevent Community Rules [EU rulers] from having full force and effect, were incompatible with community [EU] law. The full effectiveness of Community [EU] law would be impaired if a rule of national law prevented a court seized of a dispute governed by Community [EU] law from granting interim in order to ensure the full effectiveness of the judgement when given on the existence of the rights claimed under Community Rule See ***Factortame Ltd V Secretary of State for Transport (No. 2)***[1]**.** Further in ***Factortame Ltd V Secreatry of State for Transport (No. 3)***[2] the House of Lords granted an interlocutory injunction against the Secretary of State for Transport to prevent him from withholding or withdrawing registration of the applicants' vessels under the provisions of the Merchant Shipping Act 1988, it being alleged that the Act incompatible with community [EU] law. The Factortame decisions left the law in a highly unsatisfactory state, with injunctive relief available against Ministers in judicial review proceedings which raised an issue of community [EU] law, but not obtainable where only domestic law was involved, hence the decision in ***M V Home Office*** [supra].

Furthermore, the learned authors De Smisth, Woolf and Jowell in their book ***Judicial Review of Admininstrative Action***[3] on this aspect have commented as follows at p 719:

> "It is well accepted that, in judicial review proceedings, injunctions,, like the prerogative orders, can not be granted against the Crown directly. After a period of considerable uncertainty surrounding the question whether Section 31 of the supreme court Act 1981 [of England] gave the court power to grant a final or interim injunction on an application for judicial review against Ministers and other officers of the Crown acting in their official capacity, it is now clear that there is such jurisdiction. Part II of the Crown proceedings Act 1947 which limits the extent of the court's jurisdiction to grant injunctions against the Crown and its Ministers applies only to civil proceedings and has no application to proceedings on the Crown Side of the Queens' Bench Division. In practice, however, an injunction against a Minister can be no more than a

[1] ***Factortame V Secretary of State for Transport[No. 2]*** 1991 A.C. 603
[2] ***Factorame V Secretary of State for Transport*** [No.3] [1992] Q. B. 680
[3] deSmith, Woolf and Jowell, ***Judicial Review of Administrative Action*** 1995 fifth Edition, London, Sweet & Maxwell p 710

> peremptory declaration because of the definition of 'Order against the Crown' in Rules of Supreme Court Order 77 r(2) which provides which provides for special rules on the execution and satisfaction of orders of court. The fact that the court has jurisdiction to grant injunctions against ministers and other officers of the Crown does not mean that the jurisdiction should be exercised except in the most limited of circumstances".

Having said this, I now turn to the law on interlocutory injunctions. The law as regards interlocutory injunctions is, in my view, very clear. The usual purpose of an order of interlocutory injunction is to preserve the ***status quo*** until the rights of the parties have been determined in the action. As was stated by Tambala, J as he then was in case of ***Mangulama and Four Others V Dematt***[1] that:

> "Applications for an interlocutory injunction are not an occasion for demonstrating that the parties are clearly wrong or have no credible evidence…The usual purpose of an order of interlocutory injunction is to presence the ***status quo*** of the parties until their rights have been determined".

In the case of ***Honorable Brown Mpinganjira and Six Others V the Speaker of the National Assembly and Attorney General***[2] the position and practice upon which interlocutory injunctions are granted was stated by Kapanda J, as follows:

> "In litigation be it private or public, where (the plaintiff) an applicant seeks a permanent injunction, against (the defendant) the respondent, this court has a discretion to grant (the plaintiff) the applicant an interlocutory injunction – a temporary restriction pending the determination of the dispute at the substantive trial which is designed to protect the position of the applicant (plaintiff) in the interim. In that event, the applicant will normally be required to give an undertaking to pay damages to the respondent should the latter succeed at the trial".

It is now well settled that the principles governing the grant or refusal of an interlocutory injunction are trite knowledge and are those enunciated by

[1] ***Mangulama & Four Others V Dematt*** Civil Cause No. 893 of 1999 [unreported]
[2] ***Hon. Brown Mpinhanjira & six Others V Speaker of the National Assembly & Attorney General*** Miscellaneous Civil Cause No. 3140 of 2001

Lord Diplock in the celebrated English case namely ***American Cynamide Company V Ethicon Limited***[1]. The first principle is that the plaintiff must show that he has a good arguable claim to the right that he seeks to protect. Secondly, the court must not, at the interlocutory stage, attempt to decide disputed issues of facts on the affidavits before it, it is enough if the plaintiff tried. Thirdly, if the plaintiff satisfies these tests, the grant or refusal of an injunction is for the exercise of the court's discretion on a balance of convenience. In deciding where the balance of convenience lies the court must consider whether damages are a sufficient remedy; if so an injunction ought not be granted.

In the ***American Cynamide Case*** [supra] the court held that there was no rule of law that the court was precluded from considering whether on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeds in establishing a ***prima facie*** case of probability the he or she would be successful at the trial of the action i.e. that there was a serious question to be tried. These principles as laid down in the ***American Cynamide*** have been quoted with approval and followed in numerous cases in our jurisdiction. In the case of ***Candlex Limited V Phiri***[2], the court stated:

> "It is accepted that the procedure relating to the grant or refusal of an interlocutory injunction and the tests to be applied are generally those laid down by Lord Diplock in the ***American Cynamide Company V Ethicon Limited*** [supra]. It is important to recognise these principles as guidelines which are not cast in stone although variations from them are limited. Put simply, the guidelines require that there is a serious question to be tried. If the answer is yes, then the grant or refusal of an injunction will be at the discretion of the court. The Court must consider whether damages would be an adequate remedy for a party injured by the court's grant or refusal to grant an injunction. If damages are not an adequate remedy or the losing party would not be able to pay them, then the court must consider where the balance of convenience lies".

[1] ***American Cynamide Company V Ethicon Limited*** [1975] AC 393; [1975] 1AllER 505 HL
[2] ***Candlex Limited V Phiri*** Civil Cause No. 713 of 2000 (unreported)

And in ***Ian Kanyuka suing on his own behalf and on behalf of all National Executive Members of the National Democratic [NDA] V Chiumia and Others***[1], Tembo J, as he then was, said:

> "Order 29 of the Rules of Supreme court makes provision for the general principles respecting the grant or refusal of an application for interlocutory injunction. The usual purpose of an interlocutory injunction is to preserve the ***status quo*** until the rights of the parties have been determined in an action. The order is negative in form, thus, to restrain the defendant from doing some act. The principles to be applied in applications for interlocutory injunctions have been authoritatively explained by Lord Diplock in ***American Cynamide Company V Ethicon Limited*** [supra]. The plaintiff must establish that he has a good arguable claim to the right he seeks to protect. The court must not attempt to decide the claim on affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. If the plaintiff has satisfied these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on a balance of convenience. Thus, the court ought to consider whether damages would be a sufficient remedy. If so an injunction ought not be granted. Damages may not be a sufficient remedy if the wrong - doer is unlikely to pay them. Besides, damages may not be a sufficient remedy if the wrong in question, is irreparable or outside the scope of pecuniary compensation or if damages would be difficult to assess. It will be in general material for the court to consider whether more harm will be done by granting or refusing an injunction. In particular it will usually be wiser to delay a new activity rather than risk damaging one that is established".

Further in ***Mobil Oil (Malawi) Ltd V Leonard Mutsinze***[2] Chatsika J, as he then was stated the law as follows:-

> "The principles upon which an application for an injunction will be considered are set out in order 29/1/2 and 29/1/3 of the Rules of the Supreme Court and were succinctly elucidated in the case of ***American Cynamide Company V***

[1] ***Ian Kanyuka suing on his own behalf and on behalf of all National Executive Members of the National Democratic Allicance [NDA] V Chiumia and Others*** Civil Cause Number 1510 of 1992 [unreported]

[2] ***Mobile Oil(Malawi)Ltd V LeonardMutsinze*** Civil Cause Number 1510 of 1992

> ***Ethicon Limited***. Before an injunction can be granted, it must be established that the applicant has a good arguable claim to the right he seeks to protect. The court does not decide the claim on the evidence contained in affidavits. A good claim is said to have been established if the applicant shows that there is a serious question or point to be decided. When these principles have been established, the court exercises its discretion on the balance of convenience. In deciding the question of balance of convenience, the court will consider whether damages will be a sufficient remedy for the mischief which is complained of and even if it considers that damages will be a sufficient remedy, it must further consider and decide whether the defendant or wrong – doer shall be able to pay such damages".

And my learned brother Mwaungulu, J in the case of ***Amina Daudi t/a Amis enterprises V Sucoma***[1] enumerated the following principles, which I equally hold to be good law, viz:-

1) A court will not grant an injunction unless there is a matter to go for trial.
2) Once there is a matter to go for trial the court had to consider whether damages are adequate.

The learned judge continued to state at p 4

> "[F]irst, a court will not grant an injunction unless there is a matter to go for trial. This obviously filters cases not deserving the equitable relief that by its nature prevents exercise of rights before a court finally determined the matter…Secondly, once there is a matter to go for trail, the court has to consider whether damages are as adequate remedy. This consideration requires answers to two sequel questions. First, from the perspective of the defendant, even if damages are an adequate remedy, the court will refuse to grant the injunction if the plaintiff can not pay them…Secondly from the perspective of the plaintiff, if damages are an adequate remedy and the defendant can pay them, the court will not refuse an injunction. The court may therefore allow an injunction where damages are an adequate remedy and the defendant can pay them".

[1] ***Amina Daudi t/a Amis Enterprises V Sucoma*** Civil Cause No. 3191 of 2003 (unreported)

It must therefore be appreciated that damages will be an inadequate remedy where the plaintiff's or the defendant's losses will be difficult to compute. In ***ICL (Malawi) V Lilongwe Water Board***[1] wherein Chimasula – Phiri, J reasoned, thus:-

> "Further, if the defendants were found liable would pecuniary compensation be difficult to assess and/or would the defendant be unable to pay such damages? I see no such evidence in the affidavits in opposition as would logically lead to such inference. Therefore, on reflection it has become apparent that the injunction was founded on a decision which was wrong in law. It should not have been granted in the first place because damages would be adequate compensation to the plaintiff if the defendant becomes liable and damages would not be difficult to assess".

Finally, the supreme court of appeal in the case of ***Registered Trustees of Christin Service Committee V Mandala Building Construction Company Limited***[2] has perhaps restated the law on injunctions. This is what their Lord Lordships said:

> "[I]n determining whether to grant an interlocutory injunction, the question for the court to consider was not whether it was mandatory or prohibitory, but whether the injustice that would be cause to the defendant if the plaintiff was granted an injunction and later failed at the trial outweighed the injustice that would be caused to the plaintiff if the application was refused and he later succeeded at the trial".

In my most considered opinion therefore the question as to whether the applicants have established or demonstrated that they have a good arguable claim to the right that they seek to protect and therefore entitled to an order of injunction can only be answered by looking at the facts before me as well as the law. It was argued by Mr Kara, Counsel for the applicants herein that the issue of qualification and disqualification is provided for in Sections 51 and 80 of the Constitution and that in both these Sections the issue of nomination fees does not arise. Of course Counsel conceded that the

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[1] ***ICL (Malawi) V Lilongwe Water Board*** Civil Cause Number 64 of 1998 (unreported)

[2] ***Registered Trustees of Christin Service Committee V Mandala Building Construction Company Limited***[2][MSCA] Civil Appeal No. 9 of 1999 (unreported)

respondents have power both under the Parliamentary and Presidential Elections Act and the Electoral Commission Act to fix the nomination fees but he was quick to submit that where the said two Acts do not provide for the mechanism of fixing the said nomination fees, the process of arriving at the same must be reasonable, as well as the final figure. Counsel therefore contended that if both of these are unreasonable, then the decision arrived at is ***ultra vires***. It was further submitted by Mr Kara that in arriving at the final figures as nomination fees for both Parliamentary and Presidential aspirants, the respondents should have taken into account the prevailing economic situation in the country, like our GDP and the stakeholders and that that is the reason why most stakeholders i.e. political parties are crying foul, and that most aspiring Presidential candidates and Parliamentary candidates have therefore been caught unawares and that these revised nomination fees will stand in their way and suppress their Constitutional right to stand for public office. Counsel also submitted that if an order of interlocutory injunction was granted the same would not occasion delay of the Electoral calendar as the respondents have not issued an order or notice appointing a day for nomination. If anything, Counsel submitted, there is already a delay, because according to the minutes of the meeting held by the respondents exhibited to the affidavit of Mr David Bandawe, they show that the respondents had initially planned for nomination of presidential candidates on 5th – 9th January, 2009 and that this had not yet taken place. In that sense therefore, Mr Kara contended there is already delay, at the instance of the respondents. Counsel also contended that the said minutes also show that no consultation took place between the respondents and stakeholders, and that even when one looks at the last nomination in 2004, the same took place in March, and yet campaign still went ahead. In any case, he said, according to Section 36 of the Parliamentary and Presidential Election Act nomination of Presidential and Parliamentary candidates could still take place 28 days before elections.

On her part Mrs Kanyuka, learned Chief State Advocate, for the respondents in reply to Mr Kara's submissions contended that the stay order, and the order of interlocutory injunction being sought by the applicants should not be granted it being the respondents argument that leave having already been granted for judicial review, the emphasis now should be on the actual hearing of the said judicial review. The Chief State Advocate also submitted that when one looks at the purpose and functions of the respondents, under our law, they have the mandate to manage the Electoral calendar, and further that under the Parliamentary and Presidential Elections Act, the respondents

have the power to fix nomination fees, and nowhere is it provided that in fixing the said nomination fees, the respondents shall make consultations. Mrs Kanyuka also submitted that the applicants' argument that the respondents decision is unconstitutional is frivolous and vexatious , in that there is nothing unconstitutional in what the respondents did as the respondents have the mandate under our laws, and that all they did was to merely regulate the Electoral process and calendar.

The Electoral Commission under our law is established or provided for under Chapter VIII of our Constitution. Section 75 (1) of the Constitution provides as follows:-

> S75(1) "There shall be an Electoral Commission which shall consist of a Chairman who shall be a judge nominated in that behalf by the Judicial Service Commission and such other members, not being less than six, as may be appointed in accordance with an Act of Parliament".

The Powers and functions of the Electoral Commission are provided for under Section 76 of the Constitution. The said section is in the following terms:-

> S76(1) "The Electoral Commission shall exercise such functions in relation to elections as are conferred upon it by this Constitution or by an Act of Parliament.
>
> (2) The duties and functions of the Electoral Commission shall includes -
>
> a. To determine constituency boundaries impartially on the basis of ensuring that constituencies contain approximately equal numbers of voters eligible to register, subject only to consideration of –
>
> i. Population density;
>
> ii. Ease of communication; and
>
> iii. Geographical features and existing administrative areas
>
> b. To review existing constituency boundaries at intervals of not more than five years and alter them in accordance with the principles laid down in subsection (2)(a);

c. To determine electoral petitions and complaints related to the conduct of any elections;
d. To ensure compliance with the provisions of this Constitution and any other Act of Parliament; and
e. To perform such other functions as may be prescribed by this Constitution or any Act of Parliament…".

Further, in addition to the powers and functions conferred on the respondents in the Constitution, the respondents are also conferred powers and functions under the Electoral Commission Act. Section 8 of the said Act provides:

S8(1) "In addition to the broad functions and powers conferred on the Commission by the Constitutions and subject to the Constitution, the Commission shall exercise general direction and supervision over the conduct of every election and without prejudice to the generality of such functions and powers, it shall have the following further functions –
…
(l) to perform the functions conferred upon it or by or under any written law.
(m) To take measures and do such other things as are necessary for conducting free and fair elections".

Furthermore, the Parliamentary and Presidential Elections Act, [PPE] makes provisions with respect to the conduct of elections for the election of members of Parliament and for the election of the President of the Republic and for matters ancillary thereto or connected therewith. In terms of nomination of Members of the National Assembly, the Act provides in Section 45as follow:-

S45(1) "At the same time as the nomination paper for a candidate is lodged, there shall be deposited with the returning officer by or on behalf of the person nominated, such sum as may be fixed by the Commission
(2) If a poll takes place for the constituency concerned, the sum deposited under subsection (1) shall be refundable to the payee, whether the candidate in respect of whom the sum was deposited is or is not

elected in the poll, unless the number of valid votes case for an unsuccessful candidate is less than five percent of the total valid voted cast in the constituency in which case such sum shall be paid into the Consolidated Fund.

(3) If the poll for the constituency concerned does not take place, the sum deposited under subsection (1) shall be refundable to the payee".

And in terms of the Nominations for Election to the office of President, the Parliamentary and Presidential Election Act provides in Section 50 as follows:

S50(1) At the same time as nomination papers are lodged by or on behalf a candidate for election as President, there shall be deposited with the Commission by or on behalf of the person nominated, such sums as may be fixed by the Commission

(2) Save as provided in Section 53(3) a deposit under subsection [1] shall, ***mutatis mutandis*** be treated in the same manner as deposit under Section 45".

As can clearly be seen, the respondents are given the mandate to fix the amount of nomination fees both under Sections 45 of the Act in respect of aspiring Parliamentary candidates and under Section 50 of the said Act in respect of aspiring Presidential candidates. Further, although Mr Kara argued that the respondents' minutes showed that no consultation took place between the respondents and stakeholders to wit political parties, it is clear from the reading of both the Electrical Commission Act and the Parliamentary and Presidential Elections Act, that no such obligation or duty is placed on the respondents to consult when fixing such nomination fees. In my view, the position would have been different, if the respondents were required to consult, and they did not. In the instant case before me, the respondents had no such duty and I accordingly do find.

Further, it was argued by Mr Kara that in fixing the nomination fees, MK500,000.00 and MK1000,000.00 for the Presidential and Parliamentary candidates respectively as the respondents did, the respondents are actually suppressing the applicant's constitutional right to stand or to run for public office. With due respect to learned Counsel, I am afraid that the court is unable to follow this argument. Whilst Sections 32, 38 and 40 of the Constitution provide for the right to freedom of association, freedom of

assembly and freedom or the right to form or join or participate in the activities of a political party or indeed to campaign for a political party or cause and to freely make political choices, it is to be appreciated that these rights are not absolute: further they are not amongst the rights provided for in Section 44(1) of the Constitution in respect of which there shall be no derogation. The rights in Section 32, 38 and 40 are in my most considered view clearly derogable and as such the same can be limited as long as such a limitation is a limitation prescribed by law, is reasonable and recognized by international human rights standards and is necessary in an open and democratic society, as is provided for under section 44(2). Further, I think, it is to stretch the argument too far to say did the respondents acted ***ultra vires***, the Electoral Commission Act and the Parliamentary and Presidential Election Act and therefore that that decision is accordingly unconstitutional.

Clearly, in my most considered opinion, Sections 45 and 50 of Parliamentary and Presidential Election Act give power to the respondents to fix the nomination fees and to that extent therefore it is difficult to see how in exercising that power, one would say the respondents acted ***ultra vires.*** Furthermore, in my view, the fixing of the nomination fees by the respondents does not negate the essence of the rights, like those of the applicants provided for Section 32, 38 and 40 of our Constitution. In my judgement, the respondents acted within their powers as conferred on them by the Constitution, the Electoral Commission Act and the Parliamentary and Presidential Election Act. These are valid laws, and unless repealed they are to be obeyed, as there is presumption that legislation is valid unless it is declared invalid by a competent court of law or unless it is repealed.

Where an applicant like in the present case, seeks to restrain a public authority from enforcing an Act of Parliament, courts should be hesitant to grant relief which interferes with the performance by the statutory authority of its role. In the case of ***Dr Bakili Muluzi V The Director of the Anti – Corruption Bureau***[1] Justice Dr Jane Ansah said:

> "Such is the law concerning the grant of an interim injunction where the Constitutionally of an Act of Parliament is challenged. In this case maintaining the

[1] ***Dr Bakili Muluzi V The Director of the Anti – Corruption Bureau,*** Constitutional Case Number 8 of 2005

> injunction will mean suspending the operation of the CPA and the affected sections are the very functions and mandate of the ACB. This will entail suspending the business of the ACB in so far as it involves those people who are not public officers such as Presidents, Ministers Deputy Ministers and Members of Parliament. It is obvious that this case does not only affect the parties concerned, and it is one that affects public interest in that the activities of ACB must not be hampered in any way. The consequences of continuing the injunction is far – reaching in that the injunction gives immunity against complying with the Directors Notices to the plaintiff and any other person who may fall in the same category may follow suit and obtain injunctions. It is noted that an Act of Parliament is passed by a democratically elected parliament therefore there must be a presumption that legislation in valid until it is declared invalid by a court of law after full trial".

Further in ***Morgantaler V Ackroyd***[1], a case that was followed in the ***Dr Muluzi Case*** [supra] it was pointed out that

> "In my view therefore the balance of convenience normally dictates that those who challenge the Constitutional validity of laws must obey those laws pending the court's decisions".

Thus, indeed where acts of a public body are in question, the public interest plays an important factor and thus qualifies the ordinary considerations laid down in the ***American Cynamide Case***. See ***Smith V Inner London Education Authority***[2].

The rule therefore is that a public body should not be restrained by an interlocutory injunction in exercising its statutory powers unless the plaintiff shows that there is a real prospect that he or she will succeed for a permanent injunction at the trial. In the case of ***Shore Buses Ltd V Transport Board***[3], a Fijian case, the court made the following observation, which, I consider pertinent for purposes of our discussion.

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[1] ***Morgantaler V Ackroyd*** (1943) 42 CR 659
[2] ***Smith v Inner London Education Authority*** [1978] lAllER 411
[3] ***Shore Buses Ltd V Transport Board*** [1993] FJCA, 16

> "I accept Mr Cope's submissions that the Board is a public authority performing its duties to the public. As such I feel courts should not lightly impede the functioning of such a body endeavouring to give effect to the legislation particularly when the interests of a large section are involved. If the Board has misinterpreted the legislation or has acted out of jurisdiction then no doubt the Court of Appeal will pronounce its judgement accordingly and the appellants will then be at liberty to seek appropriate remedies".

Further in the case of ***R V Licensing Authority Ex – parte Smith Kline & French Laboratories Ltd (Genetics) UK Ltd and Another Intervening [No. 2]***[1] the court had this to say:

> "I also bear in mind that the licensing authority is performing a statutory duty. It is a duty which it is required to perform and the court, in my view, should be hesitant in granting relief which interferes even on interim basis, with the performance by the authority of this role. When one contemplates the problems involved in granting the sort of interim relief which the applicant seeks, I have come to the conclusion that as matter of discretion this court should refuse that relief".

In my view, it is not doubted that the respondent is a public body performing public and statutory functions to wit ***inter alia*** conducting elections for the election of members of Parliament and for the election of the President of the Republic. As such, in my most considered opinion, the court should be hesitant, if not slow indeed to interfere with the performance of the respondents of their role as conferred on them by both the Constitution, and two Acts namely The Electoral commission Act, and the Parliamentary and Presidential Elections Act. The role of the respondents in respect to elections be it General elections or the Local Government elections in our country can not be over – emphasised. Theirs is a pivotal role and as long as they act within their made, which I find to be the case, the court should be hesitant to interfere, unless of course the applicants show that there is a real prospect that they will succeed in their claim for a permanent injunction at the trial. I am afraid to say that this I have not found. There is a lot of public interest, 2009 being an election year, and the injunction sought,

[1] ***R V Licensing Authority Ex – parte Smith Kline & French Laboratories Ltd (Genetics) UK Ltd and Another Intervening [No. 2]*** [1995] 2 AllER, 128

would, if granted disturb the calendar of events and also put the respondents to a greater expense, which I doubt, the applicants would be unable to compensate. Since I have already found that there is nothing unconstitutional in what the respondents did in fixing the nomination fees, I do not see how this case qualifies, as one of those cases in which an injunction ought to be granted.

CONCLUSION:

In these circumstances therefore and by reasons of the foregoing, it is my finding that the balance of convenience in this matter weighs in favour of refusing to grant the injunction sought, and I accordingly dismiss the applicant's summons for an order of injunction herein; The applicants not having shown that there is a real prospect that they will succeed for a permanent injunction at the trial. Equally, as a consequence, I also find no merit in granting a stay of the respondents decision to fix the nomination fees for Presidential and Parliamentary candidates at MK500,000.00 and MK100,000.00 respectively. Here too, I therefore dismiss the applicant's application for stay.

I however wish to take note that this is a matter for which leave to move for judicial review was already granted, and therefore taking into account that these are matters that must be executed with speed, the court already ordered an expedited hearing. The matter should therefore proceed accordingly.

As for costs, these normally follow the event, and since the applicants have been unsuccessful, I condemn the in costs.

Pronounced in Chambers at Principal Registry this 16th day of January, 2009.

Joselph S Manyungwa
JUDGE