**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**JUDICIAL REVIEW CASE NUMBER 71 OF 2017**

**BETWEEN:**

**THE STATE**

**AND**

**THE MALAWI COMMUNICATIONS REGULATORY AUTHORITY** **RESPONDENT**

**EX PARTE: FRANCIS BISIKA** **APPLICANT**

**CORAM: JUSTICE M.A. TEMBO**

Gondwe, Counsel for the Applicant
Mmeta, Counsel for the Respondent
Mpasu, Official Court Interpreter

## ORDER

This is the order of this Court on the application made by the party cited as the respondent to set aside all or part of the proceedings. The application is taken out under Order 2 rule 3 Courts (High Court)(Civil Procedure) Rules.

The applicant applied for permission to commence judicial review proceedings on 9th November, 2017 under Order 19 rule 20 (3) Courts (High Court) (Civil Procedure) Rules 2017.

The application for permission to commence judicial review comprised a form 86 A under the Rules of Supreme Court and a sworn statement verifying the facts relied upon in support of the application for permission. This Court granted the permission in this matter considering that the applicant demonstrated that he had a case fit for further investigation at a hearing for judicial review sought to be had later on.

In addition to granting the permission, this Court also granted an injunction that the applicant sought. Further, this Court also granted the prayer to commence the judicial review by originating motion and that the hearing be expedited. The notice of originating motion for judicial review has not yet been filed with this Court.

When the respondent was served with the injunction and notification of the decision of this Court granting permission to commence judicial review proceedings, the respondent applied to this Court to set aside part or all of the proceedings so far. The application is made under Order 2 rule 3 Courts (High Court) (Civil Procedure) Rules 2017.

The grounds for the application to set aside are fourfold, namely, that there are no proceedings commenced before the court with a mode of commencement which is known to the law, there is no named defendant to the proceedings as required by law, the proceedings are so defective that the court's coercive force has wrongfully been procured and that the proceedings are so defective that the defendant is embarrassed to respond to the same.

This Court must decide whether indeed the four stated grounds justify the setting aside of all or part of the proceedings.

The respondent submitted that the applicant has commenced these proceedings using a mode not known to our laws. Further, that the applicant attempted to commence judicial review proceedings but to no good effect at all. Consequently, that the proceedings are scandalous and embarrassing to the respondent and this Court.

The respondent submitted on commencement of proceedings before the High Court of Malawi. The respondent referred to the following.

Order 5 rule 1 of Courts (High Court) (Civil Procedure) Rules, 2017 (hereafter referred to as the CPR) which stipulates that unless otherwise provided under these

Rules or any other written law, a proceeding shall be commenced by filing a summons in Form 1.

Order 5 rule 2 CPR which states that a summons shall

(a) Specifically state the relief claimed by the claimant;

*(b)* Contain a statement of case.

Order 5, rule 3 CPR which prescribes that

A summons shall –

(a) Be signed by the claimant or the claimant's legal practitioner;

(b) Name as defendant anyone whose interest shall be affected by the order sought; and

(c) Be signed and sealed by the Registrar

Order 19 rule 20 (3) CPR which states that an application for judicial review shall be commenced ex-parte with the permission of the Court.

Order 19 rule 23 (1) CPR which states that an application for judicial review shall set out the grounds for making the application and shall be supported by a sworn statement.

Order 19, rule 23(2) (c) CPR which states that an application under sub rule (1) shall name as defendant – for an order about a decision, the person who made or should have made the decision.

And Order 19, rule 24 CPR states that the defendant shall, within 14 days of service of the application, file a defence supported by a sworn statement.

The first issue that the respondent teased out was whether the applicant commence judicial review proceedings known to the law? The respondent argued as follows on that issue.

That the CPR provides for a two-tier structure for judicial review proceedings. First - tier, being the application for permission to commence judicial review proceedings under Order 19, rule 20(3). And the second - tier, being the application for judicial

review under Order 19, rule 23(1). The respondent then submitted that the mode of application for the judicial review proceedings is by way of summons as per Order 5, rule 1 CPR. The respondent noted that, for the avoidance of doubt, Order 19, rule 23 CPR does not provide for a different mode of commencement of the originating process.

The respondent submitted that judicial review proceedings should have a named defendant as per Order 19, rule 23(2) CPR.

The respondent observed that the proceedings before this court have no named defendant.

Further, that the proceedings before this court have not been commenced by summons as required by the rules. And that the proceedings under consideration do not have a statement of case as required by the rules.

The respondent added that the permission to commence judicial review proceedings, 1st tier, was granted in a vacuum without the relevant application for judicial review as envisaged in the CPR, 2nd tier.

The respondent added that, in amplification, there is no sworn statement in support of the 2nd tier application, which is, of course, non-existent.

The respondent argued that the current proceedings are so irregular and defective with the potent likelihood of embarrassing the respondent and this Court.

The respondent then submitted on what is the fate of these defective and irregular proceedings?

The respondent then referred to several Orders in the CPR as follows. Order 35, rule 8(2) CPR which states that where a party files with the Court a mode of commencement under the existing procedure rules on or after the commencement date it shall be returned unissued.

Order 6, rule 1 CPR which states that subject to rule 15, a person is a party to a proceeding if he is named as a claimant or as a defendant.

Order 2, rule 1 CPR which states that the failure to comply with these Rules or a direction of the Court shall be an irregularity.

Order 2, rule 2 CPR which states that notwithstanding rule 1, an irregularity in a proceeding, or a document, or a step taken, or order made in a proceeding, shall not render a proceeding, document, step taken or order a nullity.

And Order 2, rule 3 CPR which states that where there has been a failure to comply with these Rules or a direction of the Court, the Court may

(a) Set aside all or part of the proceeding;

(b) Set aside a step taken in the proceeding;

(c) Declare a document or a step ineffectual;

(d) Make an order as to costs;

(e) Make any order that the court may deem fit.

The respondent then referred to the case of *Dr. Bakili Muluzi and The United Democratic Front vs The Malawi Electoral Commission* Constitutional Case No. 1 of 2009, in which the Court opined as follows

> … we wish also to observe that in any type of proceedings that come before the Courts, issues concerning Mode of Commencement are fundamental. The Law, as all its Practitioners ought to appreciate, clearly makes the effort to classify proceedings that may be brought before Courts of Law either by the Cause of Action that gives rise to them, or by the subject-matter they relate to. It then duly assigns to each category or class of action, or proceedings, the particular mode or particular modes by which proceedings can be tabled in a Court of Law… The substantive Law governing a given state of affairs, as read with the available procedural law, in the ordinary course of things, is ever in place to guide a litigant as to the best applicable mode of commencing his/her action or proceedings in a Court of Law. Commencing proceedings in a correct manner, therefore, is like boarding the right bus or train when traveling, because it is capable of getting you to the destination you want. In like manner, commencing an action or proceedings in a wrong manner, is like boarding the wrong bus or train, because it does not have prospects of getting you to the destination you desire, unless you disembark and restart the journey on the correct bus or train.

The respondent argued that the mode of commencement herein ought to have been returned unissued and should therefore be set aside. That these judicial review

proceedings do not have a named defendant as require by the CPR and therefore should be set aside as a whole.

Further, that these judicial proceedings fit in the caricature of boarding a wrong bus with no prospects of getting you to the destination and therefore should be set aside.

And that the coercive force of the Court was improperly procured in issuing an order granting permission to apply for judicial review and giving directions and the same should be deemed ineffectual.

In response, the applicant also referred to Order 2, rule 2 and 3 CPR.
He next referred to Order 2 rule 4 CPR which provides that an application for an order under Rule 3, for setting aside or otherwise on non-compliance with the rules, shall

> (a) be made within a reasonable time and before the party making the application takes a fresh step in the proceeding after becoming aware of the irregularity; and
> **(b)** set out details of the failure to comply with these Rules or a direction of the Court.

The applicant then submitted that there is now a new regime for particular proceedings.

He submitted that Order 19 CPR has brought in the issue to do with particular proceedings such as constitutional matters, election matters, judicial review matters and habeas corpus matters and that these have special rules designed at achieving more streamlined and uniform process.

He referred to Order 19 rule 20 CPR where it is provided that

> (2) A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.
>
> (3) Subject to sub-rule (3) an application for judicial review shall be commenced ex-parte with the permission of the courts.

He then referred to Order 19 Rule 21 CPR which provides that an application for a mandatory order, a prohibiting order or a quashing order shall be made with an application to the court for judicial review.

The applicant then submitted on what he termed a managerial judge. He submitted that the CPR have brought in a paradigm shift in civil litigation process in Malawi. And that at the centre of litigation is now the Judge who controls the pace of litigation and pushes for its early resolution either by way of settlement via mediation or outright determination through summary process or trial.

He then submitted that where permission to apply for judicial review is granted the court will give reasons and may also give case management directions in terms of Order 1 CPR.
The applicant then submitted that there are two stages in an application for judicial review. These are first an application for permission to proceed with the application for judicial review, and if permission is granted, secondly, the substantive hearing. He stated that the purpose of the requirement of obtaining permission is to filter out frivolous and hopeless applications with the minimum waste of court time.

He then submitted that if it becomes clear that the paper work is incorrect, the court may be prepared to allow it to be amended. He referred to the case of *In R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] 1WLR 1593 the House of Lords allowed an application to be amended from a review of a planning resolution to a review of a planning permission. The applicant stated that in public law, the emphasis should be on substance rather than form.

The applicant then submitted that cases decided before the changes in the rules are largely to be regarded as redundant because the CPR 2017 are a new procedural code. He quickly added that, however, many of the established principles may continue to be applied by the courts together with some of the old case law that establish substantive as opposed to procedural law albeit with a strong procedural flavour. He concluded that some care is therefore needed when citing old cases.

He then observed that the case cited by the respondent of *Dr. Bakili Muluzi and The United Democratic Front v The Malawi Electoral Commission* Constitutional case no 1 of 2009 must be treated with caution as the same was decided before the new CPR 2017.

The applicant then submitted on the application of the overriding objective of the CPR of dealing with cases justly.
He submitted that the overriding objective to deal with cases justly as provided in Order 1 rule 5 (1) CPR, means that the primary concern of the court is doing justice. And that shutting away a litigant through a technical breach of the rules will not often be consistent with this, because the primary purpose of the civil courts is to decide cases on their merits, not to reject them through procedural default.

He gave an example of this in *Jones v Telford and Wrekin District Council* (1999) The Times, 29 July 1999 where service had been delayed beyond the period of validity because the claimant's solicitors had problems in obtaining psychiatric reports for service with the particulars of claim. The Court of Appeal upheld an extension of time largely because there were no previous authorities dealing with this situation. The Master of the Rolls commented that the court must not lose sight of the fact that its primary concern was doing justice.

The applicant the referred to dealing with cases expeditiously, fairly and saving of costs.
He submitted that in the case of *Cadogan properties Ltd v Mount Eden Land Ltd* (1999) LTL 29/6/99 the court of first instance had made an order for service by an alternative method in circumstances where there were no grounds for doing so. That order was set aside on appeal, with the result that proceedings had not been served and the period of validity had expired. And that the Court of Appeal relied on the English CPR, r1.1 (2) (d) on the need to deal with cases fairly and expeditiously, and also on the need for proportionality (r1.1(2) (c), to justify making an order extending the validity of the originating process.

The applicant submitted that the respondent was aware of the proceedings herein and has suffered no significant prejudice by the course adopted by the court. The applicant referred to the case of *Re Hoicrest Ltd* [2000] 1WLR 414 in which it was

held that, on the facts, the case was not an appropriate one for using the part 8 procedure. Instead of striking out the proceedings, the court of Appeal allowed the claim to continue as an ordinary chancery claim as that was more cost effective than forcing the claimant to start again by issuing fresh proceedings.

The applicant submitted as follows on the parties herein.
That the use of Applicant and Respondent for Plaintiff and Defendant has no prejudicial effect on the Defendant/Respondent.

And that under the new CPR 2017, there is an innovation on the use of ordinary language in place of expressions and Latin expressions. For instance, instead of Applicant/Plaintiff, it is now Claimant and that a Respondent/Defendant is now just Defendant. That is in terms of Order 6 of CPR 2017.

The applicant submitted that the whole idea is to make the new rules user friendly to lay litigants in line with rule of law requirements that the law should be accessible and comprehensible to the public.

The applicant then submitted on proceedings in the name of the Crown/State.

He referred to the case of *R v Commissioners of Customs and Excise, ex p. Kay & Co* [1996] STC 1500, 1517 c-d where Keene J. stated that it might be thought that the bringing of judicial review proceedings in the name of the Crown is no more than a formality. However, that it reflects the fact that this court is dealing with what are essentially issues of public law: R. *v Traffic Commissioner for North Western Traffic Area, exp Brake* [1996] COD 248 (whereas private law proceedings involve claimant invoking supervisory jurisdiction of the court, through proceedings brought nominally by the crown). This last statement does not come out clearly to this Court.

He added that alongside the rules which govern judicial review, a number of aspects of public law litigation are worth. And that judicial review proceedings illustrate its special nature, virtues and flexibility which cannot just be done away with.

The applicant then submitted on what he termed teething problems.

He stated that there is no format for applications for permission to commence judicial review proceedings in the CPR.
He added that since the CPR are new there is a danger of lack of consistent approach and interpretations by the judges. He opined that this will be minimized by the judge's resort to case law that has developed in England and Wales and the Caribbean, when interpreting provisions that are pari materia to CPR 2017 provisions.

He added that in as much as we advocate for home-grown jurisprudence when it comes to interpreting and applying local legislation and in this case the CPR 2017 provisions, there are some instances where the principles call for universal understanding and application given the common law bases of fundamental principles of civil procedure. He cited Neil Andrews, *English Civil Procedure* (Oxford, 2002) and Neil Andrews, Fundamental Principles of Civil procedure and Neil Andrews, Civil Procedure (19992)). The last two citations are not clear to this Court.

The applicant submitted that the foregoing being the case, one should not lose sight of the fact no matter how the CPR procedural code is drafted, judicial review proceedings are public law issues and proceedings are brought in the name of the State. And that therefore there is nothing wrong about the parties in this matter.

The applicant then submitted on the applicable rules in judicial review proceedings. The applicant submitted that judicial review proceedings are governed by a separate written law, namely, the Statute Law (Miscellaneous provisions) Act.

The applicant referred to section 16 of the Statute Law Miscellaneous Provisions Act which provides that

> (1) The High Court shall not whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs.
>
> (2) In any case in which the High Court in England is by virtue of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.

The applicant also referred to section 16(5) (b) of the Statute Law (Miscellaneous Provisions) Act which provides that the Chief Justice may from time to time make rules to regulate the procedure in cases under this subsection.

The applicant then referred to section 17 (4) of the Statute Law (Miscellaneous Provisions) Act which provides that until rules under subsection (1) have been made, the rules of court made under section 99 of the Supreme Court of Judicature (Consolidation) Act, 1925 pursuant to section 10 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom shall apply with such adaptation as appears appropriate.

The applicant then submitted that the CPR as made by the Chief Justice under section 67 of the Courts Act are not the ones envisaged under section 16 of the Statute Law (Miscellaneous Provisions) Act.

He added that there is no mode of commencement of such particular proceedings under order 19 rule 20 save for the fact that the application for judicial review shall be commenced ex-parte with the permission of the court. He further stated that the Order 19 rule 20 CPR does not provide for application for permission to be by summons. Rather, that it is only by an application which was what was done by the applicant.

The applicant submitted that the Statute Law (Miscellaneous Provisions) Act should be read together with the new CPR and where the new CPR have not prescribed the form/mode of commencement, provisions of the Statute Law (Miscellaneous Provisions) Act should be resorted to as a parent statute.

The applicant stated that this is a murky area and this is the first application of such nature and that there is nothing wrong in terms of the procedure.
He added that even where this court feels that there is an irregularity, in saving costs and giving effect to order 1 Rule 5 of CPR which entails dealing with matters justly this Court may condone such irregularity under its case management powers by making any order that will help resolve the matter on substance rather than on form.

He then submitted that the Courts Act has no provision relating to constitutional review or judicial review proceedings. And that the jurisdiction of the High Court to

grant like orders to prerogative writs and declaratory orders under its supervisory powers over conduct of public officials and public institutions including tribunals emanates from the Statute Law (Miscellaneous Provisions) Act. Further, that the aforesaid Act also empowers the High Court to make rules on the practice and procedure for judicial review.

He concluded that to that extent it is questionable as to whether the provisions relating to judicial review can effectively be made by the Chief Justice under the Courts Act as judicial review is not prescribed under the Courts Act or within the purpose of the aforesaid Act.

Further, that the provisions in issue cover substantive law matters while the CPR 2017 are procedural in character and effect and as such they cannot confer or alter or diminish any existing jurisdiction, rights or duties created or conferred by substantive law. *Everett v Griffiths* [1924] 1 KB at 195.

He added that, it would appear that at the moment where there are no prescribed forms for judicial review proceedings and recourse can be made to the substantive law under the Statute Law (Miscellaneous Provisions) Act.

The applicant then argued that he properly commenced these proceedings as a judicial review matter in terms of Order 19 rule 20 of the CPR 2017 and that under the CPR, judicial review proceedings are treated as particular or special proceedings. In fact, in this part, the applicant wrongly referred to Order 20 CPR which is on skeleton arguments.

He added that Order 19 rule 20 (3) CPR 2017 sets down the procedure that an application for permission for judicial review shall be commenced ex-parte with the permission of the court which was properly done.

He added further that Order 19 rule 21 CPR provides that an application for a mandatory order, a prohibiting order or a quashing order shall be made with an application to the court for judicial review.

And that Order 19 rule 23 CPR provides that an application for judicial review shall set out the grounds for making the application and shall be supported by a sworn statement, which were all duly complied with.

The applicant contended that the new rules have not specified the form to be used for judicial review application and that section 5 of the General Interpretation Act provides that where a form is prescribed or specified by any written law, deviations therefrom neither materially affecting the substance nor calculated to mislead shall not invalidate the form used.

He contended further that he is yet to file the substantive application which would comply with Order 5 CPR if this Court directs under its case management powers. And that in any event, an interim application can be made before a proceeding has started, during a proceeding, or after a proceeding has been dealt with.

He added that the application that was brought before this court was an application for permission to apply for judicial review. And that this Court may give directions under Order 1 CPR on how the subsequent applications shall proceed.

Further, that Order 2 CPR provides that the failure to comply with these Rules or a direction of the court shall be an irregularity. And that it is further provided under Order 2 rule 2 CPR that notwithstanding rule 1, an irregularity in a proceeding, or a document or a step taken, or order made in a proceeding shall not render a proceeding document, step taken or order a nullity.

He then submitted that the current situation requires guidance from this Court as was held by Justice of Appeal Chipeta SC in *Mdolo v Mdolo & another* MSCA Civ. Appeal no. 44 of 2016 that let those responsible for creating such situation, if we find it unpalatable, correct it, but for heaven's sake let us not punish the innocent litigant, who has not made any contribution to the creation of this situation, through subjection of what portions of received law will or will not apply.

The applicant argued that finally, there is no material prejudice on the part of the respondent herein.

In conclusion, the applicant submitted that he had properly commenced the present matter, and that in any event this Court can give effect to Order 1 of the CPR 2017 which provides for the overriding objective of the new rules, namely, to deal with cases justly.

Further, that this Court may use its active case management powers to give directions, in that much as the litigation is conducted in an adversarial manner, the parties are not at liberty to do as they wish, but must conduct their cases within a framework controlled by the court.

The applicant added that the present application has no merit under the CPR, since with judicial management, the philosophy is that judges get involved in the management of the case at an early stage and control both the pace of litigation and the number of interlocutory applications leading to trial.

He prayed that whatever irregularity is there, the same is curable under Order 2 of the CPR and that this court may proceed to give further directions for the conduct of the matter in view of sections 16 and 17 of the Statute Law (Miscellaneous Provisions) Act as read with Order 19 rule 20 CPR.

He added that the present application being satellite litigation contrary to the CPR should be dismissed and this Court should proceed to give directions on how the substantive action could be heard and determined. Since under the new rules substance reigns over form.

The claimant contended that in the present proceedings where we have no prescribed forms under the CPR, the forms and the procedure ought to be the one under the Statute Law (Miscellaneous Provisions) Act as this one is the substantive law.

He concluded that this is the right case where this Court under its case management mandate has the powers to condone the present proceedings and give directions both for this case and for future cases in view of the gap in our procedural law in this court.

The respondent stated in reply that if the CPR do not apply to judicial review proceedings as argued by the applicant, then the proceedings should nevertheless be set aside because they were purportedly commenced under the CPR albeit unsuccessfully.

It added that the existing procedure rules which included the English Rules of the Supreme Court have been replaced by the CPR. If the CPR applies to judicial review, as it should, then these proceedings should be set aside.

This Court first notes that the instant application has been properly taken out before within a reasonable time and before the respondent has taken any step after becoming aware of the alleged irregularity. see Order 2 rule 4 CPR.

This Court notes that indeed as contended by the applicant and the respondent, an application for judicial review has a two-tier process.

The first tier is the permission stage provided in Order 19 rule 20 CPR. There must be an ex parte application for permission to commence judicial review. Once permission is granted then the matter moves to the second tier of a hearing of the judicial review.

Under Order 53 of the Rules of Supreme Court there was a similar two-tier process.

The issue first of all is whether on an application for judicial review the Rules of Supreme Court still apply by virtue of section 16 of the Statute Law (Miscellaneous Provisions) Act. Or whether the Order 19 part III of the CPR does apply with the coming into effect of the CPR on 3rd October 2017.

This Court agrees with the applicant that the power of this Court to make like orders to certiorari, mandamus and prohibition on judicial review is derived from section 16 (2) Statute Law (Miscellaneous Provisions) Act. And that the applicable rules were in Order 53 of the Rules of Supreme Court as per section 17 (4) Statute Law (Miscellaneous Provisions) Act. See *State v Lilongwe Water Board and others, ex parte Malawi Law Society* Judicial review case number 16 of 2017 (High Court) (unreported).

This Court has considered the argument by the applicant that Order 53 of the Rules of Supreme Court still applies by virtue of section 17 (4) Statute Law (Miscellaneous Provisions) Act and agrees but only to the extent of applicable forms for the application for judicial review.

This Court notes however that the interpretation of section 17 (4) Statute Law (Miscellaneous Provisions) Act by the applicant is flawed. The applicant thinks that section 17 (4) Statute Law (Miscellaneous Provisions) Act cross references to section 16 (6) (b) Statute Law (Miscellaneous Provisions) Act which provides that the Chief Justice shall make rules regulating procedure under section 16 (5) Statute Law (Miscellaneous Provisions) Act concerning what is commonly known as habeas corpus procedure.

On the contrary, section 17 (4) Statute Law (Miscellaneous Provisions) Act provides that the Rules of Supreme Court will apply on judicial review unless relevant rules are made under section 17 (1) Statute Law (Miscellaneous Provisions) Act. Section 17 (1) Statute Law (Miscellaneous Provisions) Act provides that any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court where certain orders like those like orders to certiorari and others are sought under section 16 of the Statute Law (Miscellaneous Provisions) Act.

The import of section 17 (1) Statute Law (Miscellaneous Provisions) Act is that any powers of the Chief Justice or whichever office to make rules of court for any matters relating to the procedure in civil courts shall include the power to make provision for rules prescribing procedure on judicial review where reliefs of like orders to certiorari and others are sought.

The view of this Court is that the Chief Justice has in exercise of his powers under section 67 of the Courts Act to make rules of court relating to procedure of civil courts altered the position on the applicable rules where orders are sought on judicial review under section 16 of the Statute Law (Miscellaneous Provisions) Act. That was done in line with section 17 (1) Statute Law (Miscellaneous Provisions) Acts.

Section 17 (1) Statute Law (Miscellaneous Provisions) Act does not restrict the Chief Justice from making rules only under the said Act. That section actually says

the power could be provided for anywhere and can be used to prescribe procedure under section 17 (1)(a) Statute Law (Miscellaneous Provisions) Act to regulate procedure and fees on application for like orders to certiorari and others on judicial review.

In the premises, Order 19 Part III CPR now has partially replaced Order 53 Rules of Supreme Court in so far as the procedure on application for judicial review is concerned. Order 53 Rules of Supreme Court previously wholly applied by reason of section 17 (4) Statute Law (Miscellaneous Provisions) Act and applied only until rules of procedure have been made under section 17 (1) Statute Law (Miscellaneous Provisions) Act.

In consequence of the exercise of powers under section 67 of the Courts Act and pursuant to section 17 (1) Statute Law (Miscellaneous Provisions) Act an application for judicial review shall state the reasons for making the application and shall be supported by a sworn statement. See Order 19 rule 23 (1) CPR.

There shall be named as a defendant every person or office whose decision is subject of judicial review. See Order 19 rule 23 (2) CPR.

This Court agrees with the respondent that, unless otherwise provided, the only mode of commencement of proceedings under the CPR is by filing a summons in form 1. See Order 5 rule 1 CPR.

However, as submitted by the applicant there is a contrary provision in written law or rules and so the commencement of judicial review proceedings shall not be by summons in form 1.

A summons is not intended to be used to commence an application for judicial review given that as per the form 1 prescribed for a summons it ought to have a statement of the reliefs sought as well as a statement of case and it must have an accompanying form of response to be completed by the defendant.

In contrast, Order 19 rule 20 to rule 24 CPR talks of an application for judicial review. This application for judicial review is to be commenced ex parte with the permission of the Court. See Order 19 rule 20 (3) CPR. Then Order 19 rule 23 CPR provides that an application for judicial review shall state the grounds for

making the application and shall be supported by a sworn statement. There is a two-tier process, namely, the permission stage and the full hearing stage.

The defendant to judicial review proceedings shall file a defence supported by a sworn statement. There is no provision for a response that is meant to be filed in response to a summons under Order 5 rule 1 CPR.

Apart from providing for an application for judicial review, no procedure has been provided in terms of the form of the application at the permission stage and at the full hearing stage under the CPR. As correctly observed by the applicant, there is a lacuna.

Applications under Order 10 CPR do not include an application for permission to apply for judicial review. Order 5 CPR is not intended for substantive judicial review application.

What this means is that we have to revert to the provisions in section 17 (4) Statute Law (Miscellaneous Provisions) Act and proceed according to the Order 53 Rules of Supreme Court since the Chief Justice has not exercised power to provide for the forms to be used on an application for judicial review. Section 17 (4) Statute Law (Miscellaneous Provisions) Act is the written law providing for the mode of commencement of an application for judicial review contrary to the general provision for commencement of all proceedings under the Order 5 CPR by summons.

Applications for judicial review shall therefore continue to be commenced by application ex parte using Form 86A as provided in order 53 rule 2 Rules of Supreme Court until such time as the CPR provides the form for the permission application in the two-tier mode for application for judicial review.

However, the proper name for the applicant for judicial review should be claimant. See order 6 rule 1 CPR. The one whose decision is sought to be reviewed should be named as defendant. See Order 19 rule 23 (2) CPR.

As correctly observed by the applicant, these proceedings have to maintain their particular nature as per the provisions of section 16 (2) Statute Law (Miscellaneous Provisions) Act which is the substantive law on the jurisdiction of this Court in judicial review matters. The jurisdiction of this Court in such matters mirrors that

of the High Court in England under section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938.

Consequently, the proceedings must be titled- State (on the application of Bisika) as claimant v Malawi Communications Regulatory Authority as defendant. Judicial review proceedings by virtue of section 16 (2) Statute Law (Miscellaneous Provisions) Act cannot change to be ordinary suits as some may envisage under the CPR.

This Court agrees with the applicant that the overriding objective of the CPR is for this Court to deal with cases justly. See Order 1 rule 5 CPR.

This Court further notes that it is open to this Court to make a variety of different orders where there is an irregularity due to non-compliance with the CPR. See Order 2 rule 3 CPR. Particularly, this Court can make an order that it deems fit. See order 2 rule 3 (F) CPR.

Having considered this matter, this Court notes that the applicant, despite not correctly naming the parties in line with the CPR, did disclose a case fit for further investigation at a full hearing of judicial review.

As submitted by the applicant, it would therefore not be just to increase costs of the proceedings by setting aside the whole of the proceedings.

In line with Order 2 rule 3 (f) CPR this Court deems fit that it should maintain the order granting permission to commence judicial review proceedings.

The naming of the parties shall be as indicated earlier on by this Court. The claimant shall accordingly make the necessary amendments.

As correctly submitted by the applicant, after permission is granted ex-parte or otherwise under Order 19 rule 20 (3) or (4) CPR an application for judicial review shall be by originating motion as provided under Order 53 rule 5 (1) and (2) Rules of Supreme Court. This is for the same reason that no form has been provided for the substantive application for judicial review except that the same shall state the grounds for review and be supported by a sworn statement. See Order 19 rule 23 (1) CPR.

The defendant shall thereafter enter a defence supported by a sworn statement in line with Order 19 rule 24 CPR. Time shall start to run after seven days from the date of this order during which the claimant shall serve the amended papers on the defendant.

The applicant in this matter correctly applied for permission to apply for judicial review and for the substantive application except for the naming of the parties which this Court has ordered to be amended.

In the premises, the instant application by the respondent on the three grounds fails. The respondent succeeds on one ground in that it should have been named as defendant to the proceedings as required by the CPR. This is cured by the amendment ordered.

Costs shall be in the cause in view of the novel nature of the matters raised by the instant application.

Made in chambers at Blantyre this 1st December 2017.

M.A. Tembo
**JUDGE**