



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 201 OF 2014**

**BETWEEN:**

**MR. FELIX MUNTHALI ..... APPLICANT**

**-AND-**

**HON. MRS. MARTHA CHIZUMA-  
MWANGONDE (THE OMBUDSMAN) ..... 1<sup>ST</sup> RESPONENT**

**HON. MR. ... MHANGO (THE ATTORNEY  
GENERAL) (COUNSEL) ..... 2<sup>ND</sup> DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**  
Applicant, present and acting by himself  
Mr. Chuma, of Counsel, for the 1<sup>st</sup> Defendant  
Ms. Chatepa, of counsel, for the 2<sup>nd</sup> Defendant  
Mrs. Jessie Chilimapunga, Court Clerk

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**RULING**

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*Kenyatta Nyirenda, J.*

This is my ruling on an application by Mr. Felix Munthali (Applicant) for an order of committal of the Honourable Mrs. Martha Chizuma-Mwangonde, the Ombudsman (1<sup>st</sup> Respondent) and the Honourable Mr. Charles Mhango, the Attorney General (2<sup>nd</sup> Respondent) to prison for contempt of court.

The facts, in a nutshell, are as follows. On 29<sup>th</sup> May 2014, the Applicant commenced the action herein against the Ombudsman (as 1<sup>st</sup> Defendant), the Clerk of Parliament (as the 2<sup>nd</sup> Defendant) and the Attorney General (as the 3<sup>rd</sup> Defendant) claiming “*the sum of K32,046,234.00 being front salary, increments, Gratuity, Pension leave commutation and interest for period between June 1998 to*

*May, 2005 and interest from May 2005 to date of Judgement (Ref No. INQUIRY No. 56/2001 FILE No. MB/BT/C/192/99)”.*

On 20<sup>th</sup> June 2014, a default judgement was entered against the Defendants in the sum of “K13,854,224.00 and interest at 1% above the National Bank lending rate from the 1<sup>st</sup> June 1998 to this date of judgement and costs of the action to be taxed”.

On 5<sup>th</sup> August 2015, the Applicant filed with the Court an application for:

*“Declarations and Orders as follows:*

1. *Whether or not the Court has jurisdiction to make an Order to commit the Attorney (Mr. Kalekeni Kaphale) oppressor of the poor to prison for eight weeks, for willfully refusing to execute the Default Judgement dated 20<sup>th</sup>. Day of June, 2014 in contempt,*
2. *Whether or not the Court can make Orders directing the Office of the Secretary to the Treasury, to pay the Plaintiff damages amounting to MK32,046,234.00 uncontroverted on account of Attorney General/Ombudsman within 30 days.”*

The application was supported by as affidavit sworn by the Applicant. The substantive part of the affidavit is couched in the following terms:

- “2. ***THAT on 20<sup>th</sup> April 2015 the plaintiff served on the Attorney General, a Default Judgment dated the 20<sup>th</sup> day of June, 2014 requesting him to collect the sum MK32,046,234.00 from the Secretary to the Treasury on account of Malawi Institute of Education, Domasi and gave a deadline of 30 days to take action which expired on 20<sup>th</sup> May, 2015 sent a reminder on 25<sup>th</sup> May, 2015 and no action was taken again, given 14 days which expired on 12<sup>th</sup> June, 2015 in vain; FM 2***
3. ***THAT Attorney General is in contempt of the Court’s Default Judgment dated the 20<sup>th</sup> day of June, 2014 for failing to enforce it. FM 3***
4. ***THAT Plaintiff filed a matter with the Ombudsman claiming his employment was terminated unfairly and without given reasons, by the Malawi Institute of Education, Domasi. And the Ombudsman found Malawi Institute of Education guilty by declaring the termination as lawful and directed the Malawi Institute of Education must pay the Plaintiff Front Salary, Leave days, commutation, gratuity, pension and other benefits, ref : NO 56/2001 FILE NO. OMB/BT/C/192/99 pages 4/9 dated the 13<sup>th</sup> July, 2001. FM 4***
5. ***THAT the plaintiff tried to visit the Blantyre Ombudsman’s Office many times, to ask them to apply to the Court to strike out the unprosecuted appeal made by The Respondents (Malawi Institute of Education) in 2001. The Ombudsman***



*ignored the plaintiff's request. Out of the frustration the Plaintiff through M/S Bazuka & Co applied to this court to strike out the appeal and Counsel for Malawi Institute of Education agreed with this action, under CIVIL CAUSE No. 2107 OF 2001. FM 5*

6. *THAT plaintiff attempted to apply in this Court asking to enforce the Ombudsman's Determination: INQUIRY ref No. 56/2001 FILE NO. OMB/BT/C/192/99 pages 4/9 dated the 13<sup>th</sup> July 2001. Under MISCILLANEOUS CAUSE No. 84 OF 2003 pages 8 Judge Mkandawire advised the Ombudsman/Attorney General (Photocopy given) to go back to parliament to which he reports, find a solution so that the Applicant (Plaintiff) reaps the fruits of determination which is in his favour. The plaintiff served a photocopy on the Ombudsman and the Attorney General under Plaintiff's recent covering letter dated the 20<sup>th</sup> April 2015 which has been without taking action. So the Court would not entertain any action on this matter from neither Ombudsman nor Attorney General. FM.6*

**PRAYER:-**

*Wherefore, Plaintiff prays to this Honourable Court to Punish the Ombudsman and Attorney General, as a lesson, by condemning their evil acts of defiance to inject seriousness, by Declarations and Order as follows:*

1. *A Declaration that the Ombudsman and Attorney General are both guilty of incompetence and in contempt of Court Orders and commit them to Prison for 8 months, by purposely, denying the Plaintiff to immediately enjoy the fruits of his own determination for the past 14+ years without any remorse;*
2. *An Order that the Ombudsman and the Attorney General pay from their Head/Vote Funded by the Treasury direct to the plaintiff within 30 days from this ruling.*
3. *An Order by copy of the ruling to the Secretary to the Treasury who must pay the Plaintiff damages amounting to MK32,046,234.00 and deposit same to*

**MALAWI SAVINGS BANK**

**A/C No. 200 5269125 001**

**SAVINGS A/C**

**BLANTYRE BRANCH.**

*Account Name: Felix Lasmith Munthali must be paid within 30 days using an Advance Account to the Ombudsman and Attorney General out of Malawi Government Consolidated Contingencies/Advance Account in accordance with Treasury Instructions (Finance) and Finance and Audit Act to be recovered when next funding to the Ombudsman's Office and Attorney General is to be made as a punishment to teach them to be serious in the discharge of their duties and desist from oppressing the poor from now and in future."*

The Respondents oppose the application. Counsel Chuma forcefully argued that the Applicant is simply abusing court process. It might not be out of order to quote the relevant part of his submissions in full:

### **"3.1 Abuse of Court Process**

*It is trite law that it is an abuse of Court process for a litigant to use the process of the Court to one's ulterior advantage. See Mwaungulu, Registrar as he then was in **Kotecha and Kotecha vs. Fun 'N' Food Civil Cause No. 576 of 1991**. In **Goldsmith v. Sperrings** (1977) 2 ALLER 566 (CA) Lord Denning alludes to an objective standard for ascertaining whether an action is an abuse of the process of Court or not. He had this to say:*

*'On the face of it, in any particular case the legal process may appear to be entirely proper and correct. What makes it wrongful is the purpose for which it is used. If it is used to exert pressure so as to achieve an end which is improper in itself then it is a wrong known to the law. It had been abused because it had taken as Tidal CJ said "to effect an objective not within the scope of the process" ..... and as Basanquet J said "the process was enforced for an ulterior motive"*

**3.1.1 In Costanha v. Brown and Root (UK) Ltd (1980) 3 All ER, 72 80 Lord Denning further says:**

*"If it is used for the purpose of the party obtaining some collateral advantage for himself and not for the purpose for which such proceedings are properly designed and accepted, he will be guilty of the abuse of the process of the Court"*

**3.1.2 Lord Scarman in **Goldsmith v. Sperrings** (1977) 2 ALLER 566 (CA) has something that would aid the court in decifying the motive. He looks at motive through the object of a reasonable man and says:**

*"In so far as Lord Denning MR is saying that the plaintiff's purpose must be objectively ascertained, i.e. by reference to what a reasonable man placed in his situation would have in mind when initiating the action, I respectfully agree with him.*



3.1.3 *A reasonable person in the plaintiff's position would not commence contempt proceedings against the Ombudsman for the sole reason that the said office made a determination awarding him employment emoluments that his employer had withheld from him. The Office of the Ombudsman does not have legal mechanism to enforce its determinations as such it is an abuse of Court process to commence committal proceedings against the said office simply because it made a determination on the matter. As regards the other defendants the plaintiff's explanation as to why they have to be committed are baseless, frivolous, vexatious and a clear indication that the plaintiff does not understand how these offices operate, accordingly therefore these proceedings should be dismissed for being a clear case of abuse of Court process."*

Counsel Chuma also submitted that the defendants are wrong parties to the action herein and that they can rely on the defence of limitation. The submissions were put as follows:

"3.2 ...*The decision regarding which party to sue is an essential decision which must be made after anxious consideration of facts by the litigant. In **Tembo (J Z U) and Another v Speaker of National Assembly** (M.S.C.A. Civil Appeal No. 1 of 2003 (Unreported), the Court observed as follows:*

*"A decision regarding which party to sue is an important decision which is made by a party or his Counsel after a careful consideration of the facts of the case. The task of which party to sue must be performed by the litigant and not the court. **It is no business of the court to assist a litigant in choosing for him the correct party to sue.***

3.2.1. *The Supreme Court in **Tembo (J Z U) and Another v Speaker of National Assembly** (M.S.C.A. Civil Appeal No. 1 of 2003) (Unreported) approved the High Court's decision in which the court struck out the respondents for being wrong parties. It stated as follows:*

*"Clearly all the three respondents were wrong parties. The learned Judge in the court below was justified in holding that the appellants brought an application for judicial review against wrong parties. **He was right to strike off the said respondents from the proceedings.** The question would be having struck off the three respondents from the proceedings, against whom would the interlocutory injunction stand? Clearly the appellants lost the injunction when it became clear that they sued wrong parties."*

3.2.2. *Similarly, in **State v Director of Public Prosecutions and Another Ex parte Dr. Cassim Chilumpha** (Miscellaneous Civil Cause No. 315 of 2005), the Court dismissed judicial review proceedings on the ground that the proceedings were brought against a wrong party.*



- 3.2.3. *The court will not allow a plaintiff to join a party if to do so would deprive the defendant of the defence of the plea of limitation (**Ingolosi v Mahomed and another** 1971-72 ALR (Mal)335 ).*
- 3.2.4. *Section 4 of Limitation Act provides that contract matters be brought within six years.*
- 3.2.5. *The plaintiff in this matter was employed by the Malawi Institute of Education. He was never employed by either of the defendants as such he cannot claim these emoluments from them and it follows that they cannot be a party to the proceedings.*
- 3.2.6. *Furthermore, even if the defendants were right parties, there is a defence of limitation. The present events arose in 1998 and the plaintiff sued the defendants in 2014 hence it is caught by limitation period."*

Having considered the application by the Applicant for committal of the Respondents, the respective affidavit evidence and respective submissions, I am satisfied that the application has to be summarily dismissed. It is trite law that committal proceedings cannot be commenced without the applicant having first to obtain leave of the Court. Leave to commence committal proceedings in the present matter was never sought. In the circumstances, these proceedings were irregularly commenced and cannot therefore be entertained.

I would have been content to stop there but there is another equally important reason for dismissing the present application. The law is clear that a matter that has been adjudicated in a prior action cannot be litigated a second time. The following dicta in the case of **Barrow v. Bankside Agency Ltd (1996)1 WLR 257** at 260 is apposite:

*"The rule in Henderson v. Henderson (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."*

In the present case, the undisputed facts are that the Applicant was employed by Malawi Institute of Education (Institute). After his employment was unlawfully terminated, he sued the Institute under Civil Cause No. 1827 of 1998 claiming the

sum of K82,704.00, the same being arrears of salary relating to the period between January 1994 to April 1998 and costs. Civil Cause No. 1827 of 1998 was settled through a consent order dated 30<sup>th</sup> August 2010 whereby the Applicant was paid K430, 920,00 in full and final settlement of his claim. As if the Institute knew what was to follow, paragraph (b) of the consent order provided that:

*“Upon payment of the said sum this action shall stand wholly withdrawn and discontinued and no fresh action shall be commenced in respect of the same facts and issues as in this action by the Plaintiff herein.”*

Hardly had three years elapsed when the Applicant, under Civil Cause No. 46 of 2013, sued the Institute again on the same facts that his employment had been unlawfully terminated. He obtained a default judgment in the sum of K23, 047, 144.00. Further, under the present case, that is, Civil Cause Number 201 of 2014, the Applicant sued the Ombudsman, the Clerk of Parliament and the Attorney General on the same facts regarding his employment with the Institute, and again obtained a default judgment requiring the defendants to pay him K13, 854,224.00.

The Applicant could not give a plausible explanation for bringing all these cases which are all based on the same facts and cause of action that his employment was unlawfully terminated by the Institute. The Applicant cannot be allowed to keep coming to court to advance claims or arguments which he could very well have put forward for determination in one cause of action.

In light of the foregoing, the application by the Applicant for an order of committal of the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent to prison for contempt of court is dismissed with costs.

Pronounced in Court this 1<sup>st</sup> day of February 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda  
**JUDGE**