



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
JUDICIAL REVIEW CASE NO. 67 OF 2017**

BETWEEN

THE STATE

AND

**THE MINISTER OF GOVERNMENT OF
MALAWI RESPONSIBLE FOR
AGRICULTURE, IRRIGATION AND
WATER DEVELOPMENT 1ST RESPONDENT**

AND

**THE REGISTERED TRUSTEES OF THE
SMALLHOLDER FARMERS REVOLVING
FUND OF MALAWI 2ND RESPONDENT**

EX-PARTE: TRANSGLOBE PRODUCE EXPORTS LIMITED

HON. DR. JOSEPH CHADANTI MALUNGA ... ALLEGED CONTEMNOR

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Messrs Gondwe, Theu and Hara, of Counsel, for the Applicant
Alleged Contemnor, absent and unrepresented
Messrs Nyirenda, Likomwa and Pheleni, of Counsel, for the National
Assembly
Mrs. J. Chilimapunga, Court Clerk**

RULING

Kenyatta Nyirenda, J.

This was the Applicant's application, made under Order 30, r. 5 and Order 10, r. 3 of the Courts (High Court) (Civil Procedures) Rules 2017 (CPR), for an order of committal of Honourable Dr. Joseph Chidanti Malunga (the alleged contemnor) to prison for contempt of court.

On 2nd November 2016, the Applicant filed with the Court an ex-parte notice for an order granting permission to move for contempt against the alleged contemnor on the ground that he was without any reasonable cause interfering with administration of justice in this matter and an additional relief restraining the alleged contemnor from such interference or prejudicing the administration of justice [Hereinafter referred to as the "ex-parte notice"].

The ex-parte notice was supported by a sworn statement of Mr. Rashid Tayub, the Operations Director of the Applicant [Hereinafter referred to as the "Applicant's Affidavit"]. The material part of the Applicant's Affidavit reads:

- 2.1 *On Friday, October 20, 2017 His Lordship Honourable Kenyatta Nyirenda [the Judge] of the High Court, Principal Registry [the Court] made an Order staying the decision of the Defendant distributing coupons to all and any suppliers under the Farm Input Subsidy Programme [FISP] and implementing and conducting any activities under the said FISP [the Order].*
- 2.2 *Initially there was an order of the High Court in Judicial Review Cause No. 56 of 2017 [the Nriwa Order] between the State vs The Speaker of the National Assembly ex parte Transglobe Produce Exports Limited.*
- 2.3 *The Nriwa Order was brought to the attention of the Alleged Contemnor as the Order was against the decision of the Committee which the Alleged Contemnor chairs.*
- 2.4 *The Alleged Contemnor is aware that the Applicant is allowed to do business in Malawi. The proceedings therein were later amended to read against the Speaker of the National Assembly in place of the Alleged Contemnor and were concluded by Consent Order of the parties. There is now produced and shown to me marked **RTI** a copy of the Consent Order. Yet, knowing these proceedings, the Alleged Contemnor:*
 - 2.4.1 *told the Nyasa Times Online Publication that the Committee has demanded that the Applicant should lift the Court Order within 48 hours. There is now produced and shown to me marked **RTIA** a print out of the publication.*
 - 2.4.2 *told the Daily Times the same demand and that if the Applicant does not bulge it shall be closed down. There is now produced and shown to me marked **RTIB** a copy of the said article.*

- 2.5 *I have no doubt that the Alleged Contemnor has knowledge of these proceedings and has nonetheless made prejudicial statements bent on interfering with the administration of justice herein.*
- 2.6 *The Alleged Contemnor has written the Applicant [knowing fully well that they are still under litigation and they are allowed to conduct business by the Courts] threatening them to withdraw the legal proceedings herein failing which the Applicant will be barred from doing business. There is now produced and shown to me marked **RT2** a copy of the said letter to that effect.*
- 2.7 *From the foregoing, the Alleged Contemnor has clearly neglected or ignored the value of the independence of the judiciary. He tends to undermine the power of the Courts. He incites indignation in the minds of the nation. This is not in good keeping with administration of justice.*
- 2.8 *The Alleged Contemnor is infringing the Applicant's right to litigate and is attempting to defeat the ends of justice by making threats."*

Having perused the ex-parte notice and the supporting documents, permission to move for contempt of court was granted and the motion for committal was set for 17th November 2017 at 2 o'clock in the afternoon.

On 17th November 2017, the Applicant filed with the Court a sworn statement by Richmond Nyasulu, a Process Server at Messrs Ritz Attorneys at Law. For reasons which will become clear in a moment, the substantive part of the sworn statement will be quoted in full:

2. **THAT** *on November 10, 2017 at around 1405 hours I personally went to serve on the alleged contemnor, Honourable Dr. Joseph Chidanti Malunga, at his office, Parliament Building in Lilongwe, with a true copy of Notice of Motion for Committal. Upon arrival at the Parliament Building, I was blocked by police officers at the gate who would not allow me to meet the Alleged Contemnor., though I told them that I have some documents to be personally served on the said Alleged Contemnor.*
3. *It was at this time that I called Mr. Kizito Pheleni, a Legal Practitioner at Parliament who advised me that he was not available but would send someone by the name of Janet Chingeni, a Legal Assistant to him, to assist m in signing the said document. Service was accepted by the said Legal Assistant who can be reached on **0992769838**.*
4. *I therefore left the said copy with her. She confirmed to me that she had instructions from Mr. Pheleni and the Alleged Contemnor to accept service accordingly."*

On the set hearing date of 17th November 2017, Counsel Gondwe informed the Court that he had discussions with Counsel Pheleni and they both believed that the matter could be settled out of court. In this regard, they had agreed to request the

Court that hearing of the matter be adjourned to pave way for discussions on whether the proceedings could be resolved by the alleged contemnor retracting the alleged prejudicial statements. To quote Counsel Gondwe's own words:

"We have had serious negotiations with Mr. Pheleni such that we believe that the matter can be settled out of court...Essentially, the Applicant has proposed to Honourable Malunga that he should retract his statements. A retraction has been drafted for his consideration. If he agrees, that will mark the end of this matter. The draft retraction has only been sent to Parliament this afternoon.

The agreement on the bar is that the application be stood over today and adjourned to 22nd November 2017."

Counsel Pheleni confirmed that his team had discussions with the Applicant's lawyers, as stated by Counsel Gondwe, and joined in the prayer for an adjournment to 22nd November 2017. Again, it might help to quote Counsel Pheleni's own words:

"I wish to confirm what Mr. Gondwe has said. We have been discussing this matter to see if we could have it settled out of court. We have just received the proposed retraction.

There is need to go through it and consult the alleged contemnor to see the way forward."

The Court accepted the prayer for the matter to be stood over. The matter was, accordingly, adjourned to 22nd November 2017 at 10 o'clock in the forenoon.

On 21st November 2017, there was filed with the Court the following Notice of Preliminary Objection:

"TAKE NOTICE that at the intended hearing of the notice of motion for committal in the matter herein scheduled for the 22nd day of November 2017 the alleged contemnor will raise the following preliminary objections to the hearing:

- i. That the alleged contemnor has never been served with any of the court process or documentation in these contempt proceedings and has so far only heard of the contempt proceedings in the media.*
- ii. Further to (i) above, the alleged contemnor has not been given the 14 days notice of the hearing of the contempt proceedings as required by the law.*

Dated this 20th day of November 2017

HON. DR. JOSEPH CHIDANTI MALUNGA
ALLEGED CONTEMNOR"

The Notice of Preliminary Objection is supported by skeleton arguments which are signed by the alleged contemnor. It is striking that both the Notice of Preliminary Objection and the skeleton arguments do not state that they were filed either personally by the alleged contemnor or through a legal practitioner. Rules 4 and 5 of Order 8 of CPR are relevant. Rule 4 of Order 8 of CPR provides that:

- “1. *An address for service is the address at which documents in a proceeding, other than a summons, can be served on the party giving the address, and shall be—*
- (a) *a home or place of business located within the boundaries of Malawi;*
 - (b) *at a post office or postal agency; or*
 - (c) *where the party is represented by a legal practitioner, the address of the legal practitioner's office.*” - Emphasis by underlining supplied

Rule 5 of Order 8 of CPR requires every filed document to state an address for service for the party filing the document.

Having regard to the contents of the Notice of Preliminary Objection and the above-mentioned provisions of Order 8 of CPR, it became necessary when the case was called on 22nd November 2017 to ascertain the capacity in which Counsel Nyirenda, Likomwa and Pheleni were before the Court. Counsel Nyirenda informed the Court that they were attending the proceedings on behalf of National Assembly and not the alleged contemnor as such. To quote his words:

“We are here because court process was served on Parliament. As a legal section of National Assembly, we came to attend to the proceedings because of that. We are not attending on behalf of the alleged contemnor. He is a party to these proceedings in his personal capacity. He is entitled to appoint counsel of his own choice. Parliament is merely an interested party to these proceedings”

In his response, Counsel Theu invited the Court to note that the alleged contemnor had raised a preliminary objection. Counsel Theu submitted that this constituted taking fresh steps in committal proceedings. It was argued that, having taken the said fresh steps, the alleged contemnor was precluded from contending that he had not been served with court process.

The principle purposes of the law of contempt of court is to preserve an efficient and impartial system of justice, to maintain public confidence in the administration of justice as administered by the courts, and to guarantee untrammelled access to the courts by potential litigants. A contempt of court is an offence of a criminal character. A man may be sent to prison for it: see Order 30, r.17 of CPR,

Mpinganjira v. Lemani and Another [2000-2001] MLR 295, Knight v. Clifton [1971] Ch.D 700 and Re Bramble Ltd [1970] Ch. 128. It is, therefore, of outmost importance and very much necessary that the notice of motion be personally served on an alleged contemnor unless, of course, it is shown that the alleged contemnor deliberately seeks to evade personal service of the notice of motion on him or her: see Order 30, r.2(3) of CPR

I have reviewed the evidence in this case and it is my finding that the Applicant sought to have the notice of motion served on the alleged contemnor when the latter was attending parliamentary business: the National Assembly was in sitting. In this regard, section 5 of the National Assembly (Powers and Privileges) Act is pertinent. The provision is couched in the following terms:

“No process issued by any court in the exercise of its jurisdiction shall be served or executed within the precincts of the Assembly while the Assembly is sitting or through the Speaker, the Clerk or any officer of the Assembly.”

In as much as the purported service of notice of the motion on the alleged contemnor was done while the National Assembly was sitting, the purported service was plainly defective. However, the answer does not lie in having the matter dismissed but in giving the Applicant an opportunity to effect fresh service of the Notice of Motion on the alleged contemnor. Such a course of action will not, in my considered view, cause any party to suffer any prejudice: see Order 1, r.5 and Order 2 of CPR.

In view of the foregoing, it is ordered that the Applicant should effect fresh service of the Notice of Motion on the alleged contemnor within 14 days hereof. A date of hearing shall only be set after the Applicant has filed (or caused to be filed) with the Court a sworn statement to prove that service of the notice of motion has been effected on the alleged contemnor.

Before resting, there is one matter that merits commenting thereon. Neither the National Assembly nor Parliament (see s. 49 of the Constitution for the distinction between the two terms) is a party to the proceedings before the Court. According to Counsel Nyirenda, the alleged contemnor is a party to these proceedings in his personal capacity and has not given any instructions to parliamentary counsel to represent him.

That being the case, it would appear to me that Counsel Nyirenda, Likomwa and Pheleni were before the Court as mere volunteers. This means that the Court erred in giving them the right of audience. Needless to say, such a right shall not continue to be extended to them unless, of course, an application seeking to make National Assembly or Parliament, as the case may be, is made and granted.

Pronounced in Court this 8th day of January 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE