



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CIVIL CAUSE NO. 1029 OF 2018

BETWEEN

VITUS GOMAMTUNDA DZOOLE MWALE CLAIMANT

AND

MALAWI CONGRESS PARTY DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chirwa, of Counsel, for the Claimant

Mr. Mhone, of Counsel, for the Defendant

Mr. D. K. Itai, Court Clerk

ORDER

Kenyatta Nyirenda, J.

This is this Court's Ruling on an application by the Claimant for an order "restraining the Defendant, by itself, its servants, agents or assignees, from continuing to recognize Ms. Liana Kakhobwe Chapota as the legitimate winner of the September 29th Malawi Congress Party primary elections, and, therefore, as the party's shadow member of Parliament, for Lilongwe Msozi South" pending the determination of the main action herein.

The application came ex-parte on 10th December 2018 and there was filed along with it a statement sworn by the Claimant [Hereinafter referred to as the "Claimant's sworn statement"] which reads:

3. **THAT** *I am a politician, a bona-fide member of the Malawi Congress Party (MCP), and current Member of Parliament for Lilongwe Msozi South Constituency.*
4. **THAT** *keen to run again as Member of Parliament for the party in the 2019 elections, I contested in the party's primary elections that were held at Mwatsetere open ground in the constituency on 29th September, 2018.*

5. **THAT** the said Primary elections were conducted by Honourable Richard Chimwendo (MP) and Honourable Peter Chalera.
6. **THAT** prior to the commencement of the actual elections, three officials from the Regional Committee assigned to be part of the elections team, namely Honourable Kalima (MP), Honourable Jephther Mwale (MP) and Honourable Bonex Malunga (MP), left the venue of the elections due to disagreements over the implementation of election procedures.
7. **THAT** voting at primary elections is done by selected delegates from the party's recognized local areas, Constituency Committee members, and District Committee members, as per Article ... of the MCP Constitution.
8. **THAT** at the material time, Lilongwe Msozi South Constituency had a total of 50 Constituted MCP areas, 450 voting delegates from the areas, 30 Constituency Members and 5 District Committee Members, giving a grand total of 485 voting delegates.
9. **THAT** prior to the commencement of the actual elections, a list of MCP areas duly approved by the Constituency Chairman, Mr. Kachama and the District Chairman, Mr. Lenard Mwase was made available to the candidates. I attach a copy of the said list exhibited and marked "**VGDM 1**".
10. **THAT** upon completion of the preliminary procedures, the delegates were called to the ground to stand behind the candidate of their choice, the normal way by which actual voting in primary elections takes place.
11. **THAT** when the delegates took to the voting ground, **467 delegates** voted for me while remaining voted for Ms. Liana Kakhobwe Chapota, my only competitor. I attach a copy of an original photograph taken instantly as the people were lining up at the elections venue, showing roughly the difference in the lengths of the queues between the two candidates, exhibited and marked "**VGDM 2**" and a disc of the video recording of the whole voting process exhibited and marked "**VGDM 3**".
12. **THAT** immediately after the voting, the Presiding Officer, Honourable Peter Chalera (MP), did not officially announce the results but, instead, just left the place and went into the same direction with my competitor, Ms. Liana Kakhobwe Chapota and the two of them drove off at the same time in their different cars.
13. **THAT** however, Honourable Richard Chimwendo openly announced to the gathering crowd that the results were very clear that I had won and that the people could now celebrate and disperse.
14. **THAT** Honourable Richard Chimwendo also told the District Chairman for Lilongwe Rural East, Mr. Lenard Mwase and members of his committee that I had won the elections, upon which the Chairman congratulated me and escorted me home.

15. **THAT** the said District Chairman, Mr. Lenard Mwase, later after Honourable Chalera had announced manufactured results, wrote a letter to the Director of Elections, Honourable Dr. Elias Chakwera, complaining about the twisting of results by Honourable Chalera and bearing witness that I had clearly won the elections. I attach the said letter by Mr. Mwase exhibited and marked “**VGDM 4**”.
16. **THAT** after the elections, the Constituency Committee submitted a report to the Regional Committee, confirming that I had won the elections. I attach a copy of the said report exhibited and marked “**VGDM 5**”.
17. **THAT** however, I was later shocked to learn through local media that Honourable Chalera had officially submitted a report to the party indicating that I had lost the elections to Ms. Liana Kakhobwe Chapota. I attach a copy of the newspaper article quoting a results sheet signed by Honourable Chalera indicating that I lost the elections, exhibited and marked “**VGDM 6**”.
18. **THAT** the District Chairman, Mr. Lenard Mwase, later, after Honourable Chalera had announced the manufactured results, wrote a letter to the Director of Elections, Honourable Dr. Elias Chakwera, complaining about the twisting of results by Honourable Chalera and bearing witness that I had clearly won the elections. I attach the said letter by Mr. Mwase exhibited and marked “**VGDM 7**”.
19. **THAT** on 1st October, 2018 I, together the Constituency Committee and MCP Chairpersons followed up with the Regional Committee to find out what had happened with the results, whereupon the Regional Chairman and his Committee promised to investigate the matter and revert to me later. However, he told us that he had received conflicting verbal reports regarding the results.
20. **THAT** when I demand a copy of the official report that the Regional Committee had been supposedly furnished with, I was told that the Committee had not received any report and that the report was at Headquarters.
21. **THAT** I found the arrangement to be very strange because, procedurally, reports for Primary elections are supposed to be given to the Regional Committee first before they can be forwarded by the committee to the headquarters.
22. **THAT** on 9th October, 2018, I went again with my team to the Regional Offices where we were told by Honourable Patrick Zebron Chilondola, the Regional Chairman, and the Regional Administrative Secretary Mr. Poko, that the Regional Office did not have any report of the results and, instead they referred us to the Headquarters. This, is to say the least, was strange to me.
23. **THAT** on the 11th of October, 2018, together with my team, I followed up with the National Director of Elections, Dr. Elias Chakwera, at the National Headquarters of the Party in City Centre, Lilongwe.

24. **THAT** the said Director of Elections told us, very strangely, that the National Headquarters did not have any official results of the Lilongwe Msozi South Constituency.
25. **THAT** it was unheard of to me that the Director of Elections did not have the official results of my constituency almost two weeks after the elections had been held.
26. **THAT** the whole series of events left me impressed that some individuals in the party were acting with malice against me and that it would be very difficult for me to be treated with justice and fairness within the party structures.
27. **THAT** I was reliably informed by Honourable Bonex Malunga in a telephone conversation one day that Honourable Peter Chalera had made it open that he did not like me; and I now suspect that all this is a desperate effort by Honourable Chalera and his unknown friends in the party to finish me off politically.
28. **THAT** on the 27th of November, 2018, One hundred Constituency Area Chairpersons went to meet the Party's Secretary General, Mr Elsenhowever MKaka to further push for my justice from the party, but the Secretary General told us to meet him again at his office on 3rd of December, 2018, Monday.
29. **THAT** when they returned to the Headquarters to meet him on the 3rd December, 2018, they did not get any tangible feedback that would point to any serious commitment to the authorities to sort out the problem.
30. **THAT** However, on 4th of December, 2018. I was further shocked to see a list of confirmed MCP Shadow MPs circulating on the MCP MPs forum, a whatsapp group members of Parliament. The said list indicated Ms. Liana Kakhobwe Chapota as the Shadow Member of Parliament for our Constituency despite that she had convincingly lost the primary elections to me. A copy of the said list is herewith attached, exhibited and marked "**VGDM 7**"
31. **THAT** given that there has been no any official statement from the party to refute the authenticity of this list, plus the party's indifference to my case, I am meant to believe that the party has robbed me of my well-deserved victory at the Primary elections by officially endorsing Ms. Liana Kakhobwe Chapota, the very person who lost to me, as the party's candidate.
32. **THAT**, as can be appreciated from the preceding paragraphs, before coming to this court, I have tried all reasonable means to have this matter addressed within the party structures, including lodging an official complaint with the party, but, to date, no reasonable step has been taken by the party to address the matter. I attach a copy of the said complaint sent to the party exhibited and marked "**VGDM 8**".

The application came before me on 28th November 2018 and I ordered the application to be by way of an inter-partes hearing and the same was set for 11th December 2018.

The Defendant is opposed to the application and it, accordingly, filed a statement in opposition, sworn by Honourable Peter Chalera. The substantive part of his sworn statement states:

- “2. **THAT** *at all material times, I was the presiding officer for the primary elections, organised by the Defendant, for Lilongwe Msozi South on the 29th September 2018 at Mwatselera Full Primary School ground and, by reason of which, I am duly authorized to make this sworn statement.*
3. **THAT** *I make this sworn statement in opposition to an application for an order of interlocutory injunction. The matters set out below are within my personal knowledge, except where I indicate to the contrary, and I verily believe the same to be true.*
4. **THAT** *I refer to the Claimant’s sworn statement filed in support of the inter-partes application for the said order of injunction and state that the Claimant has suppressed and indeed misrepresented material facts and which facts are mostly fictive:*
 - a. **THAT** *the within matter stems from the resolution of the National Executive Committee of the Defendant to hold primary elections across all 193 constituencies in Malawi.*
 - b. **THAT** *pursuant to that resolution, the primary elections for Lilongwe Msozi South were, initially, scheduled to take place on the 22nd September 2018.*
 - c. **THAT** *however, the night before the said date, it was discovered that the Claimant herein had all the delegates to the elections camped at his residence and by reason of which, it was decided that, in the spirit of free and fair elections, the date for the elections be shifted to the 29th September 2018.*
 - d. **THAT** *on the said 29th September 2018, when I reached the venue, I noted that Honourable Jephther Mwale, Honourable Boniface Malunga and Honourable Kalima, who had no mandate whatsoever to conduct the within elections, had organised individuals purporting to be delegates.*
 - e. **THAT** *when I asked the said Honourable Jephther Mwale, Honourable Boniface Malunga and Honourable Kalima as to their mandate in respect of the elections, they left the venue admitting the irregularity they had caused.*

- f. **THAT** by reason of the said matters, I restarted the entire exercise, with the help of Honourable Richard Chimwendo and Honourable Peter Dimba, who were, respectively, National Executive Committee Observer and Regional Committee Observer.
- g. **THAT** in the process of verifying and vetting the rightful delegates for the exercise, we noted that there were many other individuals, including children, who were masquerading as delegates and we accordingly dismissed them.
- h. **THAT** thus, in our verification and vetting exercise, we found that the rightful delegates to vote were four hundred eighty five (485) representing four hundred and fifty (450) from Area Committees, thirty (30) from Constituency Committee and five (5) from District Committee.
- i. **THAT** after completing the verification and vetting exercise, we asked the aspirants to come forward and subsequently, the delegates to stand behind the candidate they intended to vote for.
- j. **THAT** to our utter amazement, after we had just finished counting the delegates for both candidates, we saw the group, we had dismissed earlier as fake delegates, rushing to join the rightful delegates who were behind the Claimant and I was outraged by a request from the Claimant's director of campaign that I should declare the Claimant as the winner as he had commanded the longest line of the two candidates.
- k. **THAT** I dismissed the Claimant's director of campaign as I had already counted the rightful delegates who were entitled to vote and not the bogus ones who were strategically positioned to deflect the just electoral process.
- l. **THAT** when all was said and done, I proceeded to declare Miss Liana Kakhobwe Chapota as the winner, there and then, with two hundred and fifty one (251) votes against the Claimant who only got two hundred and thirty four (234) votes. A copy of the Elections Results Sheet is attached hereto and marked exhibit "PCI".
- m. **THAT** in the very end, I asked the candidates to sign against their names on the said Results Sheet and whilst Miss Liana Kakhobwe proceeded to sign, the Claimant refused and demanded that I recount the delegates who were behind him.
- n. **THAT** having diligently discharged our duties, we left the venue leaving the Claimant with his delegates and supporters still hanging around the venue.
- o. **THAT** on the 1st October 2018, I submitted a report on the elections to the National Executive Committee through the Director of Elections and to

the Regional Committee through the Regional Chairperson. A copy of the said report is attached hereto and marked as exhibit "PC2".

5. **THAT** *by reason of the matters aforesaid:*
- a. *I refer to paragraph 7 of the Claimant's sworn statement and deny that the said Jephther Mwale, Bonnex Malunga and Kalima had any mandate to conduct the elections other than the engagement they had with the Claimant to deflect the just electoral process;*
 - b. *I refer to paragraph 10 of the Claimant's sworn statement and state that through the verification and vetting exercise, we noted some Area Chairmen had deliberately been replaced with bogus ones by the said Mr Kachama and Mr Mwase.*
 - c. *I refer to paragraph 12 of Claimant's sworn statement and deny that the Claimant got four hundred and sixty seven (467) votes. Counting of the votes was done by myself and one monitor from each candidate and through which counting, the Claimant only got two hundred and thirty four (234) votes. In any event, the Claimant was not in a position to count the delegates behind him. I have also perused through the exhibit marked "VGDM2" and state that the said picture was only taken after we had already counted the rightful delegates and indeed after the infiltration by the bogus delegates.*
 - d. *I refer to paragraph 13 and 14 of the Claimant's sworn statement and deny that I left the venue without announcing the results of the elections. It is also not true that Richard Chimwendo had made any declaration as to results as that was not his mandate.*
 - e. *It is not true that the Claimant only came to know of the results through the media. In any event, the Claimant is contradicting himself as in paragraph 16 of his sworn statement he says after I had announced the results, the District Chairman wrote the Director of Elections. Whilst in paragraph 18, he says he was later shocked to learn through the media of the official results.*
 - f. *It is also not true that the Claimant did not get hold of the results sheet and elections report which I had submitted to the National Executive Committee and the Regional Committee. The truth of the matter is that, the Claimant advertently opted to disregard the said documents as they exposed his ill-conceived conduct insofar as the elections were concerned.*
6. **THAT** *in addition to the matters aforesaid, the Claimant is, by the application of the injunction herein, merely intending to derail the Defendant's preparations for the 2019 tripartite general elections the consequences of which cannot be estimated in damages.*

7. ***THAT*** furthermore, the Claimant has failed to state the legal rights he is intend to protect by way of injunction.
8. ***THAT*** I verily believe that damages would be an adequate remedy in the present circumstances in the event that the Claimant succeeds in the substantive matter and that the Defendant would adequately compensate the Claimant.
9. ***THAT*** therefore, the Defendant is greatly disadvantaged and inconvenienced and the injury and loss it suffers by the said injunction would be incapable of being compensated in damages and thus, the balance of convenience lies in favour of dismissing the present application.
10. ***THAT*** therefore, I pray that the Claimant's application for the interlocutory injunction be dismissed, for the reasons highlighted in the preceding paragraphs, with costs to the Defendant.
11. ***THAT*** I understand that this sworn statement shall be used in these proceedings, and I acknowledge that if I make a false statement I may commit perjury and be liable to substantial penalty."

For reasons that will become apparent shortly, I have not found it necessary to recite the legal arguments advanced by Counsel. Instead, I have opted as a matter of prudence to address what in my view constitutes the threshold question, namely, whether or not the application is properly grounded.

The application is said to be brought under Order 10, rule 27, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as the "CPR"] which provides as follows:

"The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court-

- (a) there is a serious question to be tried;*
- (b) damages may not be an adequate remedy;*
- (c) it shall be just to do so,*

and the order may be made unconditionally or on such terms or conditions as the Court considers just."

In the same Order 10 of CPR, there is rule 8 which is couched in the following terms:

"8— (1) A person may apply for an interlocutory order before a proceeding has started by filing an application in a proceeding and the application shall—

- (a) *set out the substance of the claim;*
 - (b) *have a brief statement of the evidence on which the applicant will rely;*
 - (c) *set out the reasons why it is appropriate that the order be made before a proceeding has started; and*
 - (d) *have with it a sworn statement in support of the application.*
- (2) *The Court may make the order if it is satisfied that–*
- (a) *the applicant has a serious question to be tried and, if the evidence brought by the applicant remains as it is, the applicant is likely to succeed; and*
 - (b) *the balance of convenience favours the making of the order.*
- (3) *When making the order, the Court may also order that the applicant file an application by the time stated in the order.”- Emphasis by underlining supplied*

It is not in dispute that Order 10 of CPR allows a party to bring an application for an interlocutory order at any stage of the proceedings, that is, before a proceeding has started, during a proceeding or after a proceeding has been dealt with: see Order 10, rule 3, of CPR. Order 10, rule 8, of CPR applies to applications for an interlocutory injunction brought before the commencement of the main action.

On the other hand, applications for an interlocutory injunction after the main action has been commenced, whether during or after the main proceedings, are governed by Order 10, rule 27, of CPR. In short, the applicable rules depend on the stage at which the main proceedings are at the time an application for an interlocutory injunction is being sought.

As already observed herein, the present application was filed with the Court on 10th December 2018. At this point in time, neither summons nor any other founding document to initiate proceedings had been filed with the Court. Actually, the Claimant has yet to commence the main proceedings. More than 41 days have elapsed since the application was lodged with the Court. There being no main proceedings, an application for an interlocutory injunction brought under Order 10, rule 27, of CPR is untenable.

It might be that the Claimant meant to premise the application on Order 10, rule 8, of CPR but inadvertently mentioned Order 10, rule 27, of CPR. Unfortunately, the application does not also meet the requirements of Order 10, rule 8, of CPR which among other matters, enjoins an applicant to set out the reasons why it is appropriate that an order of interlocutory injunction be made before the main

action has started. I have read many times over the Claimant's sworn statement to find out why the application was being brought before commencement of the main action but my search has been in vain.

Further, it seems to me that the only reasonable explanation behind the inordinate delay, and lack of interest, in commencing the main action is that the application herein is not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose. This amounts to abuse of the process of the Court: see **Lonrho v. Fayed (No.5) [1993] 1 W.L.R. 1489**.

The term "*abuse of the process of the Court*" connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation: see **Castro v. Murray (1875) 10 Ex. 213**.

The Court has an inherent jurisdiction to stay all proceedings before it which are obviously an abuse of its process: see **Reichel v. Magrath (1889) 14 App. Cas. 665**. In such cases, the Court will dismiss before the hearing actions which it holds to be an abuse of the Court process: **Metropolitan Bank v. Pooley (1885) 10 App.Cas. 210**, **Boaler v. Power [1910] 2 K.B. 229** and **Grovit v. Doctor [1997] 1 W.L.R. 640**.

The application was accompanied by, among other documents, a Certificate of Extreme Urgency wherein the Claimant's lawyers state that this matter is of extreme urgency. By this, I understand the Claimant acknowledging the need to have this case resolved as quickly as possible. Surprisingly, the Claimant is not keen to prosecute the case with dispatch.

No doubt, the Claimant is aware that the closing date for submission of nomination papers to Malawi Electoral Commission is 8th February 2019. Viewed from this angle, the conduct of the Claimant in not taking any steps, within the last 41 days, to commence the main proceedings is simply indefensible. Until there is a real change in the culture in which civil litigation is conducted by legal practitioners in Malawi, it is unlikely that the new regime introduced by the CPR will be applied differently. The new ethos of litigation requires a party and his or her legal practitioner to be vigilant.

In the present case, allowing further prosecution of the action would be prejudicial not only to the interests of the Defendant but it would also be detrimental to good administration in general and to good administration of justice in particular: see **R. v. Dairy Produce Quota for Tribunal for England and Wales, ex p. Caswell [1989] 1 W.L.R 1089**. In short, the delay herein is intolerable. “*They have lasted so long as to turn justice sour*”, to use the words of Lord Denning M.R. in **Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 1 ALL ER 543**. In the premises, I have no option but to strike out the proceedings herein. It is so ordered.

In the circumstances and by reason of the foregoing, I have also no option but to dismiss the application with costs.

Pronounced in Chambers this 21st day of January 2019 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE