



**IN THE HIGH COURT OF MALAWI  
ZOMBA REGISTRY  
ELECTION CASE NO 13 OF 2019**

**BETWEEN:**

**THE STATE**

**AND**

**MALAWI ELECTORAL COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE: ELLOCK MAOTCHA BANDA.....APPLICANT**

**CORAM : HON. JUSTICE PROF. KAPINDU**

Mr. T. Chirwa, of Counsel for the Applicant,

Mr. T. Chokhotho, of Counsel for the Respondents

Mr. K. Pheleni, of Counsel for the Clerk of Parliament (interested party)

Mr. Nkhwazi, Official Interpreter

## **RULING**

KAPINDU, J

1. This is the Court's ruling arising out of an application brought by Mr. Ellock Maotcha Banda. Mr. Maotcha Banda contested in the Parliamentary Elections held as part of the tripartite elections for the Presidency, Members of Parliament and Ward Councillors which were conducted by the 1<sup>st</sup> Respondent, the Electoral Commission, on 21 May 2019.
2. Mr. Maotcha Banda contested for the position of Member of Parliament in the Machinga Central Constituency as an independent candidate. He claims that those elections were riddled with irregularities and that he is aggrieved by the decision of the Electoral Commission to declare Mr. Samuel Malume Bokosi, who run on the ticket of the Democratic Progressive Party (DPP) as winner of the May 21 2019 Parliamentary Election for Machinga Central Constituency. He has outlined various reliefs that he seeks from this Court which include a number of declarations and orders including one that invites this Court to declare him as the winner of that election.
3. In respect of his grievances as they relate to the conduct of the 1<sup>st</sup> Respondent during those elections, the Applicant approached this Court on the 31 May 2019 with an application for permission to commence judicial review proceedings. On the same day this Court granted the Applicant permission to apply for judicial review.
4. However, on the same day, the Applicant also made application for an interlocutory injunction to restrain the Clerk of Parliament from swearing in Mr. Samuel Malume Bokosi as Member of Parliament for Machinga Central Constituency until the final determination of this

matter or a further order of the Court. The Court determined that the application be heard inter partes today, 5 June 2019.

5. Before Counsel Chirwa for the Applicant could proceed with his application for interlocutory injunction against the Clerk of Parliament, Counsel Chokhotho for the respondents raised a number of preliminary objections. As will become evident in my analysis that proceeds below, the issue of the application for injunction will be addressed as I address the matters raised in the preliminary objections.
6. Counsel Chokhotho's first objection was that the application has been commenced against a non-entity, the Malawi Electoral Commission. In support of this proposition, Counsel Chokhotho pointed out that in all the laws that describe the Electoral Commission, whether under the Constitution or under statute, nowhere is the body referred to as the Malawi Electoral Commission. In further support of that argument, Counsel Chokhotho cited the High Court decision in the case of **Dr. Bakili Muluzi & the UDF vs Malawi Electoral Commission**, Constitutional Cause No. 1 of 2009 where, he stated, the High Court, per Chipeta J (as he then was) held that it was irregular to cite the Electoral Commission in court proceedings as the "Malawi Electoral Commission." Counsel Chokhotho was firm in his submission that in that case, the Court dismissed the matter on that basis. Counsel Chokhotho therefore submitted that on this basis alone, the whole matter herein, including the present application, should be dismissed with costs.
7. In response, Counsel Chirwa acknowledged that indeed in all applicable laws, this Country's electoral body is called the Electoral Commission and not the Malawi Electoral Commission. However, he reminded the Court that the electoral body as well calls itself by that irregular name. He invited the Court to take judicial notice of the fact that even the ballot papers themselves and other polling materials relating to the

impugned election herein bore the label of Malawi Electoral Commission and not simply the Electoral Commission. He further pointed out that as a matter of fact, the very decision of the 1<sup>st</sup> Respondent to declare the results which are the subject matter of the present proceedings was purportedly made by the Malawi Electoral Commission and not just the Electoral Commission. He therefore argued that as such, the Electoral Commission should be estopped from denying a name that it openly espouses merely because the circumstance is to its detriment. Counsel Chirwa therefore concluded on the point by stating that whilst the defect was admitted, it was one that could be cured under the rules of practice and he therefore sought an order granting the Applicant leave to amend the name of the 1<sup>st</sup> Respondent from Malawi Electoral Commission to Electoral Commission.

8. The Court wishes to begin by analysing the decision of the High Court in **Dr. Bakili Muluzi & the UDF vs Malawi Electoral Commission** which, in essence, seems to be the root of the preliminary objection herein. I have carefully gone through the entire decision. As this Court understands that decision, it is, with respect to Counsel Chokhotho, incorrect to state that the Court dismissed that matter on the basis that the Electoral Commission was cited by the defective name of “Malawi Electoral Commission.” It is very clear from the decision that the Court dismissed that matter on the basis that it had been commenced as an ordinary action by way of Originating Summons instead of being commenced by way of Judicial Review in terms of Section 76(5) of the Constitution as read with Order 53 of the Rules of the Supreme Court applicable at the time. Admittedly, the Court touched on the issue of the name. Perhaps for better context, I will do well to quote what the Court said *in extenso*:

We note that the Defendant sued in the matter has been named The Malawi Electoral commission. It has

taxed our minds whether at Law there is in existence any legal entity going by that nomenclature, regardless of what name people loosely use when referring to that organization. In our observation, the creature the Constitution establishes under its Section 75, is the Electoral Commission. Even the Act that follows up on the Constitution to further expound on the institution so created, i.e. the Electoral Commission Act (cap 2:03) of the Laws of Malawi, applies to the Electoral Commission, and not to the Malawi Electoral Commission. At Section 2 of this Act, the several words and expressions used in the Act are said to have the same meanings as assigned to them in the Constitution, and in the Parliamentary and Presidential Elections Act (cap 2:01) of the Laws of Malawi. The Constitution does not define the words Electoral Commission, but we know for certain that it does not prefix the word Malawi to the Electoral Commission it creates.

Under the Parliamentary and Presidential Elections Act, in its Section 3, what is defined is the word Commission, and it means the Electoral Commission established by the Constitution. Specifically, in terms of Section 3 of the Electoral Commission Act, what we notice is that what is recognized as a body corporate with perpetual succession, and a common seal, and which is capable, among other things, of suing and being sued in its own name at paragraph (b), is the Electoral Commission established by the Constitution, and not any differently named Commission. In a nutshell, therefore, we are of the view that the name Malawi Electoral Commission, even if it might refer to the same institution as the

Constitution created, and even if it may be in common use, is as good as a nickname. It certainly is not the legal name the constitution gave it at birth, and by which the generality of electoral Law refers to it with. The act, therefore, of the Plaintiffs in these proceedings suing, so to speak, a body corporate in a name other than its legal name, comes to us, as a Court, with a sense of surprise.

We felt we should point this out, even though we are presently dealing with a different application.

9. This is all that the Court in **Dr. Bakili Muluzi & the UDF vs Malawi Electoral Commission** had to say about the issue of the name. Clearly, the point did not form the *ratio decidendi* of that case. The ratio decidendi was that in the circumstances of the case, the proceedings had been commenced irregularly by way of originating summons instead of by way of Notice of Motion under judicial review, and that the Court could not simply order that the proceedings proceed as if by way of judicial review because that would have circumvented the need to first apply for leave to commence judicial review. Again, reading the above quoted holistic passage in **Dr. Bakili Muluzi & the UDF vs Malawi Electoral Commission**, it is clear that Counsel Chokhotho's submission that the matter was determined on the point of the name of the 1<sup>st</sup> Respondent (Defendant) was incorrect.

10. The 1<sup>st</sup> Respondent seems to be operating with two faces on the issue of its name. It seems to be functioning with double standards on the matter. The whole nation knows that this Country's electoral body happily calls itself the Malawi Electoral Commission in almost all official documents. This is a point that needs no belabouring. This Court takes judicial notice of that notorious fact. That Counsel for the Electoral Commission would come here to rely on the 2009 decision of this Court in **Dr. Bakili Muluzi & the UDF vs Malawi Electoral**

**Commission** in order to, as it were, denounce its purported name – a name under which it organised the whole gamut of the 21 May 2019 elections, comes to this Court with a great sense of surprise indeed. Just to point out a few among the many glaring things, the Commission’s official logo states that it is the Malawi Electoral Commission not the Electoral Commission. The Commission declared results as Malawi Electoral Commission not as the Electoral Commission. It is in the public domain that the Chairperson of the Electoral Commission, when she officially announced the results which are the subject matter of the present proceedings, started by saying that: “It is with a deep sense of humility and satisfaction that I, on behalf of my fellow Commissioners and the entire team of the Malawi Electoral Commission (MEC), come here today to perform this noble task.” Now, here we are: an applicant comes to Court to say, in essence, “Malawi Electoral Commission (MEC), I am disputing the manner in which you handled that noble task.” Does it, in all equity, fairness and justice, lie in the mouth of the Electoral Commission to say “Wait a minute, no, the Malawi Electoral Commission is a non-entity, we are called the Electoral Commission” as Counsel Chokhotho argues? I think not. This in my view is a clear case where equitable estoppel must be invoked to restrain the 1<sup>st</sup> Respondent from asking the Court to dismiss the matter on the point of a wrong citation of its name in point of law. As is well known, equitable estoppel applies to restrain a person, body or entity from taking unfair advantage of another person by seeking to rely on the technical instrument of the law, when, through his/her/its own conduct or representations, it has induced that other person to act in a certain way. I therefore agree with Counsel Chirwa that the 1<sup>st</sup> Respondent is estopped from resiling from its own representations whereby it calls itself the Malawi Electoral Commission, and now seeking to insist on strict legal technicalities to have this matter dismissed for not being called the Electoral Commission.

11. Having said that, I must affirm the observations made by the Court in **Dr. Bakili Muluzi & the UDF vs Malawi Electoral Commission** that the correct name of Malawi's electoral body at law is the Electoral Commission and not the Malawi Electoral Commission. I am not sure why this has remained unattended to by the relevant authorities of the State since the High Court's decision in 2009. One would have thought that since Malawi Electoral Commission seems to be the preferred name, and perhaps appropriately so, the law could by now have been easily amended to ensure that what the Electoral Commission calls itself is in tandem with the law. The Executive and the Legislature, together with the Electoral Commission, might wish to look into this matter with the required urgency.
12. In the premises, I order that the Applicant is at liberty to amend all relevant court processes herein to reflect the fact that the correct name of the 1<sup>st</sup> Respondent is the "Electoral Commission". There is no prejudice to the 1<sup>st</sup> Respondent whatsoever with that amendment in my view. Resultantly, Counsel for the Respondent's objection on that point is accordingly overruled.
13. The Second issue Counsel Chokhotho raised was that it is irregular that the Applicant is seeking an Order of Injunction against the Clerk of Parliament and Mr. Samuel Malume Bokosi, both not being parties to the matter and without the permission of the Court.
14. Quickly, on the point of seeking an Order of interlocutory injunction against the Clerk of Parliament, upon being informed by the Court that it is the Honourable the Chief Justice and not the Clerk of Parliament who has the responsibility of swearing in new Members of Parliament, Counsel Chirwa, upon being referred to Section 52 of the Constitution, quickly conceded. He said he would pray that the Clerk of Parliament be removed as a party and that she be replaced by the Hon. the Chief Justice.



15. Counsel Chokhotho in response, whilst welcoming the concession by Counsel Chirwa on the issue of the Clerk of Parliament, stated that it would equally be inappropriate to add the Chief Justice as a party in the manner that Counsel Chirwa sought to do. He stated that this was being raised as an oral application and there was procedure stipulated as to how oral applications may be made before the Court. He referred this Court to the provisions of Order 10 Rule 9 of the Courts (High Court) (Civil Procedure) Rules, 2017 which states that:

The Court may allow an oral application in a proceeding to be made

where\_\_

(a) the application is for urgent relief;

(b) the applicant undertakes to file an application in a proceeding within the time directed by the Court;

and

(c) the Court considers it appropriate\_\_

(i) because of the need to protect persons or property;

(ii) to prevent the removal of persons or property from Malawi;

or

(iii) because of other circumstances that justify making the order asked for.

16. Counsel Chokhotho observed that in his purported oral application, Counsel Chirwa did not demonstrate what the urgency was in order to justify the oral application nor did he provide reasons justifying such an application.

17. The Court agrees with Counsel Chokhotho. It seems Counsel Chirwa just realised he had made a mistake of targeting the Clerk of Parliament, and suddenly, without any explanation at all, he said that

he was applying to add the Chief Justice as a party. This manner of bringing an oral application is improper and the oral application to add the Hon. the Chief Justice as a party is dismissed.

18. Again I agree that there does not seem to be any plausible reason why Mr. Samuel Malume Bokosi has not been added as either a respondent or a third party when clearly he is a party directly affected by these proceedings. I agree that it would be unjust under these circumstances to directly target him with an order of interlocutory injunction when the Applicant, in his wisdom, sought not to add him as a party. I see no justification for having excluded him as a party.
19. In view of this position, it effectively means that the application for interlocutory injunction herein falls away, and it is so ordered. The Clerk of Parliament as a targeted party has been dropped from the application for interlocutory injunction by Order of this Court upon the Applicant's own concession and the Chief Justice cannot be added by oral application in the manner in which the Applicant sought.
20. I must however proceed to mention that in any event, I would not have granted the Order of interlocutory injunction herein in terms of Order 19 Part III of the CPR, 2017 as read with Order 10 Rule 27 of the CPR, 2017. The Court does not consider it just to do so. There is a presumption of legality that applies when public institutions make decisions within their mandate. Having declared Mr. Samuel Malume Bokosi winner of the Parliamentary seat for Machinga Central Constituency, the balance of justice and convenience lies in letting the relevant state institutions treat him as duly elected unless and until a competent Court declares otherwise. This is also appropriate for the general smooth functioning of Parliament as an important organ of the State. It must be in exceptional cases in my view, supported by very cogent reasons and concerns, that a Court should be amenable to making an order restraining a person who has been declared as a duly elected Member of the National Assembly from proceeding to take oath

of office. I did not see any exceptional circumstances in the present matter warranting such course of action. Should the Court find that the 1<sup>st</sup> Respondent indeed had significant failures in the manner it exercised its functions herein, and that thereby Mr. Samuel Malume Bokosi was not duly elected as a Member of Parliament for Machinga Central Constituency, there is nothing to stop this Court from making such declarations according to law. The Applicant would have an affective remedy.

21. The other point that was raised in the preliminary objections of Counsel Chokhotho was that the application should not have been brought by way of judicial review but rather, by way of petition under section 100 of the Presidential and Parliamentary Elections Act (Cap 2:01 of the Laws of Malawi). I have taken a careful look at both Section 76(5) of the Constitution upon which the application for judicial review is primarily premised, and Section 100 which Counsel Chokhotho argues is the correct provision for purposes of an application of this nature.

22. Having gone through the grounds for judicial review as well as the sworn statement in support; I find that there is a paramount issue which is that the Applicant alleges failure in the manner the Electoral Commission discharged its functions. He alleges that having submitted a letter of complaint to the 1<sup>st</sup> Respondent dated 23 May 2019, which the 1<sup>st</sup> Respondent duly acknowledged on 25 May 2019, the 1<sup>st</sup> Respondent never determined the complaint and yet proceeded to declare the results for the Constituency without determining the complaint. If the complaint had been determined, the argument perhaps could have been that the Applicant could have proceeded by way of a petition of appeal under Section 114 of the Presidential and Parliamentary Elections Act. But the allegation is that the complaint was not determined. The Electoral Commission, at least in the course of the proceedings thus far, has not suggested that it did determine the

complaint and respond to the Applicant accordingly. An allegation of failure to determine the complaint as per laid down procedures would entail failure by the Commission to properly discharge its functions. This is a core question that is amenable to the judicial review process in this court's determination. I therefore see nothing wrong with proceeding to determine this matter on the premises of an application for judicial review. Of course it is evident that the matter is mixed with some matters that could potentially have been dealt with under Section 100 of the Presidential and Parliamentary Elections Act. The Applicant has raised issues that, in the bigger scheme of things, suggest that there has been an undue election of Mr. Samuel Malume Bokosi as Member of Parliament for Machinga Central Constituency. But these are issues which the Applicant believe could have been dealt with by proper decisions of the 1<sup>st</sup> Respondent had it procedurally discharged its due functions in the manner in which it run the elections in that constituency. It is therefore my decision that the matter has been correctly commenced as a judicial review matter.

23. There was an issue raised in the preliminary objection that the Court had also set down today as the date of hearing for the Notice of Motion. We clarified this at the start of the proceedings that this was a clerical mistake by the Assistant Registrar as the Order I made on 3 June 2019 granting permission to commence judicial review proceedings gave clear directions on how this matter is to proceed. The date of hearing on the Notice of motion is therefore to be ignored as a clerical mistake but the Notice of Motion itself remains unaffected by this decision. The Court will fix a date of hearing once all the processes envisaged in the directions I made on 3 June 2019, or any further directions the Court may give, have been fulfilled.

24. Another issue raised was that the application for permission to commence judicial review was supported by a sworn statement which

contains inadmissible evidence. My decision is that this is a matter to be dealt with during the substantive hearing.

25. Counsel Chirwa prayed that he be granted permission to file a supplementary sworn statement. At this stage of the proceeding, I see no reason why I must not grant such a prayer. The prayer is granted.

26. Counsel Chokhotho prayed for costs for today's proceedings, since the application in respect of which today's hearing was sought had been dismissed. I see no reason why the 1<sup>st</sup> Respondent should not be granted costs. I order that the 1<sup>st</sup> Respondent be awarded costs for today's hearing.

27. Counsel Pheleni came to represent the Clerk of Parliament towards whom the intended Order for interlocutory injunction was directed. He briefly told the Court that fortunately, all the issues that he would have wanted to address had been addressed by Counsel Chokhotho. He therefore simply prayed for costs as he was made to travel from Lilongwe to Zomba for these proceedings. Again I see no reason for denying the Clerk of Parliament costs. I order that the Applicant pays the Clerk of Parliament's costs for today's hearing.

28. It is so ordered.

**Pronounced** in Chambers at Zomba this 5<sup>th</sup> day of June 2019 at Zomba

R.E. Kapindu

**JUDGE**