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JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
ELECTORAL MATTER No. 33 OF 2019



IN THE MATTER OF SECTION 97 OF THE LOCAL GOVERNMENT ELECTIONS ACT
IN THE MATTER OF AN APPEAL FOR A DECLARATION THAT THE LOCAL
GOVERNMENT ELECTIONS IN BLANTYRE CITY SOUTH EAST CONSTITUENCY
HELD ON 21ST MAY 2019 ARE NULL AND VOID
IN THE MATTER OF AN ELECTION PETITION BY BONNY EDWARD SAUTI

In matter between:

BONNY EDWARD SAUTI
AND
ELECTORAL COMMISSION

PETITIONER

RESPONDENT

RULING

nyaKaunda Kamanga, J.,

The Petitioner, Mr Bonny Edward Sauti, contested as an independent candidate in the local government elections in Blantyre South East constituency, Namiyango Ward, which were conducted under the Tripartite Elections of 21st May 2019. The elections were supervised and managed by the Electoral Commission, the Respondent herein. The sworn statement in support of the petition which contains evidence of the allegations reveals that Mr. Raphael Mzimu, who should have been made a party to the proceedings, who run under the Democratic Progressive Party ticket was declared winner of the said elections on 27th May 2019. On 24th May 2019 the Petitioner lodged a complaint on electoral malpractices with the Respondent, which the Respondent proceeded to dismiss on 25th May 2019. On 6th June 2019, the Petitioner presented to the court this petition pursuant to section 97 of the Local Government Elections Act requesting the court to exercise its discretion in favour of the Petitioner and decree that the results of local government elections in Blantyre South East Constituency, Namiyango Ward are null and void and that the Petitioner be awarded costs of this petition.

On 20th June 2019, the Respondent filed an application to set aside /strike out the petition herein on the ground that the same is irregular and/or incompetent having been filed out of the prescribed time. The Respondent's application is taken under section 97(1) of the Local Government Elections Act as read with Order 2 rules 3 and 4 and Order 19 rule 13 of the Courts (High Court) (Civil Procedure) Rules, 2017. On 2nd July 2019 the court proceeded to hear the parties on this preliminary issue and this is the ruling of the court after carefully considering and analysing the arguments and submissions made by the legal practitioners of both parties.

The Respondent filed a sworn statement in support of the application which was sworn by Mr. Victor Jere, a legal practitioner in the firm of Messrs Churchill and Norris, who have conduct of this matter on behalf of the Respondent. It is deponed in the said sworn statement that the petition 'was clearly filed out of time' on 6th June 2019 as the decision that forms the basis of the Petition was allegedly 'communicated to the Petitioner on 25th May 2019 as per exhibit 'BS 6'.' The Respondent prays that the petition herein be set aside/struck out for being incompetent and/or irregular.

In the skeletal arguments that were filed by the Respondent in support of the application, the Respondent argues that electoral matters are given a specific time which must be complied with and that a departure as to time would create an irregularity: *The State v Electoral Commission, ex p Jumbe and others* Judicial Review Cause no. 38 of 2014 at pp 4, 8 and 9. The Respondent also rely on the criminal case of *DPP v Banda and another* [1996] MLR 166 at pp174-175 where the court emphasised the principle that statutory time limits for commencement of any process must be strictly complied with and are not a matter of the court's discretion to decide whether they must be complied with or not. The Respondent also rely on the following civil matters: *Chiume v Attorney General* [2000-2001] MLR 102; *Atwood v Chichester* [1878] 41 Vic 22; *Eaton v Stover* [1883] 22 Ch D. 91; *Ratram v Cumarasamy* [1965] 1 WLR 8; *Costellow v Somerset County Council* [1993] 1 All ER 952; *Allen v McAlpine & Sons Ltd* [1968] 1 ALL ER 543; *Grovit v Doctor* [1997] 2 ALL ER 417; *Trill v Sacher* [1993] 1 ALL ER 961 and *Samuels v Linzi Dresses Ltd* [1981] QB 115 to argue that the rules of the court's procedure are meant to be strictly adhered to and in so far as they relate to time, it is not a matter of the court's discretion to decide whether strict compliance was necessary or not as that undermines the very effectiveness of the civil jurisdiction of the courts to enforce strict compliance and sanction striking out for delay. It is the view of the Respondent that the court is justified to dismiss a matter where it is apparent that there was inordinate delay which is *prima facie* inexcusable and further that it is a contumelious default and an abuse of the court process.

The Respondent argues that it is a clear rule of procedure regarding petitions to the High Court concerning Local Government elections that the

petition shall be brought before the court within seven days of the decision of the Electoral Commission confirming or rejecting the existence of alleged irregularities. The Respondent asserts that since it allegedly communicated its decision to the petitioner's complaint on 25th May 2019, the Petitioner had until 1st June 2019 to file the present petition with the court. The Respondent contends that time is of essence in the commencement and prosecution of electoral matters from the time his cause of action arose to completion to ensure compliance with the set time table for electoral matters. It is argued that there is need for speedy disposal of the matters so that neither party suffers prejudice that may be occasioned by among others things, relocation of key witnesses or the loss or possible alteration of relevant evidence in the course of the delay to prepare a prejudiced case as a petition to the court. The Respondent correctly argues that a delayed petition smacks of being an abuse of the courts process since it raises doubts that if the Petitioner had a cause worth bringing before the court, he would have brought it in good time, without ignoring the time prescribed by the rules otherwise such a petition is irregular and incompetent. The Respondent submits that the court should strike out the present matter under order 2 rule 3(a) of the Courts (High Court) (Civil Procedure) Rules, 2017 for being irregular and/or incompetent for having been filed on 6th June 2019, which was out of the prescribed time of seven days of the decision of the Respondent which was allegedly communicated on 25th May 2019.

The Petitioner filed a sworn statement in opposition to the application which was sworn by Ms. Chikondi Chijozi, a legal practitioner appearing on behalf of the Petitioner. In paragraph 3 of the said sworn statement the Petitioner depones as follows:

- i. 'THAT I refer to the contents of paragraphs 4 of the Respondent's Sworn Statement and state that although the Respondent's letter is dated 25th May 2019 per exhibit BS 6 referred to in the Petitioner's sworn statement, the Petitioner was given the letter on 27th May 2019.
- ii. THAT I refer to the contents of paragraph 5 of the Respondent's sworn statement and state that there was no inordinate or inexcusable delay in filing of the Petition and therefore the Respondent's application should be dismissed.
- iii. THAT even where there was delay in the filing of the Petition, the delay was not such an inordinate or inexcusable delay as to cause any prejudice to the Respondent to warrant the court to set aside / strike out the petition.'

The Petitioner argues that granting an order to dismiss the application to set aside/strike out the petition for being irregular and/or incompetent by being filed out of time will protect the Petitioner against the violation of his right to access to any court of law under section 41(2) of the Constitution. The Petitioner

contends that non-compliance with the mandatory seven days limitation period of filing petitions as per section 97 of the Local Government Elections Act is of such a nature that can be deemed condonable and curable under the procedure rules set out in Order 1 rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017. The petitioner submits that his late filing should be declared effectual in accordance with Order 2 rule 3(d) of the Courts (High Court) (Civil Procedure) Rules, 2017. The Petitioner alleges that he received the letter dated 25th May 2019 on 27th May 2019 and that from the date that the Petitioner received the letter and the date on which he filed the petition, nine days had elapsed, of which two days were during the weekends and one day was a public holiday and therefore there was no inordinate and inexcusable delay on the part of the Petitioner.

The Petitioner is of the view that the provisions of section 97 of the Local Government Elections Act, should be distinguished from section 100 of the Parliamentary and Presidential Elections Act, which expressly includes Saturday, Sunday and public holidays when counting the mandatory seven days for filing an electoral petition. The Petitioner submits that section 97 of the Local Government Elections Act does not have such express provision, as such, the court should find any delay in the filing of the petition excusable and not one warranting the striking out of the petition.

The Petitioner contends that where the court finds that the petition was filed late, the court should, in the spirit of dealing with the proceedings justly, not be quick to strike out the petition as the delay was not inordinate. According to the Petitioner the period of nine days against the mandatory seven days period in filing the petition cannot be said to be of an exceedingly substantial margin nor can such period compare to the long periods declared not inordinate as was shown in the cases of *Sabadia v Dowsett Engineering Ltd* 11 MLR 417 and *Biss v Lambeth, Southward and Lewisham Health Authority (Teaching)* [1978] 2 ALL ER 125.

The Petitioner further contends that the court should take into consideration that this petition has an implication of human rights under chapter IV of the Constitution and that according to the case of *Dr Chilima & Dr Chakwera v Prof Mutharika and Electoral Commission* HC Constitutional Reference No. 1 of 2019, the court is bound to adopt a broad and generous approach that favours access to electoral justice and that justice will not be done where the petition is struck out on mere technicalities.

The Petitioner asserts that with regards to the prejudice towards the Respondent, the same has not shown that there is any substantial risk that will render it impossible to have a fair trial arising from the issues in the action neither have they shown that there was any form of additional prejudice incurred after the issuing of the petition. It is the view of the Petitioner that the Respondent's application to strike out the Petitioner's petition appears to be more of a way to

escape or avoid trial and extinguish the legal rights of the Petitioner to attain justice.

The Petitioner submits that the court should consider the overriding objective set out in Order 1 rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017 to deal with proceedings justly and not strike out applications or proceedings due to mere procedural technicalities. The Petitioner submits that the court after reflecting on the questions set out in *Trill v Sacher* should dismiss the Respondent's application to set aside/strike the petition on the grounds that the delay was not inordinate nor did it cause any prejudice to the Respondent.

In replying to the petitioner's response, the legal practitioner for the Respondent argues that the Petitioner in his sworn statement and skeletal arguments does not dispute at all that the present petition was filed out of time and that he made no attempt whatsoever to apply for extension of time or explain the reasons why he failed to adhere to the clear dictates of the Local Government Elections Act. The Respondent also contends that the legal practitioner for the petitioner is confusing this application for an action that was purportedly commenced out of time as if it was for dismissal for want of prosecution if one considers most of the authorities cited in his skeletal arguments. The Respondent also relies on paragraph 12 of the sworn statement in support of the petition to assert that the Respondent dismissed the complaint on 25th May 2019 and that the Petitioner's assertion that it was only communicated on the 27th May seems to be an afterthought to try and bring the filing of the petition herein within time.

What has been outlined above is a summary of the affidavit evidence and arguments that were advanced by the parties in this application. At the heart of this application is the issue of whether or not this petition is statute barred to warrant it being set aside/strike out for being irregular and/or incompetent by being filed out of time.

In terms of the applicable law and rules, section 97(1) of the Local Government Elections Act provides for appeals to the High Court against a decision of the Commission on complaints in the following manner:

‘An appeal shall lie to the High Court against a decision of the Commission confirming or rejecting the existence of an irregularity and such appeal shall be made by way of a petition, within seven days from the date the Commission made the decision, supported by affidavits of evidence, which shall clearly specify the declaration the High Court is being requested to make by order’.

Also contained in the above statutory provision is a procedural restriction on the time within which an electoral petition by contestants for a ward councillor may be brought to court.

Order 19 rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides that

‘An election matter shall commence in the manner specified under the Parliamentary and Presidential Elections Act, the Local Government Elections Act or, in any other event, by an application’

Computation of time is critical to this application and the petition in general and the court has made recourse to the provisions under section 45 of the General Interpretation Act as well as Order 3 of the Courts (High Court) (Civil Procedure) Rules, 2017. Section 45 of the General Interpretation Act reads as follows:

- ‘(1) In computing time for the purpose of any written law, unless a contrary intention appears-
 - (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
 - (b) if the last day of the period is a Sunday or a public holiday (which days are in this section referred to as excluded days) the period shall include the next following day which is not an excluded day;
 - (c) where any act or proceedings is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day;
 - (d) where an act or proceedings is directed or allowed to be done or taken within any time not exceeding six days excluded days shall not be reckoned in the computation of time
- (2) Where, in any written law, an act or proceeding is directed or allowed to be done or taken within a number of clear days, excluded days shall not be reckoned in the computation of such number.’

Order 3 rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides that

‘where a time of a day or a longer time is to be reckoned by reference to a given day or event, the given day or the day of the given event shall not be counted’

Order 3 rule 2 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides for exclusion of day when a Registry is closed by stating that

‘Where a period, being a period of 5 days or less, would include a day on which the Registry is closed, that day shall not be counted’

Order 3 rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides for the last day where a Registry is closed and states that

‘where the last day for doing a thing is a day on which the Registry is closed, the thing may be done on the next day on which the Registry is open’

Further, Order 4 rule 4 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides for closed days of a Registry and states that

‘Each Registry shall not be open for Court business on a Saturday, a Sunday or a public holiday’

In line with Order 23 rule 6(1) Courts (High Court) (Civil Procedure) Rules, 2017 the principle for time for judgment or orders to take effect is that it is

‘from the day when it is given or made, or such later date as the Court may specify’.

Section 97(1) of the Local Government Elections Act seems to suggest that the effective date of the decision of the Respondent as a Commission confirming or rejecting the existence of an irregularity is the date the decision is made. Supposedly that is also the date when the cause of action is supposed to accrue. However, in this petition the Petitioner alleges in his sworn statement that he was only communicated the decision of the Commission on 27th May 2019. The record of the case shows that the Respondent has failed to effectively respond to or disprove this serious allegation and has merely made an oral submission that the assertions being made by the Petitioner are merely an afterthought. The court notes that none of the parties has provided any evidence in relation to the procedure followed and the manner in which the Respondent delivered the decision that the Petitioner is appealing against. That is, there is no evidence as to whether the decision which is dated 25th May 2019 was either read out on the same date it was made and drawn up in the presence of Petitioner or that the Petitioner was served with the decision on that same date. In the absence of proof on the part of the Respondent that the decision was appropriately communicated to the Petitioner on 25th May 2019 through legally accepted means, by either reading it out in the presence of the Petitioner or serving him on the date that it was made and drawn up and after carefully noting the evidence on oath that the Petitioner received the letter dated 25th May 2019 some two days later, on 27th May 2019, it is only fair and just that this court resolves the lingering doubts in favour of the Petitioner. This court finds that the decision was not communicated and served on the Petitioner on the date that the letter was issued, the 25th May 2019. Under the circumstances the court will deem the decision to have been made, communicated and served on the Petitioner on Monday, the 27th May 2019. This also happens to be the day when the electoral authority declared the winner of the poll.

This court has also examined and compared the provisions on election petitions under section 100(1) and section 114(1) of the Presidential and Parliamentary Elections Act and section 97(1) of the Local Government Elections Act and is in agreement with the observations made by the legal practitioner for the Petitioner that it is only section 100(1) of the Parliamentary and Presidential Elections Act, which expressly includes Saturday, Sunday and public holidays when counting the period of seven days for filing an electoral petition. However, when recourse is made to section 45 of the General Interpretation Act it comes out clearly that the omission by the legislature to factor into the provision in section 97(1) of the Local Government Elections Act the days of Saturday, Sunday and public holidays when counting the statutory period of limitation of seven days does not really have the effect that is contemplated and asserted by the legal practitioner for the Petitioner. That is, the computation of time for filing the petition does not really result in excluding those three days from counting the seven days period of limitation. The weekend days and public holidays would only have been excluded from counting if the period of limitation had fallen within the provisions of section 45(1)(d) of the General Interpretation Act, section 45(2) of the General Interpretation Act or Order 3 rule 2 of the Courts (High Court) (Civil Procedure) Rules, 2017. The period of limitation being seven days under section 97(1) of the Local Government Elections Act, in reckoning the period of time the relevant statutory provision and rule to apply are section 45(1)(a) of the General Interpretation Act and Order 3 rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 which results in the weekend days be included in counting. Consequently, in the circumstances of the Petitioner the seven days period of limitation would have expired on Monday the 3rd June 2019.

Table 1: reckoning periods of time for filing an election petition for a ward councillor

May 2019						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
19	20	21	22	23	24	25 Date of issuing letter containing decision of Commission
26	27 Date when letter containing decision of Commission is deemed made & received by the Petitioner	28 Day 1	29 Day 2	30 Day 3	31 Day 4	

June 2019						
◀ May						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
						1 Day 5
2 Day 6	3 Day 7 Last date for filing petition & date of expiry of period of limitation	4 Day 8	5 Day 9 Eid – public holiday	6 Day 10 Actual date when Petitioner commenced proceedings	7	8

Under section 45(1)(a) of the General Interpretation Act and Order 3 rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 the seven days period of limitation will be reckoned from 28th May 2019 and the time limit for the Petitioner to take action against the Respondent was supposed to have expired on Monday 3rd June 2019, which happens to be some three days before the proceedings against the Respondent was commenced. From the record of case the Petitioner has not stated any good cause or explanation as to why he delayed in commencing the lawsuit and it is also not clear why the Petitioner failed to comply with the statutory requirement for the timely filing of the petition which would have enabled him to comply with the applicable laws of procedure: *Chiume v Attorney General* [2000-2001] MLR 102; *Kassim Ligomeka v Rep* [2012] MLR 229. The Petitioner having failed to establish a factual basis for tolling the limitation period it is assumed that he was afforded reasonable opportunity within which the petition could be brought and the petition is subject to dismissal as barred by the applicable limitation of statute.

Table 1 illustrates, through the applicable calendar days in May 2019 and June 2019, how the limitation of time would be counted in the circumstances of this election matter. The computation clearly shows that the time limit provided for in the section 97(1) of the Local Government Elections Act as read with section 45(1)(a) of the General Interpretation Act and Order 3 rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 in respect of filing an electoral petition for a ward councillor in this case expired on 3rd June 2019. Therefore the election petition which was filed on 6th June 2019 is statute barred and being stale it should not have been entertained by the Registrar: *DPP v Banda and another* [1996] MLR 166. This court disagrees with the arguments of the Petitioner that steps taken by the Petitioner can be deemed condonable and curable under Order 1 rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017. Accordingly, this court declines the Petitioner's submission and prayer that his late filing of the petition should be declared effectual in accordance with Order 2 rule 3(d) of the Courts (High Court) (Civil Procedure) Rules, 2017. This court is of the view that whether or not an election petition is statute barred is neither a 'mere procedural technicality' as has been argued by the Petitioner nor something that can be dealt with at the court's discretion as one of the underlying principles in elections petitions is the observance of procedural justice which has a critical impact on the substantive justice in any election petition. The legislature in its wisdom established deadlines for commencing electoral petitions and the court cannot extend the time period unless the statute provides for such authority. The main aim of this statutory provision on period of prescription is to facilitate the commencement and resolution of electoral disputes within a reasonable length of time. Democratic governance demands that disputed elections and returns be resolved expeditiously and that there be finality in election outcomes. It is therefore expected that a contestant in a local government election, who has a valid complaint, should pursue it with reasonable diligence and such strict time limits also allows the Respondent to know the complaints that have been appealed against to the High Court and which they need to manage and defend.

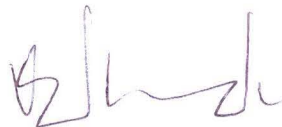
As has been noted by the legal practitioner for the Respondent most of the authorities that the Petitioner rely on in opposition to this application are not directly relevant to the issue at hand as they deal with applications for dismissal of a matter that is validly commenced, while the Respondent's application that is before this court is really about whether or not the maximum time period within which an electoral petition could be initiated had elapsed. Section 97(1) of the Local Government Elections Act provides that election petitions shall not be

brought after the expiration of seven days from the date on which the Commission makes a decision. This court is satisfied that the Respondent has established on a balance of probabilities that the Petitioner has not complied with the prescribed time limits for filing a petition as the Petitioner failed to bring the petition to the High Court for filing before the expiration of the seven days referred to in section 97(1) of the Local Government Elections Act. This court finds that the election petition herein was irregularly commenced for being statute barred and proceeds to allow the Respondent's application to set aside /strike out the petition herein on the ground that the same was irregular and/or incompetent for having been filed out of the prescribed time limit. The Respondent's application is successful as failing to comply with the prescribed time limit is a good defence of limitation for the petition that was issued in this electoral case. The statute of limitation having expired the court lacks jurisdiction to hear the petition and is accordingly set aside. For the above reasons, whatever allegations of electoral malpractices that the Petitioner had against the Respondent will not be given their 'day in court'.

The law on commencing election petitions is clear and the Petitioner ought to have known that the lawful way in which he would have facilitated the protection of his human rights and the enforcement of his right to access to any court of law under section 41(2) of the Constitution would have been through commencing the petition within the statutory time limit.

The court exercises its discretion and orders that each party should bear its own costs of the successful preliminary application and the dismissed petition.

Pronounced in open court this 9th day of July 2019 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga

JUDGE

Case information:

Date of hearing

2 July 2019.

Date of ruling

9 July 2019.

Ms. Chikondi Chijozi

Counsel for the Petitioner.

Mr. Victor Jere

Counsel for the Respondent.

Ms. Faith Ngoma

Court Clerk.