



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

ELECTION PETITION NUMBER 2 OF 2019

**IN THE MATTER OF THE PRESIDENTIAL AND PARLIAMENTARY
ELECTIONS ACT**

BETWEEN:

TIKONZE PEOPLES MOVEMENT

PETITIONER

AND

THE ELECTORAL COMMISSION

1st RESPONDENT

DR CASSIM CHILUMPHA SC

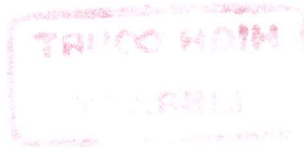
2nd RESPONDENT *[Signature]*

ORDER

This is this Court's order on a without notice application brought by the 2nd respondent, namely, to set aside the decision of this Court made on 11th April 2019 on a petition brought by the petitioner and to have the petition re-heard.

The decision of this Court in question was that there were irregularities in the nomination of the 2nd respondent in that he purported to be a presidential candidate sponsored by the petitioner in relation to the forthcoming presidential election.

The application is brought under Order 16 rule 7 of the Courts (High Court) (Civil Procedure) Rules.



The 2nd respondent has indicated why he was absent at the hearing of the petition herein. He has also indicated the merits of the case that he wishes to bring to the attention of this Court in the event that the order to re-hear the petition is made.

This Court is of the view that it must first deal with the issue of the absence of the 2nd respondent at the time the petition was made before examining whether his case has merits warranting a re-hearing.

The 2nd respondent asserts that he was not served with the petition in this matter and that he had no notice of the hearing of the same.

The 2nd respondent correctly observed that the petition herein was filed on 15th March 2019 and was scheduled for hearing on 11th April 2019.

He also correctly observes that on 8th April 2019, the 1st respondent applied that he be joined as 2nd respondent in this matter. Further, that at that point this Court ordered that the 2nd respondent be served with the petition in this matter as well as the order adding him as a party.

The 2nd respondent also observes correctly that the hearing of the petition proceeded on 11th April 2019 in his absence and that he neither acknowledged service of the petition nor filed a sworn statement in response.

The 2nd respondent stated that after perusing the record of this Court in this matter he noted that the petitioner and the 1st respondent purported to serve him by email through an email address headed 'chilumpha@yahoo.com'.

The 2nd respondent asserts that both the petitioner and the 1st respondent did not seek permission of this Court before attempting to serve the petition on him.

The 2nd respondent denies receiving any court process in his email or otherwise, and he asserts that as a lawyer he is aware of the need to attend to court documents but could not do so as he was not aware.

This Court agrees with the 2nd respondent's observation that indeed the petitioner and the 1st respondent did not seek permission to serve him with the court process herein by email.

This is because this Court by its own motion in exercise of its active case management powers, as provided in Order 1 rule 5 (4) and (5)(j) Courts (High Court) (Civil Procedure) Rules, ordered the 1st respondent to ensure that the court process was served on the 2nd respondent by email. This was in view of the fact brought to the attention of this Court by counsel for the 1st respondent that the 2nd respondent was by then outside this jurisdiction.

This Court was anxious to make sure that the 2nd respondent was notified of the petition without much ado given the urgency with which election matters are to be dealt with within a strict calendar as provided under Part II of Order 19 of the Courts (High Court) (Civil Procedure) Rules.

There was therefore no need or requirement on the part of the petitioner or the 1st respondent to seek leave of this Court to serve the petition on the 2nd respondent by electronic mail.

The next issue raised by the 2nd respondent is that he was purportedly served on an email address 'chilumpha@yahoo.com'.

The 2nd respondent is advancing the reason that this is not his email address and that he never received the court process on the said email address. Nothing can be further from the truth.

The email address 'chilumpha@yahoo.com' that the 2nd respondent now seeks to disassociate himself from was actually not created by the petitioner or the 1st respondent. This email address is the one indicated by the 2nd respondent himself as his email address. This email address is clearly indicated on the letter from the 2nd respondent that he had sent to the 1st respondent on 19th February 2019, responding on the issues raised by the petitioner with the 1st respondent which are the subject matter of the petition herein. That letter bearing the email address was exhibited as DMB5 by the 1st respondent.

It is therefore clear to this Court that the 1st respondent was served court process on his usual email address indicated by himself on his official communication with the 1st respondent.

In the circumstances, this Court does not at all believe the 2nd respondent's claims that he was served on an email address that is not his and that consequently he was never served the relevant court process.

The view of this Court is that the 2nd respondent was actually served the relevant court process and for reasons best known to himself did not attend to the said court process. That state of affairs, and the urgency of the issues on the petition, left this Court with no option but to proceed to determine the petition herein in the absence of the 2nd respondent.

This Court has noted that the 2nd respondent is seeking a setting aside of the decision of this Court dated 11th April 2019 and a re-hearing of the petition in the foregoing circumstances and must determine whether that should be allowed.

This Court observes that, as correctly submitted by the 2nd respondent, this Court is entitled to proceed to determine a matter at trial in the absence of a party and that the 2nd respondent as such absent party is entitled to apply to set aside a judgment made against him in his absence. See Order 16 rule 7 (1) and (3) Courts (High Court) (Civil Procedure) Rules.

The application to have the judgment set aside must be supported by evidence from the aggrieved absent party. See Order 16 rule 7 (4) Courts (High Court) (Civil Procedure) Rules.

This Court may grant the application, only if, the aggrieved party acted promptly in applying to set aside after finding out about the decision in issue, had a good reason for not attending trial and has a reasonable prospect of success at trial. See Order 16 rule 7 (5) Courts (High Court) (Civil Procedure) Rules.

The 2nd respondent indicated that he acted promptly to seek to set aside the decision of this Court on the petition. This Court observes that he actually attempted to appeal against the said decision and that course of action is not allowed by law and this Court declined to give him leave to appeal. That was on 18th April 2019.

Then today, the 2nd respondent filed the instant application.

In the circumstances this Court may give the 2nd respondent the benefit of the doubt that he acted promptly to seek redress. There were the intervening Easter holidays

that he also had to contend with as he rightly pointed out. This satisfies the first requirement set in Order 16 rule 7 (5) Courts (High Court) (Civil Procedure) Rules.

The next requirement, set in Order 16 rule 7 (5) Courts (High Court) (Civil Procedure) Rules, is that the 2nd respondent must have a good reason for failing to attend to the petition given that he was served on his email address by order of this Court.

No good reason, and actually no reason at all, has been advanced as to why the 2nd respondent did not attend to the petition after he was served on his own email address. Instead, the 2nd respondent made an unsuccessful attempt to disassociate himself from an email address that he personally provided to the 1st respondent when communicating in relation to the subject matter of the petition prior to the said petition.

This Court concludes that there was no good reason for the 2nd respondent's failure to attend the hearing of the petition in the circumstances given that he was served.

Given that there is no good reason for the 2nd respondent's failure to attend hearing of the petition it is not necessary for this Court to consider the third requirement that must be considered when this Court determines whether to set aside a decision made in the absence of a party, namely, that the aggrieved party has a reasonable prospect of success at trial as per Order 16 rule 7 (5) Courts (High Court) (Civil Procedure) Rules.

This Court is also of the firm view that, considering the conduct of the 2nd respondent in not attending to very important matters that have a serious impact on the election calendar, it is not just to set aside the decision of 11th April 2019 and to order a re-hearing of the petition in the circumstances. This Court is bound to ensure that it deals with matters according to the overriding objective of the Courts (High Court) (Civil Procedure) Rules which entails dealing with matters justly.

In the foregoing circumstances, the without notice application herein is declined.

Made in chambers at Blantyre this 25th April 2019.


M.A. Tembo
JUDGE