



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
ELECTIONS CASE NO.7 OF 2019**

BETWEEN:

THE STATE

-AND-

THE ELECTORAL COMMISSION..... RESPONDENT

EX-PARTE

MALAWI CONGRESS PARTY.....1ST APPLICANT

DR LAZARUS MCCARTHY CHAKWERA.....2ND APPLICANT

**THE DEMOCRATIC PROGRESSIVE PARTY..... 1ST INTERESTED
PARTY**

**PROFESSOR ARTHUR PETER MUNTHARIKA... 2ND INTERESTED
PARTY**

-AND-

MALAWI LAW SOCIETY.....INTERESTED AMICUS CURIAE

CORAM: THE HON JUSTICE M.C.C MKANDAWIRE

**Messrs Kaphale, Chisiza, Kaonga, Banda and Kapinda of Counsel for the
Respondent**

Messrs Mvalo, Likongwe, Ndalama and Mhone of Counsel for the Applicants

Messrs Mhango, Mbeta, Kanyenda, Gondwe, Masanje, M'meta and Taulo of Counsel for 1st and 2nd Interested Parties

Messrs Mpaka and Nthewa of Counsel for Interested Amicus Curiae

Itai, Court Clerk

ORDER

1. On the 25th day of May 2019 the Applicants filed an Ex-Parte application for permission to apply for Judicial Review. The application was brought pursuant to Order 19 Rule 20(3) of the Courts (High Court) (Civil Procedure) Rules 2017 and Section 16(2) of Statue Law Miscellaneous Provisions Act Cap 5:01 of the Laws of Malawi. I should put it on record that Section 16(2) of Statue Law Miscellaneous Provisions Act has no relevance to Order 19 Rule 20(3) of the Courts (High Court) (Civil Procedure) Rules 2017. I however proceeded to entertain the application having in mind the provisions of Order 2 rule 2 of the Courts (High Court) (Civil Procedure) Rules 2017. This Order provides that;

“Notwithstanding Rule 1 an irregularity in a proceeding, or a document, or a step, or order made in a proceeding, shall not render a proceeding, document, step taken or order a nullity.”

2. The Applicants in their application sought Judicial Review on the following decisions by the Respondent:

- i) The decision of the Respondent to consider results of the Presidential elections from areas which are marred by tampering of tally sheets fraud and/or vote rigging.
- ii) The decision of the Respondent through its presiding officers who refused to give copies of the genuine tally sheets to the Applicants' accredited monitors

- iii) The decision by the Respondent to tabulate results of the Presidential elections without prior verification with the Applicants' accredited monitors.
- iv) The decision of the Electoral Commission to take into account results from constituencies and polling centres where the votes cast are higher than the registered number of voters in the constituency or polling centre
- v) Failing to consider material facts in making the decision
- vi) Failing to reverse results after seeing evidence of rigging
- vii) The decision of respondent in failing to accord rules of natural justice to the Applicants and their agents.

3. The Applicants are seeking several reliefs which are eleven in number

4. After hearing Counsel, I granted permission to apply for Judicial Review and gave directions. I further ordered that until a further order of the Court, the announcement of Presidential election results be stayed until results from Nsanje, Chikwawa, Mangochi, Blantyre, Zomba, Mulanje, Chitipa, Rumphi, Karonga and Nkhata-Bay are verified through a transparent re-counting of the ballot papers in the presence of representatives of Political Parties which contested in the Elections.

5. The Respondent through Counsel Andy Kaonga filed an Application on the 25th of May 2019 to have the order for permission to commence Judicial Review and Stay discharged. In a sworn statement made by Mr. Kaonga, the Respondent says that the it has made no decision. That the Applicant presented all their complaints at once in a letter copy of which they have exhibited as marked TM4. Mr Kaonga says that the Respondent is currently engaged in the process of resolving the complaints and will only announce results after resolving all complaints received. Mr Kaonga also referred to the last Press Statement which is MEC 1 in which the Respondent assured the nation that it was acting on the complaints through its

Legal Team. Mr Kaonga said that the Respondent has not made any decision on the complaints filed. It is concluded by Mr Kaonga that the 8 days for the Respondent to resolve the complaints has not expired, as such the Applicants' action and orders can not be sustained by the Court and therefore ought to be vacated with costs.

6. The Respondent filed two skeleton arguments in support of their application. In a nutshell, the issues raised in these skeletal arguments are three namely:

- i) Whether leave should have been granted
- ii) Whether the attendant injunction should have been granted
- iii) Whether the injunction should be discharged

7. It has been argued at length by the Respondent that Order 19, rule 20 of the Courts (High Court) (Civil Procedure) Rules Judicial Review is meant to cover the review of law, an action or a decision of the Government or a Public Officer for conformity with the Constitution. It follows therefore that there must be an action or indeed a decision made before one can apply for Judicial Review.

8. The Respondent argued that the Applicants on 23rd of May 2019 raised various allegations of vote rigging/tampering in diverse polling stations. The Respondent received the complaints and commenced investigations as well as taking corrective steps. That the Electoral Commission is yet to make a decision on the complaints raised by the applicants. As such there is no matter fit for Judicial Review. The Respondent therefore submits that the Applicants should have waited for a decision by the Respondent and then approach the High Court by way of appeal as provided for in Section 76 (3) of the Constitution.

9. The Respondents Submitted that the Applicants wrongly commenced this matter since the law in Section 76 (3) of the Constitution does provide that any person

who has petitioned or complained to the Electoral Commission shall have the right to appeal to the High Court against determinations made.

10. That by engaging the High Court, the Applicants have two Electoral Tribunals seized with the same matter and that this is an abuse of the court processes.

11. It is therefore submitted that the High Court did not have jurisdiction to even entertain the case herein which came before it in the manner it did. That the proceedings were a nullity. In support of the above issues, the Respondent referred this Court to several cases such as: **The State vs Attorney General Ex-Parte Ian Kanyuka miscellaneous Civil Cause Number 116 of 2012, Christopher Mtikila vs Attorney General {1995}, T.L.R. 31, Malawi Electoral Commission vs Nthala and Sawerengera Miscellaneous Civil Cause Numbers 52 and 53 of 2002 respectively, Professor Chisi vs Electoral Commission Electoral Case Number 1 of 2014, Jessie Kabwira vs Electoral Commission electoral Case Number 2 of 2014 and Hetherwick Mbale vs Hassan Maganga MSCA Misc Civil Appeal Number 21 of 2013.**

12. The Respondent further submitted that the matter herein was commenced through a wrong order. That Election matters are a particular proceeding within the meaning of the Courts (High Court) (Civil Procedure) Rules 2017. That the proceedings in Electoral Matters are governed by Order 19 Part II which are Rules 13 to 19. That rule 13 makes it mandatory that an election matter must be commenced in a manner specified by the Parliamentary and Presidential Elections Act or The Local Government Elections Act and that in any event by application. That it is not within Part III of Order 19 because different considerations apply.

13. The Respondents have argued that this matter was brought in bad faith. The Applicants did not disclose to the court that the Electoral Commission was investigating the complaints and that a decision is yet to be made. That the

Applicants have not even shown any documentation showing the communication of the Respondent of its decision based on their complaint. That the Applicants have presented false information to the court.

14. It is submitted that a manual counting of the votes would defeat the timelines set in Section 99 of the Parliamentary and Presidential Elections Act. The determination of results by the Respondent is based on Section 96 of the Parliamentary and Presidential Elections Act and the process set therein has to go uninterrupted until it is concluded. The Order for recounting obtained by the Applicants flies in the face of a clear statutory provision whose effect is to stop the Respondent from determining the results uninterrupted. That the order to recount is a final remedy yet the Court has powers to annul the elections pursuant to section 100 of the Parliamentary and Presidential Elections Act which proceeds on the understanding that the challenge should be made after declaration of the results

15. That Order 19 Rule 19 of the Courts (High Court) (Civil Procedure) Rules 2017 provides that an application for an interim injunction in connection with election matters shall be made inter-parties.

16. The 1st and 2nd Interested Party made their submission. Most of what was submitted by them has already been alluded to in the submissions made by the Respondent.

17. The Malawi Law Society which appeared as Interested Amicus Curiae was allowed to make oral submissions and the court took note of their contribution. Suffice to say that most of what they said had already been alluded to by other parties.

18. In response to the Respondents application, the Applicants filed a sworn statement made by Mr. Titus Mvalo. The Applicants say that in its briefing of 23rd

May 2019, which is marked as MEC 1, the Respondent acknowledged that it had received complaints which would require resolving before the results are announced. Notwithstanding that the Respondent is yet to resolve the same but ready to proceed with announcement of the Presidential Election results. That the Respondent is not acting on the Applicants' complaints. In its press briefing of 25th May 2019, the Respondent stated that it had responded to all complaints to the satisfaction of all stakeholders and that it is ready to announce the Presidential Elections results but for the stay granted by the Court. The press statement is TM 5. The Applicants have not received any communication whatsoever from the Respondent purporting to resolve any of the irregularities raised in the complaint. The Respondent has thus made a decision to proceed announcing the Presidential Elections results before resolving the Applicants' complaints thereby denying the Applicant the right to be furnished with reasons for the Respondents administrative action.

19. Further, although in the question session of the said press briefing on the 25th of May 2019, the Respondent stated that the complaints will be resolved by way of verification of the results in the districts which are subject of the Applicants' complaint, the Respondent failed to afford the Applicants the opportunity to be present during the said verification exercise thereby, denying the Applicants the right to a procedurally fair administrative action.

20. The Applicants submit that the court properly exercised discretion to grant permission to the Applicants for Judicial Review so that the court does review such decisions, inter alia:

i) The decision to consider the results of the Presidential Elections from areas which were marred by serious irregularities; and

ii) the decision to tabulate the results of the Presidential Elections without prior verification with the Applicant.

It is therefore prayed that the Respondents' application to set aside/discharge the permission for Judicial Review in the present case be dismissed with costs.

21. let me express my very real sense of gratitude and indebtedness to Counsel. There were so many exciting submissions.

22. I have looked at all the relevant legal framework at my disposal starting from the Constitution to the Parliamentary and Presidential Act which are the most relevant pieces of legislation in this matter.

23. I am satisfied that one mode of commencing an election matter is our law is through Judicial Review as provided for under section 76 (5) a of the Constitution. Once that route is taken, one has to make an application for Judicial Review. This Judicial Review is covered under Order 19 rule 20 of the Courts (High Court) (Civil Procedure) Rules 2017. This is what the Applicants did. There have been a lot of arguments that the Applicants should not have gone to the High Court since they already lodged a complaint with the Respondent. It has also been submitted that there is no decision to be reviewed since the Respondent is still considering the Applicants' complaints. Let me first put it on record that the decisions the applicants want to be reviewed are stated in their application. As Counsel Mvalo had observed, an election is a process and there have been several decisions/actions taken by the Respondents' presiding officers who refused to give copies of the genuine tally sheets to the Applicants' accredited Monitors.

24. It is interesting to note that in its press statement TM 5, the Respondent was ready to announce the Presidential results but for the stay granted. This gives an

impression that the Respondent could have released the results without deciding on the complaints submitted by the Applicants.

25) I am satisfied that this matter was properly brought before this court and that the court had jurisdiction to entertain it. I do not agree that the Applicants had suppressed information that they had already complained to the Electoral Commission. It is very clear that Counsel Mvalo had attached a letter of complaint (TM 4) that was submitted to the Respondent. If the Applicants had wanted to suppress information, they could not have disclosed that letter.

26. On the stay order that this Court had granted, it should be noted that after hearing the arguments from both sides, the court has appreciated and is satisfied that the said stay order should be discharged. The Court is very much aware that the Respondent is mandated by section 99 of the Parliamentary and Presidential Act to finalise its processes within the timeframe prescribed therein. I therefore order that the Respondent is at liberty to proceed with the processes so that it complies with the said Act. The permission for Judicial Review still stands. I order that each party should meet its own costs.

MADE THIS  DAY OF MAY 2019 AT LILONGWE


M.C.C. MKANDAWIRE

JUDGE