



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
ELECTORAL CASE NO. 6 OF 2019**

BETWEEN:

**ELLEN KADANGO 1ST PETITIONER
FACKSON WALAPA 2ND PETITIONER
LEVY LUWEMBA 3RD PETITIONER**

-AND-

THE ELECTORAL COMMISSIONS RESPONDENT

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. D. K. Itai, Court Clerk**

ORDER

Kenyatta Nyirenda, J.

There is before the Court a petition brought by Messrs Ellen Kadango, Fackson Walapa and Levy Luwemba (Petitioners) against the Electoral Commission (the Respondent). The Petitioners contested in the Parliamentary Elections which were conducted by the Respondent on 21st May 2019.

The action herein commenced on 24th May 2019 when the Petitioners filed with the court an ex-parte summons for an order “*restraining the Respondent by its servant, agents or whosoever from announcing the results of Parliamentary and Local Government elections of Lilongwe City South East Constituency until the final determination of the matter*”.

The application was brought under Order 10, rule 30, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as “CPR”] and it was supported by the following statement, sworn by the 1st Petitioner:

“Introduction

1. *THAT I swear this sworn statement on behalf of myself and others*
2. *THAT we are of full age.*
3. *THAT we are shadow Mps and Councillors of UDF, DPP and UTM.*
4. *THAT the matters of fact we depone herein are within my knowledge and I hold the same to be true and accurate unless stated to the contrary.*
5. *THAT for the matters of fact that are not within our personal knowledge, we duly disclose the sources thereof and provide the grounds for my belief thereof.*

Background and Crux of Present Application

6. *THAT on 21 May, 2019 we had participated in the election process as we went to vote in our respective wards.*
7. *THAT we noticed some anomalies and irregularities at our respective wards.*

Particulars of Irregularities

- 7.1 *In the polling centers of Mtengo wa Kachere, Chipasula and Chifuniro in Lilongwe, counted votes exceeded the number of registered voters per the polling station.*
- 7.2 *That their discrepancies between the original tally sheet and the duplicate sheet which was given to us. Attached and exhibited as ‘EK 1’ is a sheet in which the number of signatories on the original sheet is different from the duplicate and are in different handwritings.*
- 7.3 *Some of our Monitors were told to start late at 10 am, 4 hours after other monitors had already started.*
- 7.4 *That one UTM monitor at Kaliyeka ward discovered an assistant presiding officer assisting people to vote for an MCP candidate. The concerned officer was not removed from the polling center.*
- 7.5 *That there was a mismatch in the number of ballot papers received and the ballot papers used and the actual votes counted.*
- 7.6 *The presiding officer of Chilinde Ward speaking with councilor of Chilinde Ward A*
- 7.7 *Voters were given money in Chilinde 1 Ward, Kaliyeka Ward, Chilinde 1 and 2, and Tsabango 1 and 2 to vote for MCP. The money was given by Mike Nsungama.*
- 7.8 *Monitors were given 1 hr breaks before counting votes and the voting boxes were left with presiding officers.*

8. *THAT in view of the foregoing we wrote a letter to the Constituencies Returning Officer on 22nd May 2019 and the same was copied to Mrs Kattie Mjojo, the Regional Returning Officer of Central Region. We attach and exhibit the said letter marked as 'EK 2'*
9. *THAT as of 24th May, 2019 there was no any official communication from either of the offices and hence no positive step was made to rectify the situations.*

Balance of Convenience

10. *THAT it is with regard of the foregoing that maintain a prayer for an interim interlocutory injunction restraining the defendant from announcing the results of the parliamentary and local government elections.*
11. *THAT we suffered a great prejudice in the way the election process was handled at our constituency.*
12. *THAT clearly the balance of justice and fairness would militate towards granting an injunction pending the hearing of this matter."*

The ex-parte summons was brought before me on 24th May 2019 and I summarily dismissed it on the grounds that it was not accompanied by a writ of summons and/or statement of case and for non-compliance with O.10, r.8, of CPR.

Thereafter, on 31st May 2019, the Petitioners filed the Petition which is the subject matter of this Order. It might not be out of place to set out the Petition in full:

"PETITION UNDER SECTION 114 OF THE PARLIAMENTARY AND PRESIDENTIAL ELECTIONS ACT

The humble Petition of ELLEN KADANGO, FRACKSON WALAPA AND LEVY LUWEMBA showeth as follows:-

1. *THAT on the 21st May, 2019 Tripartite Elections the Petitioners, namely Ellen Kadango, Frackson Walapa, Levy Luwemba and Ulemu Msungama were contesting as a parliamentary contestants in Lilongwe City South East Constituency and were standing on the United Democratic Party, Democratic Progressive Party, United Transformation Movement and Malawi Congress Party tickets respectively.*
2. *THAT Mr. Ulemu Msungama, who was standing for the Malawi Congress Party, was declared by the Respondent as a duly elected Member of Parliament for the Constituency.*
3. *THAT the elections was marred by massive irregularities.*

PARTICULARS

- 3.1 *At the polling centres of Mtengo wa Kachere, Chipasula and Chifuniro in Lilongwe, counted votes exceeded the number of registered voters per the polling station.*
- 3.2 *There were discrepancies between the original tally sheet and the duplicate sheet which was given to the Petitioners. Over and above, a number of signatories on the original sheet are different from the duplicate and also bearing different handwritings.*
- 3.3 *Some of our Monitors were told to start at 10 am, 4 hours after other monitors had already started.*
- 3.4 *One UTM monitor at Kaliyeka ward found an Assistant Presiding Officer assisting people to vote for an MCP candidate. The concerned officer was not removed for the polling centre.*
- 3.5 *There was a mismatch in the number of ballot papers received and the ballot paper used and the actual votes counted.*
- 3.6 *Voters were given money in Chilinde 1 Ward, Kaliyeka Ward, Chilinde 1 and 2, and Tsabango 1 and 2 to vote for MCP. The money was given by Mr. Ulemu Msungama, the Respondent.*
- 3.7 *Monitors were given 1 hour breaks before counting votes and voting boxes were left with Presiding Officers.*
4. *THAT on 22nd May, 2019 the Petitioners presented a complaint to the Respondent based on the grounds above a copy of which is hereto exhibited as "EK1".*
5. *THAT despite the Petitioners' complaint the Respondent went ahead and declared Mr. Msungama of Malawi Congress Party as duly elected Member of Parliament for the Constituency.*
6. *THAT the Petitioners humbly prays to this Honourable Court for:-*
 - a) *An order declaring the Lilongwe City South East Constituency Parliamentary elections null and void;*
 - b) *An order declaring that Mr. Ulemu Msungama was not duly elected as Member of Parliament for Lilongwe City South East Constituency;*
 - c) *An order directing the Respondent to conduct fresh parliamentary elections in Lilongwe City South East Constituency or in the alternative an order directing the Respondent to recount the Parliamentary votes for constituency; and*
 - d) *An order condemning the Respondent in costs."*

Exhibit “EK1”, that is, the complaint referred to in paragraph 4 of the Petition, is addressed to the Constituency Returning Officer (Mrs Kettie Mjojo) for Lilongwe City South East Constituency. The body of the Exhibit is in the following terms:

“Dear Madam,

RE: ANOMALIES IN THE POLL RESULT SHEETS IN SOME POLLING CENTRES UNDER LILONGWE SOUTH EAST CONSTITUENCY

We Councilors and Shadow Members of Parliament for UTM, UDF and DPP would like to register our complaints regarding the manner in which the results have been counted and recorded in different centres within the above named constituency.

The following anomalies have been identified and the polling returning officers have failed to assist us:

- 1. In some of the centres the number of counted votes exceed the number of registered votes per polling station i.e. Mtengo wa Kachere, Chipasula and Chifuniro Poling Centres.*
- 2. The names of the monitors recorded on the original Polling station results sheets are not the same i.e. Mlodza F.P. School Polling Centre.*
- 3. The writing on the original polling station sheet and the duplicate do not match. The handwriting are different.*
- 4. The figures have been altered.*
- 5. A UTM monitor at Kaliyeka Ward discovered an assistant presiding officer, who was assisting the voters to vote for an MCP candidate. Monitors complained about this, but the presiding officer failed to discipline the concerned officer. When the matter was further reported to the returning officer, the concerned officer was not removed from the centre, the presiding officer just assured us that the officer will not repeat the conduct, Contrary to **MEC** regulations.*
- 6. At Mtengo Kachere Polling Station the presiding officer was chasing monitors for UDF, DPP and UTM when polling was commencing in the morning. She only allowed them in the afternoon.*
- 7. Most of the monitors were not handed over the results sheets for the presidential candidates to check.*

We raised these concerns to the polling Station presiding officer to rectify the same, but to no avail. We have attached the Polling Station Results sheet for Mlodza F.P. School Centre for your appreciation of the problem.

We kindly need your intervention by immediately stopping the whole process and order a recount of the votes before transmission to the Constituency, District and National tally centres.

We hereby give five (5) hours to rectify this anomaly failing which we shall refer the matter to the court for proper redress.

Yours concerned aspirants,

1. *Ellen Kadango Shadow MP-UDFsigned.....*
2. *Levy Luwemba Shadow MP-UTMsigned.....*
3. *Flackson Walapa Shadow MP-DPP.....signed.....*
5. *Russell Golden Shadow Councilor-DPP.....signed.....*
6. *Sunganani Thomas Shadow Councilor- UTM.....signed.....*
7. *Catherine Maria Sudi Shadow Councilor-UDF.....signed.....*
- *8. *MICA Chisale Shadow Councilor signed - UTM CR*
- *9. *Ester Mpila Mkwamba signed – UDF CR*
- *10. *Madalitso Matias Sipolo UDF CR*
- *11. *Innocent Chikafa – UDF CR*
- *12. *Andy Leonard Mkandawire signed UTM CR*
- *13. *Patricia J. Chitekwe –UTM CR*
- *14. *James Banda – signed UTM CR*
- *15. *Fraser Mkhumba – UTM CR*
- *16. *Linda Mpela – DPP*
- *17. *Zebunissa Kunje - DPP*

*CC : The Regional Returning Officer,
Mrs. Kettie Mjojo,
Central Region*

**22nd May, 2019”*

** denotes words hand written*

I have carefully gone through the Petition and the exhibit thereto. The first question to consider is whether or not the Petition has been competently brought.

The Petition has been brought, as expressly stated in the heading/title of the Petition, under s.114 of the Parliamentary and Presidential Elections Act (the Act). Section 114 of the Act falls within Chapter XI of the Act which Chapter deals with complaints and appeals. For reasons that will become apparent in a moment, I deem it necessary to quote Chapter XI of the Act in full:

“PART XI – COMPLAINTS AND APPEALS

113. Save as otherwise provided in this Act, any complaint submitted in writing alleging any irregularity at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided on by the Commission and where the irregularity is confirmed the Commission shall take necessary action to correct the irregularity and effects thereof.

114. (1) 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, supported by affidavit of evidence, which shall clearly specify the declaration the High Court is being requested to make by Order.

(2) On hearing a petition under subsection (1), the High Court-

- (a) shall subject to subsection 3, make such order or orders as it thinks fit;*
- (b) in its absolute discretion, may or may not condemn any party to pay cost in accordance with its own assessment of the merits of the complaint.*

(3) An order of the High Court shall under subsection (2) not declare an election or the election of any candidate void except on the following grounds which are proved to the satisfaction of the court-

- (a) that voters were corruptly influenced in their voting contrary to any provision of this Act; or had their ballot papers improperly rejected, or voted more than once;*
- (b) that persons not entitled to them were improperly granted ballot papers;*
- (c) that persons entitled to them were improperly refused ballot papers:*

Provided that the court shall not declare an election void, after proof of any ground in paragraphs (a), (b) or (c), if it is

satisfied that the number of votes involved could not have affected the result of the election;

(d) *non-compliance with this Act in the conduct of the election:*

Provided that, if the court is satisfied that any failure to comply with this Act did not affect the result of the election,

it shall not declare the election void; or

(e) *that the candidate was at the time of his election a person not qualified for election or that he was not properly nominated, or that a duly qualified candidate had his nomination improperly rejected by the returning officer.*

(4) *The court shall have power to direct scrutiny and recount of votes if it is satisfied, during proceedings on an election petition, that such scrutiny and recount are desirable.*

(5) *At the conclusion of the trial of an election petition the court shall determine whether the member whose nomination or election is complained of, or any other and what person was duly nominated or elected, or whether the election was void, and shall report such determination to the Commission. Upon such report being given such determination shall be final.*” – Emphasis by underlining supplied

My understanding of the provisions of section 114(1) of the Act is that an appeal under that section lies within a very narrow circumscribed compass. It is not all decisions of the Commission that can be challenged under section 114(1) of the Act. The only appeals that can be entertained under this provision are those that challenge “*a decision of the Commission confirming or rejecting the existence of an irregularity*”. In short, the provisions of section 114 of the Act come into play after a complaint, submitted under section 113 of the Act, “*alleging any irregularity at any stage, if not satisfactorily resolved at a lower level of authority,*” has been examined and decided on by the Commission. The non-exercise by the Commission of its duties under section 113 of the Act might be a subject of judicial review (See **The State v. Malawi Electoral Commission and the Attorney General ex parte Ellock Maotcha Banda, HC/ Zomba District Registry, Election Case No 13 of 2019, unreported**) but it is certainly not a matter for inquiry by way of an appeal under section 114 of the Act.

By way of comparison or contrast, it is not uninteresting to note that the wording of the corresponding Chapter that deals with petitions in respect of election to the office of the President is markedly different in material respects. Part IX of the Act is worded as follows:

“100 – (1) *A complaint alleging undue return or undue election of a person to the office of President by reason of irregularity or any other cause whatsoever shall be presented by way of petition directly to the High Court within 48 hours, including Saturday, Sunday and a public holiday, of the declaration of the result of the election in the name of the person,-*

(a) *claiming to have had a right to be elected at that election; or*

(b) *alleging himself to have been a candidate at such election.*

(2) *In proceedings with respect to a petition under subsection (1), the Commission shall be joined as a respondent.*

(3) *If, on the hearing of a petition presented under subsection (1), the High Court makes an order declaring-*

(a) *that the President was duly elected, such election shall be and remain valid as if no petition had been presented against his election; or*

(b) *that the President was not duly elected, the Registrar of the High Court shall forthwith give notice of that fact to the Commission which shall publish a notice in the Gazette stating the effect of the order of the High Court.*

(4) *Pursuant to an order of the High Court under subsection 3(b) declaring that the President was not duly elected, a fresh election to the office of the President shall be held in accordance with this Act.*

(5) *A declaration by the High Court under subsection (2) (b) shall not invalidate anything done by the President before that declaration.”* Emphasis by underlining supplied

From a comparative study of the two Chapters, particular regard being given to the underlined words, that is, “*by reason of irregularity or any other cause whatsoever*” and “*directly to the High Court*”, two obvious examples of the differences between a electoral petition brought under section 100 of the Act and an electoral petition commenced under s.114 of the Act stand out like sore thumbs. Firstly, whilst section 114 limits the subject matter of an appeal to “*a decision of the Commission confirming or rejecting the existence of an irregularity*”, a petition brought in terms of section 100 can be premised on any other cause whatsoever and not just limited to an irregularity. Secondly, under section 100 of the Act, the petition can go directly to the High Court whilst under section 114, the complaint is enjoined to lie first to the Commission, under section 113 of the Act, and only go to the High Court by way of appeal.

In the present case, I have read and re-read the Petition and the exhibits attached thereto in search of “*a decision of the Commission confirming or rejecting the existence of an irregularity*” but my search has been in vain. In short, this Petition is not coming to this Court by way of an appeal against a decision of the Commission confirming or rejecting the existence of irregularities alleged by the Petitioners. In the premises, the petition is wholly misconceived. It is, accordingly, dismissed.

Pronounced in Court this 12th day of June 2019 at Lilongwe in the Republic of Malawi.

A handwritten signature in black ink, appearing to read 'Kenyatta Nyirenda', is written over a horizontal line. The signature is enclosed in a hand-drawn oval.

Kenyatta Nyirenda
JUDGE