



**IN THE HIGH COURT OF MALAWI**

MZUZU REGISTRY

CIVIL CAUSE NO. 26 OF 2019

BETWEEN

LETNAY NYANKHATA ..... CLAIMANT

AND

MALAWI CONGRESS PARTY ..... 1<sup>ST</sup> DEFENDANT

DR KEN ZIKHALE NG'OMA ..... 2<sup>ND</sup> DEFENDANT

CORAM: HON. JUSTICE T.R. LIGOWE

M. Nkhono and M. Chinkhuntha of Counsel for the State

W. Chibwe of Counsel for the Devendants

F. Mwakhwawa Luwe, Court Clerk

R. Luhanga, Court Reporter

**RULING**

Ligowe J

1 On 31<sup>st</sup> January 2019, Letnay Nyankhata filed a summons for her claim against the Malawi Congress Party seeking:

- (a) A declaration that the defendant's acts of not holding primary elections in Nkhata-Bay South Constituency, and imposing Dr Ken Zikhale Ng'oma as a candidate of the defendant's party for a parliamentary seat or as a shadow member of parliament for the forth coming 2019 parliamentary elections in Nkhata-Bay South Constituency on the defendant's ticket, is a breach of the



defendant's policy/ custom and/ practice and amounts to infringement of the claimant's political rights to join and participate in the party's activities and her legitimate expectation;

- (b) A permanent order of injunction restraining the defendant either by itself, its agents, its president, or any one working under instructions from officials of the defendant or any person acting on its behalf, from appointing or imposing any person as a candidate of the defendant's party for a parliamentary seat or as a shadow member of parliament for the forthcoming 2019 parliamentary elections in Nkhata-Bay South Constituency unless parliamentary elections are held in the constituency;
- (c) Damages for the breach of human rights;
- (d) Damages for inconvenience; and
- (e) Costs of the action.

2 Her statement of case is that she and Dr Ken Zikhale Ng'oma are aspiring candidates for the Malawi Congress Party for the position of Member of Parliament for Nkhata-Bay South Constituency in the forthcoming tripartite elections. The established custom at MCP is to hold primary elections for the constituency members to choose their favoured candidate. MCP failed and neglected to hold the primary elections on three occasions citing the absence of Dr Zikhale Ng'oma and economic reasons for the failure. The last date set for the elections was 14<sup>th</sup> December 2018. MCP has since neglected to set another date for the primaries despite her numerous reminders to do so, and has now endorsed Dr Ken Zikhale Ng'oma as its candidate. She has spent enormous amounts of money and energy campaigning for the primary elections with the legitimate expectation that the elections would be held. She claims MCP has infringed her political rights under the Constitution of the Republic of Malawi, to join and participate in the activities of any political party of her choice.

3 The summons was filed together with an application for an injunction to restrain MCP either by itself, its agents, its president, or any one working under instructions from its officials or any person acting on its behalf, from appointing or imposing any person as



a candidate of the party for a parliamentary seat or as a shadow member of parliament for the forth coming 2019 parliamentary elections in Nkhata-Bay South Constituency unless primary elections are held. Now that MCP has settled for Dr Zikhale Ng'oma, the injunction is to compel MCP not to submit the nomination papers for Dr Ken Zikhale Ng'oma as a candidate for the party until it holds primary elections, or an order that there be no candidate representing MCP in Nkhata-Bay South Constituency during the forthcoming tripartite elections. This is the ruling on the hearing of the application.

- 4 I need to start with the wisdom in *Hassan Hilale Ajinga v. United Democratic Front*, Civil Cause No. 39 of 2007 (unreported) advising that political parties are like clubs. Justice Chikopa said:-

“Political parties are no more than clubs. Membership is voluntary. Members are free to leave in much the same way they are free to join. The members conduct however is regulated by the clubs’ rules/ constitution which acts like some contract between the members and the club/ party and between the members themselves. The clubs’ (in this case the parties) activities are regulated by the clubs’ rules/ constitution. In the case of party primaries, they must be run in accordance with the party’s rules/ constitution. If there are disputes, they should be resolved in accordance with the party’s rules/ constitution. The Court should be slow, again very slow, to intervene in the party’s internal dynamics. It should instead allow the party and its membership to deal with the matters in dispute using their own internal dispute resolution mechanisms. Where a member is not happy either with the party’s conduct or a fellow member’s conduct he is free to leave the club/ party and join one that accords with his ideals. Or be without a club or party. The only time a court should intervene in a club’s or party’s activities is where the club/ party fails to comply with its own rules/ constitution, where it acts in breach of rules of natural justice or when it or its members conduct themselves in breach of the laws of the country.”

- 5 In opposing the application for the injunction the defendants argue that this matter has come before court prematurely. It has been exhibited in the sworn statement of



Kondwani Phikamalaza Phiri, Director for Elections in the North-South Region of the party and Loti S. Mhone, the party's Constituency Chairman for Nkhata-Bay South, that on 23<sup>rd</sup> January 2019, the Directors of the party resolved to disqualify Letnay Nyankhata "from the competition for Nkhata-Bay South for distributing meal cards bearing her photo to delegates to the primary elections on the day of previous elections" and the party settled for Dr Ken Zikhale Ng'oma. She needed to exhaust the mechanisms within the party before coming to court.

- 6 Letnay Nyankhata contends that she did not receive communication about her disqualification until she read the sworn statement. She was not called for discipline and made no representation to the party in her defence.
- 7 These are the internal matters talked about in *Hassan Hilale Ajinga v. United Democratic Front* which this court has to be slow to venture into before internal mechanisms have been exhausted. This means that the court would not deal with the substantive claim until it is satisfied that the internal dispute settlement mechanisms have been exhausted and that it concerns noncompliance with the party's rules/constitution, or breach of the rules of natural justice or breach of the laws of this country.
- 8 The concern of the claimant is perhaps that her claim hinges on the submission of nomination papers to the Electoral Commission closing this Friday 8<sup>th</sup> February 2019. It has to be remembered though, that "a right to obtain an injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court." *The Siskina* [1979] AC 210 as applied in *Patrick Bandawe v. Malawi Congress Party*, Civil Cause No. 1010 of 2018 (Lilongwe Registry) (unreported).



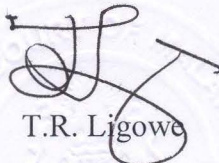
- 9 This is why Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 requires that the court should first consider whether there is a serious question to be tried between the parties before granting an interim injunction.
- 10 I agree that although Letnay Nyankhata just knew of her disqualification to compete for the primaries after reading the sworn statement in opposition to her application, it still is an internal matter, immature for the court to intervene.
- 11 The decision to take Dr Ken Zikhale Ng'oma as the MCP parliamentary candidate for Nkhata-Bay South constituency does not restrict her right to contest in the tripartite elections. Reading her statement of case closely, it is clear that her main concern is the money and time she has spent preparing for primary elections, for which she claims compensation. There is nothing she specifically claims to have suffered or will suffer because she is not or will not be an MCP candidate. It has already been stated above that a political party is just like a club.
- 12 This takes us to the second consideration in Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 that an interim injunction may be granted when damages may not be an adequate remedy. By claiming damages, the claimant admits that she can be adequately compensated and she indeed can be adequately compensated.
- 13 The last consideration is whether it is just in the circumstances to grant the injunction. This is a matter the court has to consider after it finds that there is a serious question to be tried and damages may not be an adequate remedy. If the answers to the first two questions are in the negative, there is really no point belabouring with the third question. The injunction need not be granted.
- 14 Even if we were to consider it in the present case, there is no other injustice she suffers as a result of MCP's failure or neglect to hold primary elections apart from money and time spent preparing for the primaries. She is free to contest in the forthcoming elections for the Nkhata-Bay South Constituency seat. She can adequately be



compensated at the end of the case for her money and time. On the other hand, I have read the sworn statement of Kondwani Phikamalaza Phiri and Loti S. Mhone and the report of Anthony Mukumbwa who presided over primary elections which failed on 10<sup>th</sup> November 2018, exhibited to Dr Ken Zikhale Ng'oma's sworn statement. The indication is that there is a lot of tension between Letnay Nyankhata and her supporters on one side, and Dr Ng'oma and his supporters on the other side. It will need time for them to agree on the venue of the primary elections, mobilise resources and agree on modalities of transporting delegates from 214 areas to the venue of the election and how the election may be conducted freely and fairly. All this targeting at Friday 8<sup>th</sup> February 2019. Today is 6<sup>th</sup> February 2019. In my view there is just no time for the primary elections to be held. The claimant has argued that if not possible then each of the candidates should contest independently. MCP will be without a candidate. It sounds rather vindictive to me for her to insist on MCP going to the polls without a candidate. The court cannot not condone it.

15 Letnay Nyakhata's application for an interim injunction is dismissed because there is no cause of action yet between her and MCP ripe for the courts. If there were, she can adequately be compensated for whatever she loses and suffers by the decision for MCP to take Dr Ken Zikhale Ng'oma as their candidate, and there is no injustice that she cannot be adequately compensated because of that decision.

16 Made in chambers this 6<sup>th</sup> day of February 2019.



T.R. Ligowe

**JUDGE**