THE REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CONSTITUTIONAL REFERENCE NO.1 OF 2019

BETWEEN

DR. SAULOS KLAUS CHILIMA.....1ST PETITIONER

DR. LAZARUS MCCARTHY

CHAKWERA.....2ND PETITIONER

– AND –

PROFESSOR ARTHUR PETER MUTHARIKA.....1ST RESPONDENT

ELECTORAL COMMISSION.....2ND RESPONDENT

MALAWI LAW SOCIETY.....1ST AMICUS CURIAE

WOMEN LAWYERS ASSOCIATION.....2ND AMICUS CURIAE

CORAM: HONOURABLE JUSTICE H. POTANI

HONOURABLE JUSTICE I. KAMANGA

HONOURABLE JUSTICE D. MADISE

HONOURABLE JUSTICE M. TEMBO

HONOURABLE JUSTICE R. KAPINDU

Mr. Mwale, Counsel for 1st Petitioner

Mr. Soko, Counsel for 1st Petitioner

Mr. Msisha SC, Counsel for 2nd Petitioner

Mr. Likongwe, Counsel for 2nd Petitioner

Mrs. Ottober, Counsel for 2nd Petitioner

Mr. Songea, Counsel for 2nd Petitioner

Mr. Mhone, Counsel for 2nd Petitioner

Mr. Ndalama, Counsel for 2nd Petitioner

Mr. Mhango, Counsel for 1st Respondent

Mr. M'meta, Counsel for 1st Respondent

Mr. Gondwe, Counsel for 1st Respondent

Hon. Mr. Kaphale SC, The Attorney General, Counsel for 2nd Respondent

Mr. Chisiza, Attorney General Chambers

Mr. Mpaka, Counsel for Malawi Law Society (Amicus Curiae)

Mr. Ngunde, Counsel for Malawi Law Society (Amicus Curiae)

Dr Malunga, Counsel for Women Lawyers Association (Amicus Curiae)

Mrs. Pindani, Court Reporter,

Mr. Mutinti, Court Reporter

Mrs. Nyalaya, Court Reporter

Mrs. Mboga; Court Reporter

Mr. Chitatu, Interpreter

Mr. Nkhwazi, Interpreter

Mr. Munkhondya, Interpreter

Mr. Mathanda, Interpreter

Mr. Matchaya, Interpreter

RULING ON APPLICATION FOR SUSPENSION OF JUDGMENT

THE COURT

1. This is the Court's Ruling on applications for suspension of enforcement of judgment brought by the 1st and 2nd Respondents in respect of the judgment of this Court delivered on the 3rd day of February, 2020. The applications have been brought in terms of Order 28 rule 48 of the Courts (High Court) (Civil Procedure) Rules, 2017 (CPR, 2017).

PRELIMINARY ISSUES

2. The first issue raised by the petitioners is that the applications brought by the respondents herein are fatally defective in that they are not supported by sworn statements. In support of this contention, Counsel for the 1st Petitioner argues that the oath in the sworn statements in support of both Respondents' applications were not administered by Commissioners for Oaths as defined in sections 3 (2) and 4 (1) of the Oaths, Affirmations and Declarations Act, in that Messrs Musopa and Sikwese, who purported to administer the said oaths, in support of the

applications of the 2nd Respondent and the 1st Respondent respectively, are not licenced legal practitioners.

3. Counsel contended in his Skeleton Arguments that a document only becomes a sworn statement if the deponent takes an oath duly administered by a Commissioner for Oaths and that under sections 3 and 4 of the Oaths, Affirmations and Declarations Act, a Legal Practitioner is only a Commissioner for Oaths if he or she holds a valid licence issued under the Legal Education and Legal Practitioners Act (the 'LELPA'). In this regard, Counsel submits that the sworn statement of Justice Dr. Jane Mayemu Ansah, SC purports to have been signed before Mr Musopa of NBS Bank Ltd whilst the said Mr Musopa was not a licensed legal practitioner as at 7th February, 2020. It is his argument that Counsel Musopa therefore had no capacity to administer an oath at the material time.

4. It is in view of these circumstances that Counsel for the 1st Petitioner argued that there are no valid sworn statements in support of the Respondents' applications. Counsel fortified his arguments by submitting that under Order 28 rule 49 of the CPR, 2017, applications for the suspension of the enforcement of judgments must be supported by sworn statements, and that the consequence is that the Applications that are now before this Court are fatally incompetent and that they must therefore be dismissed. Counsel cited several authorities in support of the contention that acts done by legal practitioners who have not yet renewed their annual practicing licences are invalid. Counsel cited the following cases in this regard: *Mtunthama Farming Ltd v Agri-Courier Ltd*, MSCA Civil Appeal No. 82 of 2018 (per Mzikamanda SC, JA); Nkhoma *v Mlumbe*, Commercial Case No. 43 of 2016 (per Mtalimanja J); *Chimangeni Khamalatha v Secretary General of the Malawi Congress Party*, Civil Cause No. 1347 of 2015 (per Kachale J); and Suleman *v Suleman*, Civil Cause No 290 of 2014 (per Potani J).

5. Counsel further argued that this irregularity is not curable under section 7 of the Oaths, Affirmations and Declarations Act because, unlike irregularities regarding form which are curable under section 7, the requirement that a sworn statement be sworn before a competent Commissioner for Oaths is one that relates to substance. He contended that these missteps cannot be saved by Order 2 of the CPR, 2017 neither, because subsidiary legislation cannot

override a clear principle under a principal statute. He argued in this regard that dismissing these statements will be consistent with section 48 (2) of the Constitution and section 21 of the General Interpretation Act (Cap. 1:01).

6. The issue of matters relating to practicing licences should, in our humble view, not have arisen. The Court conveyed a clear message to the parties through the case management forum for this case that the Court did not want issues relating to renewal of practicing licences to cloud the proceedings herein. In conveying this message, the Court sought to put the parties on notice so that they should carefully examine the status of licence renewal for any legal practitioner involved in the formal legal process herein at any stage. We find it unfortunate that this issue has therefore still arisen.

7. The law is very clear: formal legal acts purported to be done by a legal practitioner who has not renewed his or her licence of practice are invalid. The authorities cited by Counsel for the 1st Petitioner are clear authorities on the point. In the circumstances of the present matter, the act of the unlicenced legal practitioner herein, purporting to administer an oath, was therefore invalid. Without a valid oath, a purported sworn statement is no sworn statement at all.

8. However, we notice that the 2nd Respondent has since rectified the position and has now filed a sworn statement properly sworn before a legal practitioner with a valid licence of practice. Counsel for the 1st Petitioner has taken issue with the filing of the rectified sworn statement. He argued that the same was filed without the permission of the Court.

9. The Court however, having considered all the circumstances of the matter, forms the view that the irregularity cited by Counsel Soko for the 1st Petitioner is one that is curable under Order 2 rule 3 of the CPR, 2017. We find that the filing of the rectified document has not prejudiced the petitioners in any way. Therefore, in terms of Order 2 rule 3 (c) of the CPR, 2017, the Court declares the sworn statement of Hon. Justice Jane Mayemu Ansah, JA, SC, sworn on the 11th day of February 2020 and filed on the same day before this Court to be ineffectual.

10. Counsel for the 1st Petitioner, in the Notice of Intention to Rely on Preliminary Objections, stated in the grounds thereof that Counsel Sikwese who administered the oath of Counsel Mbeta on his sworn statement in support of the 1st Respondent's application for suspension of enforcement of judgment, had not renewed his licence of practice as a legal practitioner as on the 7th of February, 2020. However, we observe that this allegation is not supported by any form of evidence whatsoever. It was simply stated in the Skeleton Arguments. In this regard, there is no merit in the 1st Petitioner's objection against the use of Counsel Mbeta's sworn statement on the purported basis that Counsel Sikwese who administered Counsel Mbeta's oath on the said sworn statement had not yet renewed his licence of practice.

11. The second issue that has been raised relates to the right of the Honourable the Attorney General to continue to represent the 2nd Respondent notwithstanding this Court's Direction of the 3rd of February, 2020. We wish to emphasise that what we stated in our judgment of the 3rd of February, 2020 in respect of the appearance of the Attorney General in those proceedings was a direction of the Court. It was not a mere comment as suggested by the 2nd Respondent.

12. Pausing there, we wish to refer to the case of *Misozi Chanthunya v. The Republic (Chanthunya Case 2)*, MSCA Criminal Appeal No. 2 of 2019, where Kamanga, JA was hearing an appeal against a High Court Order in *Republic v. Misozi Chanthunya, (Chanthunya Case 1)*, Criminal Case No. 11 of 2018 (High Court, Zomba). In the latter case, the High Court had ordered that Counsel Fostino Maele should cease representing the accused person, Mr. Misozi Chanthunya, on the grounds that he was conflicted having previously handled the same matter on behalf of the prosecution. The accused person appealed against the said High Court Order. On appeal, Kamanga, JA stated that:

> "Despite the order the court below made on 25th July, 2018, that he should not continue to represent the Appellant, and further despite the fact that the decision of the court below had not been stayed, Counsel Maele continued representing the Appellant and on 8th August, 2018 he filed, on behalf the Appellant, a notice of intention

to appeal to the Supreme Court of Appeal; on 10th August, 2018, he filed [an] *ex-parte* summons for stay of the trial in the court below, pending the hearing and determination of the appeal; on 5th March, 2019, he sought to appear in [the] court below, on behalf the Appellant, at the hearing of an application by the Respondent to discharge the order of stay of the trial in the court below granted on 12th October, 2018; on 15th May, 2019, he sought to obtain from the Registrar a copy of the a decision of the Supreme Court in the case of *Joyce Zione Gomani v Ernest Muza,* to enable him to prepare skeleton arguments for the Appellant's appeal; on 28th August, 2019, he filed an affidavit, opposing the Respondent's application to dismiss the Appellant's appeal for want of prosecution, as well [as] a notice of an application for my recusal from hearing the Respondent's application; and on 29th August, 2018, he sought to appear in this Court, on behalf of the Appellant in relation to the Respondent's application to dismiss the Appellant's appeal for want of prosecution."

13. The learned Justice of Appeal proceeded to state that:

"All the highlighted efforts of Counsel Maele, on behalf of the Appellant, amount to an exercise in futility. In this regard, and for the avoidance of doubt, it is important to stress that all court processes prepared by and/or filed by Counsel Maele and/or Messrs Maele Law Practice, for or [on] behalf of the Appellant, after the decision of the court below of 25th July, 2018, that Counsel Maele may not represent the Appellant, are of no legal effect while the decision of the court below stands. Furthermore, for purposes of determining the Respondent's application to dismiss the Appellant's appeal for want of prosecution, it is important to stress, particularly in relation to the notice of appeal filed by Counsel Maele, on behalf

the Appellant, on 9th August, 2018, that to the extent that the notice of appeal was prepared and filed by Counsel Maele, when he was and is not able to represent the Appellant, the notice of appeal has no legal effect, and there is, consequently, no valid appeal pending hearing and determination in the Supreme Court of Appeal."

14. It is very clear from these passages that once Counsel Maele had been declared conflicted by the High Court, it was no longer open to him to handle any other processes whatsoever on behalf of his client unless the High Court Order be successfully set aside or is otherwise reversed.

15. Considering that the effect of Kamanga JA's Order was that Mr. Chanthunya had no appeal before the Supreme Court of Appeal, he then brought another application, *Misozi Chanthunya v The Republic, (Chanthunya Case 3)*, MSCA Criminal Appeal No. 55 of 2019, for extension of time within which to appeal. This application came before Chikopa, JA. The Appellant was now represented by another legal practitioner, Counsel Ngunde. Chikopa, JA stated as follows:

> "The application was heard before my above mentioned learned brother Kamanga SC, JA. Quite apart from the matter of the application for a dismissal there was also raised the question whether or not Counsel Maele should be appearing before him for the Applicant in view of the trial Court's order that he was conflicted and should stop representing the Applicant herein. His Lordship's answer was in the negative. Then also came the question whether there was any appeal herein in view of Counsel Maele having been taken off this case on account of his being conflicted. His Lordship thought there was none. Anything done herein by Counsel Maele post the trial Court's order by way of appeal against the said Court's order was null and void. There is therefore no appeal in this Court against the ruling of the trial Court regarding Mr. Maele's status in so far as his representation of the Applicant is concerned."

16. The learned Justice of Appeal concluded as follows:

> "It is our considered view that as soon as Counsel Maele was in this case declared conflicted and therefore incapable of acting for the Applicant, he immediately ceased to be a legal practitioner in respect of whom the Applicant could exercise section 44 (4) rights [section 44 (4) of the Constitution]. And once that happened it was not and it is still not for the Applicant to appeal against such finding in the hope that upon success he can then be a legal practitioner of his choice. That would be equal to a litigant fighting against the powers that be's refusal to renew a lawyer's practicing license with a view to that lawyer being a legal practitioner of their choice...The application for a stay of proceedings in the trial Court is premised on the extension of time having been dismissed, there will be no such appeal. The application for stay is equally dismissed."

17. We have seriously considered the possibility that perhaps these decisions could be distinguished from the situation in which the Honourable the Attorney General finds himself. The Court has considered the circumstances in which the Attorney General finds himself in the present matter. We have also considered our direction on this issue of the 3rd of February, 2020. In addition, we have considered the representations of Counsel for the parties herein as well as Counsel for the Malawi Law Society, 1st amicus curiae herein. We form the view that whilst the Court was clear that in all future proceedings, the Honourable Attorney General should not represent the 2nd Respondent or any party at all in constitutional litigation unless he is a party to such proceedings, and that he should only appear in such proceedings in his own right as the public's defender of the Constitution, we did not clarify that this included barring him from appearing in any subsequent application within the present proceedings. For this reason, we resolve the doubt in his favour and our position therefore is that in so far as we are still dealing with Constitutional Reference No.1 of 2019, he is entitled to appear before us to make any application within the proceeding.

18. However, we are convinced that any proceedings in the Supreme Court of Appeal will certainly constitute future proceedings within the meaning of our Direction of the 3rd of February 2020.

19. Consistent with the Supreme Court of Appeal jurisprudence above, we therefore find that unless our direction of the 3rd of February, 2020 in this regard be stayed, the Honourable the Attorney General is not entitled to go and appear before the Supreme Court of Appeal on behalf of the 2nd Respondent in respect of the within proceedings. Indeed, the foregoing jurisprudence of the Supreme Court of Appeal demonstrates that it is for the Attorney General himself to appeal against the direction that was made against him and not for the 2nd Respondent to appeal against the same.

20. In the premises, we find that whilst we can entertain the Attorney General's application before this Court for the reasons we have provided above, the fact that he is not entitled to appear before the Supreme Court of Appeal on behalf of the 2nd Respondent in connection with the present proceedings entails that it is an exercise in futility for the Attorney General to apply before this Court for suspension of enforcement of this Court's judgment on the basis that he will be appealing against the judgment of this Court before the Supreme Court of Appeal on behalf of the 2nd Respondent. For this reason, we find that the 2nd Respondent's application for suspension of the enforcement of this Court's judgment of the 3rd of February, 2020 as filed and argued by the Attorney General cannot be sustained and it must fail.

21. Be that as it may, in the event that perhaps our position may be faulted, the we will still proceed to consider the merits of the 2nd Respondent's application

22. The third preliminary issue raised by the petitioners was that the 2nd Respondent's Notice of Appeal is incompetent because there are no minutes presented by the Chairperson of the Commission indicating the resolution of the Commission to appeal.

23. We observe that Counsel for the 1st Petitioner purports to rely on this Court's finding in its judgment of the 3rd of February, 2020 that there was need for the Chief Elections Officer to have shown minutes of the Commission authorizing him to appear in Court and give evidence

on behalf of the Commissioners. We find this argument misplaced on a number of fronts. First, we observe that in our judgment, we made it clear that the Chief Elections Officer, not being a member of the Commission and having no decision-making powers of his own in relation to the discharge of the Commission's mandate, needed to demonstrate that he had been authorised to appear before the Court to testify on behalf of the Commissioners. In addition, it was the Court's determination that the Commissioners would have been the best material witnesses to testify about the Commission's decisions. In the absence of Commissioners' testifying, the Court held that there was need for minutes to have been brought to Court about the Commission's decisions. Put simply, the Court was dealing with questions of evidence.

24. By contrast, we find nothing in our judgment of the 3rd of February 2020 to suggest that when filing a Notice of Appeal, the Notice of Appeal should be accompanied by minutes exhibited thereto. That is a very strange proposition of procedural law. The filing of a Notice of Appeal and Grounds of Appeal is a procedural step. It is not a question of evidence. We have taken a look at the Supreme Court of Appeal Rules, under Order III rule 2 thereof which deals with Notice and Grounds of Appeal. Again an examination of the rule shows that there is nothing in the rule that states or suggests that the Notice or grounds of appeal filed by a corporate entity must be evidenced by authority to appeal in the form of minutes or resolutions.

25. This preliminary objection has no merit and is accordingly dismissed.

MERITS

26. The law on suspension of enforcement (execution) of judgment is largely well settled. In this respect we take note that the parties are in full agreement on the applicable law and principles. Most significantly, all the parties including the amici have made reference to the case of *Mike Appeal and Gatto v. Saulosi Chilima* [2014] MLR 231 (SCA), as one of the local leading authorities on the subject where the Supreme Court of Appeal, per Chipeta JA, stated, at 238, as follows:

"In my reading and analysis of the various principles the case authorities discuss, I am satisfied that what emerges is that although there is an undeniable tug of war between, on the one hand the *The Annot Lyle* principle that as a general rule a Court of Law should not make it a practice to deprive the successful litigant of the fruits of his litigation while an appeal is pending, and on the other hand the *Church v Wilson (2)* principle that when a party exercises his right to appeal his said appeal, if successful, should not be rendered nugatory. [I]n the discretion the Court has in the circumstances to exercise (Sec: *Attorney General v Emerson*) about which way to go between the opposite directions these principles pull it towards, it ought to attach greater weight to the principle that the successful litigant should reap the fruits of his labour. As I have earlier observed, the case of City of *Bantyre v Manda and others* makes this point very pointedly, and goes even a step further as two earlier High Court decisions also do. Indeed, I see that apart from the *Chidzankufa v Nedbank Malawi Limited Case* also being in agreement with this authority, even the Supreme Court decisions in the cases of *In the Matter of Citizen Insurance Company Limited and In the Matter of the Registrar of Financial Services Act, 2010 v The Registrar of Financial Institutions* and *The Minister of Finance and the Secretary to the Treasury v Honourable Bazuka Mhango MP and others*, cited by the appellant itself, do vividly make the point that it is the party seeking a Stay that shoulders the onus to persuade the Court that such a Stay is essential, and that this it must do by making facts and evidence available for the Court's assessment."

27. As the law stands, it is clear that the onus lies on the party seeking suspension of the enforcement of judgment, in this case the Respondents, to demonstrate what injustice would be occasioned by the refusal to grant the suspension. This comes out clearly from the case cited

of *Speaker of the National Assembly, Ex-parte Hon. John Tembo*, MSCA Civil Appeal Number 27 of 2010 (unreported).

28. We must state at this juncture that we are mindful that the case before us has its own novelty in that it is a public interest litigation premised within public law as opposed to private law. It follows, therefore, that the principles on the subject which apply in private law have to be cautiously considered and cannot simply be applied wholesale.

29. The case for the 1st Respondent in his quest for a suspension order is that his fundamental constitutional rights would be rendered nugatory if the appeal succeeds and the suspension of the enforcement of judgement is declined. In paragraph 4.10 of his skeleton arguments, he has raised five points of contention in that respect.

30. First, that if the 1st Respondent succeeds both on the appeal and also on the fresh elections, then all the electoral stakeholders including the 1st Respondent would be put to great expense and harm which would be irrecoverable and irremediable.

31. The view of this Court is that democracy is an inherently expensive process. It is expected that in the course of determining who are legitimate leaders in a democratic set up, expense has to be incurred. Therefore, expense is not to be an impediment to the pursuit of legitimate election of leaders in line with applicable Constitutional and statutory provisions. We therefore strike a balance between the rights of the citizenry to be governed by those elected through due electoral process on the one hand, and the rights of those aspiring to govern on the other, in relation to the latter incurring expenses in the process. The balance tips in favour of the citizens' rights.

32. Secondly, the 1st Respondent lamented that the wanton expense on running a fresh presidential campaign and also conducting a fresh Presidential election will be rendered nugatory in the event of a successful appeal. The view of this Court is that the considerations on the first ground raised by the 1st Respondent apply with equal force here. The Court would not stop the pursuit

of constitutionally sound electoral processes on account of expense to those voluntarily aspiring to be elected. This ground is equally not tenable.

33. The 1st Respondent then contended that if the fresh elections would produce a different successful candidate and the same is sworn in and subsequently the appeal is successful there will be social and administrative chaos as the new president shall have appointed his own cabinet and officers in different capacities which will create confusion as there shall have been two elected presidents in two the different elections which is avoidable by way of suspending the enforcement of the judgment.

34. Having considered this argument, this Court is of the view that in the first place it is highly unlikely that elections would take place before the Supreme of Appeal determines the appeal herein. The main reason is that, as submitted by the Petitioners, appeals normally delay because of the process of preparation of the record of appeal. In this case, the court record will be ready without much delay considering that we already have a draft record. In the unlikely event that elections take place before the appeal is determined, there would not be chaos as suggested because the Supreme Court of Appeal would, in that case, exercise its inherent powers to make consequential orders to reflect the proper constitutional order in relation to the Presidency; just like this Court did when it determined that there was an undue election on account of breach of constitutional rights and provisions, irregularities and anomalies.

35. The 1st Respondent then argued that, if a stay is refused, Parliament shall be compelled to take legislative measures as prescribed by the Court which may be difficult to reverse if the Appeal is successful.

36. The view of this Court is that this argument by the 1st Respondent rests on very shaky premises. Parliament has power to make and unmake legislation subject to the Constitution. It has the power to repeal legislation. There is therefore no difficulty as envisaged by the 1st Respondent.

37. Lastly, the 1st Respondent contended that if a stay is refused, Parliament shall be compelled to take legislative measures as prescribed by the Court including provisions regulating a run off

in the event no candidate secures the 50%+ 1 vote majority. Yet Parliament evinced its intention to decline the 50% + 1 majority in 2018.

38. This Court has considered this argument and is of the view that Parliament is a living institution. The fact that the issue of majority was considered two years ago from today does not entail that the same is closed to consideration forever. The argument therefore does not stand.

39. In view of the foregoing, the 1st Respondent's application is dismissed in its entirety.

40. The 2nd Respondent's contention for suspension of the judgment is premised on three grounds.

41. Firstly, that in the matter at hand, the estimated budget for the fresh election is K43, 733, 950, 500. And that if the judgment of the Court were to be enforced, the above-mentioned amount, and more, will be spent by the 2nd Respondent. It is the 2nd Respondent's submission that the Petitioners shall not be able to reimburse the 2nd Respondent's expenses of running as fresh election in the event of success of the appeal herein and as such the 2nd Respondent would suffer great injustice and prejudice.

42. The Court has considered this argument and is of the considered view that the balance of electoral justice tips against this argument. The 2nd respondent shall not pay its own money. It is a taxpayer funded constitutional body. And cannot therefore contend that it will suffer loss. If any loss is to be suffered it would be the people of Malawi who would have suffered such loss as a consequence of the 2nd Respondent's mismanagement of the 21st May, 2019 Presidential elections. The argument by the 2nd Respondent therefore fails.

43. The 2nd Respondent then contended that, furthermore, the 2nd Respondent has the responsibility of conducting the said fresh elections. And having considered the court's judgment, 2nd Respondent is of the view that the 150-day period for conducting the fresh elections is not attainable and that the earliest possible time frame for the elections is within, at least, 261 days on 28th October, 2020 if the 2nd Respondent is to operate on an expedited calendar.

44. The firm of this Court is that the proposed fresh election calendar set by the 2nd Respondent smacks of luxury of time on its part which should not be the case in the circumstances of this matter. For instance, there is a month set for the proposed consultation with traditional leaders to do civic voter education. Considering that we are coming from an election recently held several months ago we are of the considered view that some of the proposed activities can be compressed within the prescriptions of the law. Further, the 2nd Respondent proposes six phases for voter registration. However, with proper resource mobilization the phases of registration may be reduced to three phases thereby reducing the registration in half. Therefore, the argument that the 150 days is short is therefore untenable.

45. Lastly, the 2nd Respondent noted that enforcement of the judgment of the Court herein will result in the Parliament making an enquiry into the competence and conduct of the 2nd Respondent's Commissioners and staff as directed by the court. It then argued that, considering the Court's comments on the conduct of the said Commissioners and staff, great injustice and prejudice would occasion the individuals in the event of the success of the appeal.

46. This Court has considered this contention. The firm view of this Court is that the Parliamentary Committee has oversight function over the 2nd Respondent. The expectation of this Court is that in discharging that oversight function Parliament would exercise its functions based on its own findings and not simply based on what this Court has found on the evidence. In other words, Parliament would exercise its independent function in the matter. We therefore find the 2nd Respondent's argument to be ill-conceived.

47. There was an argument that this Court cannot suspend enforcement of a declaratory judgment, for instance, that the 1st Respondent was not duly elected. Counsel for the Petitioners cited the case of *Aziwelo Nkhata v Opportunity Bank of Malawi and Aisile Ambele* Civil case number 490 of 2011 (High Court) (unreported). Whilst we agree that indeed enforcement of declaratory judgments cannot be suspended, we are of the firm view that the declaration in question herein was not made on a claim for a declaratory judgment but on a petition and as a statutory remedy. The Court also made consequential orders pursuant to sections 41(3) and 46 (3) of the

Constitution. In the circumstances, this Court does not agree that it cannot suspend its decision in this matter on account of the same having what appears to be some declaratory orders.

48. The 2nd Respondent contended that this Court should be guided by an analogy to be drawn from the provisions of section 63(3) of the Constitution which provides that:

> "The Speaker may, upon a motion of the National Assembly, postpone the declaration of a vacant seat for such period as that motion prescribes so as to permit any member to appeal to a court or other body to which an appeal lies against a decision which would require that member to vacate his or her seat in accordance with this section."

49. The learned Attorney General argued on behalf of the 2nd Respondent that considering that section 63(3) of the Constitution envisages that a decision to declare vacant a seat of a Member of the National Assembly may be stayed pending appeal, the justification for applying the same principle in respect of the high office of the President is even more compelling. Thus he invited the Court to be inspired by the provisions of the abovesaid section in this regard.

50. Counsel for the Petitioners argued that such analogy is inapplicable as section 63(3) of the Constitution relates to a stay pending appeal in respect of proceedings in the National Assembly whereas in the present matter we are dealing with an invitation to suspend (stay) a judicial determination of the High Court pending appeal.

51. We agree with the submissions of Counsel for the Petitioners that the analogy sought to be drawn by the Honourable the Attorney General in this regard is not applicable in the circumstances of the present matter, in that whilst the declaration of a vacancy of a seat of a member of the National Assembly is administrative in nature; the decision of the High Court such as in the present matter is a judicial determination and the manner in which such a decision is reached is very different from how the Speaker of the National Assembly would arrive at her decision.

52. In the final analysis, the application by the 2nd Respondent is dismissed in its entirety.

53. Costs are in the discretion of this Court. This Court makes no order as to costs.

54. This is the unanimous decision of the Court.

55. It is so ordered.

Delivered in Chambers at Lilongwe this 12th day of February, 2019.

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HONOURABLE JUSTICE H. POTANI

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HONOURABLE JUSTICE I. KAMANGA

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HONOURABLE JUSTICE D. MADISE

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HONOURABLE JUSTICE M. TEMBO

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HONOURABLE JUSTICE PROF. R. KAPINDU