



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**ELECTORAL MATTER NO. 44 OF 2019**

**IN THE MATTER OF SECTION 76 OF THE CONSTITUTION AND OF  
SECTION 144 OF THE PARLIAMENTARY AND PRESIDENTIAL  
ELECTIONS ACT**

**AND**

**IN THE MATTER OF THE UNDUE ELECTION OR RETURN OF  
HONOURABLE UCHIZI MKANDAWIRE AS A MEMBER OF THE  
NATIONAL ASSEMBLY FOR KARONGA SOUTH CONSTITUENCY**

**AND**

**IN THE MATTER OF ELECTORAL PETITION BY DUNCAN KAONGA**

**BETWEEN**

**DUNCAN KAONGA ..... PETITIONER**

**AND**

**ELECTORAL COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**AND**

**HONOURABLE UCHIZI MKANDAWIRE ..... 2<sup>ND</sup> RESPONDENT**

**Coram** : **HONOURABLE JUSTICE R MBVUNDULA**  
Chidothe, Counsel for the Petitioner  
Jere, Counsel for the 1<sup>st</sup> Respondent  
Mpaka, Counsel for the 2<sup>nd</sup> Respondent  
Chimang'anga, Official Interpreter

## RULING

### *Background*

There are two applications before this court.

The first was filed by the 1<sup>st</sup> respondent asking the court to grant an order setting aside or striking out an election petition of the petitioner on the ground that the same is irregular and/or incompetent and embarrassing to the 1<sup>st</sup> respondent the same having been filed pursuant to a non-existent law.

The second application was filed by the 2<sup>nd</sup> respondent asking for an order to strike out the election petition brought by the petitioner on the grounds of want of jurisdiction on the part of the court and for failing to disclose a reasonable cause of action in an election matter and for abuse of the court process.

The two applications were heard concurrently they being considered by the parties and the court as addressing substantially the same issues.

Mr Victor Jere, counsel for the 1<sup>st</sup> petitioner, filed a sworn statement in support of the 1<sup>st</sup> petitioner's application wherein he deposes to the following effect:

1. That the petition herein was filed on 22<sup>nd</sup> August 2019 apparently pursuant to section 76 of the Constitution and section 144 of the Parliamentary and Presidential Elections Act.
2. That whereas section 76(5)(a) of the Constitution confers on this court the jurisdiction to entertain applications for judicial review of the exercise of the 1<sup>st</sup> respondent's purported powers and functions, there exists no section 144

in the Parliamentary and Presidential Elections Act as the said Act ends at section 123.

3. That hence the petition is clearly irregular or incompetent and consequently embarrassing for the 1<sup>st</sup> respondent.
4. That on that ground the petition should be set aside or struck out for being incompetent and/irregular.

For the 2<sup>nd</sup> respondent is a sworn statement made by Mr Patrick Gray Mpaka, of counsel, to the following effect:

1. He deposes in like manner as Mr Jere as to section 76 of the constitution as well as the reference to and non-existence of section 144 of the Parliamentary and Presidential Elections Act.
2. That to the best of his knowledge the Constitution only ascribes to the High Court judicial review and appeals jurisdiction and not petitions jurisdiction as against the 1<sup>st</sup> respondent.
3. That the purported petition herein having been filed on 22<sup>nd</sup> August 2019 in respect of the Parliamentary elections which took place on 21<sup>st</sup> May 2019, whose results were announced on 27<sup>th</sup> May 2019, (and served on the 1<sup>st</sup> respondent on 27<sup>th</sup> August 2019 and on 29<sup>th</sup> August 2019 on the 2<sup>nd</sup> respondent) the petition was made out of time.
4. That the 2<sup>nd</sup> respondent not only denies the allegations alleged in the petition but also observes that the petitioner does not disclose how any irregularities complained of by the petitioner, if made out, would have affected the result under which the 2<sup>nd</sup> respondent was declared the winner for the disputed parliamentary seat.

In view of the foregoing Mr Mpaka believes that the petitioner's case has no merit, the jurisdiction of the court not having been triggered, and the process taken out being ill-timed and unsustainable by reason of which it ought to be struck out as ineffectual.

In response to both applications there are two sworn statements by Mr Cassius Omar Chidothe, counsel for the petitioner, wherein he states:

1. That the reference to section 144 was a clerical error and that the intention was to refer to section 114 of the Constitution. He expresses the view that the said clerical error does not occasion any prejudice to the 1<sup>st</sup> respondent.
2. That the petitioner has used the correct procedure.
3. That the matter of irregularities raised in the sworn statement of Mr Mpaka can only be resolved after a full trial.
4. That the 2<sup>nd</sup> respondents' application is misconceived and constitutes an abuse of court process.

### *Issues for consideration*

The following issues arise:

1. Whether the Constitution ascribes to the High Court judicial review and appeals jurisdiction only and not petitions jurisdiction as against the 1<sup>st</sup> respondent;
2. Whether the petition is brought under a non-existent law namely section 144 of the Parliamentary and Presidential Elections Act;
3. Whether the reference to section 144 of the Parliamentary and Presidential Elections Act is a mere clerical error and not occasioning any prejudice to the respondents;
4. Whether the petition was brought out of time;
5. Whether the petition was brought prematurely;
6. Whether the question of irregularities ought to be considered under this application.

### *Consideration and determination*

*Whether the Constitution ascribes to the High Court judicial review and appeals jurisdiction only and not petitions jurisdiction as against the 1<sup>st</sup> respondent.*

The case record seems to suggest that the petitioner has “originated” the petition a number of times. There is on the record a Table of Contents pertaining to an electoral petition, though nothing else attached thereto, bearing the date 31<sup>st</sup> May 2019 and

filed in the Principal Registry. There is another filing containing a Table of Contents, a Petition and supporting documents, bearing a Mzuzu Registry stamp dated 31<sup>st</sup> June 2019. These two sets of documents show the Petitions being brought pursuant to section 76 of the Constitution and sections 100 and 144 of the Parliamentary and Presidential Elections Act.

There is then another filing in the Principal Registry bearing the date 22<sup>nd</sup> August 2019 showing that it is brought under section 76 of the Constitution and section 144 of the Parliamentary and Presidential Elections Act. Noteworthy is the fact that section 100 is omitted from this last-mentioned petition. This is the petition now before me.

In so far as may be relevant to the issues at hand, section 76 of the Constitution provides:

**“76. Powers and functions**

(1) The Electoral Commission shall exercise such functions in relation to elections as are conferred upon it by this Constitution or by an Act of Parliament.

(2) The duties and functions of the Electoral Commission shall include—

...

(c) to determine electoral petitions and complaints related to the conduct of any elections;

...

(3) Any person who has petitioned or complained to the Electoral Commission shall have a right to appeal to the High Court against determinations made under subsections (2) (c) ...

...

(5) Without prejudice to subsection (3)—

(a) the High Court shall have jurisdiction to entertain applications for judicial review of the exercise by the Electoral Commission of its powers and functions to ensure that such powers and functions were duly exercised in accordance with this Constitution or any Act of Parliament; ...”

By way of summary this court has the following jurisdiction under section 76 of the Constitution, under which the petition before this court is brought:

1. jurisdiction to hear appeals from a determination by the Electoral Commission of petitions and complaints brought to it under section 76(2) (c) of the Constitution;
2. jurisdiction to entertain applications for judicial review of the exercise by the Electoral Commission of its powers and functions to ensure that such powers and functions were duly exercised in accordance with this Constitution or any Act of Parliament under section 5(a) of the Constitution.

No other jurisdiction is conferred upon the High Court by section 76 of the Constitution. Specifically that section does not provide for the making of a petition to the High Court against decisions of the Electoral Commission. Therefore in so far as the present petition is brought pursuant to the provisions of section 76 of the Constitution the same cannot be entertained on account of this court want of jurisdiction under the law cited.

The jurisdiction of the High Court to entertain election petitions is conferred by section 100 (1) of the Parliamentary and Presidential Elections Act where it is provided:

“A complaint alleging an undue return or an undue election of a person as a member of the National Assembly or 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 seven days, including Saturday, Sunday and a public holiday, of the declaration of the result of the election in the name of the person ...”

As already mentioned, however, the petition in its current form is made otherwise than under section 100 of the Parliamentary and Presidential Elections Act.

*Whether the petition is brought under a non-existent law namely section 144 of the Parliamentary and Presidential Elections Act; and whether the reference to section 144 of the Parliamentary and Presidential Elections Act is a mere clerical error and not occasioning any prejudice to the respondents*

It is conceded by the petitioner’s counsel that section 144 does not obtain in the Parliamentary and Presidential Elections Act. Counsel for the petitioner states that

reference to section 144 was a mere clerical error and should, presumably, be excused. Further, counsel submits, no prejudice has been occasioned by the alleged clerical error.

The respondents do not complain of prejudice. They complain of embarrassment. As I understand it, the respondents are saying that they have searched for section 144 in the Act in order to properly respond to the petition, to no avail. Embarrassing matter, in litigation, may well be understood from the explanation made under Order 18 of the Rules of the Supreme Court, though no longer governing our civil procedure. It is stated under practice note 18/7/11 that it is imperative that a party formulating their case against another must, for the other party to be on their guard as to what case they are to meet, and be able to formulate their defence, to be informed of all that is material to the case. If any one material statement is omitted the statement is bad and embarrassing. Proceeding on this understanding I would accept that reference to a non-existent provision in the law is embarrassing for how is one to determine what was in the mind of the other if not precisely disclosed?

Having said the above I would also be of the view that the reference to section 144 in this case is not a mere clerical error. The reason is that the alleged clerical error does not appear only once or twice. It repeatedly appears in all of the petitioner's documents, both those sets filed in the Mzuzu Registry as well as those filed in the Principal Registry. That in my opinion is a consequence of an omission by counsel to proof-read his papers and to cross check his references. In other it arises from less than careful preparation. Legal practitioners must be more meticulous than has been the case here. I do not therefore accept it to be a mere clerical error.

*Whether the petition was brought out of time or prematurely*

In so far as the petition cannot stand for want of jurisdiction it matters not whether the same was brought out of time or prematurely.

*Whether the question of irregularities ought to be considered under this application*

This is a matter of evidence and would be prematurely considered at this interlocutory stage.

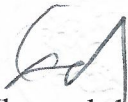
*The result*

The applications to set aside/strike out the petition succeed on the grounds:

1. that the same is brought under a wrong and/or non-existent law and consequently
2. that the court lacks jurisdiction to entertain the petition under the law relied upon by the petitioner.

Accordingly the petition is hereby struck and/or set aside with costs.

Pronounced in chambers at Blantyre this 31<sup>st</sup> day of January 2020.

  
R. Mbvundula  
**JUDGE**