



The Judiciary

IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

ELECTION CAUSE NUMBER 12 OF 2019

Between

DR. NDIFANJI NAMACHAPETITIONER

-and-

ELECTORAL COMMISSION1ST RESPONDENT

HONOURABLE LYANA LEXA TAMABALA 2ND RESPONDENT

CORAM: Austin Jesse Banda, Assistant Registrar

Mr. W. Hara, for the Petitioner

None for the 1st Respondent

Mr. Mambulasa, for the 2nd Respondent

Ms. F. Makhambera, Clerk/ Official Interpreter

Banda

RULING

Background

Dr. Ndifanji Namacha (“the Petitioner”) petitioned the Court against the Electoral Commission (“the 1st Respondent”) alleging that the 1st Respondent unlawfully declared Honourable Lyana Lexa Tambala (“the 2nd Respondent”) as a winner of Mulanje North Constituency Parliamentary elections of 21st May, 2019, before addressing issues of irregularities that affected the result. She prayed for orders that the Court should nullify the election and that a fresh election be conducted.

The 2nd Respondent later applied to the Court under Order 6 of the Courts (High Court)(Civil Procedure) Rules, 2017 (“CPR”) to be added as a party stating that she would be affected, but unheard, if the Court allowed the petition. The Court allowed the application by the 2nd

Respondent to join as a party. The Petitioner then withdrew her petition by Notice of Withdrawal and Discontinuance under Order 12 rule 46 CPR, dated 21st October, 2019.

The 2nd Respondent filed a Bill of Costs and a notice of appointment for the assessment of costs against the Petitioner. The Petitioner filed a notice of preliminary objection, a sworn statement and skeletal arguments in objection to the assessment of costs proceeding. The 2nd Respondent opposes the objection. This Ruling is therefore on the preliminary objection raised by the Petitioner and opposed by the 2nd Respondent.

Arguments

The objections by the Petitioner were three fold. The first was that the Court made no Order as to costs. The second one was that the matter was discontinued on the terms that each party will bear its own costs. Lastly, the Petitioner is of the firm belief that the 2nd Respondent was not a necessary party, she applied to join the proceeding herself and as such the discretion to award costs cannot be exercised in her favour in the circumstances.

The 2nd Respondent replied to all the arguments from the Petitioner. For reasons that will be shown later, I will not reproduce the arguments.

Issue

The only issue to be determined by the Court in this preliminary objection is whether the step to assess costs in this proceeding lacks a basis and should be dismissed.

Determination

The first line of argument by the Petitioner in objecting to the assessment of costs by was that there was no Order by the Court as to the Costs. It was also apparent from the argument by the 2nd Respondent in opposition to this position by the Petitioner that there was no Order by the Court awarding any party costs, that the 2nd Respondent too, was of the mind that there was not an Order per se by the Court. A perusal of the case file however, is clear that there is actually an Order made by the Honourable Justice Madise dated 21st November, 2019 ordering costs consequent to the withdrawal. The Order is as follows:

*Upon reading the Notice of Withdrawal and Discontinuance filed by the Petitioner, this Court makes an order that the matter is withdrawn and struck off the Cause List **with costs.** [Emphasis supplied].*

Essentially, the Order is to the effect that the Petitioner must pay costs incurred in this matter this far. Ordinarily, both Respondents should have been entitled to be paid the costs as per the Order of the Court stated above. However, I am aware that the Petitioner did engage with the 1st Respondent on the issue of costs, where it was agreed, as a paragraph in the Notice of Withdrawal and Discontinuance will show, that each party shall bear its own costs (as between the Petitioner and the 2nd Respondent). With the foregoing, it is abundantly clear that the Order by the Court therefore relates to the 2nd Respondent recovering costs.

It should be clear as well from the foregoing that the Petitioner's argument that the Notice of Withdrawal and Discontinuance was on the basis that each party would bear own costs did relate only to the 1st Respondent. The Notice of Withdrawal and Discontinuance filed by herself is clear that the bearing of own costs was by agreement between herself and the 1st Respondent. It did not concern the 2nd Respondent.

Lastly, having found as I have above, it is my conviction that it is not necessary to delve into determining the argument whether the 2nd Respondent was the right party or not. It is of no consequence at all, having found that the Court ordered that the withdrawal and discontinuance be with costs, and especially that these the costs be paid to the 2nd Respondent. The assessment of costs here-in therefore has a lawful basis.

Conclusion

The Notice of Withdrawal and Discontinuance filed on 23rd October, 2019 was with the consequence that the Petitioner had to pay costs as per the Order of the Court of 21st November, 2019. The assessment of costs is well founded as such, and it must proceed. The objection by the Petitioner is hereby dismissed. The 2nd Respondent to file a notice for the assessment of costs to proceed on a date to be set by the Court. I make no order on costs of this application.

Made this 18th day of February, 2020.



Austin Jesse Banda

ASSISTANT REGISTRAR