



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
MISCELLANEOUS CRIMINAL APPLICATION NO: 10 OF 2022
(Being Criminal Case No. 934 of 2021 before the Chief Resident
Magistrate Court at Lilongwe)**

BETWEEN

CHRIS CHAIMA BANDA.....APPLICANT

AND

THE REPUBLIC (ANTI-CORRUPTION BUREAU).....RESPONDENT

CORAM: THE HONOURABLE JUSTICE R.E. KAPINDU

Mr. Nthewa, Counsel for the Applicant

Mr. C. Saukila, Court Clerk/Official interpreter

ORDER

KAPINDU, J

1. This is the Court's Order following an *ex-parte* application made by Mr. Chris Chaima Banda, hereafter referred to as the Applicant, for this Court to call for the record, and to review the decision of the Court of the Chief Resident Magistrate Court sitting at Lilongwe, in the case of *Republic vs Hon. Newton Kambala and 2 Others*, Criminal Case Number 934 of 2021.
2. The decision in respect of which the review is sought is that of Hon. Justice Patrick Chirwa, made on the 11th of April, 2022, to continue presiding over the matter notwithstanding his recent appointment as a Judge of the High Court. It is being argued by the Applicant that Hon. Justice Chirwa lacks jurisdiction, as a matter of law, to continue to preside over the case in the capacity of a Chief Resident Magistrate Court. He forms the view that another Magistrate should take over the matter for the remainder of the trial. The learned Judge was seized of the matter in his capacity as Chief Resident Magistrate before his recent appointment as a High Court Judge.
3. When the parties brought the issue of jurisdiction before Hon Justice Chirwa, sitting as Chief Resident Magistrate, the Court, on 11th April, 2022, made its determination clear that it would proceed with the matter with the learned Judge sitting as Chief Resident Magistrate. The Court followed up this determination with a reasoned perfected ruling delivered on 20th April, 2022. The Court premised its decision on section 108(1) of the Constitution, that gives the High Court unlimited original jurisdiction, and section 5A of the Courts Act (Cap 3:02 of the Laws of Malawi) that gives every Judge of the High Court all the powers of any subordinate Court under any law.

4. The application has been made under section 26(1) of the Courts Act as read with section 362(1) of the Criminal Procedure and Evidence Code (Cap 8:01 of the Laws of Malawi) (CP & EC).

5. Section 26(1) of the Courts Act provides that:

“(1) In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require.”

6. Section 362(1) of the CP & EC on the other hand provides that:

“In the case of a proceeding in a subordinate court the record of which has been called for or which has been forwarded under section 361, or which otherwise comes to its knowledge, the High Court, by way of review, may exercise the same powers as are conferred upon it on appeal by sections 353 (2) (a), (b) and (c), and 356.”

7. It is evident that section 362(1) cited by Counsel refers to section 361 of the CP & EC, so it is perhaps germane to examine the text of section 361 of the Code. Section 361 is in the following terms:

“(1) Any Resident Magistrate may call for and examine the record of any criminal proceedings before a subordinate court of the first, second, third or fourth grade, for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior subordinate court.

(2) If any Resident Magistrate acting under subsection (1) considers that any finding, sentence or order of the subordinate court of the first, second, third or fourth grade is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the High Court.”

8. It is clear from these provisions that the procedure under the CP & EC that the Applicant seeks to invoke is incompetent. Wrong provisions of the law have been cited. The provisions cited empower a Resident Magistrate, of whatever level, to call for a record before a subordinate court of the first, second, third or fourth grade, for the purpose of satisfying himself or herself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior subordinate court.
9. In the present matter, the decision sought to be reviewed is not that of an inferior subordinate Court. It is that of a Chief Resident Magistrate Court. The provision cited under the CP & EC is therefore inapplicable.
10. This Court will, however, not be so pedantic as make an adverse decision simply on account of that procedural lapse. What Counsel should

have done was to simply read the last preceding provision in the CP & EC, namely section 360 of the CP & EC which provides that:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of reviewing the proceedings and satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

11. That, for Counsel’s guidance, is the correct provision to cite when making applications of this nature.
12. Coming to the substance of the application, the question for the Court’s decision is a very simple and straightforward one. It is whether the learned Judge having conduct of the matter has the jurisdiction to continue presiding over the matter, having been appointed Judge of the High Court. I agree with the Court below that there was nothing complex about this issue.
13. This Court quickly observes that the present application is a typical example of a frivolous and vexatious application. There is no need to call for the record, let alone hear the parties on this matter.
14. Section 5A of the Courts Act (Cap. 3:02 of the Laws of Malawi) is clear and plain. It provides that: *“Every Judge shall, in addition to such other powers as may be conferred upon him, have all the powers conferred on any subordinate court by any written law.”*
15. The term *“jurisdiction”* in reference to a Court refers to the power of a court to inquire into a matter, apply the law, and make a judicial

decisions thereon. The Black's Law Dictionary, 8th Edition, defines jurisdiction as "A court's power to decide a case or issue a decree."

16. In order to give the issue better context, it is appropriate to refer to the provisions of section 108(1) of the Constitution which uses the term "jurisdiction" in reference to a Court. Section 108(1) of the Constitution provides that:

"There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law."

17. Expounding on the import of this provision, in the case of *Liquidator of Finance Bank (in voluntary Liquidation) vs Kadri Ahmed and Sheith Aziz Bhai Issa (Aziz Issa case)* MSCA Civil Appeal No 39 of 2008, the Supreme Court of Appeal explained that: "The scheme of [section] 108 of the Constitution was to give unlimited power to every judge of the High Court to hear and determine any case."

18. Likewise in *Hetherwick Mbale vs Hissan Maganga*, MSCA Civil Appeal Cause No. 21 of 2013, the Supreme Court of Appeal explained that: "The intention of [section] 108 of the Constitution was to empower High Court judges to deal with cases of whatever kind and dispense justice." In the case of *Village Headman Chakwera vs Village Headman Mponda* Civil Appeal No 30 of 1997 (H.C.), Chikopa J (as he then was), stated that:

"It is clear that the respondent has a good case on the merits. Whereas the lower court had no jurisdiction to entertain this matter this court has. It also has power to order that which the lower court could not. Taking all matters into consideration therefore this court is of the view that the justice of this case demands that this court make the order that the lower court in

its zeal to do justice made in the absence of the requisite jurisdiction.”

19. It is evident from all these decisions and other authorities that when the law makes reference to the jurisdiction of a Court, it is referring to the power of that Court to do things that are specified or envisaged in the law conferring the jurisdiction.

20. As stated earlier, Section 5A of the Courts Act is manifestly clear. A Judge of the High Court has all the powers of a Magistrate, under whatever law such powers are conferred on the Magistrate. Put differently, a High Court Judge has the jurisdiction to do anything that the law empowers a Magistrate to do. The difference in terms of jurisdiction or power is that a Judge of the High Court has far greater powers than a Magistrate. In the *Mbale case* above, the Supreme Court of Appeal described the powers of a High Court Judge as “*vast*”. Put differently, the powers of a Magistrate are a subset of the powers of a High Court Judge and not vice versa. This is the clear import of section 5A of the Courts Act.

21. I must say that I find it quite surprising that that Counsel made no reference at all to the provisions of section 5A of the Courts Act in the present Application, even though the learned Magistrate clearly made reference to the provision in his decision. It would appear to me that this might have been done deliberately to create the impression that the Court below simply relied on the provisions of section 108(1) of the Constitution. I will not even comment on whether reliance on that constitutional provision was proper or not, because the matter is effectively resolved by reference to section 5A of the Courts Act. On the principle of constitutional avoidance, I do not find it necessary to advert to section 108(1) of the Constitution. Reference to section 108(1) of the Constitution above is

merely for providing clarity of reasoning on the meaning and import of the term “*jurisdiction*”.

22. It is the finding of this Court that the Application herein is hopeless, with no prospect of success at all, and the threshold for triggering this Court to exercise its powers under section 26(1) of the Courts Act to call for the record of the Court below in order to review the proceedings therein has not been reached.

23. Let me also mention that in the case of *Billiat Luberto Gadabwali v State* [2013] MLR 14 (SCA), Chipeta JA stated at page 24 that:

“[I]t is my belief that the fact that I am a Judge on Appeal does not mean that I have now lost all the powers I enjoyed as a first instance Judge. I in fact apprehend that...I still have the combined powers of a Puisne Judge and added powers...”

24. Unlike section 5A of the Courts Act, there is no explicit provision that states that a Justice of Appeal has all the powers of a High Court Judge, but the learned Justice of Appeal clearly suggested so. I must say that I am as much bound as I am convinced about the correctness of this pronouncement by the Supreme Court of Appeal. Just as was expressed by the learned Justice of Appeal in the *Gadabwali* case, it is likewise the position of this Court that the fact that Hon. Justice Chirwa is now a High Court Judge does not mean that he has now lost all the judicial powers he enjoyed as Chief Resident Magistrate. He now has a combination of the judicial powers of a Chief Resident Magistrate and added powers. In the instant case though, he may only exercise the judicial powers of a Chief Resident Magistrate that he fully has.

25. It is also interesting to observe that whilst it emerges very clearly, in particular from section 5A of the Courts Act, that the learned Judge herein has the jurisdiction under the law to exercise the powers of a Magistrate as a subordinate Court, it is paradoxical that Counsel did not cite any law that, by contrast, clearly states that a High Court Judge has no jurisdiction to exercise the powers of a Magistrate.

26. I should also point out that my remarks herein obviously do not mean that High Court Judges will be all too happy to get into the subordinate Courts' arena and take up any matters that they would wish to try as they may please. Judges always, and will always exercise their powers judiciously. They will, at all material times, be aware that they have more than enough of their own High Court specific matters to worry about. However, in peculiar cases, and these to my mind include instances where there is change in the official status of the presiding officer from a Magistrate to a Judge in middle of an ongoing trial, it is to my mind an exercise of judicial prudence for the Judge to proceed with and conclude such a matter whilst still sitting as a Magistrate.

27. I should, on this point, before closing, restate, albeit briefly, what this Court has now repeatedly stated about review applications under section 26(1) of the Courts Act and, in criminal cases, as read with section 360 of the CP & EC. This Court has emphasised that these review powers should be exercised sparingly and only under very compelling circumstances. In the case of *Paul Norman Chisale vs Republic*, Miscellaneous Criminal Application No. 4 of 2021, this Court stated, in this regard, that:

“The approach of invoking this Court’s supervisory and/or review powers in ongoing proceedings in subordinate Courts very sparingly is, in this Court’s view, necessary for purposes

of proper case management and the smooth process of judicial proceedings in the subordinate Courts. Judicial processes in subordinate Courts might become chaotic, and the High Court would become clogged with review applications, if this Court were to readily admit applications for review in ongoing proceedings every time a party feels disagreeable with a particular decision made by such Court during a proceeding.”

28. In the case of *Shepherd Bushiri & Another vs Government of the Republic of South Africa*, Criminal Review Case No. 11 of 2021, this Court further clarified that the review process under these provisions:

*“is an unusual process that is meant to check against the handling of cases in subordinate courts that appears to be flagrantly incompetent, abusive, unlawful or such as would otherwise show that the proper administration of justice is clearly being frustrated or is such as would demonstrably lead to a manifest and incorrigible failure of justice. If the Court detects the existence of any or a number of these serious risk factors in the trial procedure, and that failure to immediately intervene may result in an incorrigible failure of justice, the Court may call for the record, review the proceedings and the High Court, with its unlimited original jurisdiction has extensive powers of remedying them. See *In re: Criminal Case No 42 of 2013 and related matters; Ex parte People’s Trading Centre Ltd: S v Attorney General (The First Grade Magistrate Anthony C. Banda)* [2013] MLR 96 (HC), at Page 98.”*

29. I restate these remarks to emphasise the need for parties, and indeed for Counsel, to exercise restraint when deciding on what matters to bring up to the High Court under the review procedure. Parties and their

Counsel should diligently and carefully exercise their minds before making a decision to call upon this Court to stop ongoing proceedings in a subordinate Court for review purposes. Obviously, where the grounds are sufficiently meritorious, the review process is a remedial avenue open to an aggrieved or concerned party.

30. I also wish to mention that this Court is deeply troubled by the allegation made by Counsel, an officer of the Court, made in the Skeleton Arguments, that in his view *“the Court has personal interest in the matter as he does not want to let go of the matter.”* This is a scurrilous allegation made by an officer of the Court against the Court, which is deeply unfortunate when one examines the application in its entirety. The Applicant seeks to make a mountain out of a molehill by alleging that the Court below remarked that from the indications made by the State the last 3 witnesses are likely to be brief. Such a statement, whether it would indeed be substantiated by the record of proceedings or not, provides no warrant whatsoever for Counsel making such an allegation. I see no inherent prejudice whatsoever in such a statement.

31. Pausing here, I wish to recall the words of the Supreme Court of Appeal made in *Arthur Peter Mutharika & Anothers vs Saulos Klaus Chilima & Another*, MSCA Constitutional Appeal No. 1 of 2020, where, referring to some of the grounds of appeal made by the 2nd Respondent, the Court said the 2nd Respondent made:

“unwarranted and baseless allegations, including allegations of bias, against the Court below. Allegations of bias, especially against a court, should not be lightly made, but must be based on concrete and provable evidence... We have to say some of the grounds were not just fictitious, but clearly unprofessional and distasteful.”

32. Making an allegation against a Court that the Court has “*personal interest in the matter*” and this is why “*he does not want to let go of the matter*”, given the context in which the Applicant claims that the remarks were made, and indeed after examining the text of the lower Court’s decision on the matter as exhibited by the Applicant’s Counsel to the affidavit in support, is to my mind an even worse allegation than a mere suggestion of bias. I can therefore not add more to the words the Supreme Court used above in describing the conduct of Counsel in making the scurrilous allegation that he has made against the lower Court herein. Accusing a Court of having a personal interest in a matter simply because the Court has exercised its normal judicial discretion, as it is perfectly entitled to under the law, is as unprofessional as it is distasteful.

33. The application herein is dismissed in its entirety and the proceedings in the Chief Resident Magistrate Court herein shall proceed before Hon. Justice Patrick Chirwa sitting as, and exercising the powers of, a Chief Resident Magistrate at Lilongwe in the matter.

34. It is so ordered.

Made in Chambers this 25th day of May, 2022 at Lilongwe.

R.E. KAPINDU
JUDGE