IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

CIVIL DIVISION

JUDICIAL REVIEW CASE NUMBER 05 OF 2022

(Before Hon. Justice MZONDE MVULA)

BETWEEN:

THE STATE (ON APPLICATION BY HON SHADRICK NAMALOMBA MP.....CLAIMANT

AND

LEADER OF OPPOSITION (HON KONDWANI NAKHUMWA M.P).....1ST DEFENDANT

SPEAKER OF THE NATIONAL ASSEMBLY.....1ST INTERESTED PARTY

DEMOCRATIC PROGRESSIVE PARTY.....2ND INTERESTED PARTY

RULING ON APPLICATION TO DISPOSE CASE ON POINTS OF LAW

CORAM

HONOURABLE JUSTICE MZONDE MVULA - PRESIDING

FOR THE CLAIMANT

1. **Mr. Lusungu Gondwe**
2. **Mr. Gonjetso Dikiya**

FOR THE DEFENDANT

1. **Mr. Cassius Bin Omar Chidothe**
2. **Mr. Yusuf Nthenda**

FOR THE FIRST INTERESTED PARTY

1. **Mr. Thabo Chakaka Nyirenda- the Attorney General**
2. **Mr. Neverson Chisiza- Principal State Advocate**
3. **Mr. Chrispin Kalusa- Senior State Advocate**
4. **Mr. Masauko Chijere- Legal Officer for Parliament**

ORDER

MVULA, J.

1.0 **Introduction**

1.1 The Claimant moved the court on 8th March 2022, for permission to apply for Judicial Review. Interim reliefs, notably of stay of the decisions of the Defendant and interlocutory injunction restraining implementation of the decision made in Parliament, on 15th February 2022 allocating the Claimant seat 99 and later 100 for Parliamentary deliberations were made. Claimant contends that the same is *ultra vires* the powers of the Defendant who acted unlawfully and unreasonably.

1.2 The Court granted Claimant permission to apply for Judicial Review. The order was made to subsist, until its further order(s), of this Court, which in part went as follows:

> (a) the decision made on or around 15th February 2022 altering sitting arrangements in the National Assembly by re-allocating the Claimant to Seat 99 and later Seat Number 100 from Seat Number 25;
> (b) appointing a shadow cabinet for the 2nd interested party without consultation with and approval of the 2nd interested party;
> (c) decision appointing Parliamentary spokesperson for 2nd Interested Party without consultation and approval of the 2nd Interested Party.

1.3 Further orders were made against the Defendant:

> (a) restraint from discharging the duties of the office of Leader of Opposition without consultation and with written approval of the Second Interested Party.
> (b) restraint of the First Interested Party from acting or recognizing the decisions of the Defendant in the absence of proof in writing to the satisfaction of the 1st interested party that the 2nd interested party has
> been consulted by the Defendant and that the 2nd Interested Party has approved the said decisions of the Defendant.

1.5 Defendant and the First Interested Party challenge the orders. The issues that the court, now turns to determine are:

(a) Can the Court interfere with internal Parliamentary matters? Does the Court's inquiry into the conduct of Parliament tantamount to a fundamental breach of

Parliamentary privilege? Does the court have jurisdiction over internal Parliamentary decisions made by the Speaker of the National Assembly?

(b) Is the issue pertaining to appointment of a cabinet and allocation of seats in Parliament justiciable?

(c) Can a court interfere in intra political party disputes and indoor political party matters?

(d) Whether the speaker of the National Assembly is at law duty bound to satisfy herself that communications to her office by the Leader of Opposition followed consultations and with approval by the political party to which the said leader of Opposition belongs to?

1.6 Defendant sets out that he is a wrong party to the proceedings. The Claimant has sued the wrong party. According to the law, Standing Orders of Paliament do not recognize allocation of seats. They recognize reservation of seat or put simply how a seat should be reserved for Member of Parliament. Whither *nomen clature* is used, the task is performed by the Speaker of the National Assembly. In this regard, the Defendant cannot be said to have allocated the seat.

1.7 The Defendant furthers that the Claimant has misrepresented facts in four scenarios:
(a) That Defendant allocated seats in National Assembly;
(b) That Claimant is spokesperson of the Democratic Progressive Party;
(c) That allocation of seat is based on seniority of membership;
(d) That by seat change, he cannot meaningfully represent constituents.

1.8 On a more serious footing, the function of the Speaker of Parliament to reserve seats to Members of Parliament should not be amenable to Judicial Review. Moreover, the claimant came to court without exhausting internal alterative remedies available. He wrote the Speaker on 17th February 2022 over reservation of seats. He is yet to get a response to that. The interim orders that the claimant obtained went outside the scope. In any event, the application for Judicial Review was made while Parliament was in session to effect that session of

Parliament where the Leader of Opposition requested Speaker on fresh sitting arrangement in Parliament. This violates Parliamentary privilege for which the leave for Judicial Review should be dismissed with costs.

2.0 Response by the Claimant

2.1 The decision to be reviewed is allocation of seats and related decisions. Claimant calls the Court to review, whether Leader of Opposition rightly made impugned decisions. It does not call the Court to regulate Parliamentary proceedings. The Defendant according to them allocates seats in Parliament. This is because sworn statement in opposition, the Defendant said that under order 39(3), he is empowered to allocate seats. Paragraph 6 and 7 of the sworn statement the Defendant says he has power so to do.

2.2 There was no suppression of material facts. The effect of the injunction referred to by the Defendant and the First Interested Party was to stop the Claimant from exercising functions of the Spokesperson of the Second Interested Party. It was not to declare his position a nullity. He remains senior in the Party. In any event, suppression should be of a fact that is material to the matter at hand. It should be important to the determination of the matter. The misrepresentation here is not material.

2.3 From the evidence, Claimant should be allowed to prosecute the matter because he has an arguable case. The evidence is found in newspaper cuttings and statement by the Speaker under Paragraphs 6 and 7 of her sworn statement. As such the issues are not about Parliamentary procedures. They are about office bearer of Leader of Opposition, and not regulating the office Speaker or proceedings in Parliament.

2.4 Exhibit SN 5 being letter addressed, seeks the Speaker to act from 12th February 2022. Without reaction from the latter, Claimant came to court on 5th March 2022 for redress. He could not wait longer because his human rights and specific provisions in the Disability Act affecting

him were at stake. The Speaker had abdicated her responsibility. That allowed a right holder to come to court under section 41(3) of the Constitution.

2.6 The Attorney General has not paid regard to legal authorities to the effect that Parliamentary proceedings are subject to the Constitution. Events in Parliament which give rise to Constitutional provisions, are amenable to Judicial Review proceedings. The Constitutional right of Claimant to political participation, refers. The inquiry by the Attorney General only starts with section 26 of National Assembly (Parliamentary Privileges Act) *Cap* 2:04 of the Laws of Malawi. It should not start there. Instead, it should have started with section 56 of the Constitution of Malawi. The fact that matters arose during parliamentary proceedings does not place them beyond scope of Judicial Review.

2.5 No court can throw out a case because it is based on intra party politics. Rather, because the case is not arguable. The decisions to appoint a shadow cabinet and to appoint spokesperson for the Party without conducting proper consultations were not mentioned, form part of package Claimant seeks review on. The case is about constitutionally guaranteed rights to non-discrimination and political participation. The court must be slow to interfere in political affairs in political parties, does not mean courts must not intervene at all. Where grievances are genuine, the Court has jurisdiction to intervene.

3.0 **Right of Reply by the First interested Party and the Defendant**

3.1 The Attorney General concluded that there is no response by the Claimant that the proceedings are valid despite being commenced while Parliament is in session. The claimant is cherry picking the cases they cite to make their case. Looking at Form 86A, the application does not mention constitutional validity in the cases cited. The issues at Parliament such as reservation of seats, it is for the House alone to determine, from its own procedures. Parliament is about hearing,

Members submit to Parliament through the Speaker. The latter sits Members according to Standing orders upon request by Leader of House and Leader of Opposition. Therefore interpretation of this standing order is done at Parliament, and not in the Court, unless justiciable.

3.2 Reservations of seats and appointments into Committees in Parliament are administrative. These were already decided as not justiciable. The Court therefore should be slow to interfere in such affairs. The issue at Court is about allocation of seat and not appointment of shadow cabinet or spokesperson. Order 39 of Parliament Standing Orders of parliament made under section 56(1) of the Constitution. The Defendant does not reserve seats in Parliament. It is the Speaker who seats Members in Parliament. In so far as there is challenge to reserve a seat, the action cannot be brought against the Defendant but the Speaker. The request for such allocation or reserve by the Defendant cannot be amenable to Judicial Review. The matters raised by the Claimant are internal in Parliament, based on intra party politics. Therefore, not justiciable.

3.3 Other than questioning justiciability of this matter, the Claimant suppressed material facts. At the outset, the argument is premised on section 5 of National Assembly (Parliamentary Privileges Act) *Cap* 2:04 of the Laws of Malawi. The Speaker cannot be served with court documents when Parliament is in session. The same, violates Section 5 aforesaid. It remains their prayer that leave granted to commence Judicial Review should be dismissed with costs.

4.0 **Issues for determination**

4.1 There are 4 fundamental questions which we have to discuss and determine. We shall pose the question and if successful leave to proceed for Judicial Review shall be argued at trial. The questions are:

4.1.1 Should Courts be involved to inquire in the conduct of Parliament?

4.1.2 Should Court intervene in intra political party disputes and indoor management of political party matters?

4.1.3 Should Leader of Opposition consult his constituents including the Speaker of National Assembly in making communication and strategic decisions?

4.1.4 Should Court interfere with internal Parliamentary matters?

4.2 Court already alluded to the doctrine of separation of powers in our earlier ruling. We reiterate it here that the doctrine of separation of powers ensures that the 3 branches of Government are working together and each is discharging its mandate according to law. The key attributes of **membership, control and function** must be isolated. No **member** of one branch of Government can be a member of another branch. Further, no branch of Government should exercise **control** of another branch. Finally, no branch of Government is permitted to exercise the **function** of another branch. See Section 7 to 9 of the Constitution of the Republic of Malawi.

4.3 Courts have power to review executive acts by public bodies by virtue of section 9 and section 103(2) of the Constitution. The Judicial Review tool for checks and balances is reserved by the above stated sections. Judicial Review of administrative function therefore makes other branches of Government accountable for their actions. The focus is on legality or illegality of the actions by public bodies.

4.4 The body under consideration for review by the Court is Parliament. The Speaker and Members of Parliament constitute the house. As an independent autonomous organ, Parliament enjoys certain privileges and immunities. The starting point is section 56(1) of the Constitution. It reads:

> "Subject to this Constitution, the National Assembly, the Senate or may by Standing Order or Otherwise regulate its own procedure."

4.5 Parliament, as self-regulating, separate organ of Government of Malawi, and autonomous body over how business in the house is conducted. Business in Parliament is regulated by Standing Orders, whose latest edition was adapted by the House on 5th November 2013, made under Section 56(1) of the Constitution of Malawi. In such quest, the argument by the First Interested Party is that no court action shall lie for business that is parliamentary and internal in nature. The Court cannot supervise the Speaker of Parliament in conduct of duty, unless there is a violation of the Constitution, which violation must be clearly stated.

4.6 Section 5 of the National Assembly (Parliamentary Privileges Act) espouses the position on the autonomy of Paliament. It reads:

> "**No process issued by any court** in the exercise of its jurisdiction shall be served or executed within the precincts of the Assembly **while the Assembly is sitting** or through the Speaker, the Clerk or any officer of the assembly"
> [Emphasis supplied]

4.7 Reading this section under the microscope, one does not fail to notice that while the National Assembly is in session, the Speaker, the Clerk of Parliament and indeed any Member of Parliament, shall not be served with any Court process. This in essence flags the doctrine of Parliamentary privilege which the Speaker of Parliament under paragraph 13 of her sworn statement, is deponent.

4.8 The separate status and function is embellished by section 26 of the same Act. It reads:

> "**Neither the Speaker nor any officer of the Assembly, shall be subject to the jurisdiction of any Court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act**,"
> [Emphasis supplied]

4.9 Debates in Parliament are privileged, and members cannot sue each other for business of Parliament. However, privilege could be set aside

by the Court if the exercise of privilege amounts to interpretation of the constitution. See **Attorney General v Nseula Civil Appeal 18 of 1996 (Supreme Court)**. The Courts cannot supervise the Speaker in performance of functions in Parliament. If sustained, not only would it infringe Parliamentary privilege, but, further erode the doctrine of separation of powers. Therefore, internal proceedings and business of Parliament cannot be subjected to litigation. See **Mkandawire and Others v Attorney General [1997] 2 MLR 1.**

4.10 The foregoing must be balanced in the wake of the rights every individual who seeks an effective remedy enjoys under section 41(3) of the Constitution of Malawi. Every Member of Parliament has within their rights, this effective remedy before the Court. That notwithstanding, no suit can be brought against Parliament and its members, during Parliamentary proceedings, unless it concerns violation of the Constitution. The Speaker, Leader of Opposition, indeed Member of Parliament in the process of making political decisions, shall not be subjected to review by decisions from the Court, under section 26 of National Assembly (Parliamentary Privileges Act).

4.11 This position was observed by Lord Morris in the famous case of **British Railways Board v Pickin [1974] 2 WLR 208**. It was said:

> "It must be surely for Parliament to lay down procedures which are followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and to further decide whether they have been obeyed…it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders… **It would be impracticable and undesirable for the High Court of Justice to embark upon an enquiry concerning effectiveness of the internal procedures in the High Court of Parliament or an enquiry whether in any particular case those procedures were effectively followed**…"
>
> [Emphasis Supplied]

4.12 From the foregoing, Parliament enjoys privileges which are essential for the conduct of business of Parliament while at the same time, maintaining its authority. This freedom to conduct own proceedings without interference let alone intervention from outside bodies makes Parliament function, without anyone putting spanners in its mandate. In this regard, not even the court should intervene ordinarily, unless the issue raises constitutionality of a right, of which section 5 of the Constitution must be used. Parliament must control its own proceedings and regulate its internal affairs. Section 56(1) of the Constitution is clear about this. See **Attorney General v Chipeta MSCA Civil Appeal 33 of 1994 (Unreported).**

4.13. Looking at the extent Parliament enjoys privilege, unless the issue raised by the Claimant is constitutional in nature, he cannot rush to court to stop a purely political matter. Parliament has other internal offices in the Chamber such as Leader of the House, Government Chief Whip and Leader of opposition, which invariably make political decisions in the house. These are privileged within the spirit of Standing Orders of Parliament made under section 56(1) of the Constitution. Accordingly, they cannot be subject to review by judicial processes. They are political in nature. See **Mkandawire and Others v Attorney General** (***supra***).

4.14 The Claimant wrote the Speaker on seating arrangement on 17th February 2011, using eye sight disability and removal from front row seats to the back, limiting his political participation. He came to Court on 5th March 2022 even before the Speaker gave the response to the issues raised the Claimant raised the issue of non-discrimination and limitation of right to political participation as Constitutional rights under section 20 and 40 respectively. Movement from seat 25 to 99 and later 100 limited his right to political participation. Further he was discriminated against because with sight challenges, he was made to sit further back in the chamber, limiting his right to debate there.

4.15 However, if the issue was delay by the office of Speaker, to respond to the letter, which in itself is an administrative channel and not a parliamentary process, it becomes an internal matter to be sorted through the Clerk of Parliament to the Speaker. There might be need to provide internal performance standards and not standing Orders over what period the Speaker should respond to such internal claims. The answers lie in Parliament and not at Court. Policing Speaker to respond to the letter through the Court, violates section 53(5) and (6) of the Constitution. Again, issues Parliamentary privilege above cited come in.

4.16 It is open secret that high office of Speaker may need to consult other public offices in discharge of mandate. This process may take time because those other offices too may in turn need time to inquire further. The solution and speed to get such consultative process improved for such a politically charged body therefore lies in administration. The Claimant therefore was within rights on point to pen the Speaker over his issues here. All he needed to do was simply to make a follow up physically or by another letter, *via* the Clerk of Parliament, Leader of Opposition, or indeed Leader of House, to prompt the Speaker.

4.17 The Claimant acted as if his issue is the only one the office of Speaker has to urgently look into. Let it be remembered that under section 53(6) of the Constitution, the Speaker as head of Legislature, looks after the whole house. Despite coming from a political party, it is apolitical Truth be told, the Claimant needed to be more understanding than this. Rushing to Court for a remedy in the wake of the Claimant's own administrative shortfalls, precludes the Court is precluded from supervising the speaker of National Assembly in the performance of duties in the chamber during sitting.

4.18 Challenge lies with the Claimant. The facts do not warrant the Court to step in and issue declaratory orders through Judicial Review proceedings. Parliament must sort internal administrative processes, internally, without interference from outside bodies, with exceptions.

5.0 **Whether the Court can intervene in intra Political Party disputes and indoor management of Political party Matters.**

5.1 Section 103 (2) of the Constitution should be the starting point. It reads:

> "the judiciary shall have jurisdiction over **all issues of judicial nature and shall have exclusive authority to decide whether an issue whether an issue is within its competence**"
> [Emphasis supplied]

Judicial machinery is rolled into action to hear and determine cases which are judicial in nature. In other words, the matter should be justiciable. **In the matter of Ministry of Finance ex parte SGS Malawi Limited Misc. Civil Application 40 of 2003**, public law matters which are not justiciable should not be amenable to Judicial Review remedy. The reason being, in such discharge of legal mandate, in the analysis conducted by the court, such matters cannot be made subject to Judicial Review. These are kinds of matters where the decision maker takes one course over another involving questions which the judicial process is ill equipped to answer, thus not justiciable.

5.2 Cases relating to political disputes fall into such category. Courts under section 9 of the Constitution are mandated to interpret, protect and enforce the constitution and all laws made under it **with regard to legally relevant facts and prescriptions of law**. Courts world over, in which Malawi is no exception over, by their nature are ill equipped to deal and determine political disputes. This is clear from how they deal with issues in Parliament and outside parliament where politics in practiced. See **Butaroka v Attorney General of Fiji [1993 WLR 208**; **Ajinga v United Democtratic Front (Civil Cause 2466 of 2088 reported at [2008] MWHC 195; Ishmael Chafukira v John Zenus Ungapake Tembo and Malawi Congress Party Civil Cause 371 of 2009 (Unreported)**; **Butees Gas v Hammer [1982] AC 888.**

5.3 Politics is for politicians. Indeed the considerations operating in politics are different to those the Court employs. Courts only use legally relevant facts to determine cases according to prescriptions of law. Facts, evidence and law are put to systematic analysis to develop a verdict. Overtime, similar cases relating to politics have been frowned by Courts across jurisdictions because they take the trial court to "judicial no-man's land." The court is ill equipped to analyses political arguments and develop reasoned judgment making law in the matter. See **Butees Gas v Hammer [1982] AC 888.**

5.4 Unlike judicial no man's land, a case properly so called without political overtones or under water political currents, should have competing claims in law. These are weighed on the scales of justice through a judicial process. The case by the claimant has brought seems to drag this Court into this judicial no man's land where there are no competing claims. This is because it is not as if the Claimant has a seat reserved in the gallery. According to seating plan of 5th Meeting:49th Session of Parliament of 15th February 2022, Seat 25, 99 and 100 reserved are all in the opposition side, to the left of the Speaker seats 99 and 100 are in between seats 98 and 101. The seats 98 and 101 seat Members of Parliament from Opposition block to which Claimant is member. It is not justiciable.

5.5 As if the foregoing is not enough, every Member of Parliament seats in a Chair and the Speaker recognized the member to contribute to debates using an individual microphone from the Seat. One does not have to shout as if seated from the back because regardless of seating position, the discussion led is captured in the microphone and all are able to hear. Further, all business according to the order paper is circulated individually to a Member of Parliament. The same are not beamed on projector to disadvantage those seated at the back from seeing clearly on the screen in case of shortsightedness. **In this vein, reserving seat 99 or 100 does not limit right to political participation, nor is it discriminatory in any way.**

5.6 The foregoing confirms that the seating arrangements by the Defendant requesting the Speaker to reserve a seat for the Claimant in Parliament is all about strategy in Parliament. Unlike the judicial process, politics, is more about strategy. By nature, it is a game of numbers, emotions and to some extent, egos. See **Ajinga v United Democtratic Front (*supra*).** The one with numbers carries the day. The one who wields political power prevails over how charges sit in Parliament, and manner and order debate is conducted in Parliament. The Claim by the claimant is political in nature. Political disputes require political solutions. It applies therefore all factors being constant, that the less political a case is, it is more amenable to judicial intervention.

5.7 The claimant is challenging seating arrangement in Parliament. Defendant leads the largest opposition party in parliament. He is himself a Member of Parliament. He has to exercise discretion how best to oppose Government as a system of making it accountable to the people of Malawi. Claimant states that the leader of opposition should consult the party and him as party spokesperson, including where the Claimant seats in parliament. The latter goes to invoke the Speaker not to act on any communication from the office of the Chair and should consult him.

5.8 This angle followed by the Claimant sounds like conduct of a cry baby. This issue is not legal in nature. The Leader of Opposition in formation of shadow cabinet and possibly composition of committees, may consult the rank and file of the party hierarchy. By consulting, he is not bound under any law, to take wishes of the Second Interested Party. He may have that at the back of his mind. In the end he is the duty bearer in Parliament on how he applies that he may have consulted on as a mere matter of good practice within the political party and not bound by law of Malawi. Leadership requires him to exercise sound judgment and make decisions on how best to support and oppose Government in Parliament. After all it is him as Leader of Opposition whose leadership skills come to roost.

5.9 Leader of Opposition may tow party line or vary what he in his wisdom may perceive, according to the undertaking. This is an art and how decisions are arrived at, whether he consults or not, is purely in the discretion and prerogative of the Leader of Opposition. As Leader of Opposition, he enjoys privileges over certain duties which he has to exercise in the opposition side. Making appointments within Parliament, appointments into Shadow cabinet to effectively make Executive accountable, as well as request the Speaker of Parliament to reserve seats for Members in relation to seating arrangements in the opposition side under Standing Order 39(4), are his the discretion. How this is done and how it plays out, is politics and sheer strategy by Leader of Opposition. There is nothing legal. Any case surrounding this discussion is in the circumstances, "judicial no man's" land and therefore not justiciable. See **Butees Gas v Hammer (*supra*)**.

5.10 Now having Claimant who feels sidelined in key decisions of the Leader of Opposition, much as the case is about power struggle in the Second Interested Party, he simply has to man up, and have a heart to heart discussion with his leader in Parliament, to seat him where the Leader may find use for him according to political strategy in Parliament. Gagging him by court orders and expecting him to consult by every decision is, unreasonable, myopic and pedantic.

5.11 Instead of simply following up letter to the Speaker and quickly rush to court for judicial pronouncement, is bringing politics to the Court, which the Courts should never entertain. The case of **Ajiga v United Democratic Party (*supra*)** is instructive:

> "Political parties are no more than clubs. Membership is voluntary. Members are free to leave in as much as the same way they are free to join. The members conduct is however regulated by the clubs rules/ constitution which acts like some contract between the members and the club and between the members themselves….if there are disputes they should be

resolved in accordance with the party's rules/ constitution. **The courts should be slow, again very slow to intervene in a party's internal dynamics. It should instead allow the party and its membership to deal with 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**...'
[Emphasis supplied]

5.12 The Court under section 103(2) of the Constitution has decided that the issue is not within its competence. It referred it to the political party for political solution. Democracy is about dialogue and discussion, and parties should avoid rushing to court whenever such political disputes arise, to get legal redress over a political dispute. See **Ishmael Chafukira v John Zenus Ungapake Tembo and Malawi Congress Party (*supra*)**.

5.13 Honourable Namalomba complains about conduct by the Defendant. Closer look at the matters, they concern the party to which both of then belong. Expecting the defendant to consult the party based on some of the decisions made, takes away the discretion the Leader of the Opposition. Defendant who enjoys discretion to make key decisions in some regards, on his feet and at times, in split of a second in Parliament. Expecting the Leader of Opposition to consult as Claimant expects and brings him to Court, is a step too far. It does in fact not recognize that politics and law are different. See **Butees Gas v Hammer (*supra*).**

5.14 This case under trial purely an intra political party dispute. The Court should not be abused and tainted with political party colours to make directions and declaratory orders, over cases which tilt heavily in politics. There is nothing substantial on the constitutional rights which Claimant alleges are violated. The Court sees none, other than Claimant trying to settle a political score using judicial process. Politics is about egos and emotions. This is not the arena to settle that score, period!

5.15 What the Court sees, is like in a typical street brawl, Claimant has resorted tactics where the one who apparently is having weary muscles resorts into no-holds barred tactics. To save his skin biting becomes an option. Claimant should have remained within the rules of engagement in Parliament and engage the Defendant. He should not have rushed to Court for a remedy over a political issue in Parliament between Claimant and Defendant. In exercise of judicial discretion, under section 103(2) of the Constitution, this Court finds that the dispute has all the attributes of being political in nature. This Court sees no legally relevant facts to employ prescriptions of law. It not within my competence to adjudicate over such a political matter.

6.0 **Should the Speaker of National Assembly be duty bound to satisfy herself that communication to her office by Leader of Opposition followed consultations with and approval by the political party the Leader of Opposition belongs?**

6.1 The Claimant seems determined to rewrite the political landscape despite well-established laws and decided cases on the point. As if it is not enough from the decision of the court in **Ishmael Chafukira v John Zenus Ungapake Tembo and Malawi Congress Party (*supra*)**, decided in 2009 that politics is for the arena and not court. The claimant now expects the Speaker to cross check with him, before any bulletin is announced, if the Leader of Opposition consulted their political party.

6.2 This again is purely a political matter. The trajectory by Claimant has now cascaded to dragging the Speaker and Parliament and Leader of Opposition in particular, to stop exercise their respective lawful administrative mandate and watch the circus in the party to which the Leader of Opposition and the Claimant belong.

6.3 Part XI of the Standing Orders of Parliament provides for Members Seats and Attendance. It reads:

> "39(1) **Every Member shall have a seat reserved for him or her by the Speaker**.
>
> …
>
> (3) The other seats to the left-hand side of the Speaker shall be reserved for the Leader of Opposition and Members of the Opposition in accordance with any request that **the Leader of Opposition may at any time make to the Speaker**.
>
> …
>
> [Emphasis supplied]

6.4 Standing Order 39(1) provides that the Speaker shall reserve seat for every Member of Parliament. In other words, who sits where in Parliament is the prerogative of the Speaker of Parliament with request from Leader of the House under Standing Order 39(3) on Government Side and Standing Order 39(4) under Opposition side. Both these leaders at any time may request of the Speaker of Parliament.

6.5 In relation to this case, Leader of opposition **at any time**, may ask the Speaker to reserve seats for members in the opposition block. This means that the Leader of Opposition may, depending on task at hand, including but not limited to appointment into shadow cabinet, parliamentary committees, substantive positions within parliament, can ask the Speaker to reserve seats. This power Leader of Opposition enjoys without interruption, from any quarter including Claimant. The language used in the Standing Order 39 of the Leaders in Parliament is **request.** The Speaker in turns **reserves** the seat, upon such request.

6.6 The Speaker under Standing Order 39(4) is bound by the **request** made by the Leader of Opposition in the circumstances. The office of Speaker merely has to oblige to the prerogative of request by the Leader of Opposition. The latter retains discretion how his power lines in the opposition block in Parliament seat. Attempting to wrestle down the Speaker not to make the announcement, and asking the office to firstly

satisfy itself if it consulted if Leader of Opposition consulted the party, which prerogative says can be made **at any time,** is unreasonable in the **Wednesburry** Sense under Section 53(5) and (6) of the Constitution of Malawi.

6.7 The Claimant is subjecting these offices into interference and manipulating their authority. The law does not allow it as seen from section 53 (5) and (6) of the Constitution. The Speaker or Deputy speaker shall act by their own free will and guided by the standing orders. The section provides:

> "(5) **The Speaker, Deputy Speaker or any other presiding member shall discharge his or her functions and duties and exercise such powers as he or she has by virtue of that office independently or the direction on interference of anybody or authority**, save as accords with the express will and standing orders of the National Assembly.
>
> (6) Notwithstanding that the **Speaker, Deputy Speaker or any other presiding member has been elected as a member of a political party to the National Assembly he or she shall not be subjected to control, discipline, authority or direction of that political party or any other political party in the discharge of the functions and duties of that office and in the exercise of the powers of that office**"
>
> [Emphasis supplied]

6.8 The Claimant cannot in the wake of section 53(5) and (6) expect the Speaker of the National Assembly to put an equivalent of a "standing order," if that the office cross checked with claimant, if Leader of Opposition consulted the Political party he and the claimant belong to, in effecting a decision the former made. Not only is this unreasonable, but is unlawfully selfish. It is unpatriotic to expect Speaker whose office is apolitical, to stop perform national duties and worry about a Member of Parliament who does not wish to be made subject to the Leader of Opposition in Parliament. It is an open that fights are raging in their camp. The front page Newspaper article of the Daily Times of 15 June

2022 with heading **DPP SNUBS SG, NAKHUMWA: Sidelines them from Page House Meeting: we will not leave the Party**, tells it all. The newspaper article has photo caption of the Claimant. The brawl between them takes place both within outside Parliament. The tag of war which started outside Parliament has descended into Parliament.

6.9 This circus all too likely points that the issue at hand is intra party politics. The Court from Judicial arm of Government, the Speaker of Parliament from Legislative arm, both funded by the Executive arm of Malawi Government, are dancing to music played in house at the Second Interested Party. The Claimant continues to abuse privilege, expecting to use the Court to order the speaker to entertain his whimsies. This step does not consider how busy the Speaker would become be with intra party politics. What is worse, is inviting the Court to determining such in house issues despite both institutions being operationalized by the tax payer. This is a waste. This court will not be part of such wastage of resources.

6.10 The Speaker therefore is not duty bound to satisfy herself that communications to her office from the Leader of Opposition followed consultations with approval by the Democratic Progressive Party.

7.0 **Suppression of Material Facts and justiciability of the Claim**

7.1 The defendant and the first interested party argue that the claimant has suppressed material facts. It is trite that any *ex parte* application, must proceed with the highest good faith. See **Schmitten v Faulkes [1893] W.N. 64.** The fact that Court is asked to grant relief without the other part heard makes it imperative against whom relief is sought having opportunity to be heard that the applicant makes full and frank disclosure of all material facts. See **R v Kensington Tax Commissioners *ex parte* de Polignac [1917]1 K.B 486.** This allows the judge to exercise discretion properly. This includes additional facts which should be known to applicant if proper inquiries were made.

7.2 Anything to the contrary entitles the other party to apply for such order to be set aside. The same holds where the application discloses no arguable case. See **R v Secretary of State for the Home Department ex parte Khalid Al- Nafeesi [1990] C.O.D. 306.** A party coming to court, seeking equitable remedy must come with clean hands and make full and frank disclosure of material facts. Failure to disclose material facts fully and frankly, entitles the application to be dismissed. See **R v Jockey Club Licensing Committee ex parte Wright [1991] C.O.D 306.**

7.3 Material facts are those the applicant would have known had proper enquiries been made. That is why leave for judicial review was dismissed because the applicant did not disclose to the court that he had a previous conviction. See **Ndomondo v The State and Speaker of the National Assembly Misc. Civil Cause 57 of 2007 (unreported).** The argument is that the matter at hand concerns intra party politics. The case is purely political in nature. The court should not have bothered to try it in the precious time it has devoted to deliver two rulings where other deserving cases are piling up, and waiting to see light of day.

7.4 In the wake of the front page article of the Daily times of 15th June 2022 above alluded to, the Claimant should have disclosed as a material fact that there is a political feud in the Second Interested Party which may have contributed to an apparent sour relationship between Claimant and Defendant. This fact has been suppressed and Claimant wants the Court to believe as if this is a sheer case and nothing political. See **Mchungula Amani v Stanbic Bank Limited and Another (HC) Civil cause 558 of 2007**. The court held the material fact was suppressed of which had it been disclosed, the *ex parte* injunction would not have been granted.

7.5 The Speaker and the National Assembly have been unnecessarily dragged into this internal fight going on at the Second Interested Party. Had proper enquiries been made, full and frank disclosure made, and reserving seat unmasked properly in context, the claimant would never have successfully tied the hands of the Defendant and First Interested Party through *ex parte* injunction order of 8th March 2022. It is not the prerogative of the Leader of Opposition to reserve seats in Parliament.

7.6 Standing orders 39 (1) states the Speaker enjoys exclusive mandate over that. As if this is not enough, sections 53(5) and (6) of the Constitution clearly provide that the Speaker shall not be made subject to any direction of authority in the discharge of official duties. It is the duty of the Leader of Opposition to request members of the Opposition to be seated in Parliament according to political strategy.

7.7 Expecting the Speaker to first satisfy the office of speaker that Leader of opposition first consulted with the Political party before making a decision, runs contrary to the constitution. It makes such an act unreasonable and the resulting court case abusive of the court process. The court has duty to jealousy guard against such abuse. See **Kasungu FTCA v Zgambo 1992 15 MLR 94.**

7.7 The process leading to these proceedings was served on the Attorney General who in turn took to the Speaker of Parliament to affect seating arrangement of the 5th meeting of the 49th Session of Parliament following seating arrangement of 15th February 2022. It does not matter that process was taken to the Attorney General. It was so after an initial failed attempt at Parliament. The effect of the order unmasks that it was meant to have an effect on proceedings. In fact it disturbed proceedings.

7.8 In this regard, the commencement window and even as we make the present order, was served in violation of section 5 National Assembly (Parliamentary Privileges Act).It was taken out while 49th Session Parliament was in session. The process was taken in haste and

apparently in reaction to the frustration against Leader of Opposition who was only arranging his charges in the August House, in a purely political prerogative which politics allows him to. There is no law which stops the Leader of opposition from making decisions regarding conduct of business in the opposition side of the House during proceedings.

7.9 Leader of Opposition appoints persons in Shadow cabinet, appointment into committees of Parliament, which has a bearing on the sitting plan in Parliament. This is communicated to the Speaker, who following the request made, reserves a seat for the Member so recognized according to standing orders of Parliament. This issue makes the conduct of the Leader of Opposition in such cases non justiciable according to **Chaponda and another ex parte Kajoloweka and Others (*supra*).**

7.10 The issue that the Claimant raises which saw him obtain leave for permission for Judicial Review, concerns politics as practiced in Parliament. That is, whether issues on appointment of a cabinet in Parliament and seat allocation is justiciable. The answer was already settled in **Chaponda and another ex parte Kajoloweka and Others (*supra*).** Appointment into Cabinet and allocation of seats in Parliament is not justiciable. It is a political issue which has to be resolved in political discourse.

7.11 The questions below, according to the foregoing lie in politics, not law:

(a) Whether court has jurisdiction over internal matters of Parliament;

(b) Whether the Speaker has to satisfy an interest of a member who seeks the office to first satisfy itself that Leader of Opposition consulted party that sent him to Parliament;

(c) Whether the issues on appointment of cabinet in parliament and seat allocation are justiciable;

(d) Whether the court can interfere in political party matters;

7.12 The Courts before refused to make declarations which were aimed to resolve a political dispute. It is not the function of the judiciary to resolve political disputes. See **Chihana v Speaker of National Assembly and Malawi Electoral Commission (supra).** Such matters should not come to court at all in the first place. Therefore questions (a) to (d) above should be resolved internally at the Second Interested Party.

8.0 **Conclusion**

8.1 Claimant should have waited for response from the Speaker, over issues he could clarification over through his letter of 17th February 2022. He wrote the Speaker because he realized that seat allocation is the ambit of Speaker of Parliament. In another breath he cannot turn around and blame the leader of Opposition for the same. This is fishing at its best, aiming to pick a fight and make a mountain out of a mule.

8.2 Seating strategically in Parliament so Claimant contributes effectively to motions in the chamber, is political strategy. Members of Parliament use the microphones to communicate wishes of their constituencies, in Parliament. They stand and or raise of hand to be recognized by the Speaker. The Speaker grants the floor to a Member of Parliament at a time to speak through microphones to the Nation. Members of Parliament who are challenged to stand and address the Chair as is customary, need not stand to contribute to motions. They may do so while seated, or say the least how they are best accommodated.

8.3 In the same way, order papers and other communication is circulated to them in the comfort of seats in the Chamber. These are not beamed on projector in the house. Therefore to claim one does not see far and hence should not be reallocated from seat 25 to seat 99 later 100, hence limiting political participation and discrimination is fallacious. The house accommodates needs of those in need so long the Chair is engaged through appropriate channels. The claimant apparently

rushed to get remedy at court over an administrative matter in Parliament. The Claimant shot a blank, and still missed in the ploy.

8.4 Matters raised by Claimant are to say the least, of internal proceedings of Parliament. For all intents and purposes cannot and should not be made subject to litigation in the High Court of justice. Doing so violates parliamentary privilege, unless the issue is constitutional in nature. If it so turns out, then Form 86A in the originating process ought to be followed to the letter. This did not obtain in these proceedings. The order obtained by Claimant of 8th March 2022 ought to be set aside.

8.5 The Claimant applied for Judicial Review and stay of decisions by Defendant on seat allocation as well as interlocutory injunction restraining Defendant from implementing, executing and carrying out decision of Defendant allocating Claimant seat 99 and later 100 for Parliamentary deliberations.

8.6 The issues Claimant complains against the Leader of opposition relate to intra party politics. The claimant should identify a political solution to the dispute and not a judicial solution as intimated through this action. There is already plethora of judicial precedent and had the Claimant consulted the law wide enough, he would have engaged the Leader of Opposition in political discourse within Parliament and not at Court through these proceedings over matters which are not justiciable.

8.7 The Speaker in exercise of duty cannot me made subject to any direction or authority. This claimant cannot sue the Speaker to exercise function in an internal political matter. This abuse has to be struck out.

8.8 The Claimant has suppressed material facts. These are under paragraph 1.7 (a) to (d) above. In addition, he has not attempted to account for the feud in their party with the Defendant. The Court would have decided otherwise had the same been disclosed. The equitable relief obtained after such suppression should not be sustained.

8.9 To conclude, the order that the Claimant obtained from court drags the Speaker into manipulation to what the office should not do. This violated section 53(5) and (6) of the Constitution. Above all, process was taken out and served while the house was in motion, contravening Parliamentary privilege. Allowing the claimant to take out action and the defendant and first interested party to challenge the orders has grown jurisprudence in the Claimant and the Democratic Progressive Party. Every dark cloud has a silver lining.

8.10 Above all the Defendant sued is wrong party. He does not have power to reserve a seat for Claimant as a Member of Parliament. Claimant should have exhausted an alternative remedy by following up office of Speaker to respond to his latter to office of Speaker. In this follow up, the Speaker cannot sued in the allocation of Seats in parliament because this issue is not constitutional in nature. It is administrative.

8.11 The Court accordingly vacates and discharges the permission to apply for Judicial Review and the interim relief order on page 2 above recaptured in these proceedings. The Defendant and Speaker, in particular are no longer bound by the Court order that was taken out by the Claimant. This finding has been made possible because the Court has heard both sides to the matter. Sustaining the action which was initiated, and stayed the decisions of the Leader of Opposition, and served on Attorney General despite Parliament being in the 49th session, 5th Meeting, has potential to violate Parliamentary Privilege.

8.12 The Claimant stayed sitting arrangement in Parliament from seat 22 to 99 and later 100 while Parliament was in session Initial failed service at Parliament, saw it effected on the Attorney General, who took the order to Parliament. The Claimant has used the back door against Parliamentary privilege. By the same back door he is booted out from the High Court of justice.

9.0 **Costs**

9.1 Costs normally follow the event. They are awarded in discretion of the Court. Looking at the political issue that this case raises and the abundance of legal authority where it has been said that high Courts of justice should not be used to adjudicate political matters, such as appointment of shadow cabinet, allocation of members, appointment into parliamentary committees, and reservation of seats in parliament, which are not justiciable as determined not long ago, someone has to pay for this time.

9.2 The cases which make similar points in **Chihana v Speaker of National Assembly and Malawi Electoral Commission** in 2005, and most recently in **Chaponda and another ex parte Kajoloweka and Others** a decision of the Supreme Court, **(*supra*),** and the well laid legal authority in **Ishmael Chafukira v John Zenus Ungapake Tembo and Malawi Congress Party**, whose facts are on all fours with the present, speak to this case. In this regard, it is the considered view that this action should not have been brought to court in the first place.

9.3 Litigants should examine the facts and sieve them carefully before flooding the courts with claims which are not justiciable in the first place. Malawians out there need answers from the Government which must be held to account. Dragging the hands of the Leader of Opposition from forming a solid opposition block to make executive arm of Government held accountable on its mandate, and on the other hand, tying the Speaker to it, by clogging the Court with actions which lie in politics, is abuse of tax payer money. As a people we can do better over prudent use of time and financial resources in the current economic environment. Claimant is thus condemned for costs of proceedings.

Dated the **16th** day of **June** 2022

JUDGE.