REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

FINANCIAL CRIMES DIVISION

JUDICIAL REVIEW CAUSE NO 2 OF 2023

(Before Hon Justice Kapindu)

BETWEEN

GEORGE KAINJA .....CLAIMANT

-AND-

DIRECTOR OF THE ANTI-CORRUPTION BUREAU.....1ST DEFENDANT THE DIRECTOR OF THE PUBLIC PROSECUTIONS.....2ND DEFENDANT ATTORNEY GENERAL ..... 3RD DEFENDANT

CORAM: HONOURABLE JUSTICE REDSON EDWARD KAPINDU

Mr. Nankhuni, Counsel for the Claimant

Messrs. Chiwala, Khunga and Saidi, Counsel for the 1st Defendant

Mr. Sakanda, Counsel for the 2nd Defendant

Mr. Chisiza, Counsel for the 3rd Defendant

Mr. Saukila/Mr. Dzikanyanga, Court Clerk/Official Interpreter

RULING

KAPINDU, J

[1] The Claimant in the present matter, Dr. George Kainja, is the immediate former Inspector General of the Malawi Police Service. He was, in that regard, the Head of the Malawi Police Service, a very senior and important constitutional position in the country that vested him with the overall responsibility of ensuring the protection of the rights of all persons in Malawi, and also ensuring the maintenance of public safety and public order, in accordance with the prescriptions of the Constitution and the law.

[2] On or about the 23rd of June, 2022, the Claimant was arrested by the Anti-Corruption Bureau (ACB), ostensibly on charges connected to his alleged illicit dealings with a man called Zunneth Sattar, although the specific alleged charges have not been particularized in the application's founding documents.

[3] On the 22nd of August, 2022, the Claimant, feeling aggrieved by the circumstances of his arrest, the conduct of investigations and the intended prosecution against him by the 1st Defendant, brought a *"Without Notice Application for Permission to Apply for Judicial Review"*, under Order 19 Rule 20(3) of the Courts (High Court) (Civil Procedure) Rules, 2017 (the CPR, 2017). The Court must immediately state that according to the rules, the most appropriate formulation of the application should have used the words *"Ex-parte"* and not *"Without Notice."* This is so as Order 20 Rule 19, subrules (3) and (4) of the CPR, 2017 provide that:

> *"(3) Subject to [sic.] sub-rule (3), an application for judicial review shall be commenced* ***ex-parte*** *with the permission of*

the Court.

(4)The Court may upon hearing an ***ex parte*** *hearing direct an* ***inter-partes*** *hearing."*

[4] However, this non-compliance with the rules is a very nominal irregularity that obviously did not prejudice the Defendants in any way. The absence of prejudice is exemplified by the fact that none of the opposing parties even noticed the irregularity. Thus, pursuant to the discretion given to the Court under Order 2 Rule 3 of the CPR, 2017, particularly in terms of subrule 3(d) thereof, I declare the application filed herein to have been effectual for purposes of the present proceedings notwithstanding the irregularity.

[5] The Court will, however, going forward and as far as practicable, stick to use of the terms *"ex-parte"* and *"inter-partes"* in relation to applications made in the present matter.

[6] A reading of the entirety of the application shows that the overarching purpose of the intended Judicial Review action herein is essentially to permanently stop the ACB from further investigating and prosecuting the Claimant on the alleged offences herein.

[7] In the abovesaid *ex-parte* Application, the Claimant sought permission to commence judicial review proceedings against the Director of the Anti-Corruption Bureau as 1st Defendant, the Director of Public Prosecutions (the DPP) as 2nd Defendant, and the Honourable the Attorney General as 3rd Defendant.

[8] Further, the Claimant sought to obtain, if permission to commence judicial review were granted, an order staying the decision of the 1st Defendant to arrest and prosecute him or any other person on corruption or any other

charges based on information or evidence obtained from the British National Crime Agency (the NCA), without the sanction of the Attorney General and based on a corruption Report in respect of what he terms *"Sattar's dealing with Malawi Government's agencies given to the State President in June, 2022 until a further order of the Court."*

[9] The Court notes, upfront, that the Claimant did not actually exhibit the said Report as part of the documents in support of the present application. Reading through the entirety of the application, it is evident that the Claimant used the contents of the speech of the President of the Republic of Malawi (the President), in his Address to the Nation of 21st June, 2022 as foundational to his claims about the contents of the said Report. The Court will return to this matter later in the present decision.

[10] As stated above, the application herein first came *ex-parte*, in the form of Form 86A of the erstwhile Rules of the Supreme Court, 1965,[1] and was further supported by Grounds to Apply for Judicial Review and a verifying Sworn Statement deponed by the Claimant's Counsel, Mr. Gift Nankhuni.

[11] Upon considering the issues raised, the learned Judge, the Hon Kenyatta Nyirenda J, decided that the application was not appropriate for disposal on an *ex-parte* basis, without first hearing the Defendants on the matter. As such, he directed that the Application for permission to apply for Judicial Review was to come *inter-partes* on 8th September, 2022.

[12] In the circumstances, not having granted an order of permission to apply for judicial review *ex-parte*, the record shows that Kenyatta Nyirenda J did not, at that stage of the proceedings or indeed at any other point in time,

[1] See the case of *Francis Bisika vs Malawi Communications Regulatory Authority*, Judicial Review Case Number 71 of 2017 where Tembo J determined that this is the appropriate mode of commencement for judicial review proceedings.

grant the Claimant herein any attendant interim relief restraining the Defendants from taking further steps in the criminal process in this matter, whether in the form of an order of stay of proceedings or an order of interlocutory injunction. The effect, therefore, is that up to this day, the Claimant has not enjoyed any interim relief from the Court.

[13] Subsequent to the abovesaid decision by my brother Judge that the application herein should come *inter-partes*, and before such application could be heard, a number of interlocutory applications and corresponding rulings were made. The Court does not find it necessary to recount or restate the substance of those applications and rulings here, as such restatement is not relevant for purposes of the disposal of the present application.

[14] What is significant to state at this stage is that after the various interlocutory matters referred to in the last preceding paragraph were disposed of by the Court, the matter was supposed to proceed before Kenyatta Nyirenda J for the hearing of the *inter-partes* Application for Permission to Apply for Judicial Review which the learned Judge had earlier directed in his first Order of 22nd August, 2022.

[15] However, as events turned out, at just around the same time when the Court was to hear the *inter-partes* application herein, this Division of the High Court, namely the Financial Crimes Division, established under section 6A(1)(f) of the Courts Act (Cap. 3:02 of the Laws of Malawi) became functional and operational. The learned Judge then called upon the parties to address him on the issue of the appropriate forum to proceed with hearing of the matter under the circumstances. The respective parties made their written submissions. It suffices for me to simply state that there were differences of opinion on the matter among the parties.

[16] Upon a consideration of the various arguments advanced by Counsel, and indeed upon careful consideration of the law and the issues, Kenyatta Nyirenda J, by a decision dated 6th December 2022, determined that the judicial review matter for determination in the present case fell squarely within the purview of the Financial Crimes Division, and not the Civil Division or any other Division of the High Court.

[17] In the premises, the learned Judge ordered the transfer of the matter to this Division (the Financial Crimes Division).

[18] By Communication from the Assistant Registrar of the Civil Division dated 10th January, 2023, the decision of Kenyatta Nyirenda J was formally communicated to this Division and the court record was subsequently delivered to this Court a few days thereafter.

[19] This Court proceeded to set the matter down for hearing of the *inter-partes* Application for Permission to Apply for Judicial Review herein, and the said application was heard on the 13th of February, 2023.

[20] The Court must mention at this juncture, that Counsel Nankhuni representing the Claimant, who was physically present during the hearing of the application, was not allowed to make oral submissions on the material day as he was yet to renew his practicing licence and hence, according to the law, he did not have a right of audience before the Court. The Court must however express its gratitude to Counsel Nankhuni for volunteering information to the Court, without any prompting, about the expired status of his licence of practice and the fact that he was yet to be issued with his renewed 2023/2024 licence at the time. This is the kind of professional rectitude that the Court wishes some at the Bar, who are in the habit of doing the contrary, could take note of and emulate.

[21] Be that as it may, I must also mention that the Court has taken full consideration of the written arguments and sworn statements that Counsel Nankhuni had already filed with the Court prior to the expiry of his licence of practice.

[22] Pausing here, it is appropriate to recount the grounds upon which the Claimant seeks to have recourse to a judicial review of the Defendants' decisions or alleged decisions. These grounds in turn, in essence define the main issues for determination in the present Ruling.

[23] The Claimant has raised six grounds of review. By those grounds, he seeks to challenge:

(a) The decision of the 1st Defendant to collaborate with National Crime Agency without involvement or authorisation of the 3rd Defendant to investigate the corruption cases involving Malawian residents and citizens including the Claimant or any other Malawian;

(b) the decision of the 1st Defendant to present a report of its investigation (which investigation did not involve calling the Claimant to present their side of the story) on the said corruption cases to the State President, the Speaker of the National Assembly and the Chief Justice of the Republic of Malawi;

(c) the decision of the 1st Defendant to arrest the Claimant or any other person and bring them before a court of law when they can simply summon them to attend court on a specific date;

(d) the decision of the 1st Defendant to prosecute the said Claimant and such other persons against the background of high negative publicity that the said Claimant and such other persons had acted corruptly in execution of their public duties and this negative publicity was partly due to the conduct of the 1st Defendant;

(e) the decision of the 1st Defendant to flout the Stay Order of the Supreme Court of Appeal stopping the 1st Defendant from acting on the evidence gathered by the Anti-Corruption Bureau working hand in hand with the National Crime Agency of the United Kingdom; and

(f) the failure of the 2nd and 3rd Defendant to supervise the 1st Defendant in execution of her duties relating to intended or actual investigation and prosecution of the Claimant in so far as the said corruption allegations are concerned.

[24] The Claimant, if granted permission, seeks to pray to the Court for the following reliefs:

(a) A quashing order rescinding the abovesaid decisions of the 1st, 2nd and 3rd Defendants.

(b) If permission to apply for judicial review is granted, that the Court should make an order that the grant of permission should operate as a stay of the said decisions of the 1st, 2nd and 3rd Defendants and an interim relief in form of interlocutory an injunction restraining the 1st Defendant from arresting and prosecuting the Claimant, and or any other person on the corruption charges based on a corruption report in respect of Sattar's dealing with the Malawi Government's agencies

given to the State President in June 2022 pending the determination of this case.

(c) An Order for costs.

[25] When considering whether to grant permission to apply for judicial review, a Court considers a number of important considerations which are well settled. The considerations are not necessarily applied cumulatively. Thus, a Court may decline permission to apply for judicial review based on any of these considerations.

[26] One key issue that a Court must invariably consider on an application for permission to apply for judicial review is whether the Claimant has *locus standi* (legal standing) to bring the application to Court in the first place.

[27] The requirement of *locus standi* is an age-old common law requirement that has been codified by the rules of practice under Order 19 Rule 20 (2) of the CPR, 2017. The rule requires that *"a person making an application for judicial review shall have sufficient interest in the matter to which the application relates."*

[28] Another important consideration is that of timeliness. Upon an application for permission to apply for judicial review, the Court also considers whether the Claimant has delayed in bringing the application. The general rule under the rules is that an application for Judicial Review must be filed promptly, within three months of the making of the impugned decision. Order 19 Rule 20 (5) of the CPR, 2017 provides that *"Subject to sub-rule (6), an application for judicial review under sub rule (3) shall be filed promptly and shall be made not later than 3 months of the decision."* However, this rule is not inflexible.

The Court, under Order 19 Rule 20(6) of the CPR, 2017, has discretion to extend the period prescribed under subrule 5.

[29] Order 19 Rules 20(5) and 20(6) of the CPR, 2017 actually represent a codification of a long-standing position at common law in respect of judicial review applications. The case of ***Charles Mhango and others v University Council of Malawi*** [1993] 16(2) MLR 605 (HC), and a steady stream of jurisprudence on the point, establish the point that where a Claimant delays to file an application for permission to apply for judicial review within the prescribed time, they may apply for extension of time within which to apply for judicial review, but that the Court may refuse extension on the ground of delay, based on two major considerations. First, if the Defendant can show that the delay in making the application for judicial review would be detrimental to good administration or that granting the order would cause substantial hardship to the Defendant. Secondly, as was the situation in ***Charles Mhango and others v University Council of Malawi***, permission may be declined if the Court concludes that there has been inordinate and unjustifiable delay in bringing the application. In that case, the Court found that the period of delay in issue lay somewhere in the region of three years to four years, and that this delay was inordinate, unjustifiable, and inexcusable.

[30] In the present case, even though it cannot be said that the application was made promptly as such, two months having elapsed from the time the impugned decisions are alleged to have been made, it was nevertheless presented to the Court within the prescribed time of three months.

[31] Further, subject to the overriding objective of the CPR, 2017, which is to deal with proceedings justly, the Court may, where there is a procedural irregularity, within the terms of Order 2 Rule 3 of the CPR, 2017, decline permission to apply for judicial review.

[32] The issue of ensuring that the proceeding is dealt with justly, notwithstanding non-compliance with some technical procedural rules, whilst not expressly stated in the erstwhile RSC, has long been embraced in our civil procedure jurisprudence. For instance, in ***Chilima & Another vs Professor Athur Peter Mutharika & Another***, Constitutional Cause No. 1 of 2019, Ruling of 21st June, 2019, the Court stated, at paragraph 30, that:

> *"the Court is…mindful, firstly, of the overriding objective of the CPR, 2017 under Order 1 Rule 5 which is to deal with proceedings justly. An important consideration in this regard is that courts should not readily dismiss proceedings or applications within a proceeding merely on account of procedural technicalities."*

[33] The Court then proceeded to cite with approval, the oft-cited English case of ***Cropper v. Smith*** (1883) 26 Ch.D. 700, where Bowen LJ stated at 710-711, that:

> *"It is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not*

lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

[34] The principle was also applied by Mbalame, J in the case of ***Taulo and others v Attorney General and another*** [1993] 16(2) MLR 856 (HC). In that case, the Claimants, who were employees of Wood Industries Corporation (WICO), a public company [as in a Government owned company], were granted permission to apply for judicial review against Government's decision to sell the company to the second defendant without taking into consideration the interests of the employees and the broader interests of the citizens of Malawi. The learned Judge granted permission even though the application was, on its face, irregular as it did not state that it was an application for leave (permission) to apply for judicial review. Mbalame, J begun by observing, on the point, that:

"Mr Mhango submitted that although the words "judicial review" did not appear on the ex parte notice of the application, the notice and the affidavit in support thereof clearly indicated that it was judicial review the plaintiffs were seeking. It is his contention that even if there was non-compliance with the rules, that in itself should not render the proceedings null and void. He has referred this Court to Order 2, rule 1 of the Rules of the Supreme Court, which refers to such failure to comply as a mere irregularity."

[35] The learned Judge agreed with the Claimant's Counsel's contention in this regard and stated that:

> *"As I have said earlier, the way the title to the plaintiffs' ex parte notice is couched and when read with paragraph 20(c) of Mr Taulo's affidavit, it cannot be said that the plaintiffs brought the proceedings as mere employees. Indeed, if WICO were a private company, the employees would not have any right to question its disposal. However, in the instant case, the plaintiffs, besides being employees, have, in my judgment, a national interest at heart as expressed in paragraph 20(c) of Mr Taulo's affidavit. I find that the plaintiffs brought the proceedings not merely as staff of WICO, but also as nationals of this country – nationals who have the right to know how and why WICO was being disposed of."*

[36] Notably, notwithstanding an apparent defect on the face of the application, the learned Judge placed significant weight on the fact that although there were evident defects in the preparation of the documents, an examination of the substance of same showed that the Claimant had intended to apply for judicial review, and that justice required that the same be treated ass such. The Court also placed some weight on the issue of national interest. On those premises, he decided to grant permission to apply for judicial review notwithstanding the irregularities.

[37] Mbalame J however issued a word of caution. He stated that whilst on the whole, he did not agree with counsel for the defendants that documents, in the face of the evident defects, revealed that the claimants had not applied for judicial review, he was of the view that it was imperative to emphasise that

the courts should not *"in any way condone shabby pleadings. It is the duty of counsel to make sure that pleadings are clear and unambiguous."*

[38] This Court wishes, in passing, to agree with Mbalame J's statement and to provide further elaboration on the spirit behind the learned Judge's statement, in the context of the present rules regime (the CPR, 2017). The overriding objective of the rules, which is to ensure that proceedings are dealt with justly, does not entail that the Courts should readily condone the filing of shabby, erratic, desultory, grammatically contemptible or otherwise woefully irregular documents at Court for purported use by the Court. It is the duty of counsel to make sure that documents that are prepared and filed for use by the Court, in the Court's sacrosanct function of dispensing justice, are in correct and grammatically pristine order, and that they are generally clear and unambiguous. This is not only what has been expected of the noble legal profession over the centuries, but even more importantly, this eases the general process of efficient and effective disposal of matters.

[39] The Court is pleased that in the present matter, the documents have generally been drawn up well by Counsel. The Court did raise some minor issues of non-compliance with the nomenclature under the CPR, 2017 on the use of terms such as *"without notice"* or *"with notice"* instead of *"ex-parte"* or *"inter-partes".* Clearly though, as already held above, these are curable and the Court has decided to treat them as cured and effective, and that there has been no prejudice to the Defendants.

[40] Moving on, in considering an application for permission to apply for judicial review, the Court may also consider the issue of alternative remedies. Where alternative and effective remedies exist to address the issue in question, the Court may not grant permission to apply for judicial review. See, for instance, the case of ***Banda and another v Attorney General*** [1995] 1 MLR 17 (HC),

where Tambala J (as he then was) held that, as a general rule, even where plausible grounds for judicial review are available, the court will not grant relief until the applicant can demonstrate exhaustion of available alternative remedies.

[41] The emerging jurisprudence under the CPR, 2017 similarly shows that this requirement is maintained even though it has not been expressly codified and stated under the said rules. For instance, in the case of ***Dr Mwayiwawo Madanitsa v Council of University of Malawi (College of Medicine)*** [2019] MWHC 81, the claimant was a student at the then College of Medicine of the University of Malawi. He claimed that his stipend as a student had been unjustifiably subjected to Pay As You Earn (PAYE) tax. Feeling aggrieved, he sought to apply for judicial review of the decision to subject the stipend to tax. His application for permission to apply for judicial review was declined because there was evidence that at the time of his application, he had not exhausted remedial avenues within the institutional tax assessment system of the Malawi Revenue Authority (MRA). There was evidence that whilst some of these processes were still underway, the Claimant rushed to Court for judicial review. Mbvundula, J (as he then was) stated that:

> *"All this activity was taking place before the permission for judicial review was sought and obtained and there is nothing to show that the alternative remedy had been exhausted. The claimant had indeed an alternative remedy at the time and as such the permission was prematurely sought and should not have been granted…I hereby set aside the permission."*

[42] Another key consideration, in fact a paramount consideration for the Court, is whether the application has any prospects of success if it goes to a full hearing of judicial review.

[43] Thus, where a Court concludes that the Claimant has no arguable case and that the matter has no reasonable prospects of success, it may deny leave on that basis. This consideration was eloquently articulated by the Supreme Court of Appeal in the case of ***Hon. Dr. George Chaponda & Another v Charles Kajoloweka & Others***, MSCA Civil Appeal Number 05 of 2017. The Supreme Court of Appeal in that case stated that:

> *"leave should be granted, if on the material then available the court thinks, without going into the matter [in] depth, that there is an arguable case for granting the relief claimed by the applicant… the aim of this requirement is therefore to 'sieve out' proceedings which in the court's view, are spurious, and remain with those which the court is satisfied, are 'arguable cases.' The purpose for the requirement of leave is to eliminate at an early stage, any applications which are either frivolous, vexatious or hopeless and to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained is designed to prevent the time of the court being wasted by busy bodies with misguided complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."*

[44] The Supreme Court proceeded to state that:

> *"As we understand it therefore, it is* ***only when there is undoubtedly an arguable case*** *that leave should be granted ex-parte."* [Emphasis supplied]

[45] This passage by the Supreme Court of Appeal shows that the Court has placed a relatively high standard for the granting of permission to apply for judicial review. The decision to grant permission to apply for judicial review *ex-parte* is not to be lightly made. The Court needs to be satisfied that the Claimant has established an undoubted arguable case. It logically follows that the test in *inter partes* applications in not any lower.

[46] Thus, a Court should not grant permission to apply for judicial review simply because the issue presented sounds interesting although not well argued and not demonstrating good prospects of success. A Court should not grant permission in the mere hope that perhaps, at the full hearing of judicial review, the Claimant will raise some good and meritorious arguments. In the case of ***Matalulu v Director of Public Prosecutions*** [2003] 4 LRC 712, 733, the Supreme Court of Fiji held that it is not enough that a case is potentially arguable. The Court held that a court cannot *"justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen."*

[47] The strength and meritorious character of the claim must therefore be evident at the permission stage and not later. Indeed, there is a reason for this approach. In the case of ***R (On the Application of Grace) v Secretary of State for the Home Department*** [2014] EWCA Civ 1091, the Court of Appeal in England pointed out the purpose of the requirement of permission to apply for judicial review. At paragraph 13, Lord Justice Maurice stated that the purpose of the requirement:

> *"is not simply the prevention of repetitive applications or the control of abusive or vexatious litigants. It is to confront the fact, for such it is, that the exponential growth of judicial review applications in recent years has given rise to a significant number of hopeless applications which cause trouble to public authorities, who have to acknowledge service and file written grounds of resistance prior to the first consideration of the application, and place an unjustified burden on the resources of the [courts]"*

[48] In ***Hon. Dr. George Chaponda & Another v Charles Kajoloweka & Others***, the Supreme Court of Appeal held that although at the stage of permission to apply for judicial review the Court is not to go in-depth into the issues on their merits, the Court must, at the same time, also ensure that its consideration of such issues and the reasoning of its decision should not be merely cursory especially where the application is opposed. The Court went on to clarify on what courts hearing applications for permission to apply for judicial review need to do when making their decisions on the issue. The Court observed that:

> *"The [High] Court* ***did not delve deep into the question of identifying the questions fit for judicial review*** *purportedly 'out of fear of usurping the powers of the court which is to handle the substantive judicial review.'* ***This was wrong****."* [Emphasis supplied]

[49] In other words, the Supreme Court of Appeal was propounding that **it is wrong** for the High Court, at the permission stage, where an application for permission is opposed, to shy away from delving substantially deep into an

analysis of whether the questions raised are indeed fit for consideration at a full judicial review hearing.

[50] The High Court, at the permission stage, where such permission is being challenged, should not shy away from analysing issues out of fear of usurping the powers of the court at the substantive judicial review stage. The reason for this approach, the Supreme Court stated, was that when there is a challenge to an application for permission to apply for judicial review, the Court's decision must be constructed in such a way as to ensure that "*the challenger"* should *"be convinced that the court was 'satisfied' of the existence of such issues."*

[51] Thus, the requirement of ensuring that an arguable case fit for further consideration is made is very important as there is no point for the Court to proceed to a full hearing of a judicial review matter where it is clear, at the permission stage, that the intended judicial review application is hopeless and is bound to fail.

[52] This Court has also held before that such an approach is consistent with active case management under Order 1 Rule 5(5)(c) of the CPR, 2017 in furtherance of the overriding objective of the rules. In the case of ***Xelite Strips Limited & 2 Others v The Director of Anti-Corruption Bureau***, Judicial Review Cause 1 of 2023; [2023] MWHC 1, this Court stated that in arriving at its decision, the Court had considered the overriding objective of the CPR, 2017 which is to deal with proceedings justly, and which overriding objective under Order 1 Rule 4 of the Rules includes active case management. The Court further noted that in this regard, the decision of the Court was made after an *inter-partes* hearing involving both parties and bearing in mind the provisions of Order 1 Rule 5(5)(c) of the CPR, 2017 which states that

"Active case management includes deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others."

[53] Thus, notwithstanding specific provisions on ending a proceeding early under Order 12 of the CPR, 2017, as part of the overriding objective of the CPR, and specifically as part of active case management, this Court has general inherent powers to end a proceeding early, but it must provide convincing satisfactory reasons for taking such a decision.[2]

[54] The Court will therefore deal with each of the intended grounds for judicial review in a manner that is befitting this stage of the proceedings, and bearing in mind the pronouncements of the Supreme Court of Appeal in ***Hon. Dr. George Chaponda & Another v Charles Kajoloweka & Others*** as stated above, as well as the rules on active case management.

[55] The Court will first deal with the issue of *locus standi*. This is because if the Court be of opinion that the Claimant has no *locus standi*, then the matter must terminate at that point without further consideration. A party without legal standing (*locus standi*) has no business further standing up for relief before the Court. Such party must stand down from the proceedings.

[56] The Claimant states that he has sufficient interest in this matter, as the abovesaid impugned decisions were made against or in relation to him as an individual.

[2] See ***Hon. Dr. George Chaponda & Another v Charles Kajoloweka & Others*** (above) on the point of the Court having to provide convincing and satisfactory reasons on the decision to grant or refuse permission to apply for judicial review.

[57] The Court quickly finds that the Claimant indeed makes a good case on *locus standi* in his own respect, as he is no doubt personally and directly affected by the impugned decisions.

[58] However, the Claimant's claim also seeks that any remedies that this Court may grant should apply to other persons, being citizens of Malawi or residents of Malawi, allegedly similarly affected. The Court must mention though, that the Claimant does not say much to justify his claim that his *locus standi* in the present matter must extend to the vindication of the rights of those other unspecified persons. He has not advanced any plausible argument in that respect. It must be recalled that in the case of ***Hon. Dr. George Chaponda & Another v Charles Kajoloweka & Others*** (above), the Supreme Court of Appeal upheld its earlier decision in ***Civil Liberties Committee v Minister of Justice & Another***, [2004] MLR 55 that for an applicant for judicial review to show that he or she has sufficient interest in the matter, he or she must show that it is his or her right or freedom that has been violated as a basis for taking up the action.

[59] We may perhaps have our own different views about the scope or the import of section 15(2) of the Constitution on *locus standi* in matters concerning the application of the Bill of Rights in the Constitution, and some High Court Judges have previously tried to express themselves on the matter,[3] but in our system of *stare decisis*, which is one of the fundamental

[3] In ***Public Affairs Committee v Attorney General & Another*** [2003] MWHC 71, Chipeta, J (as he then was) expressed deep dissatisfaction with the approach taken by the Supreme Court of Appeal on matters of locus standi at the time. He stated that: *"Honestly, it seems to me that if it be the case that the Supreme Court has always held the above-quoted views on constitutional interpretation, then I find it difficult to understand how in the Kachere and in the Press Trust cases it could have ended up with a narrow and legalistic, if not also pedantic, version of locus standi in its interpretation of Sections 15(2), 41(3), and 46(2), the said Sections having been couched in very open and liberal terms."* He decided to depart from the approach adopted by the Supreme Court of Appeal. He was eventually greatly chastised by the Supreme Court of Appeal for doing so in the case of *Civil Liberties Committee v Minister of Justice & Another* (above) where the SCA stated that: *"Chipeta, J, fully appreciated that the decisions of Malawi Supreme Court of Appeal in the Kachere's case and the Press Trust case were binding*

pillars of our legal system, the decisions of the Supreme Court of Appeal on the point are legally binding on this Court.

[60] The Supreme Court of Appeal in ***Hon. Dr. George Chaponda & Another v Charles Kajoloweka & Others*** of course proceeded to reckon that there might be instances where properly mandated human rights bodies might be permitted to litigate on behalf of others, but went on to clarify as follows:

> *"While we are on the issue of standing, we wish to briefly revive one point… When human rights are threatened or violated, it is human beings whose rights will have been threatened or violated…[A]s a priority, where the human beings affected can be ascertained, they should be allowed the opportunity to vindicate their rights…It would be wrong, dangerous and unfair, if it became the practice of human rights defenders to snatch away cases from individuals who themselves are quite capable of complaining or bringing up actions in courts for redress."*

[61] The Claimant herein has not established any plausible basis, or at all, for seeking to secure an order on behalf of all other concerned Malawian citizens and residents of Malawi allegedly similarly affected by the 1st Defendant's conduct. He has not even attempted to demonstrate that such persons are not *"quite capable [by themselves] of complaining or bringing up actions in courts for redress"* as stated by the Supreme Court of Appeal in ***Hon. Dr. George Chaponda & Another v Charles Kajoloweka & Others***.

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upon him, but he nevertheless refused to follow them. He preferred a decision on the issue of locus standi which totally contradicted the two cases. That, professionally, is wrong and unacceptable."

[62] **Thus, on the issue of *locus standi*, the Court will proceed on the basis that the Claimant herein is only seeking to vindicate his own rights and that he has no *locus standi* to claim and seek reliefs on behalf of other unknown persons.**

[63] Moving on to the second issue, which relates to the first ground upon which the Claimant seeks to commence judicial review, the Claimant seeks to challenge the alleged decision of the 1st Defendant to collaborate with the National Crime Agency of the United Kingdom without involvement or authorisation of the 3rd Defendant to investigate the corruption cases involving Malawian residents and citizens including the Claimant or any other Malawian.

[64] What the Court finds curious at this point, having read through the supporting documents by the Claimant, is that the documents do not show the factual source or foundation of the Claimant's claim that he was arrested, and that the 1st Defendant seeks to prosecute him, based on information or evidence obtained from the National Crime Agency of the United Kingdom. The Claimant should have clearly stated the source of this proposition of fact in his grounds for judicial review and should have supported the claim and factual assertion in that regard by a verifying sworn statement. He never did so.

[65] The Court considers the provision of such information to be very basic to an application of this nature, and the failure to provide the same by the Claimant is utterly fatal to the survival of his claim.

[66] Further still, on the same issue, the Court notes that at paragraph 4.1.3 of her Skeleton Arguments filed in opposition to the present application, the 1st Defendant states that since the Claimant is yet to be served with

disclosures, he *"does not know the evidence that the [1st] Defendant shall use at trial. It is therefore premature at this stage to claim that the 1st Defendant is using evidence from the NCA without mentioning the type of evidence in question."*

[67] Notably, the Claimant furnished no factual reply, or any reply at all, to this response in opposition.

[68] It follows, in the absence of any factual information regarding the source of the claim, that the Claimant merely suspects or speculates that he was arrested based on such evidence or information, and that he seeks to use the judicial review process as a pre-emptive measure to generally avoid the criminal process relating to the matters upon which he was arrested. Unfortunately for the Claimant, on an application for permission to apply for judicial review, mere suspicion or speculation about how an investigative or prosecutorial decision was made is not enough to demonstrate that he has potential to prove unreasonableness, or consideration of irrelevant factors, upon a full hearing of judicial review. He needed to show the facts through evidence. As earlier established in this decision, the requirement that the Claimant must show that he has a good and arguable claim with good prospects of success cannot be satisfied by an argument that if allowed to survive, the Claimant might eventually be able to show that he has a good case. The good and arguable case, with good prospects of success, must be established at the time of the application for permission and not later.

[69] **In the result, on the basis that this ground of judicial review has no factual basis, the Court concludes that the ground has no legal foundation upon which it can be built any further. The ground is therefore totally without merit and thus unworthy of further investigation at a full hearing of judicial review.**

[70] On another note, the 1st Defendant noted, with curiosity, that in addressing the issue that the 1st Defendant seeks to rely on information obtained with the cooperation of the National Crime Agency of the United Kingdom, the Claimant has completely ignored or avoided to cite this Court's decision in the case of ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau***, Judicial Review Case No. 54 of 2021 (HC, LL) [2022] MWHC 63 where the alleged issue of collaboration with the National Crime Agency of the United Kingdom was extensively dealt with.

[71] The Court shares the 1st Defendant's curiosity as to how the Claimant could have fashioned his documents in a manner that suggests that the case of ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL) was never decided by this Court.

[72] In this connection, as I was incidentally the Judge who had conduct of and decided the matter of ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL)**,** I could not help but notice the striking similarity of certain parts of the arguments in the present matter with those presented in the ***Kezzie Msukwa case***. These parts were basically a replica of each other. For instance, in ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL), Counsel for the 2nd Claimant, Mr. Manuel Theu, at paragraph 5.11.5 of his Skeleton Arguments, argued that:

> *"As regards illegally obtained evidence, it is submitted that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a criminal trial. See the American case of* ***Map v Ohio*** *367 U.S. 643, 656 (1961) and also Canadian case of* ***R v Collins*** *1987 1 SCR 265."*

[73] Strikingly, in the present matter, Counsel for the Claimant, Mr. Gift Nankhuni, in his Skeleton Arguments, at paragraph 6.49 thereof, somehow replicated the abovesaid passage from Counsel Manuel Theu's Skeleton Arguments, with Counsel Nankhuni likewise arguing that:

> *"As regards illegally obtained evidence, it is submitted that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a criminal trial. See the American case of* ***Map v Ohio*** *367 U.S. 643, 656 (1961) and also Canadian case of* ***R v Collins*** *1987 1 SCR 265."*

[74] Looking at such identical passages, this Court is under no illusion that not only was the Claimant in the instant matter fully aware of this Court's earlier decision in ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL), but that the Claimant in fact seems to have accessed the Skeleton Arguments that were used in arguing ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL).

[75] Considering that ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL) basically addressed the same point, one would have expected that the Claimant would have, at a minimum, demonstrated awareness of the existence of such decision. The fact that there is a pending appeal thereon does not blot out the decision from existence. In any event, as will further be shown below, the order of stay of enforcement of that decision by the Supreme Court of Appeal is only partial as it applies only to the 1st Claimant in that case, Hon. Kezzie Msukwa. As we write, that decision remains fully enforceable against the 2nd Claimant, Mr. Ashok Nair.

[76] It is worth noting that the Court, in ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL), addressed the legal question of

whether the Anti-Corruption Bureau, as a State Crime investigative agency in Malawi, was at liberty to cooperate with a foreign crime investigative agency without prior sanction from the Attorney General, based on the provisions of the Mutual Assistance in Criminal Matters Act (Cap 8:04 of the Laws of Malawi) (the MACMA). Indeed, just like in the present case, the foreign investigative agency at issue was the National Crime Agency of the United Kingdom. The Court, upon a reading of section 5(1) of the MACMA, answered this question in the affirmative. However, on the specific facts of the case, the Court went on to conclude, at paragraph 260 [244.8], that:

> *"The Court's analysis of the issues above has shown that the Claimants have failed to demonstrate, on a balance of probabilities, that the Defendant's decision to arrest and prosecute the Claimants herein on the charges captured in the Warrant of Arrest, was actually based on information shared by the National Crime Agency of the United Kingdom, rather than based on the ACB's own investigations after receiving triggering information from the NCA of the UK."*

[77] Another issue that arose in ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL) as an issue for determination on a point law, was the question of whether illegally obtained evidence is always inadmissible in Malawian courts.

[78] After surveying a number of Supreme Court of Appeal decisions and comparative foreign case law, the Court answered this question in the negative, concluding that save where the law expressly prescribes the exclusion of such evidence, the position at law is that a court is given discretion on whether or not to exclude illegally obtained evidence in the circumstances of a particular matter, and that courts deal with the issue of

admissibility of illegally obtained evidence on a case-by-case basis after analysis of the all the surrounding circumstances specific to that case.

[79] In other words, according to the Court in ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL), there is no general principle under Malawian law that states that illegally obtained evidence is always admissible, or that illegally obtained evidence is always inadmissible. The general principle is that courts have discretion on whether to admit such evidence based on the specific circumstances of each case. This point was well stated by the Supreme Court of Appeal in ***Mike Appel & Gatto Limited v Saulos Klaus Chilima*** [2016] MWSC 138. Of course, the discretion of the court should be exercised judiciously.

[80] Again, on the specific facts of that case (***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau***) (HC, LL), the Court made no determination on whether there was any illegally obtained evidence on the matter as no such evidence was laid before the Court for its consideration and assessment. Only questions of law were presented.

[81] The Court is aware that the argument that seeks to fault the use of evidence or information allegedly obtained through the collaboration by the 1st Defendant with the National Crime Agency of the United Kingdom, without the involvement or authorisation of the 3rd Defendant, is basically premised on the principle that *"the fruits of a poisonous tree are poisonous."*

[82] The Claimant's thought experiment seems to be that even if the 1st Defendant and the ACB merely obtained intelligence information from the National Crime Agency of the UK, but that they conducted their own investigations and gathered their own evidence, and based on the assumption that it was illegal for the ACB to obtain such intelligence information from the

NCA without the sanction or authorisation of the Attorney General, then everything that followed pursuant to such intelligence information was tainted and must be excluded from any legal proceedings in Malawi.

[83] However, it is firmly established that the principle of the fruits of the poisonous tree does not apply in Malawi, just like it does not apply in the vast majority of common law-based Commonwealth jurisdictions. A number of such jurisdictions were explored by this Court in ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL). The United States of America, by contrast, does apply the principle, hence decisions such as ***Mapp v Ohio*** (above).

[84] This position was eruditely expressed by the Supreme Court of Appeal in the case of ***Mike Appel & Gatto Limited v Saulos Klaus Chilima*** (above), where the Supreme Court of Appeal stated that:

> *"[W]e want to observe that trial is a principal method of resolving disputes, the overriding purpose being to ascertain the truth. Whether to admit or exclude evidence in a trial remains a matter of discretion for the Court.* ***Where evidence is obtained illegally, improperly or unfairly two opposing views exist, one in favour of admitting the evidence as long as it is relevant and necessary, and the other view is to exclude it regardless of its relevance and whether it is necessary. The former position represents English common law while the latter represents the view that rejects the fruit of the poisonous tree in some jurisdictions.*** *There has been a plethora of academic discourse on the subject. Sometimes this is considered to be the battle between search for truth and the need to observe the*

due process of the law. ***Malawi has over time followed the English common law position that a Court will exercise discretion to admit relevant evidence*** *if in its view the probative value outweighs the prejudicial effect.* ***That remains the position under Malawi law.****"*
[This Court's emphasis]

[85] This position having been so clearly settled by the Supreme Court of Appeal, and this Court having addressed the same matter clearly in ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL), and also for the other reasons expressed above, the Court sees no point in resubjecting the issue of the alleged decision of the 1st Defendant to collaborate with the National Crime Agency of the United Kingdom without the involvement or authorisation of the 3rd Defendant to investigate the corruption cases involving the Claimant and other Malawian residents and citizens. **The issue sought to be addressed is unmeritorious and does not warrant a full investigation thereof at a full judicial review hearing.**

[86] The Court now proceeds to consider grounds 5 and 6 upon which the Claimant seeks to commence judicial review. These grounds are dealt with in this sequence as they have a close nexus to ground 1 that has just been disposed of.

[87] In ground 5, the Claimant seeks to impugn what he alleges to be the decision of the 1st Defendant to flout the Stay Order of the Supreme Court of Appeal stopping the 1st Defendant from acting on the evidence gathered by the Anti-Corruption Bureau working hand in hand with the National Crime Agency of the United Kingdom. He goes as far as asserting that the 1st Defendant, by taking action against him using such evidence or information, is acting in contempt of Court.

[88] In ground 6, the Claimant claims that the 2nd and 3rd Defendants failed in their duty to supervise the 1st Defendant in the execution of her duties relating to an intended or actual investigation and prosecution of the Claimant in so far as the said corruption allegations are concerned.

[89] With regard to the alleged decision of the 1st Defendant to flout a Stay Order of the Supreme Court of Appeal, this Court finds this proposition to be as unmeritorious as it is puzzling.

[90] First, a scrupulous scrutiny of all the documents filed by the Claimant in support of his application shows that he failed to cite the Supreme Court of Appeal decision in which the Stay Order that he is referring to was issued. Such manifest failure to cite the Supreme Court of Appeal decision in which the Stay Order was made, and more so in respect of which the 1st Defendant is alleged to be in contempt, is thoroughly puzzling to the Court. The Court is placed in the unenviable position where it must speculate as to which decision of the Supreme Court of Appeal the Claimant is referring to. Such failure to even mention the very decision forming the basis of the Claimant's claim in this regard must necessarily be fatal to the survival of such claim.

[91] Be that as it may, even if the Court is to presume that the Claimant was perhaps referring to the Supreme Court of Appeal decision in ***Kezzie Msukwa v Director of the Anti-Corruption Bureau,*** (MSCA) Miscellaneous Civil Application No. 25 of 2022 (Being High Court of Malawi, Lilongwe District Registry Judicial Review Case No. 54 of 2021), the decision of Kapanda, JA, SC, where the learned Justice of Appeal stayed the enforcement of the judgment of this Court as regards Hon. Kezzie Msukwa, the Claimant's claim herein remains totally without merit.

[92] The Court notes, in this regard, that the operative part of the Supreme Court of Appeal decision in that matter, of the 28th of June, 2022 stated that:

> *"It is therefore this Court's finding and conclusion that the order of stay pending appeal sought by the 1st Claimant be granted. In the circumstances, the interests of justice plainly require that this Court* ***should continue with the stay Order of 13 June 2022.*** *It is so ordered."* [This Court's emphasis].

[93] In turn, the *ex-parte* Order of Stay of the 13th of June, 2022 was in the following terms:

> *"**ORDER OF STAY PENDING APPEAL***
> *UPON HEARING Counsel for the 1st Claimant herein;*
> *AND EPON READING the affidavit and supplementary affidavits of CHIMWEMWE MAHEKA KALUA of Counsel in support of the application;*
> *AND FURTHER, UPON CONSIDERATION of the 1st Claimant's skeleton argument on the application;*
> *It is ORDERED that enforcement of the judgment of Honourable Justice Professor Kapindu delivered on 30th May 2022 be and is hereby STAYED and that the following decisions of the defendant made on or around 29 December 2021*
> *(a) The decision of the defendant seeking to arrest the Claimant in connection with Plot Number 46/2057 in Area 46 in Lilongwe which was sold to Zuneth Abdul Rahid Sattar by the Ministry of Lands, Housing and Urban Development [the Ministry] long before the Claimant became a Minister;*

(b) the decision by the defendant to investigate, arrest and prosecute the Claimant basing on information gathered from National Crime Agency of the United Kingdom

ARE STAYED Pending hearing of the inter partes application for stay of the judgment of the Court below on 28th day of June 2022 at 9:30 hours in the forenoon at Mzuzu Registry

This order of stay only relates to and is limited as well as confined to the 1st Claimant, Honourable Kezzie Msukwa.

Dated this 13th day of June, 2022

REGISTRAR" [This Court's emphasis]

[94] A reading of the ruling of the Supreme Court of Appeal of the 28th of June, 2022, together with its earlier *ex-parte* Order of the 13th of June, 2022, makes it abundantly clear that the application of the Order of Stay made by the Supreme Court of Appeal was and is *"limited"* and *"confined to the 1st Claimant, Honourable Kezzie Msukwa"* only. Not even the 2nd Claimant in the High Court cause in the same matter, Mr. Ashok Nair, could claim or can claim that the said Order of Stay herein equally applied or applies to him.

[95] It is therefore thoroughly difficult to appreciate how, under such circumstances, the 1st Defendant's conduct in effecting an arrest of the Claimant in the present case could be construed as flouting the Order of Stay made by Kapanda, JA, let alone amounting to contempt of that Court, when such Order was and is expressly *"confined to the 1st Claimant, Honourable Kezzie Msukwa"* only.

[96] Be that as it may, the Court remains to remind itself that as a matter of fact, the Claimant did not mention the Supreme Court of Appeal decision to which it claims to relate.

[97] **This ground therefore (the 5th ground), which is premised on the alleged non-compliance with a Supreme Court of Appeal decision that the Claimant has clearly failed to mention, and which, on the assumption that it relates to the Supreme Court of Appeal decision in *Kezzie Msukwa vs Director of the Anti-Corruption Bureau* (MSCA), results from a manifest misreading, misappreciation and misapprehension of the import of the Order of Stay of the Supreme Court of Appeal in that decision, is again totally without merit. There is nothing arguable at all about such a claim. It is not a matter worthy of further investigation by the Court at a full hearing of judicial review.**

[98] As regards the 6th ground, namely that the 2nd and 3rd Defendants failed to supervise the 1st Defendant in the execution of her duties relating to intended or actual investigation and prosecution of the Claimant in so far as the said corruption allegations are concerned, Counsel for the 1st Defendant was categorical that the 1st Defendant is not supervised by the 2nd or 3rd Defendants.

[99] Counsel contended that under section 4(3) of the Corrupt Practices Act, the 1st Defendant exercises her functions and powers independent of the direction or interference of any other person or authority, and that as such, neither herself nor the ACB generally operate under the supervision of the 2nd or 3rd Defendants. Counsel therefore argued that this ground did not raise any triable issue fit for further investigation at a full hearing of judicial review.

[100] Counsel Sakanda representing the DPP, chose not to make any oral arguments. He said he would simply rely on the written arguments as filed.

[101] The written arguments of the learned DPP are quite interesting. On the issue of whether the DPP has supervisory authority over the ACB, the learned DPP was clearly equivocal in his arguments. For clarity, I will set out the relevant parts in full:

> *"4.1.0. What therefore emerges from this is that:*
> *4.4.1The operational mode of the ACB is independent. [H]owever stepping into [a] Courtroom to prosecute a matter is stepping into the realm of the DPP.*
> *4.4.2The time the ACB is in Court with an accused person for purposes of prosecution, the DPP has duly granted consent to prosecute. The nature and complexity of corruption cases is the likely intention behind this understanding. The scheme of things was solely intended for the two organs (DPP and ACB) to coordinate jointly in terms of what is obtaining in Court. It further recognizes that the power to prosecute is a delegated authority of the DPP.*
> *4.4.3This is the whole reason why DPP appoints each and every officer working as a prosecutor for the ACB. The powers to prosecute [are] delegated from the DPP like any other prosecutor in the country."*

[102] Paragraph 4.14.1 of the DPP's arguments is unclear on its face. Whilst affirming the independence of the ACB, it states that "*stepping into Courtroom to prosecute a matter is stepping into the realm of the DPP."* Whilst this is in some sense true, it is not entirely clear what exactly the DPP means. It is not clear whether he meant that the ACB should not, in any event, step into a courtroom without the consent of the DPP. This equivocation arises particularly because the DPP failed to cite and explain the import of the

provisions of section 42(5) of the Corrupt Practices Act (as the provision existed then) which provided that:

> *"When a person is brought before a court before the written consent of the Director of Public Prosecutions to the institution of a prosecution against him is obtained, the charge shall be explained to the person accused but he shall not be called upon to plead."*

[103] Thus, if the inference meant to be drawn from the DPP's argument under paragraph 4.14.1 of his Skeleton Arguments was that the ACB should not step into a courtroom at all without the consent of the DPP, then the argument was misconceived in the light of this provision. The ACB was legally entitled, in the state of the law at the material time, to bring an accused person before a court before the written consent of the Director of Public Prosecutions to the institution of a prosecution against him was obtained, and where this occurred, the requirement of the law was that the charge would be read and explained to the accused person, but he or she would not be called upon to enter a plea.

[104] Further, paragraph 4.14.2 of the said Skeleton Arguments states that:

> *"The scheme of things was solely intended for the two organs (DPP and ACB) to coordinate jointly in terms of what is obtaining in Court. It further recognizes that the power to prosecute is a delegated authority of the DPP."*

[105] Thus, the learned DPP suggests that the relational scheme between that of his office and the ACB is one of coordinating agencies. He observably does not state that the relationship is one of a supervisor and supervisee.

[106] He then states that the ACB's power to prosecute is delegated. He justifies this claim by stating, at paragraph 4.14.3 of his Arguments, that this is why the "*DPP appoints each and every officer working as a prosecutor for the ACB. The powers to prosecute are delegated from the DPP like any other prosecutor in the country.*"

[107] First, in the observation of this Court, the DPP has merely stated that the ACB's prosecutorial powers are delegated from his office. He has not said that the DPP supervises the ACB in the actual conduct of prosecutions.

[108] This Court must add that a plain reading of section 10(1)(f) of the CPA as it was at the time when the decisions herein were purportedly made, shows that the powers of the ACB to prosecute are actually conferred by statute, namely by the CPA, and not delegated to the ACB by the DPP. However, the ACB's powers, as conferred by statute, are made subject to the directions of the DPP. The section provides that *"The functions of the Bureau shall be to, subject to the directions of the Director of Public Prosecutions, prosecute any offence under this Act."* This meant that the ACB had prosecutorial powers on its own right, but such powers were subject to what the DPP might direct. That is not what the concept of delegation entails. The provision simply meant that the ACB's prosecutorial powers were under the CPA, as they still remain under the Constitution, limited rather than delegated.

[109] Part of the limited regime was also exemplified by the fact that at the material time, the ACB's powers were made subject to the grant of the consent by the DPP to prosecute the matter under section 42(1) of the CPA. Under section 42(3) of the CPA, the DPP (the 2nd Defendant herein) was required to make his or her decision granting or withholding consent within 30 days of the making of such a request by the 1st Defendant, *"failing which the Director*

shall be entitled to proceed as if consent to prosecute had been given under subsection (1).”

[110] In the end on this point, this Court’s view is that Section 10(1)(f) of the CPA is clearly the power conferring provision. The power to prosecute was directly conferred on the ACB and the 1st Defendant by Parliament through an Act of Parliament, the CPA and that is where the ACB’s power to prosecute comes from. The DPP did not, as it were, take a decision that the ACB should have prosecutorial powers through an instrument under his hand. The power was conferred on the ACB directly by an Act of Parliament, namely, the CPA. However, the ACB’s prosecutorial power was limited as it was made subject to certain decisions of the DPP both under the Constitution and under the CPA. Even at present, notwithstanding amendments to the CPA in respect of the issue of the DPP’s prior consent in order for the ACB to prosecute, the ACB’s powers remain subject to some decisions of the DPP such as the power to discontinue any proceedings commenced or undertaken by the ACB, or to take over the prosecution of such cases.

[111] The fact that the ACB was required, at the material time, to obtain consent from the DPP did not amount to the existence of a supervisor supervisee relationship. A further exemplification of this point is evident from the decision of the Supreme Court of Appeal in the case of ***Anti-Corruption Bureau v Rodrick Mulonya*** [2006] MLR 19 (SCA), where the Court which shows that the scheme of the law, in vesting in the DPP the powers to grant consent to prosecute, does not envisage that the DPP will be supervising the ACB along the way, let alone continuously so. Changes or indeed some interim gaps in office holders have no effect on the ACB’s capacity to continue prosecuting any given matter as long as consent to prosecute had been granted or was deemed to have been granted as the case may be.

[112] Again, under section 99(2) of the Constitution, the Court is aware that the DPP, where he or she considers it desirable to do so, may (a) institute and undertake criminal proceedings against any person before any court (other than a court-martial); (b) take over and continue any criminal proceedings which have been instituted or undertaken by any other person or authority; and (c) discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or herself or any other person or authority.

[113] A plain reading of this provision shows that where an authority, such as the ACB, in exercise of the prosecutorial powers vested on it by an Act of Parliament, such as the CPA, institutes criminal proceedings, the DPP has the power to either takeover or discontinue such proceedings. The provision however does not state that the DPP shall thereby supervise the work of the ACB. Supervision entails that the supervising authority manages and/or oversees, or directs and controls, the work of the supervisee. This is clearly not the nature of the relationship be tween the 1st Defendant (the Director of ACB) and the 2nd Defendant (the DPP).

[114] In fact, the supervision argument is completely misplaced when it suggests that the 2nd Defendant should somehow have been supervising the conduct of investigations by the 1st Defendant. The DPP does not have investigative powers in the first place. His office has ultimate prosecutorial powers in the country, which are subject to general or special directions of the Attorney General under section 101(2) of the Constitution. The DPP's office however has no investigative powers.

[115] Be that as it may, as discussed above, neither basis, whether investigative or prosecutorial, gives the 2nd Defendant any supervisory authority over the

1st Defendant. The office however may make certain decisions that directly impact on the work of the 1st Defendant. These are two very different things.

[116] **In conclusion therefore, the argument that the 2nd Defendant failed in his obligation to supervise the 1st Defendant in the exercise of her functions is wholly without merit, it is not an arguable claim and does not merit further investigation at a full hearing of judicial review.**

[117] Having disposed of the issue of the purported supervisory role of the 2nd Defendant over the 1st Defendant, the issue of a similar argument in respect of the 3rd Defendant is a very straightforward matter. The 3rd Defendant can clearly not be said to have failed in his duty in that regard by reference to his function under section 101(2) of the Constitution to give general or special directions to the 2nd Defendant in the exercise of his functions. If the 2nd Defendant does not have supervisory powers over the 1st Defendant as this Court has since found, there can be no supervisory nexus between the 3rd Defendant and the 1st Defendant based on the relationship between the 1st Defendant and the 2nd Defendant on the one hand, and the 2nd Defendant and the 3rd Defendant on the other.

[118] The other Constitutional role of the 3rd Defendant is that of being the Principal Legal Advisor to the Government. Section 98(1) of the Constitution is very clear about that role. In that capacity, the 3rd Defendant may indeed provide legal advice to the 1st Defendant on how to exercise the powers of her office. The provision of such advice however does not create a supervisor – supervisee relationship between the Attorney General and the Government institutions or authorities that he or she advises.

[119] It must be recalled that the Attorney General, in exercise of his or her powers under section 98 of the Constitution, advises the entire Government

machinery including the State President, the Vice President, the Speaker of the National Assembly and the Chief Justice of the Republic; as well as some independent organs under the Constitution such as the Ombudsman and the Human Rights Commission, among others. There cannot be any shred of suggestion that by providing such legal advice to the holders of these high offices, or to the independent oversight organs under the Constitution, the Attorney General thereby supervises their work. Conceptually, the role of the Attorney General in relation to the 1st Defendant is the same as his role in relation to all the above mentioned, and indeed in relation to the entirety of the Government machinery, namely that the Attorney General is their principal (as in the ultimate) official legal advisor.

[120] **It follows therefore, that the argument that the Attorney General failed in his duty to supervise the 1st Defendant is wholly untenable. This is not a point that is worth further investigation upon a full judicial review hearing.**

[121] **Furthermore, it should be emphasized that the issue of supervision, if at all it were to be relevant, would only arise if grounds 1 and 5 of the intended judicial review action herein had any leg to stand on. It has already been demonstrated that they do not. There is therefore, in any event, no hope at all for ground 6 to succeed and, as such, it is not fit for further investigation on a full hearing of judicial review.**

[122] The next issue to decide rests on the second ground for judicial review herein, where the Claimant seeks to challenge the decision of the 1st Defendant to present a report of its investigation (which investigation did not involve calling the Claimant to present their side of the story) on the said corruption cases to the State President, the Speaker of the National Assembly and the Chief Justice of the Republic of Malawi.

[123] The Claimant argues that by submitting the Report to the Speaker of the National Assembly, this constituted politicization of the case. He further refers to the President's speech and uses it as a basis for the claim that he (the Claimant) has already been convicted in the court of public opinion. Simply put, the Claimant, to summarise his argument on this point, suggests that the President's speech of 21st June, 2022, and his actions in respect thereof, scandalized him by creating a depiction of criminality of his person in the eyes of the public.

[124] On the issue of alleged politicization, by submitting the Report to the President, and sending a copy to the Speaker of the National Assembly, first the Court observes that the Claimant did not furnish the purported Report to the Court. The Court takes note of exhibit GN3 which is a copy of the Speech of the State President of 21st June, 2022. However, the rules of evidence are clear. This Court cannot use the President's remarks in that speech as proof of the truth of the contents of Report by the 1st Defendant to the President. The *locus classicus* case of ***Subramaniam v Public Prosecutor*** [1956] 1 WLR 965, is a long established authority for that proposition. Indeed, innumerable decisions in this jurisdiction have adopted the proposition with approval. If citation of some Malawian decisions on the point be needed, it suffices for the Court to cite the cases of ***Namiti Mtsuko v Isaac Jere*** [2013] MLR 271 (HC), and ***Mpungulira Trading Ltd v Marketing Services Division*** [1993] 16(1) MLR 346.

[125] The Court therefore needed to see the Report itself and analyse its contents for purposes of ascertainment of the truth of their existence in order for it to competently determine whether the submission of the Report amounted to politicisation. Also, in particular, the Court needed to examine the Report itself and reckon whether, regard being had to its contents, it was submitted

to the President in excess of the 1st Defendant's powers. This is more so because generally, under section 4(4) of the Corrupt Practices Act, the law does enjoin the 1st Defendant to submit reports to the President. The Section states that:

> *"The Director shall submit reports to the President and to the Minister regarding the general conduct of the affairs of the Bureau."*

[126] The Claimant proceeded to state, at paragraphs 4.30 to 4.33, that:

> *"4.30 A copy of the State President address to the Nation is exhibited herein as "GN 3"*
> *4.31 The Claimant and the other persons have already been convicted in the court of public opinion as being guilty of grand corruption and looting of State resources.*
> *4.32 From the ACB Report to the State President, it is clear that there is no evidence of wrongdoing on part of the Claimant and such other persons, but that the 1st Defendant is geared at pleasing certain quarters not pursuing justice.*
> *4.33 From the submissions made by NCA to the court in England, it is clear that there is not much evidence against the Claimant. A copy of the NCA Report to court in England is exhibited herein as "GN 4"."*

[127] On the issue that by reason of the President's speech, the Claimant *"has already been convicted in the court of public opinion as being guilty of grand corruption and looting of State resources"*, the Court wishes to point out that the courts are presided over by professionals who take their oaths of offices very seriously, they are well trained, and the vast majority (save for a few

beginner magistrates) have the necessary experience to disregard extraneous or irrelevant matters. The Courts know all too well that their duty is to impartially adjudicate matters with regard only to legally relevant facts and the prescriptions of law, even in the face of hostile and widespread media or other publicity.

[128] The issue of the effect of wide publicization of matters of professional judicial officers is a matter that courts have considered before elsewhere. For instance, the European Court of Human Rights has dealt with this matter in a number of cases. In ***Previti v Italy*** (App. no. 45291/06), 8 December 2009, paras. 253–254; and ***Craxi v Italy*** (App. no. 34896/97), 5 December 2002, para. 104, the Court held that that negative media campaigns will not necessarily cast sufficient doubt on the ability of a professional judge to rise above such reporting since professional judges should possess the *"experience and training"* necessary to rule out any external influence at trial.

[129] In the case of ***Mustafa (Abu Hamza) v United Kingdom (No. 1)*** (App. no. 31411/07), 18 January 2011, the European Court of Human Rights had to deal with the issue of the trial of a radical cleric in the United Kingdom which trial, according to the Court, was characterised by unremitting and sensational hostile media publicity against the defendant. Notwithstanding such hostile media publicity, the European Court held that the defendant received a fair trial as the trial judge had given a *"full and unequivocal direction to the jury to ignore the adverse publicity . . . and to concentrate instead on the evidence before them"* (para. 39 of the Judgment).

[130] The European Court went further to find that this fact, together *"with the repeated warnings given by the trial judge to the media in the course of the trial, provided sufficient guarantees to exclude any objectively justified doubts*

as to the impartiality of the jury" - ECtHR, ***Mustafa (Abu Hamza) v United Kingdom (No. 1)*** (App. no. 31411/07), 18 January 2011, para. 40.

[131] This passage also highlights the point that the real risk that is frequently perceived is in those jurisdictions where trials are before a jury. The risk drastically reduces to negligible proportions where a professional judicial officer is the one to make the determination(s).

[132] In the South African case of ***Bernert v ABSA Bank Ltd*****,** 2011 (3) SA 92 (CC), Ngcobo CJ stated that:

> *"Judicial officers, through their training and experience, have the ability to carry out their oath of office and it "must be assumed that they can disabuse their minds of any irrelevant personal beliefs and predispositions." Hence the presumption of impartiality."*

[133] The Courts therefore, duly presided over by professional judicial officers, would not be swayed or otherwise get influenced by Presidential or other political pronouncements, and make judicial decisions to the prejudice of the Claimant herein as a result. An allegation that the State President made a speech that a person feels cast them in negative light among members of the general public is, on its own, far from being a sufficient basis for making a claim before these courts to stop an investigation or prosecution in the given matter. Doing so would be tantamount to casting an unwarranted vote of no confidence in the neutrality, impartiality, independence and general professionalism of the Judiciary.

[134] The Claimant makes further assertions to justify his claim that he cannot possibly have a fair trial in Malawi. At paragraphs 4.16, 4.19, 4.19.1, 4.19.2, and 4.22, he states as follows:

> *"4.16. In the social media there has been concerted efforts by certain Malawian individuals such as Onjezani Stanley Kenani, lddris Nassar, Timothy Nundwe and Gogo Gowoka who enjoy large following both locally and internationally to discredit the Claimant as [sic] public official and Sattar as [sic] businessman and portray him as [sic] corrupt public official and businessman respectively that duped the Malawian authorities.*
> *4.19 So far there has been a deliberate crusade to intimidate:-*
> *4.19.1 lawyers from representing the Claimant and Sattar; and*
> *4.19.2 Judges against making orders in favour of the Claimant and Sattar.*
> *4.22 To date there has been so much deliberate and calculated negative publicity against the Claimant and Sattar that it is now impossible for them to have a fair criminal trial in Malawi."*

[135] The Court has, however, already made its position clear above that the role of a professional judicial officer should be starkly distinguished from that of a jury or lay assessors. Professional judicial officers are well trained and experienced not to subject themselves to negative media campaigns when trying cases, and they are accustomed to rising above such negative media or other campaigns or negative media reports, and to rule out of their consideration any external influences during trial.

[136] In any event, even where there is a jury trial characterised by widespread media publicity, especially where public figures are concerned and such publicity is inevitable, it has already been demonstrated above, that there would still be a fair trial as long as the trial judge, both regularly in the course of the trial and during his or her summing up, gives a full and unequivocal direction to the jury to ignore the adverse publicity and to concentrate instead on the evidence before them.

[137] In the case of ***Rep v Banda and others*** [1995] 2 MLR 767 (HC) Mkandawire J stated, at pages 770-771, as follows:

> *"The starting point is section 42 of the Constitution, which provides that every accused person shall be entitled to a fair trial. It was submitted that there is no possibility of having a fair trial in this case because there has been widespread publicity. The case was used as a campaign issue before the elections…While it is appreciated that newspapers should not prejudice fair hearing by adverse or hostile reporting, publicity alone cannot be the basis of staying proceedings. There must be shown something more than that. As it was said in the case of* ***R v Reade Morris and Woodwiss*** *(unreported) in the Independent of 19 October 1993, the case is popularly known as the "Birmingham Six." It was stated in that case that: "The jurisdiction to grant a stay should be regarded as exceptional and used sparingly and only for compelling reasons. Here, publicity, though a powerful factor, did not stand alone." I cannot agree more with this statement. It should not be forgotten that the Constitution provides for a free press and so the press cannot be muzzled when it is only doing its job of informing the public. True, there has been widespread*

publicity in this case, some of it hostile to the accused. But that per se cannot be the ground for a stay. In the "Birmingham Six" case, there was much more than mere publicity. In the case of ***R v Bow Street; Ex parte DPP*** *(1992) 95 Cr App, there was widespread publicity, some of which was sensational, critical and in some cases clearly hostile to the accused and yet the Court of Appeal reversed the stay that had been granted earlier. The defence has not shown anything more than publicity. As the Director of Public Prosecutions has rightly observed, if publicity standing alone can form the basis of a stay, then the end result will be granting immunity to a fair size of the community whose involvement in the criminal matter would form juicy material for the press. I can think of prominent politicians, church leaders, prominent businessmen, the list is indeed endless. In order to have these people prosecuted, one would have to muzzle the press so that there is no publicity. This would be absolutely absurd. I wish to assure the accused persons that this Court will do all it can to ensure that they have a fair trial. This objection is, therefore, dismissed."*

[138] In the instant case, the Court purposely mentioned in paragraph 1 of this decision, the prominent official capacity in which the Claimant herein was working prior to his removal from office. A criminal process relating to a former head of the Malawi Police service, allegedly in connection with how he conducted himself whilst serving in the capacity, will inevitably be the source of widespread publicity and comment, some of it very critical on the Claimant. Courts however are duty bound to ensure that where there is a criminal trial involving such personalities, they should receive a fair trial notwithstanding such developments.

[139] With respect to the alleged *"deliberate crusade to intimidate lawyers from representing the Claimant and Sattar,"* first, and regrettably for the Claimant, no evidence has been presented to show the existence of such threats. Even if the threats were demonstrated, the solution is not rush to a permanent stay of a prosecution even before it begins. The Courts are well able to make necessary cautioning orders against such persons, and where security concerns arise, the security agencies would be called upon to discharge their constitutional and statutory functions so that the course of justice is not perverted. It would only be in extremely rare cases, where particularly compelling circumstances are shown, that a Court should conclude that a fair trial would no longer be tenable before any competent Court in the jurisdiction, but certainly not under the present circumstances where trial has not even commenced and none of the alleged issues of concern have been presented before the trial Court.

[140] In respect of the allegation of *"deliberate crusade to intimidate Judges against making orders in favour of the Claimant and Sattar,"* again no evidence of such intimidation has been furnished. If the same were shown, again the Court seized of the matter would take necessary measures to ensure that persons making such threats, in so far as they are subject to its jurisdiction, are appropriately restrained from doing so. In addition, whether such persons be within or without the jurisdiction, the Court has already emphasised the ability and indeed the fortitude of professional judicial officers, by reason of their rigorous training and years of labour and experience, to rise above such alleged campaigns and make stoutly independent judicial decisions.

[141] Further, just like the Court has mentioned earlier, if there would be any security threats, the security agencies of the state would be called upon to provide necessary security so that the course of justice is not perverted. As

already mentioned above, the solution does not lie in rushing to permanently stop a prosecution even before it commences. Such prospect is reserved for extremely rare cases where abundant and very compelling facts are laid before the trial court that a fair trial would not be tenable anywhere in the jurisdiction.

[142] The sweeping argument that it is impossible for the Claimant and Mr. Sattar to have a fair trial in Malawi is utterly unsustainable for all the reasons that this Court has already expressed above. It shows the Claimant's misappreciation of the great capability and fortitude of Malawian courts to exercise independence and impartiality, without fear or favour, affection or ill-will, which they always endeavour to adhere to. No circumstances have been demonstrated to exist in the present case which would render Malawian courts impotent to ensure a fair trial for the Claimant.

[143] The Court now proceeds to refer to the Claimant's argument at paragraph 4.32 of his grounds in support of the judicial review application where he states that:

> *"From the ACB Report to the State President, it is clear that there is no evidence of wrongdoing on part of the Claimant and such other persons, but that the 1st Defendant is geared at pleasing certain quarters not pursuing justice."*

[144] As observed earlier, the Claimant is making an allegation whose basis, according to him, are the contents of the ACB's Report to the State President, and yet such report was never produced as evidence before the Court. The Claimant goes as far as saying *"it is clear"* from the Report, yet the Report, which he alleges makes his proposition clear, has not been produced. If the Claimant saw and read the said report, he should have produced it for the

Court to make its own analysis and findings based on the same. If he did not have the Report but he really wished to see and read the same in these proceedings as a document that was directly connected to the exercise of his rights, he could have made a relevant access to information application in order to access the same. An instance where such an application was made is in the case of ***S v Lilongwe Water Board & Ors.; Ex Parte: Malawi Law Society*** (Judicial Review 16 of 2017) [2017] MWHC 135, where the Malawi Law Society, in the context of an application for judicial review, made an access to information application under section 37 of the Constitution. This was well before the coming into effect of the Access to Information Act, 2016 which further elaborates how this right may be realized and enjoyed. At paragraph 40 of the decision, the Court stated that:

> *"I am persuaded that this request falls within the remit of the right of access to information under Section 37 of the Constitution. The Court therefore grants the prayer for an Order requiring the 1st Respondent to make available to the applicant the Project Brief, if any, submitted to the 3rd Respondent; the contract between the 1st Respondent and Khato Civils (Pty) Ltd; and any relevant document concerning the project; and a further Order requiring the 3rd Respondent to make available to the applicant the documents submitted by the 1st Respondent and any other relevant document concerning the project in its custody."*

[145] However, in the circumstances of the present case, the Court may presume, from the Claimant's own utterances, where he expresses undoubted clarity in respect of the contents of the Report, that he perhaps saw and read the Report, and that he might somehow have chosen not to produce it before this Court.

[146] Whatever the case may be, the result of the omission or the failure to produce the Report is that the whole argument on this issue is unsustainable on the basis of lack of a proven factual foundation. The argument must therefore fail.

[147] Then, further still, the Claimant makes a rather surprising proposition before the Court. He states that:

> *"From the submissions made by NCA to the court in England, it is clear that there is not much evidence against the Claimant. A copy of the NCA Report to court in England is exhibited herein as "GN 4""*

[148] The Court has tried very hard to understand how and why the UK proceedings should feature in the present proceedings. The Court cannot see the relevance. The arguments exhibited are purportedly arguments that the NCA presented to the Uxbridge Magistrate Court in the United Kingdom, in relation to a matter between the NCA and Mr. Zuneth Abdul Rashid Sattar.

[149] One of the immediate problems the Court has with this document is that it appears that the Claimant's Counsel might have taken the issue of its authenticity for granted. The document, purportedly a public document in the United Kingdom, was not officially authenticated pursuant to the provisions of the Authentication of Documents Act (Cap. 4:06 of the Laws of Malawi). Under section 12 of the Authentication of Documents Act:

> *"a public document signed in any country or place in which the Convention is in operation shall be sufficiently authenticated if authenticated by a certificate or "apostille", in the form set out in the Second Schedule, signed by any person designated*

in that country or place for the purposes of the Convention as an authority competent to issue a certificate or "apostille""

[150] For the avoidance of doubt, *"Convention"* under the Authentication of Documents Act means *"the Convention abolishing the Requirement of Legalisation for Foreign Public Documents made at the Hague and dated the 5th day of October, 1961."* Both Malawi and the United Kingdom of Great Britain and Northern Ireland are States parties to the Convention.[4]

[151] According to section 2 of the Authentication of Documents Act, the terms *"public document"* means:

> *"a document emanating from an authority or an official connected with the courts or tribunals of any State being a party to the Convention, including those emanating from a public prosecutor, a clerk or registrar of a Court, a sheriff or a process server."*

[152] The document exhibited by Counsel for the Claimant, ostensibly Skeleton Arguments emanating from a public prosecutor's office in the NCA, being an official connected with the courts or tribunals of the United Kingdom, is thus caught by the provisions of section 12 of the Authentication of Documents Act. However, it is clear that exhibit "GN4" does not have a properly executed accompanying certificate of authentication or apostille, signed by a person designated in the UK for purposes of the Convention, as required by the Act.

[153] The Court is aware that under section 3(2) of the Authentication of Documents Act:

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[4] See the status of ratifications on https://www.hcch.net/en/instruments/conventions/status-table/?cid=41 (accessed 5th June, 2023).

> *"A certificate which purports to be signed, sealed or stamped by an officer whose certificate is declared by this Act to be sufficient authentication of a document may, if duly stamped under the Stamps Act, be accepted in evidence without proof of the signature, seal or stamp of such officer, and when accepted shall be presumed to be signed, sealed, or stamped by such officer."*

[154] However, the purported Skeleton Arguments (Exhibit *"GN4"*) have no signature of the purported author thereof, and they have no stamp or seal or indeed any insignia of authentication.

[155] It could well be that if they are authentic for purposes of the UK proceedings, they could have been electronically submitted to that Court and the Court there would have inbuilt mechanisms for authentication of electronically submitted documents. Those mechanisms would clearly not apply to a Court in a different jurisdiction such as Malawi, in a situation where they have just harvested from an undisclosed source, and then presented physically to the Court such as is the case in the instant matter.

[156] Indeed, the document does not even show the case reference number in respect of the matter to which it refers. The authenticity of the document therefore has not been established before this Court. The authenticity is up in the air. On this ground alone, the document must fall to be completely disregarded by this Court.

[157] Even if the document had satisfied the abovesaid legal requirements, the Court would remain unconvinced about the merits of the argument advanced. The Court observes that the proceedings in the United Kingdom to which the

document purports to refer are in fact not proceedings against the Claimant. Whilst the Claimant might have been mentioned, it is clear from *"GN4"* that the document relates to investigations into the conduct of one Zuneth Abdul Rashid Sattar and not the Claimant. And, as already said, the document relates to proceedings before a foreign Magistrate Court and no explanation has been provided why this Court should treat such document as proof that a Malawian crime enforcement agency does not have enough evidence to produce before a Malawian Court.

[158] In any event, decisions as to whether the evidence that the ACB has is insufficient would be made by the trial Court once it has seen the disclosures from the State. All in all, the Court accordingly ignores exhibit *"GN 4"* on grounds of lack of relevance to the present proceedings, and the attendant argument by the Claimant is dismissed for being totally wanting in merit.

[159] Another ground upon which the Claimant seeks to impugn the 1st Defendant's criminal process against him, which was framed as Ground 3 under Form 86A, is the decision of the 1st Defendant to arrest him, or any other person, and bring them before a court of law when they could simply be summoned to attend court on a specific date.

[160] Section 84 of the CP & EC indeed suggests that where there is a formal charge drawn pursuant to the provisions of section 83 of the CP & EC, a Magistrate may either issue summons or issue a warrant of arrest in order to compel the attendance of the accused before a subordinate Court.

[161] Section 84 of the CP & EC provides that:

> *"(1) Upon a formal charge having been completed in accordance with section 83, the magistrate may, in his*

discretion, issue either a summons or a warrant to compel the attendance of the accused before a subordinate court having jurisdiction to inquire into or try the offence alleged to have been committed.

(2) The validity of any proceedings taken in pursuance of a complaint or charge shall not be affected either by any defect in the complaint or charge or by the fact that a summons or warrant was issued without complaint or charge.

(3) Any summons or warrant may be issued on Sunday."

[162] First, the Court takes the position that no one has a guaranteed right not to be arrested if suspected of having committed an arrestable offence, unless, at the given time, such person has legal immunity or is somehow legally privileged from arrest. For instance, section 60(1) of the Constitution provides for some circumstances in which a member of the National Assembly is privileged from arrest. It provides that:

"The Speaker, every Deputy Speaker, and every member of the National Assembly shall, except in cases of treason, be privileged from arrest while going to, returning from or while in the precincts of the National Assembly and shall not, in respect of any utterances that form part of the proceedings in the National Assembly, be amenable to any other action or proceedings in any court, tribunal or body other than Parliament."

[163] This Court has of course previously expressed the need for arresting agencies or authorities to follow the text of the law when effecting arrests and not to unnecessarily humiliate or violate the dignity of arrested persons. But that is not to suggest that there is a right of persons suspected of committing

arrestable offences from being subjected to an arrest. A Detailed discussion on the issue of the manner of arrest is made in ***Kezzie Msukwa & Another v Director of the Anti-Corruption Bureau*** (HC, LL) (above).

[164] Secondly, looking at the text of section 84(1) of the CP & EC, it is clear that a Magistrate seized with a particular matter in which a formal charge has been completed in accordance with section 83, has discretion on whether to issue a summons or a warrant of arrest.

[165] Further, it is noteworthy from the text of section 84(1) of the CP & EC, that the fact that the CP & EC has expressly conferred discretion upon the Magistrate entails that even where such Magistrate is simply presented with an application for the issuance of a warrant of arrest, he or she may decide to decline the issuance of the warrant and authorise instead the issuance of a summons. The decision to issue a summons or a warrant is ultimately that of the Magistrate and not the agency, person or authority applying for the same.

[166] Another issue to note is that where a person suspected of having committed a crime is summoned rather than arrested first for purposes of court attendance, one of the major implications of that course of action is that the person facing criminal charges remains unconditionally free. The result is that he or she may, for instance, travel anywhere as he or she pleases, whether within or outside the country, without informing let alone seeking the permission of any person or authority. This is an important factor which courts take into account when deciding whether to only issue a summons to compel court attendance of such person before the Court or to authorise, through a warrant, a prior arrest so that when the person facing the charges is released, such person is released on conditions (bail) that the Court, the

Police or other arresting authority such as the 1st Defendant herein, in appropriate cases, may consider proper.

[167] In addition, and significantly so, section 84(2) of the CP & EC makes it clear that neither a defect in the summons or warrant, or indeed the fact that that the summons or warrant was issued without prior complaint or charge, would affect the validity of the proceedings.

[168] The implication is clear, therefore, that even the fact that a warrant was issued by the Magistrate, in exercise of his or her statutory discretion, without any person complaining or any completed charge being presented before him or her, such situation would still not affect the validity of the proceedings. One would readily conclude that the presumption of validity would therefore apply *afortiori* (with greater force), where a completed charge is in fact presented before the Court. The Claimant did not suggest that no completed charge was presented before the Court before the warrant of arrest was issued.

[169] In addition, if, as will be further demonstrated by case authorities below, the Claimant had issues with the fact that he was subjected to arrest rather than summoned to Court, this is a matter that would be adequately dealt with and resolved within the criminal process itself and not through resort to the judicial review process. Using the same as a basis for the overall goal of seeking to get a permanent stay of the criminal proceedings, the subject matter of the present decision, sounds like the Claimant is clutching at straws.

[170] All in all, the Court finds that, even in the multiplicity of grounds presented herein, there are no issues in the present application that are fit for further investigation at a full hearing of judicial review. The Court has made an effort

to address all the issues raised, and sees no merit for a further hearing on such matters at a full judicial review hearing. The *inter partes* hearing on permission to apply for judicial review revealed enough for the disposal of the matter.

[171] The Court must however mention that there is another very potent reason for declining to grant permission to apply for judicial review in the present matter. In this regard, the Court wishes to reiterate what it recently stated in the case of ***Xelite Strips Ltd v Director of the Anti-Corruption Bureau***, Judicial Review Cause 1 of 2023 ([2023] MWHC 1, where it adopted with approval, the reasoning of the Court in the Kenyan case of ***Republic v Director of Criminal Investigations & 2 others; Resilient Investments Limited & 3 others (Interested parties)***, (Judicial Review Application E037 of 2021) [2022] KEHC 43 (KLR) (4 February 2022), where the Court, at paragraph 30, stated that:

> *"The power to stop or quash police investigations on a suspected offender must be exercised sparingly and with circumspection and in the rarest of rare cases, and the court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion…The power to quash investigations is immense since it amounts to exonerating a suspect before trial. Such power must be exercised with extreme care and caution. It is a power which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution."*

[172] The Court, in the ***Xelite Strips case***, went further to state, at paragraph 78, that:

> *"in order for this Court to be satisfied that there is an argument and indeed a case fit for further investigation at a full judicial review hearing…[t]he Claimants would have to show that such conduct is so patently absurd that no reasonable person or body would be expected to engage in the same. They would have to show that the Defendant's conduct is highly exceptional and that it is demonstrative of abuse of power or abuse of discretion or bad faith."*

[173] The decision of the Court in the ***Xelite Strips case*** is consistent with a well-established principle, exemplified by a long line of cases, that although judicial review of a prosecutorial decision is in principle an available remedy, it is also, as a matter of principle and practice, a very rare and indeed highly exceptional remedy.

[174] A variety of cases from commonwealth jurisdictions demonstrate this fact. In ***R v Inland Revenue Commissioners, Ex p Mead*** [1993] 1 All ER 772, 782, the Court held that it is "*rare in the extreme"* that courts will permit judicial review on the exercise of prosecutorial discretion. In ***R v Director of Public Prosecutions, Ex p C*** [1995] 1 Cr App R 136, 140, the Court of Criminal Appeal in England held that the judicial review of prosecutorial decisions should be *"sparingly exercised"*. In the case of ***Kostuch v Attorney General of Alberta***, (1995) 128 DIR (4th) 440, 449, the Supreme Court of Canada stated that courts must be *"very hesitant"* to allow judicial review in such cases. In ***R (Bermingham) v Director of the Serious Fraud Office*** [2006] EWHC 200 (Admin), [2006] 3 All ER 239, para 63, the Court stated

that judicial review of prosecutorial decisions should only be allowed *"very rarely."* On the domestic plane, in ***Ex-parte Gift Trapence & Another v Director of Public Prosecutions***, Constitutional Cause No. 1 of 2017, a three-judge Panel of the High Court sitting on a constitutional cause, held that judicial review of prosecutorial decisions should only be allowed in *"rare and exceptional circumstances"*.

[175] Thus, in addition to the normal considerations that a Court must take into account when deciding whether to grant permission to apply for judicial review, the Court is mindful that when the intended challenge relates to the exercise of investigative and/or prosecutorial powers, permission to apply for judicial review will generally not be granted. Permission, in such cases, may only be granted in exceptionally rare cases, cases where highly unusual circumstances, that are *"rare in the extreme",* exist and are demonstrated. This view is further buttressed by the position taken by the Court in the case of ***R v Director of Public Prosecutions, Ex p Kebilene*** [2000| 2 AC 326, 371, where, in the House of Lords, again referring to the need for the courts to be highly restrained in intervening by way of judicial review against the exercise of prosecutorial discretion, Lord Steyn stated, with the unanimous concurrence of the Court, that:

> *"My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review."*

[176] Another instructive decision in this regard is ***Sharma v Deputy Director of Public Prosecutions & Others (Trinidad & Tobago)***, [2006] UKPC 57, where the Judicial Committee of the Privy Council took the view that almost invariably, any application that a person seeking to challenge a prosecutorial process might wish to make may competently be made before the court

handling the criminal matter and that it is not desirable to shift to the civil courts for such applications. The Privy Council started by explaining why judicial review might be the appropriate recourse in instances where the decision is one not to prosecute. The Court stated that:

> *"We are not aware of any English case in which leave to challenge a decision to prosecute has been granted. Decisions have been successfully challenged where the decision is not to prosecute…in such a case the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal, and judicial review affords the only possible remedy:* ***R (Pretty) V Director of Public Prosecutions*** *[2001] UKHL 61, [2002] 1 AC 800, para 67…In* ***Wayte v United States*** *(1985) 470 US 598, 607, Powell J described the decision to prosecute as "particularly ill-suited to judicial review.""*

[177] The Court, in ***Sharma v Deputy Director of Public Prosecutions & Others (Trinidad & Tobago)***, then proceeded to express the desirability of all challenges taking place in the criminal trial or, if unsuccessful, on appeal and not to divert proceedings from the criminal court regime to a civil court regime in a separate judicial review proceeding. The Court justified that approach, explaining that:

> *"In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself (****R v Horseferry Road Magistrates' Court, Ex p Bennett*** *[1994] 1 AC 42). But, as Lord Lane CJ pointed out with reference to abuse applications in* ***Attorney-General's***

Reference (No 1 of 1990) *[1992] QB 630, 642, "We should like to add to that statement of principle by stressing a point which is somewhat overlooked, namely, that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay.""*

[178] In ***Attorney-General's Reference (No 1 of 1990)*** (quoted in ***Sharma vs Deputy Director of Public Prosecutions & Others (Trinidad & Tobago)*** above)[1992] 3 All E.R. 169, Lord Lane, CJ proceeded to state, at page 174, that:

"This was pointed out in clear terms in a case which merits more attention than it sometimes receives, namely ***R v Heston-Francois*** *[1984] 1 All ER 785, [1984] QB 278. In that case the police searched under warrant the defendant's home for stolen jewellery. They removed files of documents and tapes prepared for his defence to charges of burglary. The officer showed the documents to prosecution witnesses. The defendant applied for a stay on the grounds that the actions of the police amount[ed] to an abuse of the process of the court. The judge refused the application. On appeal against that ruling, it was held that the judge was correct in the view that he took. The following passage appears in the judgment of the court delivered by Watkins LJ ([1984] 1 All ER 785 at 792–793, [1984] QB 278 at 290): 'A pre-trial inquiry, such as the appellant contends the judge in this case was under a duty to embark on would itself be open to abuse by unscrupulous and dishonest accused persons. The criminal trial system would be placed in jeopardy. The facts of the present case*

demonstrated the importance of, among other things, discovering during the trial whether alleged misconduct by the police had had any effect on the evidence and any likely bearing on the result… However reprehensible conduct of this kind may be, it is not, at least in circumstances such as the present, an abuse or, in another word, a misuse of the court's process. It is conduct which, in these circumstances, falls to be dealt with in the trial itself by judicial control on admissibility of evidence, the judicial power to direct a verdict of not guilty, usually at the close of the prosecution's case, or by the jury taking account of it in evaluating the evidence before them.'"

[179] Simply put, where an accused person, as in the present case, complains about the conduct of the investigative and prosecutorial authorities, the appropriate forum before which to primarily bring those complaints is before the trial court itself, and such court, as part of its responsibility of judicial control, will deal with those issues accordingly. Where, in the case of a subordinate trial court, matters of jurisdiction that are beyond or arguably beyond the competence of such court arise, the issues for determination can then be escalated to the High Court either by invoking the Court's statutory supervisory and revisionary powers under section 26 of the Courts Act, or by way of case stated or question of law reserved to the High Court as envisaged under sections 99(4) & (5) of the Constitution. But the accused person should refrain from migrating to a civil regime of proceedings in the High Court, except where the very rare (highly exceptional) circumstances described above are demonstrated.

[180] In the present case, it has not been demonstrated as to which, if any of the Claimant's complaints, may not be competently and adequately dealt with and resolved within the criminal process itself.

[181] This point takes this Court to the issue of whether the Claimant has alternative remedies as earlier discussed in this decision. The answer is in the affirmative. In the case of ***The State v The Chief Resident Magistrate & Others, Ex-Parte Friday Jumbe & Others***, Judicial Review Cause No. 18 of 2015, this Court, sitting at Zomba, stated at paragraph 1.29 of the decision, as follows:

> *"So here is the conclusion of the whole matter: I cannot grant leave to apply for judicial review because the applicants have an alternative remedial avenue. They can seek review of the matter before a Judge of the High Court under the CP & EC, under the Courts Act [sections 25 and 26], or under both pieces of legislation. I therefore direct that if the Applicants are still minded to have the decision in the Court below reviewed, they should adopt that procedure first."*

[182] Those provisions, in particular sections 25 and 26 of the Courts Act, provide a very wide spectrum within which any concerns relating to the conduct of proceedings in a lower Court, if not properly dealt with by the subordinate Court, may be escalated to the High Court for appropriate decisions. Further to the supervisory and revisionary processes, the Claimant would also have recourse to the appellate process where appropriate.

[183] Thus, again, the application herein must fail on the basis that the Claimant has not successfully demonstrated that in the circumstances, he would not have any effective alternative remedies apart from having recourse to the process of judicial review under Order 19 Rule 20 of the CPR, 2017.

[184] **It follows therefore that, in any event, the application for permission to apply for judicial review herein is without merit and it must fail. The Application is therefore dismissed in its entirety.**

[185] Finally, the Court is mindful that costs lie in the discretion of the Court. However, it is also the general practice of the courts that costs follow the event. The Court has considered that whilst the application herein does not necessarily constitute one brought in the public interest, the same has given the Court an opportunity to clarify a number of important points of law regarding the criminal procedure process as it relates to the civil judicial review process, among others. In view of this, the court exercises its discretion by making no order as to costs.

[186] It is so ordered.

Made in Chambers at Lilongwe this 5th Day of June, 2023.

R.E. Kapindu
JUDGE