



**REPUBLIC OF MALAWI
JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
FAMILY AND PROBATE DIVISION**

JUDICIAL REVIEW CAUSE NUMBER 28 of 2022

BETWEEN:

THE SATE (on the application of)

ESTERE CHUNGA 1ST CLAIMANT

MANGANI KAZEMBE 2ND CLAIMANT

-AND-

THE ADMINISTRATOR GENERAL 1ST DEFENDANT

MRS. SHIRA KAZEMBE (NEE ZIGOWA) 2ND DEFENDANT

**CORAM : HON. JUSTICE F.A. MWALE.
: Mwandira, counsel for the applicant
: Mpandaguta, Court Interpreter**

Mwale, J.

**RULING ON WITHOUT NOTICE APPLICATION TO EXTEND TIME
WITHON WHICH TO COPMMENCE JUDICIAL REVIEW
PROCEEDINGS**

1. Before I delve into the substance of the application before me, I have noted various anomalies in the sworn statement in support by counsel. I reproduce below excerpts from the sworn statement:

“ 2. **THAT** I depose to matters of fact personally known to me and from the information supplied to me by the Claimants herein and verily believe the same to be true.

3. **THAT** the 1st Claimant herein is an Aunt of the deceased herein. She is an elder Sister to the deceased's Mother and she is the one who raised up the deceased person herein

4. **THAT** the 2nd Claimant is a young Brother to the deceased named herein and he was told by the deceased who also raised him up that he was registered as '*Nest of Kin*' by the deceased at the Malawi Police Service where he was working

5. **THAT** the 1st Defendant is a Government Institution principally responsible for distributing deceased Estates as its powers are governed by Statutes that include inter alia the **Deceased Estates (Wills, Inheritance and Protection) Act, 2011**, the **Administrator General's Act Cap. 10:01** and other laws.

(...)

7. **THAT** the Malawi Police Services did all its Administrative processes until the file and all records were handed over to the 1st Defendant herein.

8. **THAT** on 7th July, 2022 the 1st Defendant received the sum of around MK11,000,000.00 as Pension for the deceased named herein which accrued after the death of the deceased herein and distributed

the same by giving the 2nd Defendant the sum of MK7,000,000.000 whilst the 1st Claimant received MK4,000,000.000 respectively.

9. **THAT** however; reading through both the **Deceased Estates (Wills, Inheritance and Protection) Act 2011, the Pension Act 2010, Laws of Malawi**, including the Case authority on Pension for deceased Person, it is clear that Pension money which accrued after the death of a deceased person is not part of the deceased Estate and as such, the 1st Defendant acted beyond its given powers.

10. **THAT** the Claimants engaged us to represent them on the claim of unlawfully distributed Pension benefits because the 2nd Claimant was told by his late brother that he was next of Kin and was therefore entitled to be part of the responsible people to distribute Pension benefits as it is not part of the Deceased Estate.”

2. Three offending issues in the sworn statement that must be addressed before the substance of the matter can be settled. First, the sworn statement contains factual statements on the issues in dispute. Secondly, the sworn statement expresses legal opinion on the issues and lastly, the sworn statement contains legal argument. It is trite law that such renditions have no place in sworn statements.
3. With regard to the first issue, our rules of procedure are silent about the issue of lawyers deposing sworn statements. Generally, therefore, there is no rule against counsel in appropriate circumstances, making sworn statements in matters in which they are on record. However, if counsel on record swears an affidavit, he or she is subject to the same rules as other

witnesses namely, order 18 rule 23 of the Courts (High Court) Civil Procedure Rules that:

“(1) A party may require the attendance, for cross examination of a witness making a sworn statement.”

Counsel who swears a statement therefore opens himself or herself up to cross-examination on factual issues that he or she has simply been told by his clients, and since counsel swears that these matters are personally known to him or her, this leaves the door open to professional embarrassment during cross-examination. Counsel has in his sworn statement referred to too many factual issues which verily should have been sworn by the applicant and not by counsel.

4. To illustrate the abhorrence with which the issue of counsel swearing an affidavit on factual issues is met, I have sought wisdom from other common law jurisdictions which have firmly settled the issue. Canada, for instance, is one such jurisdiction which in the case of *Rochon v. Commonwell Mutual Insurance Group*, 2021 ONSC 2880 a 2021 decision of the Ontario Superior Court of Justice, one of the issues raised was whether an affidavit sworn by counsel of record, in response to a motion, was entirely appropriate. The plaintiff in that matter sought to amend the statement of claim. In an affidavit, defence counsel stated that he “verily believes” that the proposed increase in the claim for damages is “frivolous, vexatious and an abuse of process” and is not “bona fide”. Justice Gomery noted that if defence counsel had evidence on these issues, he was a potential trial witness and his firm should get off the record.
5. Further, in the same vein, in the 2008 Ontario Superior Court of Justice decision in *Mapletoft v. Christopher J. Service*, 2008 CanLII 6935 (ON SC) at para. 15, Master MacLeod discussed the challenges in having an

affidavit sworn by the lawyer or staff member. He found that the issue is that counsel may become a material witness for trial, which would require the firm and the lawyer to withdraw from the action. Master MacLeod stated:

This principle is grounded in the rules governing conflict of interest and the need for counsel as an officer of the court to retain an appropriate level of professional objectivity. The court cannot countenance counsel for a party placing his or her own credibility in issue on an important point of evidence.

So sacred is the rule against counsel giving factual evidence that there is no other option than to withdraw from record as a result of offending it.

6. I have had occasion to inquire into the ethical implications of counsel giving evidence in a case in which he or she is on record in the criminal case of *The Republic v Leonard Karonga*, Criminal Case No. 68 of 2014, [2016] MWHC 491 (01 March 2016); in a ruling before sentence. In that case, the evidence in issue was live testimony at trial to be made by the prosecution as proof of when, during the course of the proceedings, the convict had pleaded guilty. My findings then were as follows:

"I have noted that the 2004 Malawi Law Society Code of Ethics (Chapter 18) does not tackle the issue of whether a lawyer can testify as a witness at a client's trial. Since this Code of Ethics has yet to be adopted it may very well be that changes have been made to it since. Whilst I am aware that in its current form the Code of Ethics is not legally binding, it is nonetheless a useful indicator of the prevailing thoughts on the subject within the profession. Whilst I have not, in the time since we adjourned the day before yesterday [been able] to source the most recent version of the proposed Code

of Conduct, I have sourced Codes of Conduct for numerous jurisdictions across the Commonwealth and beyond and the unanimous consensus seems to be that "lawyers appear to recognize, whether by rules or common sense, that merging the role of the advocate and witness is not a wise idea" but it is subject to exceptions. Thus, a lawyer may be disqualified from continuing to act for a client where it becomes apparent that he or she may be needed to testify as a witness in the client's matter if he or she does not fall under the exceptions."

The common law rules in this regard have therefore already been applied in our jurisdiction.

7. Secondly, in addition to expressing himself on the facts of the matter, counsel in this matter has also gone too far in that he has proceeded to present an opinion in his sworn statement. In paragraphs 9 and 10 of the Sworn Statement for example, counsel makes firm expression of opinion which Justice Gomery in *Rochon v. Commonwealth Mutual Insurance Group* (cited above) criticized by stating that,

"in the client's eyes, the lawyer who swears in her belief as to the appropriate outcome of a proceeding is implicitly criticizing the court should it come to a different view".

Therefore, according to that case, a lawyer who expresses his or her personal opinion or belief can undermine the administration of justice. In summary, the gist of the *Rochon* case (cited above) is that sworn statements of lawyers should contain facts and evidence, not the lawyer's personal beliefs or opinions, particularly on contentious legal issues.

8. Thirdly, is also trite law that a sworn statement should not contain legal positions. Paragraphs 5 and 8 of the Sworn Statement for example, make express reference to statute and the position of the law. The sworn statement is therefore also offensive in that respect.
9. In the absence of our own ethical rules of conduct, we can borrow a leaf from Canada, in the case of *in Mapletoft v. Christopher J. Service* (cited above), where Master MacLeod provided the following guidelines for the use of affidavits sworn by lawyers:

“15. For the guidance of counsel in future, I propose the following guidelines:

- a) A partner or associate lawyer or a member of the clerical staff may swear an affidavit identifying productions, answers to undertakings or answers given on discovery. These are simple matters of record, part of the discovery and admissible on a motion pursuant to Rule 39.04. Strictly speaking an affidavit may not be necessary but it may be convenient for the purpose of organizing and identifying the key portions of the evidence. Used in this way, the affidavit would be non-contentious.*
- b) If it is necessary to rely on the information or belief of counsel with carriage of the file, it is preferable for counsel to swear the affidavit and have other counsel argue the motion. This approach will not be appropriate for highly contentious issues that may form part of the evidence at trial. If the evidence of counsel becomes necessary for trial on a contentious issue, it may be necessary for the client to retain another law firm.*

c) Unless the evidence of a lawyer is being tendered as expert testimony on the motion, it is not appropriate for an affidavit to contain legal opinions or argument. Those should be reserved for the factum.”

10. In addition, guidance was also provided in *Ferreira v. Cardenas*, 2014 ONSC 7119, a Ontario Superior Court of Justice decision by Justice Myers who conceded that certain procedural motions turn on evidence that counsel can provide, such as the chronology of the action or facts regarding how litigation has progressed. In those instances, counsel, rather than the client, are best suited to provide these facts. Counsel would do well to follow this guidance.

11. For all I have reasoned above, I find the sworn statement in support of the application improper and inappropriate and in consequence, the order for extension of time within which to commence judicial review is not granted.

I so order.

Pronounced in Chambers in Lilongwe in the Republic, this 7th day of November 2022.



Fiona Atupele Mwale
JUDGE