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**MALAWI GOVERNMENT**

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**IN THE MATTER OF THE COURTS (HIGH COURT) (PROCEDURE  
ON INTERPRETATION OR APPLICATION OF THE CONSTITUTION)  
RULES**

**CONSTITUTIONAL REFERENCE NUMBER 01 OF 2021**

**(Being Civil Cause Number 75 of 2021, Before Honourable Justice M.A  
TEMBO Sitting at Blantyre)**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**APPLICANT**

**AND**

**NORMAN PAUL CHISALE**

**1<sup>ST</sup> RESPONDENT**

**CHIMWEMWE t/a NAMAUYA INVESTMENTS**

**2<sup>ND</sup> RESPONDENT**

**DEBORAH ZIMATHA CHISALE-**

**3<sup>RD</sup> RESPONDENT**

**ESNART GUGA**

**4<sup>TH</sup> RESPONDENT**

**FLONEY GUGA**

**5<sup>TH</sup> RESPONDENT**

**JANNET FATCH KAMANGA**

**6<sup>TH</sup> RESPONDENT**

**CHRISTINA MVULA**

**7<sup>TH</sup> RESPONDENT**

**Coram; Honourable Justice Dingiswayo Madise**

**Honourable Justice Kenan Manda**

**Honourable Justice Anneline Kanthambi**

Dr. Jean Piriminta for the Applicant

Mr. Chancy T. Gondwe for the 1<sup>st</sup> Respondent

Mr. Mathanda Official Interpreter

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## RULING

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1. This is the Court's ruling on the application taken out by the 1<sup>st</sup> Respondent herein, Norman Paulosi Chisale, that the Preservation Order in respect of the 1<sup>st</sup> Respondent be varied to enable the said 1<sup>st</sup> Respondent access his Bank Account domiciled at First Capital Bank of Malawi being Account Number 0004501004244 for him to be able to meet his reasonable living expenses and for legal costs. The Application was brought under Order 10 Rule 1 of the Courts (High Court) (Civil Procedure), Rules 2017 and Section 71(1) (a) of the Financial Crimes Act, 2017).
  
2. The facts in support of the application are laid out in the Applicant's sworn statement, and we will not endeavour to replicate the same here, save to state that the State, through the Director of Public Prosecutions (DPP) and the Financial Intelligence Authority (FIA), was granted a Preservation Order on 25<sup>th</sup> February, 2021 by which a number of properties belonging to the 1<sup>st</sup> Respondent were seized under the Financial Crimes Act. The Order was to be effective **until the conclusion of forfeiture proceedings or until a contrary order of the Court that granted the Order.**
  
3. By the operation of the said order, the 1<sup>st</sup> Respondent was restrained from dealing adversely with the property listed in the Order which include: the balance of MK 30 018 592.92 in Account Number 1519603 at National Bank of Malawi, Capital City Branch under a Preservation Order obtained by the FIA and also the balance of MK 87 375 128.00 in Account Number 0004501004244 at First Capital Bank of Malawi under a Preservation Order obtained by the FIA.

4. The 1<sup>st</sup> Respondent argued that he should be presumed innocent and be allowed to access his Accounts to enable him meet his reasonable living expenses and also funds to enable him pay for the Lawyers he has engaged to represent him in this matter. The 1<sup>st</sup> Respondent further argued that the Applicant obtained the Preservation Order without notice and as such any affected party can also apply to have the said order varied without notice. Upon receipt of this application which was made without notice, the 1<sup>st</sup> Respondent was directed by the Court, to serve the same on the State, who had 2 clear days to respond to the same.
  
5. The Director of Public Prosecutions obliged and raised a preliminary objection and prayed for an order dismissing the 1<sup>st</sup> Respondent's application for an order varying the Preservation Order on the basis that the Constitutional Court, to which the application was made, does not have the jurisdiction to hear the application. The State was of the view that the application for variation is before a wrong Court. That the jurisdiction of the Constitutional Court is limited to the interpretation of the constitutional questions that are before it, and any matters ancillary to such interpretation. That the granting of the extension of the Order by the Constitutional Court was not out of order considering that such an extension was necessary for the hearing of the matter before it. Had the Preservation Order been left to expire, the matter before the Constitutional Court could have been moot. That the application and consideration of the extension did not touch on any matters of evidence and did not have any substantive effect on the Preservation Order itself, save for its validity which had to be extended on account of the Constitutional Court referral.
  
6. The State further argued that the application to vary the Preservation Order on the other hand is quite a substantive proceeding which invites issues of

evidence before any Court can make any determination. In reply to the Applicant's preliminary objection, the 1st Respondent, on 5<sup>th</sup> August 2021, filed a sworn statement in opposition to the preliminary objection and prayed for an order to determine the substantive application for the variation of the Preservation Order on the merits based on the papers filed.

7. The 1<sup>st</sup> Respondent argued that if the issue is that of the Constitutional Court lacking the jurisdiction to entertain the variation of the said Preservation Order, then the Constitutional Court equally lacked the jurisdiction to extend the validity of the Preservation Order, and that the Constitutional Court should set aside the order that it granted extending the validity of the Preservation Order.
8. The 1<sup>st</sup> Respondent further argued that the High Court (Civil Division) having referred the matter to this Court as a Constitutional matter, all other applications in relation to the matter herein must be brought to this Court since once the matter has been referred to this Court, proceedings in the original Court are stayed therefore one cannot bring any application in the original court other than before this Court. That the effect of the referral is that the duty to exercise active case management falls squarely on this Court.
9. The 1<sup>st</sup> Respondent also argued that section 9 (2) of the Courts Act gives the Constitutional Court such wide powers that qualifies it to entertain the application brought by the 1<sup>st</sup> Respondent. That the jurisdiction of the Constitutional Court is not confined strictly to the specific questions for which the Court is empanelled to determine but includes all business arising there out if those matters largely relate to the matters being determined.

10. While stating that the Applicant's being able to obtain an order from this Court extending the Preservation Order was in order, the 1st Respondent then argued that it would be unfair and unjust for this Court to refuse to hear the 1<sup>st</sup> Respondent's application as the Court has the jurisdiction conferred on it by the section 9 of the Court's Act aforementioned.

11. The 1<sup>st</sup> Respondent further argued that the Constitutional Court has the obligation to ensure that it gives effect to the underlying objectives of the Court rules, that is, to deal with matters justly and to ensure that the parties are on an equal footing. That should this Court find that it does not have the jurisdiction to entertain this application, then the Court wrongly assumed jurisdiction over the extension of the Preservation Order and this Court should proceed to set aside the Order extending the validity of the Preservation Order.

12. Finally the 1<sup>st</sup> Respondent argued that the Constitutional Court is essentially a High Court with unlimited original jurisdiction assigned to the High Court, and so has the jurisdiction to determine those matters or issues ancillary to the main matter. The 1<sup>st</sup> Respondent then prayed to have the Application in a proceeding for preliminary issues to be dismissed and to proceed to decide the substantive application on the merits based on the papers filed.

**THE ISSUE(S).**

13. The only issue before the Court is whether the Preservation Order obtained by the Applicant herein should be varied to allow the 1<sup>st</sup> Respondent reasonable access to the funds for living expenses and for legal costs payable to his legal counsel.

## THE LAW

14. The application for variation of the Preservation Order was brought Under Order 10 Rule 1 of the Courts (High Court) (Civil Procedure) Rules 2017, which states that a party may apply during a proceeding for an interlocutory order or direction of the Court by filing an application in a proceeding in Form 4.
15. As is the practice, before this court can ably dispose of a matter, one important question of jurisdiction has to be determined. On this question, the Applicant had argued that the Constitutional Court had no jurisdiction to entertain the application made by the 1<sup>st</sup> Respondent herein which is the subject matter of this ruling.
16. Section 9 (2) of the Courts Act states that Every proceeding in the High Court and all business arising there out, **if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution**, shall be heard and disposed of by or before not less than three judges. Emphasis added.
17. The issue here is if it expressly and substantively relates to or concerns *the interpretation* of the Constitution. Does the variation of the Preservation Order expressly and substantively relate to or concern the interpretation or application of the provisions of the Constitution? We think not, and neither do the parties herein because no one has argued that it does.
18. The Applicant and the 1<sup>st</sup> Respondent are actually in agreement as to the jurisdiction of the High Court sitting as a Constitutional Court as provided for in section 9 of the Court's Act quoted above. The difference however comes in on the application of the provision in this application. As the 1<sup>st</sup> Respondent's Counsel rightly observes, and it is not in dispute that once

the original court has made a referral under sub rule 1 of Order 19 Rule 7 of the Courts (High Court) (Civil Procedure) Rules 2017, the proceeding in the original court shall be stayed pending the decision of the Constitutional Court.

19. Does the law then provide that those proceedings stayed in the original court should be continued in the Constitutional Court, because that is what the 1<sup>st</sup> Respondent seems to be suggesting? The answer is no. Those proceedings will continue in the same court that was seized with them once the Constitutional Court has disposed of the matters tasked with. Why then does the 1<sup>st</sup> Respondent want the order to be vacated by the High Court sitting as a Constitutional Court? The 1<sup>st</sup> Respondent first argued that the Preservation Order was obtained without notice and as such any affected party can also apply to have the said order varied without notice. That this Court was able to extend the Preservation Order and so it has the jurisdiction to vary the said Order, after all as a High Court, it has unlimited jurisdiction. The Applicant had already argued essentially that the application and consideration of the Preservation Order itself, save for its validity which had to be extended on account of the Constitutional Court referral.

20. First off, this Court does agree with the 1<sup>st</sup> Respondent in so far as he argues that once the matter has been referred to the Constitutional Court, the proceedings in the lower court are stayed, as provided for in Order 19 rule 7 sub rule 2... but that provision does not end there. It further states that the proceeding in the original court shall be stayed *pending a decision of the Court*. Sub rule 5 of the same rule provides that the decision of the Constitutional Court shall be remitted to the original court which shall

decide the proceeding before it, in accordance with the decision of the Court.

21. Regard being had to the foregoing, it is our considered view that much as it is true that this Court is a High Court sitting as a Constitutional Court, it would be stretching it to state that it has unlimited jurisdiction after the manner of the High Court with a judge sitting alone since the parameters of matters to be handled by this Court are clearly set by section 9 above. We do not think that that the Constitutional Court was meant to take over what was meant to be handled by the court originally before whom the matter came prior to the referral and act as a review court or a court of appeal of the issues raised before the original court. The Constitutional Court in the instant case is tasked with dealing with matters referred to it and we find that varying the Order does not fall within the ambit of what this Court is tasked to do.

22. Having so found, should entertaining the application to extend the Preservation order be equated to varying the Preservation Order? We think not. These are entirely two divergent issues. As rightly argued by the State, extending the Preservation Order substantially and relates to interpretation of the Constitution and it does nothing to the substance of the Order itself save to maintain the status *quo*. We rather agree with the Applicant's position in that while the 1<sup>st</sup> Respondent's application does indeed seek to change the face of the original order, the Applicant's application for an extension does not. Further, the application for extension did indeed expressly and substantively relate to the matter referred to this Court and not granting the same would have rendered the exercise moot.



23. The matter that was brought to Court to deal with is the Preservation Order as was made by the original Court, and nothing more or nothing less. If this Court goes on to change the original order, then would it not be effectively stating that the order it makes in place of the original Court's Preservation Order is more constitutionally sound than the one that came before it. If that is not in effect prematurely determining the matter then what is?

24. We are of the view that the 1<sup>st</sup> Respondent's Counsel was well aware of the provisions of Order 19, concerning the stay of proceedings in the original Court, and the remission of the file back to the Court that originally heard the matter once the Constitutional Court has discharged its duty. The 1<sup>st</sup> Respondent's Counsel was also aware that there is no provision in the law/rules nor intention that the Constitutional Court handles issues that were supposed to be raised before the original Court. Consequently, if the 1<sup>st</sup> Respondent was desirous of having the Preservation Order varied, it should have done the same in the Original Court prior to moving the Court to facilitate the commencement of the present proceedings fully knowing that once the matter has been referred to this Court, the proceedings in the original Court are stayed.

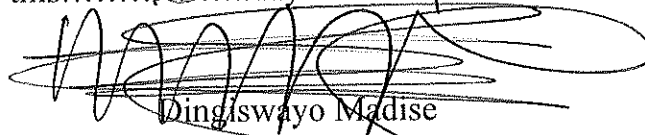
25. In any case the Preservation Order in question clearly stipulates that it is to last *until the conclusion of forfeiture proceedings or until a contrary order of the Court that granted the Order*. The Preservation Order still subsists as it has not been set aside or varied yet. Obviously this Court is not the original Court that granted the Order. In addition, this Court cannot sit as an appellate court against the decision of the Original Court. On this basis, this Court is a wrong forum to entertain the application to vary the Preservation Order.

**THE CONCLUSION**

26. In the final analysis, we are of the considered view that we are entrusted with the duty to interpret the constitution in so far as the issue referred to this Court is concerned, that is the Constitutionality of the said order and not deal in any manner with the said order as is being prayed for by the 1<sup>st</sup> Respondent. To start tinkering with the order as prayed for by the 1<sup>st</sup> Respondent would be to preempt the proceedings for it would be tantamount to stating, before the parties have substantially presented their cases, that this Court to some extent agrees with the 1<sup>st</sup> Respondent in so far as he is questioning the constitutionality of the Preservation Order.

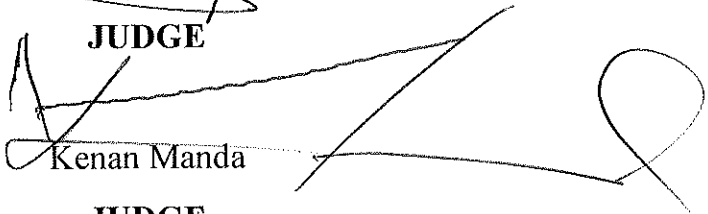
27. The application is hereby dismissed with costs.

Made in Chambers this.....13<sup>th</sup>.....day of September.....2021



Dingiswayo Madise

**JUDGE**



Kenan Manda

**JUDGE**



Anneline Kanthambi

**JUDGE**