

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**MSCA CIVIL APPEAL NO. 32 OF 1997**  
(Being High Court Civil cause No. 63 of 1996)

**BETWEEN:**

FRED NSEULA.....APPELLANT

- and -

THE ATTORNEY GENERAL.....1ST RESPONDENT

- and -

MALAWI CONGRESS PARTY.....2ND RESPONDENT

**BEFORE:THE HONOURABLE THE CHIEF JUSTICE**

**THE HONOURABLE MR JUSTICE MTEGHA, JA**

**THE HONOURABLE MR JUSTICE KALAILE, JA**

Appellant, not represented

Kenyatta Nyirenda, Counsel for the 1st Respondent

Bazuka Mhango, Counsel for the 2nd Respondent

Ngaiyaye (Mrs), Official Interpreter/Recorder

## R U L I N G

### **Mtegha, JA**

The 2nd Respondent in this matter has raised three preliminary objections which require to be dealt with before the substantive matter is considered by this Court. These objections are as follows:

“ (i) That more than three Justices of Appeal may be constituted on this Appeal.

(ii) It is not an Abuse of Court process to move to set aside a Ruling when an application to vary the order of a single Judge of Appeal is summarily refused.

(iii) It is not an abuse to apply to set aside a ruling which orders that there is no reason for not hearing the cross Appeal brought by the 1st Respondent even when the substantive Appeal no longer exists.”

The brief facts of the case are these. The appellant herein filed an appeal against the judgment of **Mwaungulu, J** which he delivered on 1st October 1997. Subsequently, the 1st Respondent filed a notice of motion of intention to affirm the judgment on grounds other than those relied upon by the Court below. Soon thereafter, the appellant decided to withdraw his appeal, but the 1st Respondent desired to continue with notice of motion. The 2nd Respondent, however, decided to file an application stating that notice which the 1st Respondent filed is without merit because the substantive appeal had been withdrawn. In a lucid judgment, **Unyolo, JA** sitting as a single Judge of Appeal, held that under O.III, r.13 of the Supreme Court of Appeal Rules, the 1st Respondent was entitled to file the notice. The 2nd Respondent appealed against that ruling to the full Court, and on 21st November 1997, the full Court dismissed the appeal summarily as an abuse of court process. It is against that ruling that the 2nd Respondent now raises the preliminary objections.

It has been submitted by Mr Mhango that there is need for more than three Judges to hear this case because of the nature of the case. The Supreme Court of Appeal can be constituted to an uneven number of five or seven Justices of Appeal. We have stated on several occasions that the practice of this Court has been that three Justices of Appeal constitute a full Court. If there is need, a full Court comprising five or seven Justices of Appeal could be empanelled. But we see no need in this case. In any case, the empanelling of the Supreme Court of Appeal is purely an internal administrative matter of the Supreme Court of Appeal, and no one else can determine its composition.

Further, the Court dismissed the 2nd Respondent's application to vary **Unyolo, JA's** ruling because it saw no merit in the application. **Unyolo, JA's** ruling covered all what was required and we found that there was no point for us to dwell on the same issues which the learned Justice of Appeal adequately dealt with. Indeed, we considered it an abuse of court process in our earlier ruling. This Court has inherent powers to dismiss summarily an application which is frivolous and an abuse of the court process. That is how we viewed that application. Mr Mhango has submitted that by not affording him the opportunity to argue his case before us, we were in violation of his rights under section 43 of the Constitution. As we have already said, Mr Mhango's application was not coming before this Court for the first time. He had been given the opportunity to be heard before **Unyolo, JA**. He was raising the same issues on the same facts before the full Court. The Court, as we have pointed out, has inherent powers to hear

or not to hear an application where the full facts of the issues for determination are before it.

It has also been submitted by Mr Mhango that there is no subject matter upon which this Court can entertain this appeal because the appeal has been withdrawn by the appellant. If the learned Counsel read the ruling by **Unyolo, JA**, he would have discovered that O.III, r.13 of the Supreme Court of Appeal Rules covered the present situation and the rule entitles the Attorney General to continue with his notice. We find that there is nothing new and novel in the present appeal to entitle us to disagree with the learned Justice of Appeal.

For these reasons, we dismiss these preliminary objections, with costs.

DELIVERED in open Court this 9th day of November 1998, at Blantyre

Sgd .....  
R A BANDA, CJ

Sgd .....

H M MTEGHA, JA

Sgd .....

J B KALAILE, JA