IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 58 OF 2003

BETWEEN

Ian Kanyuka suing on his own behalf.............................Plaintiffs
and on behalf of all National Executive
Members of National Democratic Alliance
(NDA)

-AND-

Thom Chiumia..1st Defendant

-and-

Chikumbutso Mtumodzi..2nd Defendant

-and-

Ken Ndanga...3rd Defendant

CORAM: TEMBO, J.
Kamkwasi, of Counsel for the Plaintiffs
Kaphale, of Counsel for the Defendants
Jere, Court Clerk

RULING

TEMBO, J. : On 8th January, 2003, upon an ex-parte application of the plaintiff the court granted an order for an interlocutory injunction against the defendants. By that

order, the defendants, namely, Thom Chiumia, Chikumbutso Mtumodzi and Ken Ndanga and their members, servants, agents, principals or employees or whosoever were and are restrained from holding themselves out or referring to themselves or each one of them as President, Secretary General and Treasurer General or at all as members of the National Democratic Alliance (NDA). That order further restrained and does restrain all of the foregoing from in any way using the name of, or political party, National Democratic Alliance (NDA) or its letter head, slogans, colours or party symbols as their name or political party or symbols. The order in question was to be valid until the hearing and determination of the plaintiffs' application under the Political Parties (Registration and Regulation) Act, to cancel the purported registration of the NDA party by the defendants or until further order of the court.

By their instant application, the defendants are seeking an order of the court to vacate the interlocutory injunction under review and further for an interlocutory injunction against the plaintiffs; thus to restrain the plaintiffs, by themselves, their servants, agents, members or howsoever otherwise from calling themselves or attempting to register themselves as a political party by the name National Democratic Alliance (NDA) until the trial of this matter or until further order of the court. Both parties have filed affidavit evidence and the court has heard legal arguments of both counsel for and against the application.

The Law to be considered and Applied

To begin with, it is expedient for the court to point out that in considering and determining the instant application of the defendants, for an order to vacate the ex-parte order under review and for a fresh order of injunction against the plaintiffs, the court in the main ought, among other things, to consider and apply relevant provisions of Ord.29 of the Rules of the Supreme Court (RSC), relevant provisions of the Political Parties (Registration and Regulation) Act (the Act) and indeed relevant maxims of equity; and the relevant provisions of the Construction of the Republic of Malawi.

Ord. 29 of Rules of Supreme Court makes provision for general principles respecting the grant or refusal of application for interlocutory injunction. The usual purpose of an interlocutory injunction is to preserve the **status quo** until the rights of the parties have been determined in the action. The injunction will almost always be negative in form, thus, to restrain the defendant from doing some act. The principle to be applied in application for interlocutory injunctions have been authoritatively explained by **Lord Diplock in American Cynamid Co -v- Ethicon Ltd** (1975) A.C. 396: The plaintiff must establish that he has a good arguable claim to the right he seeks to protect. The court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. If the plaintiff satisfied these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on a balance of convenience. Thus, the court ought to consider whether damages would be a

sufficient remedy. If so, an injunction ought not to be granted. Damages may not be sufficient remedy if the wrongdoer is unlikely to be able to pay them. Besides, damages may not be sufficient remedy if the wrong, in question, is irrepable or outside the scope of pecuriary compensation or if damages would be difficult to assess. It will be generally material for the court to consider whether more harm will be done by granting or by refusing an injunction. In particular it will usually be wiser to delay a new activity rather than to risk damaging one that is established.

Where, like in the instant case, it is sought that an ex-parte order be dissolved, the court hearing an application, in that regard, may grant the application if it appears to the court that the ex-parte order under review was irregularly obtained by suppression of facts. Besides, the court may discharge an ex-parte order of injunction if it becomes apparent to the court that the injunction was founded on a decision which was wrong in law.

Regard being had to the affidavit evidence and legal arguments of Counsel, the provisions ofPart III of the Act are relevant, in particular the following provisions -

“S.2 ‘political party’ means a combination of persons who have constituted themselves for a political purpose.

S.4 (1) The Registrar shall keep a register in which shall be recorded such particulars relating to a registered political party as are prescribed in this Act.

S.5 (1) A political party consisting of not less than 100 registered members may apply in writing to the Registrar for registration under this Act.

S.7 (1) (b) (I) (ii) The Registrar may refuse to register a political party if he is satisfied that -

(b) the name of the party

(i) is identical to the name of a registered political party or a political party whose registration has been cancelled under this Act;

(ii) so nearly resembles the name of a registered political party or a political party whose registration has been cancelled under this Act.

S.8 (1) Where the Registrar refuses to register a political party, an office bearer of the party may, within twenty-one days after receiving the notice of refusal, appeal to the High Court and the High Court may make such order as it thinks fit.

S.9 (1) (b) (I). Subject to subsection (2), the Registrar may cancel the registration of a political party **-**

(b) on proof to the satisfaction of the Registrar that -

(i) the registration of the party has been obtained by fraud or mistake".

Further regard being had to the affidavit evidence and legal arguments of Counsel, the court ought to have regard to the following maxims of equity. Before turning to these, it is important for the court, to state what the expression "equity" means: Primarily fairness or natural justice. A fresh body of rules by the side of the original law, founded on distinct principles, and claiming to supersede the law in virtue of a superior sanctity inherent in those principles. Equity is a body of rules formulated and administered by the court of Chancery to supplement the rules and procedures of the common law. By the Judicature Act 1873, the court of Chancery was amalgamated with the Common Law Courts to form the Supreme Court, and rules of equity are administered in all divisions of the court, and where there is any conflict between the rules of law and equity, equity is to prevail.

In the instant case the court may have regard to the following maxims of equity -

(a) equity acts on the conscience;

(b) equity will not suffer a wrong to be without a remedy;

(c) equity follows the law;

(d) equity looks to the intent rather than the form;

(e) equity looks on that as done which ought to be done;

(f) equitable remedies are discretionary;

(g) delay defeats equities;

(h) he who comes into equity must come with clean hands;

(I) he who seeks equity must do equity;

(j) equity regards balance of convenience;

(k) where there are equal equities the law prevails;

(l) where there are equal equities the first in time prevails;

(m) equity aids the vigilant;

(n) equality is equity;

(o) equity will not permit a statute to be a cloak for fraud (thus which covers, conceals, or disguises fraud).

That the law gives help to those who are watchful and not to those who sleep:**Vigilantibus, non dormientibus, jura subveniunt. Laches**: Negligence or unreasonable delay in asserting or enforcing a right. The equitable doctrine that delay defeats equities, or that equity aids the vigilant and not the indolent. A court of equity has always refused its aid to stale demands, where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; when these are wanting the court is passive and does nothing. When an equitable right is analogous to a legal right which is subject to a period of limitation in bringing actions to enforce it, the court of equity may by analogy apply the same provision to the equitable right: OSBORN'S CONCISE LAW DICTIONARY 6th Ed. By John Burke at pages 134, 193 and 342.

Reference ought also to be made to the law of passing-off as that law relates to political parties or political organisations. The following passage at page 53 under paragraph 2-14 of **The Law of Passing-Off** by Christopher Wadlow Solicitor Summons & Simmons London, is quite relevant in that regard -

" Political Parties

The position of a political party has been considered in Kean -v- McGivan (1982) F.S.R. 119 (C.A.) In which the plaintiffs claimed the exclusive right to the name **Social Democratic Party**. Although the plaintiff party was local and very little known, the Court of Appeal based its refusal of an interlocutory injunction on the more general ground that neither party was engaged in any commercial activities: Per Ackne L.J. :

'The situation is simply that a non-commercial activity - a political party - is seeking to use the same name, the same initials as a very small other such party with, so we are told, somewhat similar values and ideals. It does not provide a

situation, in my judgment, in which there is any basis for contending that a tort has occurred."

Kean -v- McGivan was followed in the Canadian case of Polsinelli -v- Marzilli (1987) 60

O.R. (2nd) 713 Ontario: Per Campbell, J. In which the official Liberal candidate in a provincial election failed to restrain the defendant from describing himself as a "Trudeau Liberal'. The defendant had recently been expelled from the Liberal Party and was campaigning against the plaintiff."

The foregoing must be understood in the light of the fact that the action for passing-off protects the right of property the plaintiff has in the goodwill of his business. Damage is the gist of the action, and if there is no damage to any business or goodwill then an action for passing-off cannot succeed. Although definitions of passing-off may expressly require the plaintiff to be a trader, this is strictly speaking redundant because a plaintiff who is not a trader cannot suffer damage to any business or goodwill. Despite this, it is often convenient to discuss the locus standi of the plaintiff in terms of whether or not he can be said to be carrying on a trade. If the plaintiff cannot fairly be said to be engaged in any kind of trade at all then he cannot sue for passing-off, although alternative causes of action may be open to him: **Law of Passing-Off** by Christopher Wadlow at pages 48 to 49, paragraph 2-11.

In the view of the court the following provisions of the Constitution of the Republic of Malawi are relevant -

S. 32 - (1) Every person shall have the right to freedom of association, which shall include the freedom to form associations.

(2) No person may be compelled to belong to an association.

S.40 - (1) Subject to this Constitution, every person shall have the right -

(a) to form, to join, to participate in the activities of, and to recruit members for, a political party;

(b) to campaign for a political party or cause;

(c) to participate in peaceful political activity intended to influence the composition and policies of the Government; and

(d) freely to make political choices.

The Facts in the Case

To begin with, it is the view of the court that there is no apparent dispute as to the facts, in relation to what has in fact happened, vis-a-vis the respective conduct of the parties hereto so as to warrant the instant application. If anything, the parties, in the main, merely share differences on the legal signification of their respective conduct, in so far as such conduct would impact on their respective ability or inability to register themselves as a political party in the name of, and therefore to use the name, National Democratic Alliance.

The following facts clearly emerge from a perusal of the affidavits of the parties hereto: The plaintiffs' political party was founded by Honourable B.J. Mpinganjira and others as far back as January, 2001. Then, this political organisation was operated as a pressure group in the name National Democratic Alliance (NDA). All defendants were fully aware of that fact as evidenced by several newspapers articles which the defendants have over the period, since January 30, 2002 to December 16, 2002 written and published in "The Sun" Newspaper, relating to the plaintiffs' NDA. It is important to note that the defendants are publishers, owners and writers of "The Sun" Newspaper. The defendants, as journalists of "The Sun" Newspaper have expressly been aware of the fact that the plaintiffs' NDA was an unregistered political grouping which was intending to register itself as a political party after holding its convention then, scheduled for the 2nd to the 5th January, 2003. The defendants had carried an item entitled "NDA Convention on the cards" in the issue of "The New Sun" of December 9, 2002. In particular that article was authored by Chikumbutso Mtumodzi, the 2nd defendant, under the caption: **The NDA political pressure group will late this month hold a day long convention in Blantyre where they will elect a President who will also be their presidential candidate.** In part, that article read as follows -

"The pressure group has done this so that NDA can be on a safe side should the opposition electoral alliance work as other political parties and groups have got infighting, says some senior members......."

Besides the foregoing, the affidavits also show that the plaintiffs' NDA was and is well known to and by all the three branches of Government, thus the Executive, including His Excellency the State President; the National Assembly or Parliament, including the Honourable Speaker of the National Assembly; and the Judiciary, including the High Court of Malawi. In that connection, both His Excellency the State President and the Honourable Minister of Justice and Attorney General, on or about 28th August, 2002, had advised the plaintiffs' NDA to register themselves as a political party under the Act. Regarding the Judiciary and the National Assembly, the High Court of Malawi at Blantyre had granted an injunction for MPS to go back to Parliament, under Civil Cause No. 3140 of 2001, following the order of the Honourable Speaker of the National Assembly expelling those MPs consequent upon the formation of NDA pressure group by such MPs.

The defendants had registered, under the Act, their political party in the name of National Democratic Alliance on 3rd January, 2003, as evidenced by a certificate of registration of that date. By that date, the defendants were fully aware, through their calling as journalists and indeed as clearly demonstrated above, that the name "NDA" had publicly been known to refer to the plaintiffs' political pressure group or organisation; that the plaintiffs would at some point in time register themselves as a political party to be known as NDA; and that the plaintiffs' political party (then pressure group) was holding its first-ever convention from 2nd January, 2003 and that during such convention the plaintiffs' NDA pressure group would resolve to register itself as a political party under the Act in that name. By the 3rd January, 2003, the defendants, therefore, had registered their political party in the name of NDA with full knowledge that the name NDA belonged to the plaintiffs' political pressure group, by then (thus 3rd January, 2003) an unregistered political party by that name, which by that date the plaintiffs' had resolved to register as a political party. In the view of the plaintiffs, by that date, the plaintiffs had gained good-will and reputation in that name.

Finally, in order for the defendants to use the expression "National" in the name of their political party: "National Democratic Alliance Party", they ought first to have obtained authority from Government sanctioning such a use. It is quite clear that at the time the application was submitted for registration and indeed when the Registrar had issued the registration certificate to defendants' NDA certifying that the defendants' NDA had been registered under the Act, on 3rd January, 2003, the defendants did not have any authority from the Government for them to avail themselves to the use of the expression "National" in the name of their political party. In that regard it is quite evident from the letter of Mr. J. Chonzi, from the Office of the Secretary to the President and Cabinet, that Mr. Chonzi had issued that letter on 4th January, 2003.

Consideration and Determination

of issues raised herein

Have the plaintiffs shown that they have a good arguable claim to the right they seek to protect? In that regard, the court ought not to attempt to decide the action of the parties on the affidavit evidence of the parties herein. That question will be answered to the satisfaction of the court if the plaintiffs' merely show that there is a serious question to be tried.

In the view of the court, it is quite clear that the question ought to be answered in the affirmative. The plaintiffs' have raised issues of fraud and deception on the part of the defendants. The defendants contend that they were not aware that the plaintiffs were intent on registering themselves as a political party in the **style of** NDA by the time the

defendants registered their political party in that name. The evidence outlined above does not bear out such a position. As a matter of fact the defendants were quite aware of that fact. Besides, in obtaining the registration, the defendants did so without, first having sought and obtained the Government authority to use the expression "National" in their name. The court will have, at the trial, to determine the legal signification of that conduct on the part of the defendants.

Having disposed of that question, the court ought to consider the balance of convenience. It is quite obvious, on the facts before the court, that damages would not be a sufficient remedy in this case. As a matter of fact the wrong is of the kind which would be irreparable or outside the scope of pecuriary compensation, if an injunction were vacated as prayed by the defendants.

Besides the foregoing, it is the considered view of the court that in deciding this application the court must also be guided by**the** equitable principles or maxims of equity set out above. Yes, Counsel for the defendants has forcefully argued and therefore urged the court to hold the view that the plaintiffs were guilty of laches and that the court should therefore apply the equity maxims that equity aids the vigilant; and that the law gives help to those who are watchful and not those who sleep. Does the court share in that view?

To begin with the court ought to have regard to the Act, in particular section 5, if it does make provision for any period during which registration ought to be made. So, by the relevant statute there is no period of limitation prescribed in that regard. Were such a period to have been prescribed, the conduct of the plaintiffs in not having registered themselves as a political party would indeed have attracted the application of the maxims of equity in question and provisions on laches. However, in the instant case, such is not the position and for that reason, any purported attempt by the Honourable Attorney General in requiring the plaintiffs to register themselves within any period of time then purportedly prescribed in a written communication of the Honourable Attorney General to the plaintiffs, is without any legal or legislative significance or consequence. The Honourable the Attorney General in advising the plaintiffs as he did, was not acting and he did not act in the exercise of some legislative power, or in the performance of some legislative duty, to prescribe a period of limitation in that regard. In the circumstances, the court would, and in fact does, reject the submission of Counsel in that regard.

Further, learned Counsel for the defendants has also vehemently argued and, therefore, urged the court not to find that the plaintiffs have raised triable issues, in that as a matter of fact the plaintiffs would not have their NDA registered under the Act even if the Registrar were to, or does, in fact cancel the defendants' NDA from the register of political parties on account of the plaintiffs application therefor on the ground of fraud or mistake. In that connection, learned Counsel for the defendants invites the court to come to the conclusion that such a result is attainable upon the interpretation and application of

S.7 (1) (b) (I) (ii)of the Act. With respect the court is not in agreement with that view. That provision provides that the Registrar may refuse to register a political party if he is satisfied that the name of the party to be registered is eitheridentical to the name of a registered political party or a political party whose registration has been cancelled under the Act or so nearly resembles the name of a registered political party or a political party whose registration has been cancelled under the Act. The expression is merely permissive. In the view of the court this provision merely grants a discretion to the Registrar to refuse registration depending on the circumstances. If the intention were otherwise, a mandatory expression of "shall" would have been used instead of the expression "may". Besides, in the instant case, and indeed in many other cases which may later be brought, before the court and the Registrar, allegations of fraud may be made. Where consequent thereupon a registration of a political party is cancelled from the Registrar, it would be against the principles of equity to deny a bonafide applicant political party from being registered on account only of the fraudster's earlier futile registration, then, cancelled. In that regard, the court would invoke the maxim of equity that equity will not permit a statute to be a cloak for fraud. In the circumstances, the court rejects the submission of learned Counsel for the defendants in that regard.

Before resting, the court would like to call to mind the maxim of equity that he who comes into equity must come with clean hands. In the light of that maxim of equity the court would react to the prayer of the defendants to vacate the injunction order under review and further for the court to grant the defendants an interlocutory injunction against the plaintiffs, in the terms already clearly set out above, in the negative. In the circumstances, and for all the reasons set-out herein above, the court would dismiss the application of the defendants in its entirety with costs. The ex-parte order under review is, therefore, confirmed, and it shall be

valid until the determination of the plaintiffs' application by the Registrar of political party. Costs are for the plaintiffs. It is so ordered.

Made in Chambers this Friday, 31st day of January, 2003, at Blantyre.

AK Tembo

JUDGE

Leave to Appeal

Court: Upon request of learned Counsel for the defendants, leave to appeal is hereby granted.

A.K. Tembo

JUDGE