IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONSTITUTIONAL CAUSE NO. 3 OF 2004

BETWEEN:

NATIONAL DEMOCRATIC ALLIANCE.....PLAINTIFF

and

THE ELECTORAL COMMISSION.....1ST DEFENDANT

and

THE MALAWI BROADCASTING CORPORATION..... 2ND DEFENDANT

and

TELEVISION MALAWI LIMITED.....3RD DEFENDANT

CORAM: **THE HON. JUSTICE A.C. CHIPETA**
THE HON. JUSTICE F.E. KAPANDA
THE HON. JUSTICE T.R.M. CHIZUMILA (MRS)
Kasambala, of Counsel for the Plaintiff
Mwakwawa, of Counsel for the Plaintiff
Chokotho, of Counsel for the 1st Defendant
Ngutwa, of Counsel for the 2nd Defendant
Kalua, of Counsel for the 3rd Defendant
Balakasi, Official Interpreter
Rhodani, Official Recorder

RULING

There is before us an Originating Summons which was set down for hearing yesterday, 29th April 2004. As the case was called, a number of preliminary objections were raised by the three defence Counsel in it. In addition, as a Court, we too raised a number of issues with all Counsel in the case. This was especially regarding the state of procedural readiness of the matter for hearing at the time appointed for such. After all due representations from both sides of the case on all issues of concern, we adjourned to this morning for a ruling on all those issues.

As already mentioned, this ruling is unanimous. It is a complete decision on all the issues that were raised by the preliminary objections and by our observations as a Court.

It will be recalled that Mr Kalua, learned Counsel for Television Malawi Limited was the first to record a preliminary objection with the Court. His concern related to exhibits "SM1", "SM3", "SM4(a)" and "SM4(b)" attached to the affidavit in support of the Originating Summons herein sworn by Mr Salule Masangwi, Director of Publicity Affairs in the Plaintiff political party. "SM1" is allegedly a letter from the Public Affairs Committee to the Electoral Commission. It neither bears the address of PAC nor a signature of its alleged author. "SM3" is allegedly the response the Electoral Commission gave to the Public Affairs Committee after receipt of "SM1." "SM4(a)" and "SM4(b)" are allegedly reports of the Malawi Electoral Commission Media Monitoring Unit. Referring to Order 41 rule 5 of the Rules of Supreme Court it was Mr Kalua's contention that the deponent of the material affidavit cannot legally exhibit these documents as evidence, as he cannot of his own knowledge prove the contents thereof.

The response the Plaintiff's Counsel gave on this included a claim that since this objection has not come from

the 1st Defendant, i.e. the Electoral Commission, which is somehow connected to the documents so exhibited, the documents in question must be taken to have been adopted by the said silence of the 1st Defendant. On this premise, it was then argued, the 3rd Defendant has no cause to take a stand against the exhibition of these documents. On point of alleged violation of the hearsay rule recourse was had to the case of Subramanian vs Public Prosecutor[1] on the admissibility of statements with the appearance of hearsay but which are presented, not for establishment of the truth of their contents, but merely to show that they were in fact so made.

Having examined Order 41 rule 5 of the Rules of the Supreme Court and having read the affidavit and the exhibits in question. Further having considered all the arguments presented on the issue, in the light of our understanding of the rule against hearsay, we are of the considered view that this objection should be sustained. Order 41 rule 5 of the Rules of the Supreme Court is very clear that an affidavit in support of an Originating Summons, such as the one before us, should only contain such facts as the deponent is able of his own knowledge to prove. By way of explanation, we observe that Note No. 41/5/2 makes it quite plain that an affidavit such as this must only contain the evidence of a deponent as to such facts only as he is able to speak of his own knowledge. To this effect the rule equates affidavit evidence to oral evidence given in Court.

It is clear to us that the Deponent herein Mr Salule Masangwi, is neither the author nor the recepient of the documents he has purported to exhibit. Whereas per the authority of the Subramanian case[2] he is competent to swear that he is aware that there exists such correspondence between PAC and the Electoral Commission and that there also exist such Media Monitoring Unit reports, he certainly

[1] [1956]1WLR 965

[2] See footnote 4

cannot competently exhibit them as his evidence. The way these documents have been exhibited in the affidavit it is clear that over and above the innocent intention the Subramanian case would accept, they are actually being offered with a view to present their contents as representing truth.

On the rules of evidence, it is our finding that if Mr Masangwi, the deponent, were testifying orally in this case he would not have been in a position to speak on the contents of these documents from his own knowledge without breaching the hearsay rules. We accordingly agree that exhibits "SM1," "SM3," "SM4(a)," and "SM4(b)" cannot, on basis of Order 41 rule 5 of the Rules of the Supreme Court, be exhibited by the Deponent of the affidavit in support as herein done. We direct therefore that a fresh affidavit should be sworn in place of the current affidavit in support and that it should omit the documents shown to have been exhibited in violation of O41 rule 5 of the Rules of the Supreme Court.

The next objection we would like to consider is the one raised by Mr Chokotho, of Counsel for the first Defendant, i.e. the Electoral Commission. Basically he was claiming that the first three questions of law which Plaintiff has put for the determination of this Court in the Originating Summons are *res judicata* by virtue of the decision of this same Court Dr Charles Kafumba and two Others vs the Electoral Commission, and the Malawi Broadcasting Corporation[3].

In the Originating Summons before us the Plaintiff has posed for determination the following questions of law and we quote:

> "[1] Whether the 1st Defendant has a duty in law to ensure that the election process is free and fair or not;
>
> [2] Whether equal coverage of the electoral activities and propaganda of all the competitors in the electoral process

[3] Misc. Civil Cause No. 35 of 1999 decision of Hon. Mkandawire, J.

is an integral part of the holding of free and fair democratic elections; and

[3] Whether equal access to the media for all competitors in the electoral process is an integral part/aspect of the holding of free and fair democratic elections or not."

Mr Chokotho has been able to show that almost word for word these were exactly the same questions of law the Court determined in 1999 in the case cited. He has thus argued that there is no need for the Plaintiff to call upon this Court to determine these questions afresh.

The response of the Plaintiff on this objection was to the effect that the objection is misplaced. *Res judicata*, it was argued, applies where the same parties want to litigate again on issues of law that were already determined between them before. Mr Kasambala, of Counsel for the Plaintiff, pointed out that at the time of the action referred to, although it did affect the 1st and the 2nd Defendants herein, National Democratic Alliance was non-existent and could thus not have been a party to it. The fact that some people litigated on the same questions of law cannot therefore prevent the present Plaintiff from litigating on them. He equated this to the situation of a minibus accident on which many people got injured and argued that the fact that one of them sues and obtains damages, does not automatically entail that all the remaining victims can go to the Defendant and queue for their damages without themselves suing separately.

We have considered this objection in detail. We are mindful of the fact that the law requires that if a party wants to raise the defence of *res judicata* he/she must plead it specifically[4]. Further, no notice was given that this issue would be raised as a preliminary objection. Our search through the two affidavits sworn on behalf of the 1st Defendant, in opposition to the Originating Summons, did

[4] *Mbilizi vs Nkhata* [1975-77]8 MLR 223 at 225-226 dictum of Justice Dr. Jere

not disclose any deposition either by Mr Roosevelt Gondwe, the 1st deponent, or by Mr Fergus Lipenga, the 2nd deponent, to the effect that the 1st Defendant would raise the question of *res judicata*. Learned Counsel for the 1st Defendant was therefore not justified, in plucking this preliminary objection from the air, as it were, when the law requires specific and advance pleading of the same.

It is also the law that *res judicata* applies in situations where an issue has been previously raised and decided between the same parties[5]. Our reference to the 4th edition of Stroud's Judicial Dictionary Vol. 4, among other authorities, on the phrase "*res judicata,*" clearly confirms this position. We have also generally on this subject drawn strength from other authorities including Inspector of Taxes vs Sacranie[6]. We are accordingly amply satisfied that this objection is lacking in merit. In the result we overrule it.

We turn next to the objection raised by Mr Ngutwa, of Counsel for the 2nd Defendant, the Malawi Broadcasting Corporation. His complainant was that the matter herein has been brought to this Court prematurely. Matters forming the basis for this action, he said, relate to broadcasting and that under the Communications Act 1998 they are regulated by the Malawi Communications Regulatory Authority (MACRA). Counsel made reference to Sections 5, 45, and 55(2) of the material Act in support of the argument that complaints relating to these issues ought first to be filed with and determined by MACRA before they can be taken to a Court of law.

In support of this stance, Mr Ngutwa, referred to the case of Dr Charles Kafumba and Others vs The Electoral Commission and MBC[7]. In particular he referred to p. 5 of the judgment where Hon. Justice Mkandawire indicated that

[5] *Ngunda vs Mthawanji* [1987-89]12 MLR 183 at pages 188-189 dictum of late Hon. Mbalame. J.

[6] [1923-61]1 ALR Mal. 615

[7] See footnote 3

he had earlier on dismissed a similar matter on basis that the Court did not have original jurisdiction, in that he felt that Section 76(2) of the Constitution required first that the parties lodge their complaint with the Electoral Commission before commencing action in the High Court. Counsel indicated that indeed the parties complied with that order and only returned to Court after the letter quoted at p. 5 of the Judgment had been written to the Electoral Commission. Similarly therefore Mr Ngutwa urged this Court to likewise decline jurisdiction in this matter on basis that MACRA should have been approached first for a determination before this matter could be brought to Court.

The response Mr Kasambala gave on this objection on behalf of the Plaintiff was to the effect that the issue before the Court is no longer the narrow issue that falls within the mandate of MACRA, but that it is a constitutional issue. In fact he added that well beyond the constitution the issue also touches on other statutes such as the Electoral Commission Act and the Presidential and Parliamentary Elections Act. The Originating Summons, it was argued, concerns allegations of violations of constitutional rights and that these certainly cannot be determined by MACRA.

By way of further reply reference was also made to Section 108 of the Constitution which gives this Court unlimited original jurisdiction to hear and determine, inter alia, any criminal and civil proceedings under any law. A reading of the Communications Act, it was contended, does not give MACRA exclusive jurisdiction so as to exclude or to displace the very wide jurisdiction of this Court. In addition Section 46(2) of the Constitution was called in aid and it was argued to be very clear about the mandate of this Court in addressing complaints on violations of Constitutional rights.

Having read the decision of the Court in the Kafumba case we should point out that we did not have chance to look at and examine either the file or the judgment in the earlier application which the Honourable Judge indicated he had dismissed. Having further read all the provisions Mr Ngutwa

cited in the Communications Act, 1998 as against the Constitution, to which it is subordinate and with which it must conform, and having in addition read provisions such as S 103(2) of the Constitution which vests in the judiciary the exclusive authority to decide whether an issue is within its competence, we have come to the conclusion that we are in disagreement with the earlier restrictive decision disclosed in the Kafumba judgment.

To begin with we do not agree with learned Counsel, Mr Ngutwa, that the provisions he has cited in the Communications Act tend to or do give MACRA primary jurisdiction on the kind of issues this Originating Summons raises in priority to this Court's jurisdiction. Further we take the view that in so far as Mr Ngutwa hails the Kafumba decision as the way forward in the way Courts should receive people's complaints concerning the violation of their fundamental rights, we think it is wrong. Fully empowered, as this Court is, under clear constitutional provisions, it ought to be very slow about acceding to demands that are simply meant to block the public away from accessing the justice the Court exists to dispense. The authority in question happens to flow from a Court of coordinate jurisdiction and so it does not bind us. Moreover, we take the view that in matters of this nature where a person complains of violation of his/her constitutional rights, we cannot accept that he/she be denied access. We thus see no merit in the objection raised by Counsel in this regard and so we dismiss it.

We mentioned earlier on that we too as a Court raised some issues with the lawyers on both sides of the divide in this case. We note that they immediately rectified what were minor defects, that they explained matters that were not readily clear in view of the incompleteness of the mother file, and that they attempted to offer answers to some of the more difficult issues we touched on. In this regard, without wasting time on the issues that were readily rectified, we received a prayer from the Plaintiff to amend its Originating Summons so as to add, in the first line of the said Summons,

after “The Malawi Broadcasting Corporation,” the words “and Television Malawi Limited” to rectify their earlier slip when inviting the Defendants to attend Court. There was no objection to this application by any of the Defendants. We note it does not prejudice them in anyway and strictly it simply aims at patching a spot that was assumed correctly expressed. We accordingly allow this amendment without any condition attached.

The next point raised by us which we would like now to discuss and determine concerns what the Plaintiff has depicted as its supplementary affidavit in this case. When we were commenting on it, it bore no date of swearing in the jurat. This made it a defective affidavit. Without our authority we note that the date 21st April 2004 has been inserted. Whether this has been done by the deponents or by the Commissioner for Oaths before whom they took oath we do not know. As far as we are concerned, however, whoever endorsed this date should have bothered to seek the Court’s authority. After all we are the ones who pointed this out as a defect. Now, if the insertion of the name of the 3rd Defendant in the Originating Summons has had to be effected by our leave on an application for amendment under Order 20 of the Rules of Supreme Court, we do not understand why the insertion of a date in this affidavit was done without like leave.

Our other observations on this affidavit were that it had been filed as a “supplementary affidavit in support,” without really indicating what it was supplemental to or in support of. At the time we did not have, on the mother file, the original affidavit of one Salule Masangwi in support of the Originating Summons. It thus was a puzzle what this affidavit was supplementary to.

Besides we wondered and still wonder what it is this affidavit supports in this case. On this aspect the two deponents of this affidavit, Alick Kimu and Eric Sabwera, merely appear to us as volunteers in the case. In paragraph

one of their joint affidavit, while claiming to be citizens of Malawi and registered voters for the forthcoming Presidential and Parliamentary Elections, they depone to the effect that they are also Parliamentary Candidates for Blantyre and Balaka districts respectively under PPM ticket. It is trite here that the Plaintiff is the National Democratic Alliance. Why PPM Parliamentary candidates should file a supplementary affidavit on the Plaintiff's side in an action in which their party is not that Plaintiff is quite a mystery to us.

We note at the same time that the deponents do not even within the affidavit anywhere seek to justify how they acquire the authority to provide this supplementary affidavit in a case that is not theirs. Going through their affidavit it clearly emerges that they are airing their own grievances which, even if similar to those raised by the Plaintiff, end up with a complaint that the conduct of the 2nd and 3rd Defendants amounts to a violation of the deponents' constitutional right to free and fair elections. The way the affidavit has been couched the deponents are not supporting the Plaintiff in the case. They are merely promoting their own grievances, but they are doing so in an action they have no link with and in which they have not indicated why they should just bulge in and swear an affidavit.

Learned Counsel tried his best to explain how these two strangers came into the case, but we are not satisfied with that explanation. We really cannot just allow affidavits in a matter between clearly identifiable parties to fly in from all and sundry. A connection with the case is essential and we think mere similarity of grievances should be no licence for people to enter into each other's cases at will without commitment of being a party thereto or without being a person strongly linked thereto. We accordingly reject the supplementary affidavit of Alick Kimu and Eric Sabwera from use in this matter. In any event, as we have already pointed out, this affidavit had a defect in its jurat, and even if all else was well, the Plaintiff would, under Order 41 rule 7 of the Rules of Supreme Court, have needed the Court's leave to

use it, which leave has neither been sought nor granted.

Among our concerns there now only remains the issue of absence of Court bundle, skeleton arguments, list of authorities and copies of authorities each party intends to use in the case. Parties cannot escape from their obligation to supply these documents to facilitate the determination of the case. Failure in this regard would result in us doing Counsel's work apart from our own. We noted during the presentation of preliminary objections an acknowledgment of this shortfall in the matter by learned Counsel for the Plaintiff and the explanation he gave about haste in the preparation of the case compounded by some last minute exchanges of affidavits between the parties. Without wishing to belabour the point, we wish to emphasize the importance of the preparation and filing of these documents before hearing can resume. Let us also emphasize that on skeleton arguments and lists and copies of authorities, we expect each party to present us with its own, in sufficient copies to cover us all and the main file, well before the matter can next resume. We so order.

Pronounced in open Court this 30th day of April, 2004 at Blantyre.

Sgd……
Hon. Justice A.C. Chipeta

Sgd……
Hon. Justice F.E. Kapanda

Sgd.....

Hon. Justice T.R.M. Chizumila (Mrs)