IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CIVIL CAUSE NO. 174 OF 2009

In the Matter of the Legal Education and Legal Practitioners Act (Cap. 3: 04)

and

In the Matter of the Discipline of the Members of the Malawi Law Society

and

In the Matter of the Discipline of Paul J. Maulidi

and

In the Matter of the Application by the Honourable the Attorney General

BETWEEN:

The Attorney General ……Plaintiff

And

Paul J. Maulidi ……Defendant

CORAM: THE HONOURABLE CHIEF JUSTICE L. G. MUNLO SC
Mr. Nyirenda of the Counsel for the Plaintiff
Mr. P. Maulidi of the Counsel and
Mr. H. Kadzakumanja of the Counsel for the Defendant
Mrs Kamuloni, Official Interpreter

RULING

Justice L. G. Munlo SC

This Application is made by the Attorney General, the plaintiff in these proceedings, to strike off the Defendant, Mr. Paul J Maulidi from the Roll of legal practitioners; alternatively, for an order directing any such lesser disciplinary measure and, further for an order that the Defendant pays over to the Malawi Law Society, for onwards payment to his clients a total sum of K5,050,000.00 being money collected by the Defendant on behalf of his clients which the Defendant has neither paid over to his clients nor properly accounted for. The Plaintiff prays for a further order that the Defendant pays the costs of the inquiry of the Malawi Law Society Disciplinary Committee (which I shall refer to in this Ruling as "the Committee) and the costs of these proceedings. The Attorney General has made this application through an Originating Summons which was taken out pursuant to section 21 as read with section 37 of the Legal Education and Legal Practitioners Act. I shall refer to this Act in this Ruling as "the Act".

It is averred in the affidavit of Mr Anthony Kamanga SC which was sworn in support of the Originating Summons on 24 November 2008 that Mrs. Edith Salawe Mwale lodged a complaint with the President of the Malawi Law Society that the Defendant's firm had not remitted K5,000,000 to the Estate of Mr. Mwale or to herself in spite collecting the said sum from Petroda Malawi Ltd. on 23rd August 2007. On 26 November 2008 the President of the Malawi Law Society requested the Defendant to make a written representation to the allegations against his firm. The Defendant did not respond and on 4 March 2009, the President of the Malawi Law Society referred the complaint to the Committee which, in turn, wrote to the Defendant on 14 April 2009 requesting him to respond to the complaint within 7 days. By 6 August 2009 the Defendant had neither responded to the complaint nor paid over to his client the money he collected from Petroda Malawi Limited.

On 6 August 2009 the Committee found that a ***prima facie*** case of misconduct had been made out against the Defendant and the same day the Committee proceeded to recommend to the Attorney General that she moves the court for an appropriate disciplinary measure.

On 16 March 2009 Mrs Mavis Kadammanja also lodged a complaint with the Malawi Law Society that the Defendant had collected K50,000.00 from the Malawi Government on behalf of her husband (now deceased) but had not paid over the same to Mr Kadammanja's beneficiaries and further that the defendant had

negligently handled their case. The goods seized by the sheriff in this case had neither been returned to the beneficiaries of Mr. Kadammanja nor accounted for.

The Vice President of the Malawi Law Society wrote to the Defendant on 27 March 2009 asking him to respond to the allegation within seven days but he did not, as a result the Vice President of the Malawi Law Society referred the matter to the Committee which, in turn, put the complaint to the Defendant asking him to respond within seven days. By 7 August 2009 the Defendant having neither offered any explanation nor defence, the Committee found that a ***prima facie*** case of misconduct had been made out against the Defendant and recommended to the Attorney General to move the High Court for the orders that are being prayed for in these proceedings. Such is the case for the Plaintiff.

On being served with the court process the Defendant gave notice on 1st February 2010 that he will, at the hearing of this Application, be raising a series of preliminary objections which can be summarized in three distinct heads. The first head is whether the mode and procedure of commencement of action used by the Plaintiff is a correct one and whether in these circumstances the Defendant has been given sufficient time to defend himself as provided for in the Rules of the Supreme Court. The first objection is that the originating summons which the plaintiff has used in these proceedings is a wrong one as it was not accompanied by an acknowledgement of service. It is the Defendant's case that the correct form that the Plaintiff ought to have used is form number 8 to which an acknowledgement of service is always a requirement. The Defendant submits that the use of a wrong form in these proceedings is an irregularity that goes to the root of the action itself. The Defendant submits that the adverse and prejudicial effect of using a wrong form is that the Defendant has been denied an opportunity to respond to the Originating Summons and to comply with all the requirements of Order 28 of the Rules of the Supreme Court.

On this point the Defendant observes that Order 28/1A requires a plaintiff who has began an action by an originating summons to file with the court the affidavit evidence 14 days after the acknowledgement of service by Defendant. He submits that in the absence of the acknowledgement of service being attached to the Originating Summons herein the Defendant is unable to file a form of acknowledgement of service hence there is no way the Plaintiff can, in these circumstances, file the affidavit evidence in accordance with Order 28/1A of the Rules of the Supreme Court in this matter.

It is the Defendant's case that the Plaintiff has not even complied with Order 28/1A (4) which allows the Defendant to adduce affidavit evidence within 28 days after being served copies of the plaintiff's affidavit evidence. The Defendant submits that he has not been given sufficient time to serve affidavit evidence in his defence. He draws the attention of the court to the fact that the Originating Summons together with the affidavit in support thereof in this case was served on Defendant on 19 January 2010. Yet he was required to appear before the court on 3rd February 2010, only 15 days after service of the Plaintiff's affidavit evidence. He submits that the Originating Summons has been prematurely set down for hearing.

He further argues that the hearing date has not taken into account Order 28/1A (5) which allows the plaintiff 14 days within which to respond to the Defendant's affidavit evidence. The Defendant also attacks the Plaintiff for not complying with Order 28/2 of the Rules of the Supreme Court requiring the Plaintiff to obtain an appointment for Attendance of the parties before the court for the hearing of the summons within 30 days of the expiry of the time within which copies of affidavit evidence may be served. The Defendant has indicated that the appointment of Attendance Form is Form No. 12 in Appendix A. The Plaintiff has not used this form instead he has used a wrong notice of day and form of attendance.

The Defendant also attacks the affidavit sworn by the Chairperson of the Committee in support of the originating summons on two fronts. First, that the Originating Summons is supported by hearsay evidence in that some of the documents exhibited to the affidavit are made by people who have not deposed to these documents and who cannot be called to be cross examined on these documents, or if called, cannot prove the truth of the content in these documents. He has particularized such documents as including Exhibit AK 1; AK 2; AK 9; AK 17 and AK 18. He submits that this contravenes Order 41 rule 5 of the Rules of the Supreme Court.

Second, that the affidavit has several documents attached to it that have not been exhibited nor certified to be true copies of the original documents. The documents in question have been particularized as follows:

(a) The Order of the Registrar of the High Court dated 13th October 2006;
(b) Warrant of execution dated 27th April 2005;
(c) Four copies of receipts from Maulidi and Company dated 28th August 2007;
(d) The letter from T.F. and Partners dated 28th

November 2008;

(e) Three sheets containing photocopies of a number of cheques; and a letter from Maulidi and Company to the President of the Malawi Law Society dated 8th January 2009 duly stamped by the Malawi Law Society on 15th June 2008.

He submits that such documents cannot be relied on and cannot form part of the affidavit in support of the Originating Summons. The Defendant submits that these two points make the affidavit not only insufficient but defective.

The second head is whether the Plaintiff has, in commencing this action, ensured that there has been compliance with the relevant provisions of the Act and the Commissions of inquiry Act Cap 18:01 of the Laws of Malawi. The Defendant's submission is that under section 21 of the Act the High Court may, on an application made by the Attorney General, make an order suspending any legal practitioner or striking any legal practitioner off the Roll. In the particular instance the Attorney General's application is premised on the basis that the Committee has established a ***prima facie*** case on which the High Court might make an order on the application of the Attorney General under Section 21. It is his contention that on the facts available it has neither been established that the Committee has enquired into the conduct of the Defendant following the complaints herein nor that a ***prima facie*** case was made out by the Committee entitling the Attorney General to make the present application before the High Court.

It is his case that Section 37 provides that for purposes of any inquiry under the section, the Committee shall have all powers of Commissioners under sections 9 and 10 of the Commissions of Inquiry Act and sections 11, 12 and 13 of the same Act shall apply to proceedings before the Committee. He submits that there is no evidence on record that the Committee conducted an inquiry into the conduct of the Defendant in this case. Neither is there any evidence that if such inquiry was conducted, it followed the procedure that is applied in the High Court as is required by section 10 of the Commissions of Inquiry Act. He makes the point that proof required in the High Court to establish a ***prima facie*** case is the same as that required to establish a ***prima facie*** case against any legal practitioner. This would entail the Committee summoning witnesses and calling for production of documents and dealing with them and matters arising therefrom in accordance with the provisions of section 11, 12 and 13 of the Commissions of Inquiry Act. It is his case that the Plaintiff has not established that all this was done. He states that under section 13 of

the Commissions of Inquiry Act, it is a legal requirement that the Defendant should be entitled to have legal representation throughout the inquiry. In this case the Defendant was denied his entitlement to legal representation. The Defendant has applied to this court to have the originating summons dismissed with costs.

When the case was set down for hearing on 3 February 2010, it could not proceed because the Defendant's counsel had not renewed his licence. The court adjourned the case for thirty days in order to give time to the parties to resolve some of the irregularities that the defendant was complaining of. The case was adjourned to 4 March 2010. On 22nd February 2010 the Defendant filed a Notice of Motion to strike out or set aside the originating summons and the proceedings for being irregularly commenced on the grounds set out in the motion. The Notice of motion is supported by the affidavit of Mr Paul Jones Maulidi, the Defendant. The grounds in the motion are essentially the same as those particularized in the preliminary objections namely that the mode and form of commencement of the originating summons by the Plaintiff is wrong as it was issued without the accompanying form of acknowledgement of service and was supported by a defective and insufficient affidavit. That the affidavit of Mrs Mwale filed herein on 28 January 2010 had not been filed in accordance with Order 28 and, if it was, then it was filed out of time and without the leave of the court.

The third head which arises from the second head is that the Court has no jurisdiction and is not competent to entertain this application because the Plaintiff has not shown that the Committee in arriving at a finding of a ***prima facie*** case against the Defendant had conducted a requisite inquiry as it is mandated to do under Section 37 of the Act as read with sections 9, 10, 11, 12 and 13 of the Commissions of Inquiry Act and, in the premises, whether a ***prima facie*** case was properly reached at a properly instituted inquiry.

The Defendant also raises issues of ***Loci standi*** of the complainants who lodged the complaints with the Malawi Law Society which I will not deal with at this preliminary stage.

There is one matter which I want to make an observation on, namely that during the hearing of the motion on 4 March 2010 it became apparent that the Plaintiff's affidavit in support of the originating summons which was sworn by Mr Anthony Kamanga SC and was on the court record had attached to it different documents from those attached to the one that was served on the Defendant. In view of the resulting confusion that arose from this in the course of the Defendant's submissions, a direction was made to the parties to the proceedings to meet and harmonise the documents appearing in the

three copies of the affidavit so that all parties have identical documents annexed to the affidavit. The parties asked for three weeks within which they could meet and harmonise the documents. The proceedings were accordingly adjourned to 27 April 2010 in order to allow this exercise to take place.

When the court reconvened on 27 April 2010, it transpired that for some obscure and inexplicable reasons, counsel for the Plaintiff had refused to cooperate with the Defendant to harmonise the documents in the three copies of the affidavit, instead, counsel for the Plaintiff filed a rectified affidavit in support of Originating Summons without the leave of the court. The new affidavit had fifty nine pages. This was again being objected to by the Defendant who filed skeletal arguments running into some sixty six pages. I refused leave to allow the plaintiff's rectified affidavit which was filed in defiance of the court's direction not to file further affidavits but to harmonise the documents in the existing affidavit

In view of the Plaintiff's refusal to harmonise the documents on the three copies of the Plaintiff's affidavit in support of the Originating Summons which were different, the court decided to proceed with the hearing of the Defendant's submission without harmonizing the documents on the Plaintiff's affidavit. During his submissions counsel for the Plaintiff indicated that he will be referring to the affidavit of Mr. Anthony Kamanga SC, of Mr. Marshal Chilenga; of Mr. Thabo Chakakala Nyirenda; of Madalitso Chinyanga and of Mr. Alick Msowoya in his address to the court. He has also adopted the two sets of skeletal arguments which were filed in the court on behalf of the Plaintiff.

In reply to the issues raised by the Defendant herein, counsel for the Plaintiff submits that the proceedings herein were properly commenced using Form 10 in order to achieve an expeditious and economic disposal of the case hereof since this case involves the reputation of the legal profession and the protection of the public. He argues that there is no legal requirement that the Originating Summons to strike out a legal practitioner should be in Form Number 8.

The Plaintiff submits in the alternative, but without prejudice to the earlier submission, that even if there were irregularities in the use of Form 10 instead of Form 8 such irregularities are cured by 0 2 r 1 of the Rules of the Supreme Court (1999) edition. It is also argued that the defendant has not shown that he has in any way been prejudiced by the irregularities, if any.

Counsel for the Plaintiff also argues that in any case when the Defendant discovered that there was no Acknowledgment of Service accompanying the Originating Summons, the Defendant took fresh steps after becoming aware of the irregularity by filling in an Acknowledgment of Service and filing it with the court. It is argued that by filling and filing the Acknowledgment of Service the Defendant must be taken to have waived the irregularity.

On the affidavit in support of the originating summons which was sworn by Mr Anthony Kamanga SC the Plaintiff has submitted that the said affidavit contains matters of fact which are within the personal knowledge of the deponent as a Chairman of the Disciplinary Committee of the Malawi Law Society. The Plaintiff submits that what has been deponed by the Chairperson cannot therefore be hearsay. In any case, so the argument goes, there is nothing that could prevent the Defendant from having the authors of the letters called to be cross-examined.

On whether the Committee was supposed to conduct a hearing, the Plaintiff submits that at the time the Committee found a ***prima facie*** case against the defendant, the Defendant had offered no explanation to the Committee regarding the complaint lodged against him. There was therefore no need for the Committee to hold a hearing because the allegations leveled against the Defendant had not been disputed.

Counsel for the Plaintiff has argued that there is no law that says the court must enquire into the way the Committee arrived at its decision of a ***prima facie*** case when dealing with preliminary issues, neither is there any law that empowers the court to set aside the decision of the Committee. The only challenge that can be made to the decision of the Committee is through a judicial review.

Counsel has argued that under section 21 of the Act the High Court may either of its own motion, or on an application by the Attorney General, make an order suspending any legal practitioner, or striking any legal practitioner off the Roll, or may admonish any legal practitioner. Counsel submits that this section means that the Attorney General may commence proceedings without any enquiry by the Committee being conducted. He submits that if the court were to find that the findings of the committee were not proper, which is denied, then the court should rectify the irregularity by dealing with the matter as if the Attorney General had commenced these proceedings without enquiries.

The Plaintiff observes that in his skeletal argument, the Defendant does concede receiving the letters from the Committee. Thus there is no dispute as to whether the letters were received by him or not.

I will deal with both the preliminary objections and the application to strike out or set aside the originating summons together. In doing so I will be paying attention to the submissions of counsel for the Plaintiff in this matter. It will be noticed that in his subsequent motion, the Defendant no longer prays that this originating summons be dismissed. He merely wants it to be struck out or set aside.

The first matter this Court has to deal with is that of the jurisdiction of the Court. It is argued that because the plaintiff has not shown that the Committee, in arriving at a finding of a ***prima facie*** case against the defendant had conducted a requisite inquiry as it is mandated to do under section 37 of the Act, this court cannot be seized of this matter and has no jurisdiction. The defendant has deponed that after the Committee had sent to the Plaintiff a finding of a ***prima facie*** case on the basis that the Defendant had neither offered an explanation nor a defence to this matter the Defendant met with the Plaintiff on 18 September 2009 and hand delivered to her a letter of protest against the proposed proceedings. He gave to the Plaintiff copies of the responses he had sent to the Committee denying the allegations that were levelled against him. On the point that he had sent a letter to the Law Society denying the accusations the Defendant is supported by the affidavit of Mr Muta who remember being assigned by the Defendant to deliver two letters to the Law Society offices in Blantyre and that he did deliver on or about 15 June 2009 the two letters dated 8 January 2009 and 8th June 2009 respectively to a lady official of the Malawi Law Society. This evidence has not been contradicted by the Plaintiff. On the contrary, it is clear from the court record that this evidence is supported by the affidavit of Madalitso Chinyanga, office assistant for Malawi Law Society who actually deponed in paragraph 10 of his affidavit that the Defendant responded to one of the letters that the Law Society wrote to the Defendant. The Defendant states that despite the meeting, the Plaintiff nevertheless ignored the letters that the Defendant wrote to the Committee, the representations that were made to her on 18 September 2009 and went ahead to issue this Originating Summons on 23 November 2009. It is the Defendant's case that in the light of these facts the conditions which are required to be satisfied under sections 21 and 37 of the Act before a case of this nature can be entertained are lacking and the court has no jurisdiction to entertain it.

In other words the defendant is claiming that this court has no jurisdiction over the subject matter before it. I believe that this argument is flawed. The question of jurisdiction arises in two ways firstly over the person and secondly over the subject matter. It is not being contended here that the court has no jurisdiction over the Defendant but that it has no jurisdiction over the subject matter because it can only have jurisdiction in a matter where the Attorney General was able to show that the Committee carried out a proper inquiry in accordance with the relevant law and properly arrived at the finding of a ***prima facie*** case. I would like to observe that the jurisdiction of this court over the Defendant is clearly spelt out in section 21 of the Act. As for the jurisdiction of this court over the subject matter of these proceedings, it is clear that section 108 of the constitution gives this court unlimited jurisdiction over any subject matter. Under Section 103 (2) of the Constitution this court has jurisdiction over all issues of a judicial nature and has exclusive authority to decide whether an issue is within its competency. Under the law, I find that this court has jurisdiction over these proceedings and that the issues contained in these proceedings are within its competency.

The law relating to Originating Summons is simple and clear. It is a legal requirement that every Originating Summons which is inter parties must be in Form No. 8 to which an acknowledgement of service is a requirement. Examples in which it can be used are multifarious. Suffice it to say here that it can be used in a matter filed pursuant to an application made under a statute as is the case here. Form No. 10 is also used in inter party proceedings and it is always a requirement that it must be accompanied by an Acknowledgement of Service. Form 10 is, however, only used where it is prescribed in the statute under which the action is brought. See Order 7 rule 2 of the Rules of the Supreme Court.

The Act under which this action has been brought has not prescribed the use of Form No. 10. It was therefore a wrong form for these proceedings see **Chirwa v State 1994 MLR 59**. What is even worse is that, this Form No. 10 which the Plaintiff used was not even accompanied by an Acknowledgement of Service as is required by the Rules of the Supreme Court. The adverse and prejudicial effect of using a wrong form which is not accompanied by an acknowledgement of service as was the case here is that a defendant is denied an opportunity to respond to the case that is brought against him in the originating summons. Secondly the defendant is denied the opportunity to comply with the requirements of Order 28 of the Rules of the Supreme Court. Order 28 gives a systematic procedure and time frames to which parties to an Originating Summons must adhere

in order to achieve a timely disposal of the matter. It is also clear that the Plaintiff did not use the correct Appointment of Attendance form which ought to have been Form No. 12 in Appendix A. I also find that this case was prematurely set down for hearing on 3rd February 2010. I do not, however, think that these irregularities are such as to nullify the proceedings.

The law relating to non-compliance with the Rules of the Supreme Court is that failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect does not nullify the proceedings. (see order 2 r 1, 2 and 3). In such an event the court may on such terms as to costs or otherwise as it thinks just, allow a party to correct the irregularities. The Rules categorically provides that the court shall not wholly set aside or nullify any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be began by an originating process other than the one employed. Such a failure to comply with the requirements of these rules shall only be treated as an irregularity. I therefore treat these lapses in pleadings by the Plaintiff as mere irregularities. Let me make it clear that by doing so I am not condoning laxity by parties in preparing their pleadings. The courts have time and again exhorted counsel regarding the virtues of proper pleadings. Proper pleadings avoid the unnecessary dragging of proceedings which may be caused by preliminary objections from the other party thereby facilitating an expeditious disposal of cases.

The defendant conceded in his submissions that the irregularities regarding the use of the wrong Form 10 and regarding failure to attach an Acknowledgement of Service do not go to the root of this case. He also admits that he himself prepared an Acknowledgement of Service and filed it. In these circumstances he cannot complain that after filing the Acknowledgement of Service he was not able to comply with the calendar of events which is prescribed in Order 28 of the Rules of the Supreme Court. It was for this reason that when I adjourned this case on 3rd February 2009 I directed the parties to take advantage of the long adjournment to rectify all the irregularities.

The defendant has told the court that if that adjournment was not granted and the case had proceeded on that day these irregularities would have affected his right to make a proper response to the proceedings. He has told the court that as the case proceeds the calendar of events will still be affected. He has not indicated to the court how the calendar of events will be affected. Should this come to pass, then the Defendant will be at liberty to apply to the court for a specific remedy which will not put him at a disadvantage as a result of

the Plaintiff's failure to use a proper form and an acknowledgement of service in the commencement of these proceedings.

The question whether the Originating Summons is supported by hearsay evidence and has several documents attached to it that have not been exhibited is not a preliminary issue. Whether in fact this affidavit, which is intended to be used in the final determination of parties rights complies with Order 41 rule 5(1) of the Rules of the Supreme Court is a matter to be dealt with when this case in being considered on the merits. Order 41 rule 5 indeed demands that such affidavit contain only facts the deponent can speak to, of his own knowledge. It is not for the court, during preliminary hearing to rule on the quality of evidence which the parties want to rely on during the hearing of the case in order to establish their case on the merits. I will not therefore deal with this issue at this preliminary stage.

It is clear that the Attorney General's present application to strike out or discipline the Defendant is premised on two issues. First, that following complaints from Mrs Kadammanja and Mrs Mwale that there may be grounds on which the High Court could make an order under section 21 of the Act against the Defendant, an inquiry by the Committee under section 37 of the Act was conducted. Second, that during the inquiry the committee established a ***prima facie*** case against the Defendant. The first issue of an inquiry by the Committee is a preliminary issue that deals with procedural requirements on how the Committee conducts the inquiry. The Court will therefore deal with it now. The second issue of establishing whether at that inquiry a ***prima facie*** case was made out against the defendant is not a preliminary issue at all because it deals with the substance of the charge which the court has to examine during the hearing of the substantive matter in order to establish whether the Defendant should be struck off the Roll or disciplined by the court. At that stage the court will subject the decision of the Committee establishing a ***prima facie*** case to a rigorous test based on legal principles and see if it will stand the test.

Counsel for the state has submitted that there is no law that says the court must enquire into the way the committee arrived at its decision of a ***prima facie*** case when dealing with the preliminary issues. Against this submission is the case of **Attorney General v Chirambo 11 MLR 463** in which the High Court actually enquired into the way the Committee went about their work in arriving at their decision. The court had this to say about the proceedings before the committee;

"We now turn to the most serious allegation, namely that the
legal practitioner misappropriated the client's money.
Unfortunately no books of accounts or other documents
relating to the legal practitioner's accounts were, it seems,
produced before the Disciplinary committee. It would have been open to the disciplinary Committee to have utilized r 12 of the Legal practitioner's accounts with a view to investigating what was paid into the client's accounts and what was withdrawn therefrom"

In the last paragraph of that decision the court had this to say regarding what had gone on in the committee and I quote:

"Finally the Plaintiff seeks an order that the legal practitioner
pay first the cost of inquiry before the Disciplinary Committee
.... It is to be noted that the proceedings there dragged on and some of the meetings were cancelled or postponed without consulting with or informing the legal practitioner. Having considered all the facts we regret that we are unable to find any justification for ordering the legal practitioner to pay the costs of the inquiry."

In **Attorney General v Chiume (1994) MLR 20** Chief Justice Banda SC considered how the committee arrived at its decision. This is what the Chief Justice said;

"The Solicitor General proceeded to convene the Disciplinary Committee which met on 20 January 1994. The defendant appeared before it and was heard in his defence. He had been requested to bring with him his books of accounts, but when he appeared before the committee he did not bring any books claiming that they were with his auditors for purposes of the Annual Accounts Certificate for his practice.... The committee after hearing the defendant, came to the conclusion that his story defied belief, consequently, they took the view on the facts before them that a **prima facie** *case of misconduct had been made out against the defendant to justify instituting disciplinary action against him."*

These two cases clearly establish that courts do have jurisdiction when considering an application made under section 21 as read with section 37 of the Act to examine how the committee arrived at its decision. The court's jurisdiction to examine how the Committee arrived at its decision is not limited to considerations of substantive issues only but transcends to considerations of preliminary issues. Invariably such an examination always reveals that there is a record of what went on in the Committee during the inquiry. It is important to bear in mind that the requirement that the Committee must conduct an enquiry is a preliminary issue which this Court must be satisfied that it was done before it can consider this case on the merits. By definition an inquiry is a formal process undertaken to establish the existence or the non existence of particular facts. This court must therefore be satisfied that an inquiry into the conduct of the defendant was in fact made. That during the inquiry all legal requirements as to procedure, which are contained in section 37 of the Act as read with sections 9, 10, 11, 12 and 13 of the Commissions of Inquiry Act were complied with. Now what do these legal requirements say?

The legal requirements are that when the committee is enquiring into the conduct of a legal practitioner under section 37 (2) it must be clothed with all the powers of commissioners under sections 9 and 10 of the Commissions of Inquiry Act. The Committee may make rules to guide it in the conduct and management of the inquiry proceedings before it regarding times and places for its sittings. Where it does not make such rules the Committee must fall back on the provisions of sections 9, 10, 11, 12 and 13 of the Commissions of Inquiry Act. During the inquiry, the Committee is clothed with the powers of the High Court to summon witnesses, call for production of books, plans and documents and to examine witnesses and parties concerned on oath in order to establish particular facts. Section 13 of the Commissions of Inquiry Act makes it not only clear but mandatory that any person who is the subject of inquiry **shall be entitled to be represented by a legal practitioner at the whole of the inquiry.**

In the case at hand there is no record of the inquiry proceedings. It is not clear whether the committee had a seating during the inquiry. It is not clear what the quorum was and whether the decision arrived at was a unanimous or a majority decision. In fact it is not clear whether the committee had made rules regarding the conduct of its inquiries or whether such rules were followed in this particular inquiry.

What is clear is that the committee did not afford the Defendant the opportunity to have legal representation throughout this inquiry (if at all it took place) as is required by section 13 of the Commissions of Inquiry Act. Paragraph 7 of the plaintiff's own affidavit sworn by one

Msowoya spills the beans and reveals it all. In that paragraph Mr. Msowoya depones as follows:

> *"The practice of the committee is to convene oral hearings only when the allegations made by a complainant are disputed by the concerned legal practitioner. There would be no wisdom in convening oral hearings where the allegations are not in dispute. In the case of the two above-stated complaints against Mr Maulidi so far as my records show there was no dispute. The allegations had not been denied.* ***The committee, therefore, had no need to convene a hearing hence the recommendation to the Honourable Attorney General."***

It is clear to this court that section 13 firmly requires that the defendant be legally represented throughout the inquiry. Therein then lies the wisdom of convening an oral hearing in order to satisfy the requirement of section 13. Counsel for the Plaintiff has submitted that if the court finds that there were irregularities with the inquiries of the Committee then the court should rectify such irregularities by dealing with the case as if the Attorney had commenced these proceedings without an inquiry. The simple answer to this submission is that courts are only bound to decide cases on the basis of pleadings as they appear on the court record. It is not for the courts to amend the pleadings of the parties without there being any application for such amendment. There has not been an application for such amendment and it is now too late to contemplate it. In any case where the proceedings are brought under section 21 of the Act only, the deponents to the affidavit in support of the Originating Summons will necessarily be different from those envisaged in the proceedings brought under section 21 as read with section 37 of the Act.

In view of the doubtful nature of this inquiry and the many loose ends attendant to it, especially the fact that the Defendant was not afforded an opportunity to have legal representation throughout the inquiry as is required by section 13 of the Commission of Inquiry Act I set aside these proceedings. However in view of the serious nature of the complaints against the Defendant the Attorney General is at liberty to recommence the proceedings in a properly prepared case should she be so minded. The defendant is awarded the costs of these proceedings.

Pronounced in Open Court this day of **13th May, 2010** at Blantyre.

Justice L. G. Munlo SC
CHIEF JUSTICE