

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

ELECTION CAUSE NO. 32 OF 2019

IN THE MATTER OF SECTIONS 100 & 114 OF THE PARLIAMENTARY

AND PRESIDENTIAL ELECTIONS ACT

IN THE MATTER OF THE 21<sup>ST</sup> MAY 2019 PARLIAMENTARY  
ELECTIONS FOR CHIKWAWA EAST; NSANJE NORTH; AND NSANJE  
CENTRAL CONSTITUENCIES

BETWEEN:

FOSTER THIPIWA.....1<sup>ST</sup> PETITIONER

ENOCK CHIZUZU.....2<sup>ND</sup> PETITIONER

KAFANDIKHALE MANDEVANA.....3<sup>RD</sup> PETITIONER

AND

THE ELECTORAL COMMISSION.....RESPONDENT

CORAM: THE HON. JUSTICE S.A. KALEMBERA

Mr Kossam, of Counsel for the Petitioners

Mr Mataka, of Counsel for the Respondent

Mrs Chanonga, Official Interpreter

**ORDER**

*Kalembera J*

The Petitioners, by way of Petition, commenced this action against the Respondent challenging the decision of the Respondent declaring or returning the following as winners of the Parliamentary polls: Rodrick Sam Khumbanyiwa (Chikwawa East); Esther Mcheka Chilenje (Nsanje North); and Francis Kasaila (Nsanje Central). Before the Petition could be heard, the Petitioners brought an application seeking an order for the disclosure of documents pursuant to Order 15 rule 14(1) of the Courts (High Court) Civil Procedure Rules, 2017. The application is supported by an affidavit sworn by Wester Kosamu, of Counsel for the Petitioners, supplementary sworn statements, as well as skeletal arguments. There are also an affidavit in opposition sworn by Dalitso Mattaka, of Counsel for the Respondent, and skeletal arguments. This therefore is an order on that application.

The Petitioners seek an order for the disclosure of the following documents:

1. Original results' sheets for all the polling centres in all the three constituencies involved duly signed by the Respondent's agents and agents of candidates and or political parties including those of the Petitioner;
2. Original tally sheets for all the constituencies duly signed by the Respondent's agents and agents of candidates and/or political parties including those of the Petitioner;
3. Counterfoils for all ballot papers used, unused, spoilt, and cancelled for all the polling centres in the constituencies involved;
4. Register of voters ticked/marked to have voted for all polling centers in the constituencies involved;
5. Log books for all the polling centres in the constituencies involved.

The Petitioners' case as deposed is that the disclosure of these documents is relevant in that the original documents will show whether the results entered into the Respondent's system for each polling centre much with the duplicate results' sheets that were used by the Respondent in entering the results and where available with the copies retained by the Petitioner' monitors. That the original documents will show whether the results entered into the Respondent's system for all the three constituencies match with the duplicate results' sheets that were used by the Respondent in entering the results and where available with the copies retained by the monitors. The counterfoils will show the number of ballot papers that were torn off for use. The log books will show a record of results for all the polling centres in



the three constituencies. And that the register of voters ticked/marked to have voted will demonstrate whether the number of ballot papers (valid, null and void, spoilt and canceled) matches the ticked/marked voters in the register.

It has further been deposed by Muntian Kazembe, Assistant Presiding Officer at Namilembe Polling Centre for Nsanje Central Constituency. That himself and other officers from the following centres: Sankhulani, Phalamanga, Chigwamafumu and Chikali witnessed some dubious and irregular activities happening at Fatima TDC Tally Centre during the counting and tabulation of the results. That during tabulation from various polling centres, Presiding Officers from the said schools or centres were forced to change figures using tippex to match with already captured figures in the MEC computers. It has further been deposed by Francis Khembo that he and other monitors for UDF and UTM witnessed some dubious and irregular activities happening at Mpatsa Tally station during the said elections; the counting; tabulation and of the results and the announcement thereof. That similarly during tabulation of results from various polling centres, Presiding Officers were forced to change figures using tippex to match with already captured figures in the MEC computers.

On the other hand, the Respondent's case as deposed is that by operation of the law the documents requested are no longer in the custody of the Respondent; rather that they are with the Clerk of Parliament (CoP) who retained and preserves such documents in safe and secure custody. That in the event that the court orders that the Respondent disclose such documents which are with the CoP that exercise will prove strenuous and costly on the Respondent since they have to travel, or seek documents which are already in the custody of the CoP.

The main issue for the court's determination is whether and order be made to require the Respondent disclose the documents specified or not.

Order 15 rule 14 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:

*“(1) The Court may, on application of a party, order disclosure of specific documents or of a class of documents where the Court is satisfied that disclosure is necessary to decide the matter fairly or serve costs.*

*(2) In considering the application under sub rule (1), the Court shall –*

*(a) weigh the likely advantage or disadvantage of disclosure; and*

*(b) assess whether the party who may be required to disclose the documents has sufficient financial resources to do so.*

*(3) The Court may order that the documents be disclosed in stages.*

*(4) The Court may order that a party need not need disclose some or any documents where the Court is satisfied that –*

*(a) the documents are not relevant to the issues between the parties;*

*(b) disclosure is necessary to decide the matter fairly;*

*(c) the costs of disclosure would outweigh the benefits; or*

*(d) for any other reason, the Court is satisfied that the documents need not be disclosed.*

*(5) The Court shall not order the disclosure of a document, unless the Court is satisfied that the person in possession, custody or control of the document has had an opportunity to be heard.*

*(6) The order of the Court may state the time and place of disclosure.”*

It is the argument by counsel for the Respondent that that according to Order 15 rule 14 (5) the Court can only order disclosure if satisfied that the one in whose possession, custody or control the documents are had an opportunity to be heard. The documents being in custody of the CoP, the said CoP has not been heard.

Section 119 of the Parliamentary and Presidential Elections Act (PPEA) provides as follows:

*“s.119. At the end of its functions, the Commission shall deposit all documents forming the official record of an election (including voters registers, ballot papers, records from districts and polling stations and summaries thereof and the record and summary of the national result) with the Clerk of Parliament who shall retain and preserve such documents in safe and secure custody without destruction for a period of twelve months.”*



Counsel for the Respondent has strongly argued in essence that, on the strength of the said section 119 of the PPEA, the Respondent cannot be asked to disclose what is not in its custody. And that it is the CoP who is in custody of the said documents and must be heard before the Court can order the CoP to disclose the said documents. On the other hand Counsel for the Petitioners has argued that at the time this action was commenced in May the documents were in possession of the Electoral Commission.

I must state from the outset that I do not believe that in electoral petitions the Respondent can wash its hands off electoral issues, especially where a party prays for disclosure of electoral documents, by virtue of having deposited electoral documentation with the CoP in compliance of the said section 119 of the PPEA. The CoP has the custody of the documentation but possession remains with the Respondent. The difference between custody and possession has been defined by WikiDiff to mean that a possessor has complete dominion over the property whereas a custodian has the duty of care or supervision over the property. Dominion simply means control. Thus, one can safely conclude that despite the Respondent depositing the documents requested with the CoP, the control over the said documents remains with the Respondent. The CoP just provides the warehousing for safe and secure custody of the documents.

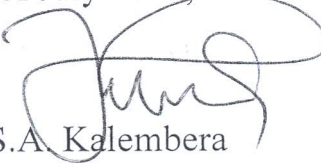
Having looked at the nature of the Petition where the Petitioners are challenging the results of the Parliamentary Elections in the said three constituencies, and having considered the electoral documents or materials which the Petitioners seek their disclosure. I am satisfied that the disclosure of these documents is very necessary for the fair determination of the Petitions herein. After all, the Respondent is not necessarily against disclosure of the said documents but rather that they are not the correct or right party to make those disclosures. It is the considered view and finding of this court that the Respondent is the right party to make these disclosures, and that the right party was given an opportunity to be heard and was heard.

All in all the Petitioners' application for disclosure must succeed and is hereby granted. The Respondent must within 14 days from the date hereof disclose to the Petitioners the following documents:

1. Original results' sheets for all the polling centres in all the three constituencies involved duly signed by the Respondent's agents and agents of candidates and or political parties including those of the Petitioner;
2. Original tally sheets for all the constituencies duly signed by the Respondent's agents and agents of candidates and/or political parties including those of the Petitioner;
3. Counterfoils for all ballot papers used, unused, spoilt, and cancelled for all the polling centres in the constituencies involved;
4. Register of voters ticked/marked to have voted for all polling centers in the constituencies involved;
5. Log books for all the polling centres in the constituencies involved.

I further order and direct that this Petition be heard before this court on the 29<sup>th</sup> day of July 2019 at 9:00 am.

**PRONOUNCED** this 11<sup>th</sup> day of July 2019, at the Principal Registry, Blantyre.



S.A. Kalembera

**JUDGE**