IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

Miscellaneous Civil Application No. 47 of 2014

BISHOP KAYIRA BWANAISSA KAPONDA KARONGA

(ON HIS OWN BEHALF AND ON

BEHALF OF AFRICAN NYASALAND PARTY)..... APPLICANT

VS

THE ELECTORAL COMMISSION.....RESPONDENT

CORAM: Hon. Justice Dr. R.E. Kapindu

Mr. Kadzipatike of Counsel for the Plaintiff

Mrs. Lisiya, Official Interpreter

RULING

Kapindu, J

1. FACTS AND ISSUES

1.1 Only 10 days remain before eligible and registered voters in Malawi go to the polls to elect the State President, Members of Parliament and Ward Councillors in general elections that are popularly being referred to as the "tripartite elections". General elections are a prized event in Malawi, an event of enormous importance that gives the people of Malawi the opportunity to exercise their democratic right to determine their political and socioeconomic destiny through the democratic free choice of their political leaders. The general elections have, for the past 20 years (i.e since May 1994), been a regular event in Malawi, repeated only once every five years, and they give effect to the Principle of the consent of the governed enshrined in Section 6 of the Constitution, that has now, arguably, also crystallised into a fundamental right at international law as a general principle of law accepted by civilised nations.[1] Section 6 of the Constitution provides that:

> Save as otherwise provided in this Constitution, the authority to govern derives from the people of Malawi as expressed through universal and equal suffrage in

[1] See T.M Franck, 'The Emerging Right to Democratic Governance', (1992) 86(1) *The American Journal of International Law* 46-91.

> elections held in accordance with this Constitution in a manner prescribed by an Act of Parliament.

1.2 The international law principle of the consent of the governed also finds expression under Section 12(1)(c) of the Constitution as one of the Fundamental Constitutional Principles. Section 12(1)(c) of the Constitution provides that:

> The authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice.

1.3 Thus the holding of regular and credible general elections is a key cornerstone of Malawian democracy that was achieved after so much sacrifice.

1.4 The Respondent, the **Electoral Commission**, is a Constitutional body established under Section 75(1) of the Constitution. In terms of Section 76(1) of the Constitution, as read with Section 8(1) of the Electoral Commission Act,[2] and other relevant laws relating to elections in Malawi,[3] the Respondent is mandated to conduct the above-mentioned elections, and to exercise general direction and supervision over the conduct of the same.

---

[2] Cap 2:03 of the Laws of Malawi

[3] See the Parliamentary and Presidential Elections Act, Cap. 2:01 of the Laws of Malawi; and the Local Government Elections Act, Cap.22:02 of the Laws of Malawi.

1.5 An *ex-parte* Application has been brought by the Applicant, **Bishop Kayira Bwanaissa Kaponda Karonga,** for an Interlocutory Order of Injunction to, among other things; stop the Respondent from conducting these elections. The Application is brought in terms of Order 29 of the Rules of the Supreme Court (RSC). According to the *ex-parte* Summons, the Applicant seeks an order restraining the Respondent, by itself, its servants, agents or whosoever from administering the tripartite elections on the 20th of May 2014; an order disqualifying all Parliamentary candidates who were nominated whilst they were public officers; an order calling for fresh nominations in all the constituencies where such candidates have been disqualified; and an order mandating the President to call for a national referendum within a shortest period possible.

1.6 The Application is supported by an Affidavit sworn by the Applicant.

1.7 The Applicant states, in his Affidavit, that Sections 40 and 77 of the Constitution accord every Malawian citizen the right to vote and to participate in elections. He states that Malawian citizens are found both within and outside Malawi. He argues that in accordance with Section 20 of the Constitution which prohibits any form of discrimination, the right to vote thereby extends to all eligible Malawians based outside Malawi. He further argues that by not according Malawians based outside Malawi the opportunity to vote in the forthcoming elections, the Respondent acted in a discriminatory manner, in conflict with Section 20 of the Constitution. The Applicant suggests, in this regard, that the Respondent should have

opened polling stations at its embassies outside Malawi to give Malawians in the Diaspora the opportunity to vote.

1.8 The Applicant also argues that in terms of Section 55(2)(e) of the Constitution, the Respondent is prohibited from accepting a person as a contestant for the post of Member of Parliament if such person was, at the time of nomination, still holding a public office. The Applicant argues, in this regard, that Members of Parliament are public officers and that for them to be lawfully and validly nominated for the position of Member of Parliament, they had to first resign from their respective positions as sitting Members of Parliament. He argues that in the forthcoming tripartite elections, most of the members of the now dissolved Parliament were nominated to contest as Members of Parliament whilst they were still holding the office which clearly shows that their nominations were unlawful. The Applicant argues that the elections will be unconstitutional and unlawful if such candidates are to be allowed to contest in the forthcoming elections.

1.9 The Applicant proceeds to the third prong of his argument which he has termed *"Issues of Public Interest"*. He begins by averring that the majority of the public in Malawi is desirous to see Sections 64, 65 and 86 of the Constitution put into effect. He argues that in repealing Section 64 of the Constitution, Parliament defeated the intentions of Malawians. He further avers that the **discretionary** nature of Sections 65 and 86 of the Constitution has defeated their effectiveness and that as such, there is need for an amendment to make them more effective. It is his argument

that the wishes of the public in respect of sections 64, 65 and 86 of the Constitution can only be ascertained through a national referendum. In support of his call for a referendum, the Applicant states that it is less likely that a sitting government can reinstate Section 64 and amend Sections 65 and 86 of the Constitution because they are a threat to a sitting Parliament.

1.10 The final leg of the Applicant's arguments is what he has termed *"Biasness and ineffectiveness of the Respondent."* He begins by pointing out, in this respect, that the law requires that the respondent administers elections impartially. He argues that this requirement notwithstanding, the Respondent graced presidential running-mates debates where only four political parties took part. This, he contends, bears clear testimony to the Respondent's bias.

1.11 The Applicant proceeds to state that the law mandates the Respondent to take action against any party which is inciting violence during the campaign period. That mandate notwithstanding, he argues, the Respondent failed to take action on the political violence which took place at *Goliati* and at *Mount Soche Hotel* and argues that, in this regard, the Respondent has demonstrated its inefficiency in conducting free and fair elections.

1.12 The Applicant further states that the Respondent is ineffective to conduct the tripartite elections as evidenced by the missing of names of various voters on the voters' roll.

1.13 He argues that all these issues present a clear indication that the tripartite elections to be held on 20 May 2014 will not be free and fair. He therefore

avers that in light of these issues, it is proper that the elections should not be held until such issues are addressed.

2. APPLICABLE PRINCIPLES ON INJUNCTIONS

2.1 The principles that are applied in applications for interlocutory injunctions were well summarised by **Kapanda, J** (as he then was) in the case of **Mpinganjira v The Speaker of the National Assembly and another** [2000–2001] MLR 318 (HC), where he stated, at pages 336-337, that:

> The principles on which such injunctions will be granted – to which reference was made in these proceedings and are trite knowledge – were set out in **American Cynamid Co v Ethicon Ltd** [1975] AC 396; [1975] 1 All ER 504 (House of Lords) and a synopsis of these principles is as follows:
>
> (a) The applicant must establish that he has a good, arguable claim to the right he seeks to protect.
>
> (b) It is not for the court, at the interlocutory stage, to seek to determine disputed issues of fact on the affidavits before it, or to decide difficult questions of law which call for detailed argument and mature consideration; it is enough if the applicant shows that there is a serious question to be tried at the substantive trial.
>
> (c) Unless the material before the court, at the interlocutory stage, fails to disclose that there is a

serious question to be tried, the court should consider, in the light of the particular circumstances of the case, whether the balance of convenience lies in favour of granting, or refusing, the interlocutory relief that is sought.

(d) If damages would be an adequate remedy for the applicant, if he were to succeed at trial, no interlocutory injunction should normally be granted. If, on the other hand, damages would not provide an adequate remedy for the applicant, but would adequately compensate the respondent under the applicant's undertaking, if the respondent were to succeed at the trial, there would be no reason to refuse an interlocutory injunction on this ground.

(e) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party, or both, that the question of balance of convenience arises.

(f) Where other factors appear evenly balanced, it is a Counsel of prudence to take such measures as are calculated to preserve the *status quo ante*.

2.2 The fact that this application has been brought before the issuance of originating process, as will become evident in the analysis below, is also relevant. According to Order 29, r.1(3) of the RSC:

> The plaintiff may not make such an application [for the grant of an interlocutory injunction] before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.

2.3 Practice Note 29/1A/23 in the *Supreme Court Practice* (Sweet & Maxwell, 1999) states that:

> An undertaking to issue the writ "forthwith" or "as soon as practicable" must be properly and expeditiously implemented by the plaintiff's solicitor and his failure to do so is prima facie a grave breach of his duty to the Court (**Refson (P.S.) & Co. Ltd v. Saggers** [1984] 1 W.L.R.1025; [1984] 3 All E.R. 111).

2.4 The foregoing authorities demonstrate that an interlocutory injunction, as a general rule, must only be granted in cases where the main action has been commenced. It may only be granted before the filing of the main action in cases of urgency, in which case the Applicant must move with speed to commence the action. Interlocutory reliefs should not assume the character of permanent reliefs disguised as interim ones. Failure by an applicant to file the main action as soon as possible is a serious matter. It is, *prima facie*, a grave breach of the Applicant's duty to the Court.

2.5 These are the principles that I need to explore in order to establish whether the Applicant's application for an interlocutory injunction herein is merited.

3. ANALYSIS OF THE FACTS AND ISSUES

3.1 In the light of the principles for the granting of interlocutory injunctions above, we need to examine a number of issues to assess whether such an injunction ought to be granted in the present proceedings.

3.2 Firstly, does the Applicant have a good and arguable claim to the right that he seeks to protect?

3.3 The Applicant states that he is the President of the African Nyasaland Party, a party duly registered in accordance with the laws of Malawi. The issues he has raised directly relate to the exercise of the people of Malawi of their political rights, rights which are of immediate and direct concern to the Applicant as a leader of a political party. The application that he has made presents a cocktail of frivolous and vexatious claims on the one hand, and good and arguable claims, that raise serious questions to be tried on some important constitutional issues, on the other. I will summarily address the frivolous and vexatious aspects as I address the issue of the balance of convenience below.

3.4 I am also mindful that at this stage, I am not to decide difficult questions of law which call for detailed argument and mature consideration, purely based on the affidavit evidence before me. I therefore restrain myself from commenting on most of the substantive issues for determination that the Applicant has raised at this stage.

3.5 The next question I need to consider is as to whether damages would be an adequate remedy for the Applicant in the event that he succeeds at trial. The answer seems to be in the negative. The constitutional matters that the Applicant raises and whose breach or violation he alleges, are not, by their very nature, easily amenable to monetary quantification in terms of compensatory damages. They are important matters of constitutional and legal principle that the Applicant seems to be passionate about. However, if there would be some economic loss suffered by the Applicant as a result of the injunction not having been granted, I would readily conclude that the Respondent would be in a position to compensate the Applicant in respect thereof.

3.6 On the flipside is the related question as to whether damages would be an adequate remedy for the Respondent if the injunction herein were granted, and the Respondent succeeded at trial. The answer once again is in the negative. In all likelihood, there would be irreparable damage, in various respects, occasioned to the Respondent and numerous stakeholders. A decision ordering the cancellation of the general elections as called for by the Applicant would come at a huge financial cost to the nation and other nations and organisations. Such costs would include costs incurred by Malawian taxpayers generally through the Government, costs incurred by foreign governments and organisations assisting this country with the conduct of the elections; and also costs incurred by the Respondent, Political Parties, candidates vying for various positions at the elections and numerous other stakeholders. It would also cause great national and

international inconvenience and/or disturbance, with inestimable ripple political, social and economic repercussions that can hardly be quantifiable, let alone compensable, in monetary terms. Even if we are to narrow our focus to only the possible financial implications, there is no indication that the Applicant would be in a position to compensate the Respondent in damages in respect of the financial cost that would be incurred. It would not be unreasonable to conclude, presumptively, that the Applicant would not have the means to provide such compensation. Indeed, the Applicant has not even made an undertaking as to damages in his Affidavit in support of the Application as is generally required in applications of this nature.

3.7 Having explored these issues, I remain to definitively decide on where the balance of convenience tilts in the instant case. However, before making that determination, I pause for a moment to point out that the Applicant has raised several frivolous and vexatious claims that we need to address summarily. First, he argues that this Court should direct the President to call for a referendum on the issue of bringing back the repealed Section 64 of the Constitution (on recall of Parliamentarians by their constituents). I must quickly point out that inviting the President to call for a national referendum on an issue of pure political concern such as this one is not an issue of a judicial nature. It is a purely political issue which the Applicant should address through political avenues. As Tambala, J (as he then was) correctly pointed out in **Gwanda Chakuamba vs Paul Ching'oma [1996] MLR 425(HC),** these courts must not be used, and should not allow

themselves to be used, as *"political football pitches"*. Judicialising issues of a purely political character breaches the principle of separation of powers. There is also another risk, pointed out by Chikopa, J (as he then was) in **Ajinga v United Democratic Front**, Civil Cause Number 2466 of 2008 (unreported) where he said that *"allowing the Judiciary and Judges into disputes entirely political unduly politicizes the Judiciary and we daresay the Judges."* Courts are not to be unnecessarily dragged into the arena of political contestation in the fashion in which this matter attempts. I hold that this is not an issue that is within the competence of the courts.

3.8 Secondly, the Applicant takes a swipe at what he calls the discretionary nature of Sections 65 and 86 of the Constitution which, he argues, makes them ineffective, and he invites this Court to order and direct the State President to call for a referendum in order to have these amended, ostensibly to remove the perceived discretion, and thus render them effective. Firstly on this second point, in terms of Section 65, it is unclear whether the Applicant impugns only subsection (1) on crossing the floor, or only subsection (2) on the right of Members of Parliament to exercise a free and independent vote in Parliament regardless of their party affiliation, or both of these. Irrespective of this observation, it is clear that neither section 65(1), 65(2) nor 86 of the Constitution is discretionary. A reading of all these provisions shows that the mandatory word "shall" is used, denoting that the processes envisaged under those proceedings are not discretionary. This is clear on the face of these provisions and does not need any legally mature and sophisticated interpretation in my view.

3.9 The Applicant also suggests that Parliament cannot amend Sections 65 and 86 of the Constitution because they are a threat to a sitting government. This masks the fact that both these Sections have been amended by Parliament before. Section 65(1) was amended through Constitution (Amendment) Act No. 8 of 2001, whilst Section 86 of the Constitution has been amended by Parliament on at least four occasions through Constitution (Amendment) Act No. 31 of 1994, Constitution (Amendment) Act No. 6 of 1995, Constitution (Amendment) Act No. 4 of 2001, and Constitution (Amendment) Act No. 13 of 2001. We can summarily conclude that the argument that Parliament cannot amend these sections is flatly contradicted by legislative precedent, is generally without merit, frivolous, vexatious and would not, in any event, be a triable issue.

3.10 Other than this, the same argument advanced by this Court in respect of the issue of Section 64 above, i.e that the decision of the President to call for a referendum is a prerogative power of a political character and of a nature that is not justiciable, equally applies in relation to the claims the Applicant raises in respect of sections 65 and 86 of the Constitution.

3.11 Back to the principles for the granting of interlocutory injunctions, I opine that the balance of convenience tilts in favour of maintaining the *status quo* which, in this case, is to allow the general elections to proceed pending the determination of substantive issues that the Applicant might wish to be determined by the Courts. If the Applicant commences his action and succeeds on his claims, the Courts can issue an order annulling

the elections where prudent and appropriate. That would be a wiser course of action than to stop the elections at this stage.

3.12 For the avoidance of doubt, the Court's analysis herein should not be misunderstood to imply that the Courts cannot, under any circumstances find that the balance of convenience tilts in favour of issuing an order of Injunction stopping the conduct of general elections. The observations I make in Paragraph 3.6 above are merely highlighted to show that in a matter of this nature, the Court should not lightly come to a conclusion that the balance of convenience lies in favour of granting the injunction. Each case, however, should be decided on its peculiar facts. There could obviously be instances where, on weighing the issues at stake, a more compelling case could be made for stopping the elections than for allowing the same to continue. The instant case however does not, by a wide stretch, come anywhere near such compelling cases which cases would, in my view, only arise on the rarest of occasions and under the most pressing of circumstances.

3.13 **The balance of convenience therefore tilts in favour of refusing to grant this application and maintaining the current *status quo*.**

3.14 Even if I were wrong in my analysis of the general principles for the granting of interlocutory injunctions *vis-a-vis* where the balance of convenience tilts in this case, I would still not allow the application on other premises.

3.15 First, it will be recalled that I pointed out earlier that the procedural law on the equitable remedy of an interlocutory injunction requires, as a general

rule, that the Applicant must make an undertaking as to damages in the event that the injunction was unlawfully or otherwise irregularly or unjustly obtained – See **Third Chandris Corporation v Unimarine SA** [1979] QB 645. No such undertaking has been made by the Applicant in the instant case. For the reasons I have advanced in 3.6 above, I do not even think it prudent to exercise my discretion to grant the injunction sought on condition that such an undertaking is subsequently made. **I would therefore disallow the application on the basis that there was no undertaking as to damages made by the Applicant.**

3.16 Secondly, I notice that although the summons for interlocutory injunction herein was issued by the Assistant Registrar at this Registry on 6 May 2014, and reached my Chambers only yesterday, the same was filed in this Court on the 16th of April 2014 as per the court's filing fees stamp appearing on the face of the Summons. As stated earlier, summonses for application of an interlocutory injunction *pendante lite* are generally not permissible. They are only allowed in cases of real urgency. Whatever the motivation for bringing this application before the action might have been, today marks seventeen (17) clear days since this application was filed and no action has yet been filed. The Applicant, if he was really serious about diligently pursuing this application and the course of action he wishes to take subsequently, he should have filed the originating process with this Court by now. Failure to do this, as he has done, sends a message to the Court that this could quite possibly end up to be one of those notorious actions that commence, stir up things around at a sensitive time in this country,

and then die silently thereafter, on the preliminaries, for want of further movement by either party. This Court takes judicial notice of such instances and will not permit the possibility of such an eventuality in the present case when the Applicant's inertia, in not expeditiously filing the originating process in a matter of such great importance, signals us in that direction.

3.17 **I would therefore also dismiss this application for failure by the Applicant to file the originating process within a reasonable time.**

3.18 I also wish to state that this Court is astonished at the overbroad nature of the scope of the reliefs that the Applicant has sought to obtain, *ex-parte*, and before the issue of any originating process, before this Court. Not only does the Applicant seek an order to restrain the Electoral Commission from conducting the general (tripartite) elections scheduled for 20 May 2014; he also seeks an order, through this pre-action *ex-parte* application, that I should order the disqualification of all Parliamentary candidates who were nominated whilst they were still Members of Parliament. The Applicant does not stop there. He also calls upon this Court, in this self-same Application, to make an order calling for fresh elections in those constituencies where Parliamentary candidates would have been disqualified by this Court as prayed for above. That is not the end of the matter. The Applicant also invites this Court to order the President to call for a national referendum on a number of issues relating to the repealed section 64 of the Constitution, and also sections 65 and 86 of the Constitution.

3.19 I have been left perplexed as to whether the Applicant properly appreciates, or has been made to properly appreciate, the purpose of interlocutory injunctions. This is more so considering that the same is being sought before the issue of originating process; and also considering that the Applicant is very much aware that the issues that he has brought before this Court, particularly at this time when the general elections are so close, are of profound national importance and concern. If indeed the Applicant were serious about his intentions, I would imagine that the various reliefs that he seeks through this *ex-parte* application for interlocutory injunction, should have been contained in the Originating Summons in the form of orders and declarations sought. These are not the type of reliefs that a person should obtain through the process of an interlocutory injunction.

3.20 **The nature of the reliefs which the Applicant seeks under this Application, to my mind, smacks of seeking to abuse this Court's powers to grant injunctory relief. I would refuse to grant the application on this ground as well.**

3.21 Finally, only by way of observation, I was left wondering, given the scope of the orders that the Applicant is seeking, whether the Electoral Commission ought to be the only intended Defendant/Respondent in the envisaged proceedings. I would have imagined that the Attorney General ought to have been included as an intended Defendant/Respondent.

4. CONCLUSION

4.1 I am mindful that this has been an *ex-parte* application where the Respondent has not even been called yet to appear to respond to the issues raised *inter partes* or otherwise. However, given the misgivings I have expressed about the nature of this Application, and also considering that the Respondent is likely to seek Counsel to study the content, effect and/or implications of this decision, I seriously contemplated the issue of costs. I however give the Applicant the benefit of the doubt, that perhaps indeed he brought this application in good faith genuinely believing that the matters of national importance that he raises must be addressed before the elections are held, and I am therefore disinclined to condemn him in costs.

4.2 In that regard, I dismiss this application in its entirety, but I make no order as to costs.

Delivered in Chambers this 9th day of May 2014 at Mzuzu

Redson E Kapindu

JUDGE