JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

MISCELLANEOUS ELECTION PETITION NO. 4 OF 2014

IN THE MATTER OF SECTION 51(2)(E) OF THE CONSTITUTION OF THE REPUBLIC OF MALAWI

IN THE MATTER OF SECTION 40(1)(A) OF THE PARLIAMENTARY AND PRESIDENTIAL ELECTIONS ACT

AND

IN THE MATTER OF REJECTION OF NOMINATION PAPER OF CHIMWEMWE KALUA

BETWEEN

THE MALAWI ELECTORAL COMMISSION …… PETITIONER

AND

CHIMWEMWE KALUA ……..……...…….. RESPONDENT

CORAM

THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Chalamanda, of Counsel, for the Petitioner

Mumba, of Counsel, for the Respondent

Mrs. D. Mtegha, the official court interpreter

Kenyatta Nyirenda, J.

DETERMINATION AND DIRECTIONS

Malawi will be holding tripartite general elections on 20th May 2014. The Respondent wishes to contest as a Member of Parliament for Blantyre Malabada Constituency [hereinafter referred to as the "Constituency"].

Presentation of Nomination Papers

On 18th February 2014, the Respondent presented his nomination papers to the Returning Officer of the Constituency, namely, Ms. Monica Kainja. As to the legal effect or implications, if any, of the contents of the nomination papers, it may be necessary to say a word or two later. I only stay to mention that page 6 of the nomination papers requires a candidate to complete a statutory declaration provided therein. For the record, and it will later be appreciated why I have to do so, the full text of the statutory declaration as completed by the Respondent is set below-

"QUALIFICATIONS FOR NOMINATION

Please complete the statutory declaration below.

1, ... KALUA ……..CHIMWEMWE……..

Surname ***First Name and Other Names***

Born on 31/03/1972 of ……PLOT….NO…..NY205,…….. NYAMBADWE, BLANTYRE…….. ***(Please print your residential address in full)***

Do solemnly and sincerely declare that:

(a) I have been adjudged or otherwise declared to be of unsound mind [ticked]
(b) I have not within the last seven years been convicted by competent court of a crime involving dishonesty or moral turpitude[ticked]
(c) I have not been adjudged or otherwise declared bankrupt under any law in Malawi[ticked]
(d) I do not work in the Civil Service [ticked]

Declared at ….BLANTYRE……..

Before me ….[signed] ……..

> *Magistrate or Commissioner for Oaths (Date)"* – [Emphasis by underlining supplied]

Incidentally, the statutory declaration forms part of a document produced by the Petitioner entitled "*MALAWI ELECTROL COMMISSION NOMINATION FORM FOR A NATIONAL ASSEMBLY/LOCAL COUNCIL CANDIDATE (Under Sections 36 to 43 of PPE Act and Sections 28 to 30 of LGE Act)*" [hereinafter referred to as the "MEC Nomination Form"]. Firstly, it is not clear whether the reference to the sections (a) denotes statutory provisions under which the MEC Nomination Form was made and/or (b) is meant to indicate that the contents of the MEC Nomination Form are addressing matters falling within the ambit of the cited sections. Secondly, there is the not-so-small matter of the status of the MEC Nomination Form. Is it subsidiary legislation? If so, was it ever published in the Gazette as per the requirements of section 74 of the Constitution? These particular questions are not before this Court (The question whether or not an issue is before the court is expounded on herein, under "Analysis", when discussing the judicial duty to determine issues as crystallized by documents filed by the parties). Nevertheless, I would pay urgent attention to the issue raised if I were the Petitioner.

Prescribed Forms

In view of the contents of the MEC Nomination Form, a word or two about prescribed forms may not be out of order.

Section 121 of the Parliamentary and Presidential Elections Act [hereinafter referred to as the "PPE Act"] empowers the Minister, on the recommendation of the Petitioner, to make regulations for the better carrying out of the provisions of the PPE Act. It is in pursuance of this section that the Parliamentary and Presidential Elections (Forms) Regulations, 1994 [G.N. 13/1994] were made. Regulation 2 (1) is relevant-

> "*The forms set out in the Schedule shall be used for the purposes of the Act, and such particulars as are contained in those forms and not particularly prescribed by the Act are hereby prescribed as particulars required under the Act*."

The Schedule to the Regulations contains the following nine prescribed forms [hereinafter referred to as the "Prescribed Forms"]-

Form I – Voter's Register (under section 22);

Form II – Voter's Registration Certificate (under section 24);

Form III – Nomination Form for a Parliamentary Candidate (under section 38);

Form IV – Nomination Form for a Presidential Candidate (under section 49);

Form V – Application for Transfer of Registration and Certificate of Transfer (under section 75(2));

Form VI – Record of Polling Process (under section 93);

Form VII – Audit Papers Audit Trail (required for section 5 and Part VII);

Form VIII – Compilation of Constituency Results for National Assembly Elections (under section 95); and

Form IX – Compilation of District Results for Presidential Elections (under section 95);

Section 5 of the General Interpretation Act provides that where a form is prescribed or specified by a written law, deviations therefrom neither materially affecting the substance nor calculated to mislead shall not invalidate the form used. It is also common knowledge that the general rule is that prescribed forms can only be amended, replaced, revoked, etc., in terms of the law under which they were made, which law in the present matter is section 121of PPE Act. An examination of the Statute Book shows that there has been no amendment to the Prescribed Forms since 1994.

In light of the foregoing, it comes to me with a sense of shock that MEC Nomination Form is materially different from the Prescribed Forms, in particular, Form III of the Prescribed Forms. Form III is no more than two pages but MEC Nomination Form runs into 7 pages. The lengthy of the MEC Nomination Form is not necessarily the issue. The point is that many of the matters in the MEC Nomination Form are not particulars prescribed under the PPE Act. Whether the MEC Nomination Form is valid or invalid is a question for another day. This particular question is not before this Court (The point about whether or not an issue

is before the court is expounded on herein, under "Analysis", when discussing the judicial duty to determine issues as crystallized by documents filed by the parties). Nevertheless, I would pay urgent attention to this matter if I were the Petitioner.

Notice of Rejection

On 12th March 2014, the Respondent received a notice of rejection of his nomination papers [hereinafter referred to as the "Notice of Rejection"]. The relevant part of the Notice of Rejection is as follows-

> "*Receipt is acknowledged of your nomination for Blantyre Malabada Constutuency/Ward. Unfortunately I am unable to accept your nomination and I have therefore rejected it on the following grounds:*
>
> *DURING THE TIME OF SUBMISSION OF NOMINATIONS PAPERS YOU WERE STILL SERVING AS PUBLIC SERVANT OF MALAWI ATTACHED IS A LETTER FROM YOUR OFFICE. THIS IS AGAINST THE LAW AS PROVIDED IN SECTION 51 SUBSECTION (2) (e) OF THE CONSTITUTION OF THE PUBLIC MALAWI.*
>
> *I assume you wish to appeal to the High Court against my decision. I have, therefore, taken the liberty to send to the High Court a statement in terms of sec 40 of the Parliamentary and Presidential Elections Act.*" – [Emphasis by underlining supplied]

It may be useful to know the material part of section 40 of the PPE Act. The material part reads as follow-

> "*(1) If, after the close of the period allowed for nominations but before the polling day, the returning officer is of the opinion that-*
>
> *(a) a candidate whose nomination paper has been lodged with him has not been duly nominated in accordance with this Act or is not qualified for election or has obtained nomination by fraud or false pretences;*
>
> *the returning officer shall forthwith notify the candidate or his election representative giving the reason for such opinion, and, if so requested by the candidate or his election representative, the returning officer shall draw up and sign a statement of the facts and his opinion based thereon and transmit it, together with the nomination paper and any certificate or affidavit which has been lodged with such nomination paper, to the Registrar of the High Court for hearing and decision by the High Court at the earliest opportunity; and a copy of the statement shall, at the same time, be delivered to the candidate or his election representative and to the Commission*"

The letter referred to in the Notice of Rejection is dated 10th March 2014 and is authored by the Chairperson of the Board of Directors of Malawi Broadcasting Corporation (Board of Directors for MBC), Mr. Evans Namanja [hereinafter referred to as the "Membership Status Letter"]. The Membership Status Letter is very brief. The substantive part of the Membership Status Letter (a) acknowledges receipt of the letter from the Petitioner dated 7th March 2014 regarding the Board Membership Status of the Respondent and (2) informs that the Respondent is still serving as a Board Member of the Board of Directors of MBC.

Membership of the Board of Directors for MBC

The Respondent admits having served as a member of the Board of Directors for MBC but avers that he resigned from being a member well before presentation of his nomination papers to the Returning Officer.

The Respondent was informed of his appointment as a member of the Board of Directors for MBC through a letter written by Comptroller of Statutory Corporations dated 3rd October 2012 [hereinafter referred to as the "Letter of Appointment"]. Paragraphs 1, 2, 3 and 6 of the Letter of Appointment are relevant and they are couched in the following terms-

> *"I am pleased to inform you that Government has appointed you a Member of the Board of Directors for Malawi Broadcasting Corporation with effect from 25th September, 2012. Your term of office will run up to 24th September, 2014.*
>
> *Please take note that this appointment is not an employment contract hence it can be terminated any time the Government sees it fit to do so. This means that the Government reserves the right to terminate your appointment at any time before the end of the said term. Such termination can be in writing or through radio announcement dissolving your Board or all Boards of Statutory Corporations.*
>
> *... please note that there are two categories of Directors viz:-*
>
> - *Directors who do not work in Government; and*
> - *Ex-officio Directors who sit on the Boards by virtue of official appointment in Government*
>
> *As Board members are not employees of the organization concerned, they do not receive any remuneration of any kind, neither can they obtain loans or benefits which employees enjoy. However, as a token of appreciation for their service to the organization, and indeed to the nation, they are paid a modest honoraria and sitting allowance at rates*

determined by the Government from time to time…" – [Emphasis by underlining supplied].

In addition to the Letter of Appointment, the Respondent was furnished with a copy of "*Code of Conduct for Board of Directors of Statutory Corporations*" . The Code of Conduct provides, among other things, that Board Members "*are not employees of the parastatals concerned or of the Government*" and "*are not entitled to any loans or advances as that would represent a conflict of interest*".

As a member of the Board of Directors for MBC, the Respondent served in two subcommittees, namely, the Administration and Human Resource Committee and Finance and Audit Subcommittee. These Subcommittees meet, and met at all material times, regularly.

On or about 24th January 2014, the Respondent decided to resign from being a member of the Board of Directors for MBC. He, accordingly, wrote a letter to the Chairperson of the Board of Directors for MBC concerning his resignation. Following the submission of the resignation letter, the Respondent was neither invited to any meeting of the Board and/or Subcommittees nor paid any honoraria and/or sitting allowance.

Referral to the Registrar of the High Court of Decision Rejecting the Respondent's Nomination to Contest as a Parliamentary Candidate

Following receipt of the Notice of Rejection on 12th March 2014, the Respondent on 13th March 2014 wrote a letter to the Returning Officer requesting her to act pursuant to section 40(1) of the PPE Act, that is, "*to draw up and sign a statement of the facts of her opinion on the rejection and transmit the same, together with all necessary documents as the law requires, to the Registrar of the High Court for hearing and determination by the High Court. I also request that a copy of the statement be delivered to me and to the Commission*".

Upon receipt of the request by the Respondent, the Petitioner referred the matter to the Registrar of the High Court by its letter dated on 13th March 2014 [hereinafter referred to as the "*Letter of Referral*"]. The Letter of Referral sets out a statement of facts and opinion. Since the statement of facts and opinion is of some importance in these proceedings, I reproduce it below in extensio-

"***STATEMENT OF FACTS AND OPINION***

1.0 Statement of Facts

1.1 The petitioner presented his nomination papers as a Member of Parliament candidate for Blantyre Malabada constituency as an Independent candidate on 11th February, 2014.

1.2 Upon examination of the nomination papers, it was discovered that the Petitioner had not resigned as a Board Member of Malawi Broadcasting Corporation.

1.3 We notified the Petitioner on 12th March, 2014 informing him of his rejection as a Parliamentary candidate.

2.0 OPINION

2.1 The law provides for a number of conditions for one to become eligible as a candidate for Member of Parliament.

2.2 The relevant law at the centre of this with respect to the eligibility of Member of Parliament, the question is centered on ***section 51 (2) (e)*** *of the Constitution which states:-*

> ***Notwithstanding subsection (1), no person shall be qualified to be nominated or elected as a Member of Parliament who-***
>
> > ***(e) holds or acts, in any public office or appointment, expect where this Constitution provides that a person shall not be disqualified from standing for elections solely on account of holding that office or appointment or where that person resigns from that office or appointment in order to stand.***

2.3 A public office may be defined as any office the holder of which is invested with or performing duties of a public nature and of public officer may be said to be holding or acting in any public office. However, it is not a simplistic at law.

2.4 The case, of ***Fred Nseula v Attorney General and Malawi Congress Party***[1] *is very instructive on the point.*

2.5 In that case, Justice Mawungulu, confronted with the issue whether or not a cabinet minister is a public officer, took a good look at a number of cases before coming to the conclusion captured herein below as follows:-

[1] . MSCA Civil Appeal No. 32 of 1997

> ***I think the phrase 'public office' must be given its ordinary meaning. I do not agree with the suggestion that they are public offices only those that have been declared to be. It may be necessary to specifically declare some. It does not follow however that the rest of the public offices should be spelt out. The Constitution has not said that they are public offices only those that have been so declared. The Phrase 'public office' must therefore be given its ordinary meaning. In the light of the cases referred to anybody is a public officer who is paid from national funds, does duties conferred on him by the Constitution or legislature. <u>The office must exist by force of the Constitution or legislation. The public office in point must be permanent and not temporal and ad hoc. The officer must exercise some aspect of sovereign functions.</u> Under this definition the President and members of his Cabinet are public officers. This is why section 88(3) uses the word 'other' because in normal parlance the President and members of his Cabinet are public officers. The Cabinet shall always be there. The Constitution provides that there shall be a Cabinet. The position is therefore permanent, not temporal. The functions of that office are created directly by the Constitution. Members of the Cabinet are paid from national funds. It was said that Ministers cannot fall in the definition because under section 97 they are responsible to the President for administration of their Ministries. The remarks of Reardon, J., in Town of Arlington -v- Board of Conciliation and Arbitration are appropriate. If section 97 is read, it will be seen that ministers are responsible to the President for administration of their ministries. Members of the Cabinet have other functions in the Constitution besides running Ministries. Section 93(1) of the Constitution is in the following terms***
>
> ***"There shall be Ministers and Deputy Ministers who shall be appointed by the President and who shall exercise such powers and functions, including the running of government departments….."*** *(Our emphasis)*

2.6 In arriving at this conclusion, his Lordship took a good tour to other jurisdictions where he found that the phrases or 'public officer' 'public office' had already been defined by Courts.

2.7 Thus referring to the case of ***Re Mirrams****,*[2] *and quoting Cave, J., said, he said*

> ***To make the office a public office, the pay must come out of a national and not out of local funds, and the office must be public in the strict***

[2] . [1891] 1 Q.B. 594,596 – 597,

> ***sense of that term. It is not enough that the due discharge of the duties of the office be for the public benefit in the secondary and remote sense.*** *(our emphasis)*

2.8 Similarly relying on ***Spring v Constantino***[3] *and quoting Loiselle, A.J., he said*

> ***The essential characteristics of a public office are (1) an authority conferred by law, (2) a fixed tenure of office, and (3) the power to exercise some portion of sovereign functions of government****. (our emphasis)*

2.9 He went further to rely on a passage from the judgment of ***Larson J, in State v Taylor***[4] *where he said several elements indicate of what constitutes a public office were laid down. He said*

> ***They are: (1) The position must be created by the constitution or legislature, (2) A portion of the sovereign power of government must be delegated to that position. (3) The duties and powers must be defined, directly or implied, by the legislature or through legislative authority, (4) The duties must be performed independently and without control of a superior power other than law, (5) The position must have some permanency and continuity, and not only temporary and occasional.*** *(Our emphasis)*

2.10 He also went on to rely on the remarks of Reardon, J., in ***Town of Arlington v Bds. of Conciliation and Arbitration*** *Mass*[5] *He said*

> *As was stated... a person may be deemed a public official where he is fulfilling duties which are public in nature, "involving in their performance the exercise of some portion of the sovereign power, whether great or small'*

2.11 The Black's Law Dictionary[6] *defines a public officer by way of its characteristics. It states*

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[3] . 168 Conn. 563, 362 A2d 871, 875,

[4] . 260 lowa 634, 144 N.W. 2d 289,292:3

[5] . 352 N.E. 2d 914 352 at 914.

[6] . Black's Law Dictionary, Abridged 6th Edition, p. 1230:

http://famguardian.org/TaxFreedom/CitesByTopic/PublicOffice.htm

"Essential characteristics of a 'public office' are:

(1) Authority conferred by law,

(2) Fixed tenure of office, and

(3) Power to exercise some of the sovereign functions of government.

(4) Key elements to establish public position as 'public office' are:

(5) Essential elements to establish public position as 'public office' are:

(a) Position must be created by Constitution, legislature, or through authority conferred by legislature.

(b) Portion of sovereign power of government must be delegated to position,

(c) Duties and powers must be defined, directly or implied, by legislature or through legislative authority.

(d) Duties must be performed independently without control of superior power other than law, and

(e) Position must have some permanency."

2.12 *An American Law Review* ***Review – 63C Am.Jur.2d, Public Officers and Employees, $247***[7] *stated instructively on the subject*

Furthermore, the view has been expressed that all public officers, within whatever branch and whatever level of government and whatever be their private vocations, are trustees of the people, and accordingly labour under every disability and prohibition imposed by law upon trustees relative to the making of personal financial gain from a discharge of their trusts.[8] ***That is, a public officer occupies a fiduciary relationship to the political entity on whose behalf he or she serves.***[9] ***It***

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[7] . http//famguardian.org/Tax Freedom/CitesByTopic/PublicOffice.htm

[8] . Georgia Dep't of Human Resource v Resources v Sistrunk, 249 Ga 543, 291 SE2d 524. A public official is held in public trust. Madlener v Finley (1st Dist) 161 III App 3d 796, 113 III Dec 712, 515 NED2d 697, app gr 117 III Dec 226, 520 NE2d 387 and revd on other grounds 128 III 2d 147, 131 III Dec 145, 538 NE2d 520.

[9] . Chicago Park Dist v Kenroy, Inc., 78 IIIDec 291, 402 NE2d 181, appeal after remand (1st Dist) 107 III App 3d 222, 63 III Dec 134, 437 NE2d 783.

has been said that the fiduciary responsibilities of a public officer cannot be less than those of a private individual.

2.13 Following from the Nseula case and the essential characteristics of a public office provided therein. The post of board member is conferred by law as a public office.

2.14 By virtue of being a board member of Malawi Broadcasting Corporation, a creature of statute, a Board Member is in the civil service and therefore holder of public office.

2.15 The law requires that such public officer must first resign. Resign is not the same thing as taking leave of absence. The natural and ordinary meanings of the two are different.

2.16 The Black Law dictionary defines "Leave of absence" as a term that applies to a temporary absence away from work due to a long illness or a holiday. This entails a real possibility of a return to employment whilst resignation is defined by the Black's Law dictionary as the act by which an offer renounces the further exercise of his office and returns the same into the bonds of those from whom he received it.

2.17 It is on the basis of the above that we are of the opinion that Chimwemwe Kalua is not eligible to contest as a member of parliament as he is a holder of public office, that of a Board Member of Malawi Broadcasting Corporation."

The Letter of Referral will be discussed at some lengthy herein below under "Submissions" and "Analysis" but I pause here to observe that one or two issues in the Letter of Referral have nothing to do with this petition, for example, leave of absence. Had it not been for the specific mention of the Respondent by name in the Letter of Referral, I would have easily concluded that the opinion was in respect of a different matter altogether, perhaps **In the matter of Referral by the Petitioner in respect of Dr. Jessie Kabwila, HC/PR Misc. Election Petition No. 2 of 2014** [Hereinafter referred to as the "Kabwila Petition"].

The decision in the **Kabwila Petition** was delivered by the High Court on 26th March 2014. Unlike as was the position with the judgement in the case of the **Malawi Electoral Commission v Mathews Ngwale, HC/PR Misc. Election Petition No. 2 of 2014** [Hereinafter referred to as the "Ngwale Petition"] (whose copies were readily available so soon after its delivery, and were actually distributed to all Judges on the day it was delivered, that is, 24th March 2014), the

judgement in the **Kabwila Petition** is not yet available for public consumption. It would appear the judgement itself was given orally on the understanding or promise that a written and/or perfected judgement would be ready in due course. I am aware that the Judiciary has since issued a Press Release on the decision in the **Kabwila Petition**. In deference to the principle of judicial comity and in the general interest of developing jurisprudence, I was ready, willing and able to take into account the respective decisions in the **Kabwila Petition** and **Ngwale Petition** in reaching my decision in this petition. I have done so with respect to the decision in the **Ngwale Case** but alas I cannot do the same in relation to the **Kabwila Petition**. The delivery of my judgment in the petition before me can no longer be delayed and I cannot debase the judicial office of High Court by commenting on a Press Release.

Electoral Petition Set Down for Hearing

The Court issued a notice setting down the matter for hearing on 20th March 2014 and directing the parties to file and serve on each other necessary documents, including skeleton arguments.

The notice was served on both the Petitioner and the Respondent. The Respondent filed his Affidavit in Opposition on 17th March 2014, which was on the same day served on the Petitioner. On 19th March 2014, the Petitioner filed Skeleton Arguments and the Respondent filed his Skeleton Arguments as well as a List of Authorities and hard copies of cases and other documents relied on.

Submissions by the Respondent

By consent of parties, Counsel for the Respondent was the first to address me. He adopted the Respondent's Affidavit in Opposition and Skeleton Arguments.

It was the case of the Respondent that the petition raised two issues, namely, (a) whether the Respondent is/was a public servant by virtue of being a member of the Board of Directors for MBC and (b) whether at the time of the presentation of his nomination papers, the Respondent was a public servant.

Whether the Respondent is/was a public servant by virtue of being a member of the Board of Directors for MBC?

In his argument on this question, Counsel for the Respondent submitted that the term "public office" is used in section 51(1)(e) of the Constitution in its strict sense of an office in the Civil Service. He argued that such an office has attributes of continuity or permanency and entitlement by the holder thereof to remuneration. Counsel placed reliance on two decisions by the Supreme Court of Appeal, namely, **The President of Malawi and Speaker of National Assembly v R.B. Kachere & Others, MSCA Civil Appeal No. 20 of 1995 [**hereinafter referred to as the **"Kachere Case"**] and **Fred Nseula v Attorney General and Another, MSCA Civil Appeal No. 32 of 1997, MSCA** [hereinafter referred to as the "**Nseula Case - MSCA**"].

In the **Kachere Case**, supra, the Supreme Court of Appeal considered several constitutional provisions which refer to public office, including section 51(2)(e) of the Constitution, whose interpretation is before the court in this Petition, and held that the President and Speaker were not public officers despite the fact that they discharge duties of a public nature. In the words of Kalaile J.A. (as he then was) at page 16-

> *"In conclusion, I hold that the definition of a "public officer" as stated in the General Interpretation Act is inconsistent with the provisions, and or, context, of the Constitution so that it does not apply to any part of the Constitution other than Chapter XX which deals exclusively with the Civil Service and those parts which deal with the offices of the Inspector General, Chief Commissioner of Prisons and those other offices which I have listed down earlier on."*

In light of the above quotation, Counsel for the Respondent turned to Chapter XX of the Constitution which provides for the Civil Service. He observed that section 187(1) of the Constitution provides that power to appoint persons to hold or act in offices in the civil service, including the power to confirm appointments, and to remove such persons from office vests in the Civil Service Commission. The argument of Counsel in relation to this provision is that the Respondent was not

appointed to any office by the Civil Service Commission. As such, Counsel for the Respondent submitted that the Respondent has never been a civil servant or public servant as defined by Chapter XX of the Constitution.

In the **Nseula Case – MSCA**, supra, the Supreme Court of Malawi made several pertinent points.

The first point was an observation that the Constitution is a special document and as such the rules and presumptions which are applicable to the interpretation of other pieces of legislation are not necessarily applicable to the interpretation of the Constitution – the Constitution calls for special principles of interpretation suitable to its nature.

Secondly, the Supreme Court of Appeal found that the Constitution does not define the term "*public office*" although the term is widely used in the Constitution and, in such circumstances, reference must be made to the Constitution itself to discover the meaning which Parliament intended to ascribe to the term "public office".

Thirdly, the Supreme Court of Appeal addressed its mind to some indicia which could help to define what constitutes a "*public office*"-

> *"There is no doubt in our view that a "public office" must have some permanency or continuity of service, there must be a fixed term of office. The office of minister, deputy minister or Member of Parliament can hardly be described as an office of some permanency and continuity or with a fixed tenure of office. Ministers and deputy ministers hold office at the pleasure of the President and can be hired and fired at his pleasure. Members of Parliament hold their office at the pleasure of their constituents.*
>
> *The Learned Judge must surely know that the office of minister cannot be permanent. Ministers can be dropped from cabinet at any time as it pleases the President. We are satisfied that the position of a minister and deputy minister are not a public office".*

Fourthly, and perhaps more importantly, the Supreme Court of Appeal held that the term "*public office*" is used in the Constitution in the sense of "*public office*" in the civil service. The holding is to be found at page 237-

> *"We have considered the Constitution as a whole and have looked at the use of the word "public office" where it appears in several sections. We are satisfied that having regard to the tradition and usages which have been given to the meaning of the word "public office" the interpretation which should be given to its use in the Constitution is in the strict sense of "public office" in the civil service. The "public office" does not connote "any public office of whatever description …… It is too wide and it is not correct and certainly it is not in the manner in which it is used in the Constitution."*

Having laid out the law, Counsel for the Respondent turned to the present petition and drew my attention to the fact that (a) the Letter of Appointment is clear that the Respondent was not an employee of MBC or of the Government and, as such, he was not entitled to remuneration, (b) the appointment did not confer any permanency or continuity of service as it could be terminated at any time, (c) the Respondent was not appointed to any office by the Civil Service Commission, and (d) the Respondent was not entitled to any remuneration and benefits as are accorded to public officers/servants through the Public Service Act. In light of the foregoing, he submitted that the appointment of the Respondent as a member of the Board of Directors for MBC did not make him a public servant/officer.

Whether at the time of the presentation of his nomination papers, the Respondent was a public servant?

Counsel for the Respondent proceeded by making it clear from the outset that the viewpoint of the Respondent, based on arguments advanced hereinbefore by his Counsel, is that he has never at any point being a public servant /officer. He submitted that even if the Court was to postulate, for the sake of argument, that the Respondent had been a public servant/officer by virtue of being a member of the Board of Directors of MBC, he would have ceased to being a public servant/officer upon submitting his Resignation Letter.

Counsel for the Respondent concluded by lamenting the fact that the Petitioner proceeded to act on the letter from the Chairperson of the Board of Directors for MBC, regarding the membership status of the Respondent, without the Respondent being given an opportunity to be heard on the contents of the said letter.

Submissions by the Petitioner

Counsel for the Petitioner adopted the Letter of Referral and the Petitioner's Skeleton Arguments. I pause here to observe that I have examined the two documents and the substantive parts thereof are identical except in three respects.

Firstly, the Petitioner's Skeleton Arguments contains two sections that are not in the Letter of Referral, that is, "*2.0 ISSUES 2.1 Whether the petitioner is a holder of a public office*" and "*4.0 Submissions*".

Secondly, while the citation given in the Letter of Referral (2.4) is that of the **Nseula Case-MSCA**, the citation set out in the Skeleton Arguments (3.4) is that of the decision in the court below, that is, **Fred Nseula v Attorney General and Malawi Congress Party, HC/PR Civil Cause No. 63 of 1995** [hereinafter referred to as the "**Nseula Case - HC**"]. The latter point, as will be evident in a moment, has much wider implications with respect to the line of argument taken by the Petitioner. For the record, Counsel for the Petitioner confirmed that the citation in the Letter of Referral was made in error, that is, the citation should have been as stated in Skeleton Arguments. Counsel is right because, with the exception of one or two paragraphs, all the paragraphs of the Opinion are either direct quotations from, or direct references to, the **Nseula Case-HC**.

Thirdly, paragraphs 2.13 to 2.17 inclusive of the Letter of Referral have been replaced in the Skeleton Arguments by the following new paragraphs-

> *"3.13 The Supreme Court, also confronting the issue of public office in **Fred Nseula v The Attorney General and Malawi Congress Party** reiterated the sentiments of Justice Mwaungulu by not only citing the **Spring v Constantino** and **State v Taylor** cases but went further to state as follows-*
>
> ***"There is no doubt in our view that a "public office" must have some permanency or continuity off service. There must be a fixed term of office."***
>
> *3.14 However, the Justices of appeal differed with the Judge in the lower court in that they restricted the connotation of public office to civil service. The justices stated:*

> ***"We have considered the Constitution as a whole and have looked at the use of the word "public office" where it appears in several sections. We are satisfied having regard to the tradition and usages which have been given to the meaning of the word "public office" the interpretation which should be given to its use in the Constitution is in the strict sense of "public office" in the civil service. The "public office" does not connote "any public office of whatever description" as the judge in the lower court finds. It is too wide and it is not correct and certainly it is not in the manner in which it is used in the Constitution."***

3.15 The Supreme Court did not however define what is meant by civil service.

3.16 According to the Black Law dictionary civil service relates to all functions under the government except military functions.

3.17 The petitioner, though not under employment contract with the Government, was holding the office of member of Director of Malawi Broadcasting Corporation.

3.18 The law under section 51(2)(e) of the Constitution refers to a person holding a public office and not being employed in a public office" – [Emphasis by underlining supplied]

I cannot help it but comment that I find the flow of argument in paragraphs 3.13 to 3.18 to be problematic. Having discussed and defined "civil service" in paragraphs 3.14 to 3.16, one would expect the following paragraphs to make conclusion regarding the "civil service" status of the Respondent. The fact that the Petitioner abruptly (and thereby leaving everyone very much in mid-air) drops discussion of "civil service" and reverts, in paragraphs 3.17 and 3.18, to the term "public office" gave me anxious moments. I could not figure out why the Petitioner has to make a superficial reference in the Skeleton Argument to "civil service" until after some dicta in the **Ngwale Petition** hit me [I will revert to this point herein when discussing it under "Analysis"].

Paragraph 4.0 of the Skeleton Arguments is headed "*SUBMISSION*" and it is as follows-

> "*4.1 It is Malawi Electoral Commission's argument that at the time of presentation of his nomination papers, he was still holding a public office that of a member of board of directors of the Malawi Broadcasting Corporation as evidenced by the letter marked "CMK2" in the affidavit of Chimwemwe Kalua.*

4.2 It is a requirement by section 51(2)(e) of the Constitution that before being nominated or elected as a Member of Parliament a holder of a public office such as the Petitioner must first resign from the public office.

4.4 The petitioner did not therefore satisfy the requirements of section 51(2)(e) of the Constitution and he is a holder of public office and therefore the Malawi Electoral Commission was correct to reject his nomination papers as a candidate for Member of Parliament for Blantyre Malabada Constituency" – [Emphasis by underlining supplied]

Counsel began by conceding that the Petitioner was not employed by MBC. Despite the Respondent not being employed by MBC, it was said that as the Respondent was a member of a Board of Directors for MBC, he was holding a public office which office, it was contended, falls within the ambit of section 51(2)(e) of the Constitution. The **Nseula Case – HC**, supra, was cited as authority in this regard.

I drew counsel's attention to paragraphs 3.15 and 3.16 of his Skeleton Arguments and requested him to enlighten the Court the significance to the present petition of his submission that the "*Supreme Court did not define what is meant by civil service*". Did he mean to say that the Respondent was a civil servant according to the Black's Law Dictionary?

I also specifically asked him as to which term between "*public service*" and "*civil service*" is wider in scope than the other. It would appear my questions took Counsel by surprise because, with respect to Counsel, I was astounded by his answers. Counsel opined that "*civil service*" encompasses "*public service*" because in terms of the Black's Law Dictionary, civil service "*relates to all functions under the government except military functions*".

I found some difficulty in following counsel's reasoning in coming to that opinion but was I surprised? No! I was not surprised at all: that is what is bound to happen when one resorts to the dictionary to find the meaning of terms used in the Constitution. It will be recalled that in paragraph 3.14 of his Skeleton Arguments, Counsel states that the Supreme Court of Appeal "*restricted the connotation of public office to civil service*". These are his own words. How then can civil service be wider in scope than public service? (This point is expounded on herein under "Analysis").

For the record, the question regarding the scope of these two terms, that is, "*public service*" and "*civil service*" was also put to Counsel for the Respondent and he was of the opposite view, that is, "*public service*" encompasses "*civil Service*" and not the other way around.

Analysis

Meaning of public office

Having identified the issue to be determined as being whether the Petitioner is a holder of public office, Counsel for the Petitioner completely lost me when he decided to define the term "*public office*" by regurgitating statements made by the High Court in **Nseula Case - HC**.

The decision in the **Nseula Case - HC** was overturned by the Supreme Court of Appeal in **Nseula Case - MSCA**. The Supreme Court of Appeal categorically held that the meaning which should be given to the use of the term "p*ublic office*", in the context of the Constitution, is in the sense of "*public office*" in the civil service. To the extent to which the High Court in the **Nseula Case – HC** laid down the contrary to the decision by the Supreme Court of Appeal in the **Nseula Case - MSCA**, the decision of the High Court, with due respect, must be taken to be incorrectly decided and reliance cannot be placed on the very arguments that the Supreme Court of Appeal ruled against. This proposition is so commonplace ("trite" in the famous parlance of Counsel) that no authority needs to be cited but it will suffice to refer to two decisions by the Supreme Court of Appeal, namely, **Civil Liberties Committee v Minister of Justice and Another [2004] MLR 35(SCA)** and the **Nseula Case –MSCA**. In the latter case, Banda, CJ (as he then was said)-

> *"The question of whether the Office of the President was public office was considered in the case of the President of Malawi and the Speaker v R.B. Kachere, M.S.C.A. Civil Appeal No. 20 of 1995. It was held in that case that the Office of the President and the Speaker is a Political Office and not a public office. We have been informed by Counsel for the first respondent [guess who?] that he cited that case in the court below. The learned Judge made no reference to that case in his judgment. It was binding on the learned Judge in the court below. It was a decision of the final court of Appeal in the country and he was bound to follow it. Although he would have been entitled to express any reservations he might have about it or could have distinguished it if he could from*

> *the case before him. It is important that the principle of stare decisis should be followed. For it creates certainty and also provides orderly development of the law.*"

In light of the foregoing, I have honestly speaking found the approach taken by the Petitioner in arguing this petition very strange and disturbing. The Petitioner is a constitutional body and I expect it to know better the doctrine of precedent. I would have understood it if the Petitioner had started its submission by looking at decisions of Supreme Court of Appeal and, thereafter, resort to decisions of other courts to fill gaps, if any, in the decisions by the Supreme Court of Appeal.

The great importance of the necessity of the High Court and courts below (and, of course, Counsel) following precedents set by the Supreme Court of Appeal justifies what might appear here to be a digression. In the short period that I have been on the bench, I have been astonished by the number of instances whereby Counsel has opted to freely cite decisions of the High Court with full knowledge that the decisions have since been overturned by the Supreme Court of Appeal. Whether in jest or not, the response by Counsel has invariably been that the High Court has no moral authority to point an accusing finger at Counsel when the High Court itself has, on not-so-few occasions, indulged in the same practice. That, in a nutshell, is the enormity of the problem being created when precedent is ignored either deliberately or on flimsy grounds, such as to satisfy the interests of a party or just plain self-glorification at the expense of the rule of law. It is noteworthy that section 12 of the Constitution (which deals with Constitutional Principles) requires, in paragraph (vi), "*all institutions and persons to observe and uphold the law and the rule of law and no institution or person shall be above the law*". Exit the rule of law, and the reign of terror shall consume the Nation of Malawi.

While on the same issue of precedent, I have noticed a growing trend of resorting to foreign case law at the expense of relevant local cases. This is a cause of concern particularly when the same approach is taken in interpreting the Constitution. Section 11(2)(c) of the Constitution is clear in providing that in interpreting the Constitution a court of law shall "*where applicable, have regard to comparable foreign case law*". The words "*where applicable*" serve as an important qualification. A foundation must first be laid before calling in aid foreign case law.

I now turn back to the submission by Counsel for the Petitioner. He contended that the Supreme Court's definition of "*public office*" is wanting in that it refers to civil service without stating what is meant by civil service: see paragraphs 3.15 to 3.17 of the Skeleton Arguments.

The Respondent proceeded to proffer the meaning of civil service as relating "*to all functions under the government except military functions*": see paragraphs 3.16 of the Skeleton Arguments. Based on this dictionary meaning of civil service, the Applicant contended that the Respondent is a civil servant and such a servant falls within the ambit of section 51(2)(e) of the Constitution. No authority has been, or can be, cited to support such a proposition, and I am obliged to overrule it. The submission lacks merit. In the first place, the Petitioner relied on the decision in the **Nseula Case - HC** not with regard to the meaning of "*civil service*" but "*public office*": see paragraphs 3.4 to 3.12 of the Skeleton Arguments, all of which talk to "*public office*". Secondly, Counsel failed to explain the significance to the present petition of knowing the definition of "*civil service*". The Respondent cannot, by any stretch of imagination, be said to have been holding a position in "*civil service*". The **Nseula Case – MSCA** makes it clear that the term "*public service*", in its unrestricted sense, is wider in scope than "*civil service*". I, therefore, cannot fathom out how a person who is not in "*public service"* can be in "*civil service*". Fourthly, it is not surprising that Counsel's reliance on a dictionary meaning of "*civil service*" lands him in a muddle (for it is nothing less). Counsel ought to have heeded the wise counsel of the Supreme Court of Appeal that "*where a term is used in the Constitution without being defined therein, reference must be made to the Constitution to discover the meaning which Parliament intended to ascribe to it*".

Changing goal posts

As already mentioned, the MEC Nomination Paper contains a part relating to a statutory declaration. I believe I am being fair in assuming that the declaration is meant to serve a purpose. I do not think candidates are required to go through the rigmarole of stating whether or not they work in civil service just for the sake of it. It is not uninteresting to note that this part of the statutory declaration, that the Respondent (and, I should think, all other candidates) completed, is in respect of working in "civil service" and not in "public service". Was the choice of the words

by a "*slip of the pen*"? I do not think so. This did not happen by inadvertence but was so done, so I believe, to be in line with the decision by the Supreme Court of Appeal in the **Nseula Case - MSCA**. Further, this being a sworn document, I wonder whether it can be rebutted by unsworn evidence such as the Membership Status Letter? Even if this is possible, I wonder if it would be in order for the Petitioner to act on it to the detriment of the Respondent without giving the Respondent an opportunity to be heard: see section 43 of the Constitution.

Having required the Respondent to state, in the statutory declaration, whether or not he was a civil servant, the Petitioner is being disingenuous by rejecting the nomination papers of the Respondent not on the ground that he was/is a civil servant but on the ground that he was/is a public servant.

As if this was not bad enough, Counsel for the Petitioner made a spirited attempt during oral arguments to move the goal posts again. He shifted gears in a very intriguing manner. Having conceded that the Respondent was not holding or acting in a public office in that he was not entitled to remuneration, his appointment did not confer any permanency or continuity of service as it could be terminated at any time, etc., Counsel submitted that the Respondent was nevertheless caught by section 51(2)(e) of the Constitution in that he was holding or acting in a public appointment.

Understandably, Counsel for Respondent raised an objection to allowing the Petitioner to introduce grounds that were not communicated to the Respondent in the Notice of Rejection. I cannot agree more with Counsel for the Respondent. The question for my determination is to find whether the Respondent is a holder of a public office. It is plain to see that this issue is premised on the grounds, given for rejecting the nomination papers, contained in the Notice of Rejection, to wit, "DURING THE TIME OF SUBMISSION OF NOMINATION PAPERS YOU WERE STILL SERVING AS A PUBLIC SERVANT OF MALAWI".

Tempting as it may be (what with the heated debate going in social media, where all and sundry are taking part) to consider the phrase "*holding or acting in a public appointment*", my judicial duty, as I understand it, is not to give gratuitous legal opinions but to decide issues as crystallised by the documents filed by the parties: **James Phiri v Dr. Bakili Muluzi and Attorney General (Interested Party) Constitutional Case No. 1 of 2008** and the **Nseula Case - MSCA**, supra. In the

later case, the Supreme Court of Appeal cited with approval the dicta by Scrutton LJ in **Blay v Pollard & Morris [1930] 1 KBD 628** at 634-

> *"Cases must be decided on the issues on record and if it is desired to raise other issues they must be placed on record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course.*" – [Emphasis by underlining supplied]

I should add one very small point in responding to the point regarding the phrase *"holding or acting in a public appointment*". Contrary to the impression being created by Counsel for the Petitioner, this phrase was considered by the Supreme Court in the **Nseula Case – MSCA** at page 328-

> *"It is interesting to note that the learned Judge himself seems to have had doubts about his own findings. At 21 of his judgment he says: "Even if there is doubt whether the office of membership to the Cabinet or Minister is a public office it is a public appointment." And again at 23 he says: "Any way membership to the Cabinet is a public appointment, if it is not a public office." In the opinion of the Judge in the court below any public appointment would be a "public office". But he did not say what is a "public appointment". It is surprising to note that although the Judge had doubts about what is a public office he nevertheless came to the conclusion he did"*.

In conclusion and acting ex abundanti cautela (acting out of abundance of caution), my specific answer and finding on the first issue of whether the appointment of the Respondent as a member of the Board of Directors for MBC did not make him a public servant/officer is in the positive, that is, it did not make him such an officer. It is my determination that even at the time the Respondent was a member of the Board of Directors for MBC (that is, after being appointed and before his resignation) he was never a public servant/officer within the context of the term "public office" as used in section 51(2)(e) of the Constitution. In this regard, and having already relied on the decision in the **Nseula Case – MSCA**, a decision of the highest court in the land, I wish to agree and endorse the concluding remarks by Justice Tembo in the **Ngwale Petition** at page 6-

> *"This Court concludes in agreement with both the respondent and the Malawi Electoral Commission that it is bound to find that the word public office when used in the Constitution connotes public office in the civil service as decided by the Malawi Supreme Court of Appeal in its decision that has binding effect on this Court."*

There it is, right before my eyes. I mean the explanation why the Petitioner had to wangle into the Letter of Referral and the Skeleton Arguments what was, to all intents and purposes, a superficial allusion to the term "civil service". In the **Ngwale Petition**, the Petitioner is recorded as having agreed that "*the word public office when used in the Constitution connotes public office in the civil service*". The Petitioner has to find a way out of this very real bind it finds itself in. Counsel for the Petitioner seeks to do that by relying on, as has already been said herein, the shallow and unhelpful definition of "civil service" in the Black's Law Dictionary.

Legal effect of resignation

The fact that the Respondent had resigned by 24th January 2014 to pave way for his political campaign has not been challenged. In fact counsel for the Petitioner informed the Court that had the Resignation Letter been brought to the attention of the Petitioner in good time, this case would not have arisen at all. Section 51 (2)(e) of the Constitution is clear. A person who holds or acts in a public office or appointment is not disqualified from being nominated or elected as a Member of Parliament if, prior to his or her presentation of nomination papers, he or she ceases to hold or act in the public office or appointment. In other words, a public officer who, prior to his or her presentation of nomination papers, resigns his office or appointment in order to stand is eligible to contest in the elections.

It is plain to me that the decision by the Petitioner to reject the nomination papers of the Respondent ought to have been reversed soon after the Petitioner had received the Resignation Letter. The Court takes judicial notice that the Respondent, as late as last week, reversed its respective decisions to bar three candidates after the said candidates had furnished the Respondent with documentation to the effect that they had resigned their respective "public offices".

Determination and Direction

All in all, it is my finding on the issues before this Court that the Respondent was not, by virtue of being a member of the Board of Directors for MBC, a public officer in the context of section 51(2)(e) of the Constitution. In any case, the Respondent resigned his membership to the Board of Directors on 24th January 2014, more than a month to the day he presented his nomination papers to the Returning Officer.

My determination is that the Petitioner erred in rejecting the nomination of the Respondent as a parliamentary candidate for the Constituency in the forthcoming tripartite elections. In the circumstances, and in exercise of the powers reposed in this Court under section 40 (4) of the PPE Act, I direct the Returning Officer (Yes, the Returning Officer – that is the office mentioned in section 40(4) of the PPE Act) to accept the nomination of the Respondent as an independent parliamentary candidate for the Constituency. The acceptance should be done within the next three days.

Costs

Counsel for the Petitioner submitted that the petition was before the Court for determination pursuant to the dictates of section 40 of the PPE Act. He further stated that the petition is of interest to both parties and this explains the absence of the traditional originating motion. Counsel for the Respondent countered by submitting that costs are always in the discretion of the court but the discretion has to be exercised judiciously.

My understanding of the provisions of section 40 of PPE Act is that a referral to the Registrar of the High Court is triggered at the instance of a candidate or his or her election representative. A request has to be made for a referral. In the present petition, the Respondent wrote a letter dated 13th March 2014 to the Returning Officer requesting her to refer his matter to the Registrar of the High Court for hearing and determination by the High Court.

Further, the conduct of the Respondent in handling this matter leaves much to be desired. Firstly, the nomination papers of the Respondent were rejected without giving the Respondent to be heard. Secondly, I have great difficulties to understand why the Petitioner proceeded with this matter after the Respondent adduced his Resignation Letter. Thirdly, I am not convinced at all why the Petitioner deliberately chose to ignore a decision of the Supreme Court of Appeal in the **Nseula Case – MSCA** which is directly binding on the question of what constitutes a public office as used in the Constitution in favour of an interpretation by the High Court **Nseula Case – HC**, which was unequivocally rejected by the Supreme Court of Appeal.

In the premises, and having regard to section 30 of the Courts Act, as read with Order 62 Rule 3(3) of Rules of Supreme Court, I award costs to the Respondent.

Made in open court this 28th day of March 2014.

Kenyatta Nyirenda
JUDGE