

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

MISC. (ELECTORAL) CASE NUMBER 64 OF 2014

BETWEEN

ULEMU MSUNGAMA.....PETITIONER

AND

THE ELECTORAL COMMISSION.....RESPONDENT

BENTLY NAMASASU.....INTERESTED PARTY

CORAM: HON. JUSTICE CHOMBO

Chapo, Counsel for the Petitioner

Mkwamba, Counsel for the Respondent

Gondwe , Counsel for the Interested Party

Kalambo, Court Interpreter

RULING

Ulemu Msungama, by his petition seeks a court declaration as follows:

- That the Interested Party was not duly elected member of the National Assembly for Lilongwe City South East Constituency, and
- That the Petitioner was duly elected; or in the alternative
- That fresh elections be ordered

The petition was made pursuant to section 100 of the Presidential and Parliamentary Elections Act.

The brief facts of the case arose from the parliamentary elections conducted by the Respondent on 20th May 2014. The Petitioner and the Interested Party, representing the Malawi Congress Party (MCP) and Democratic People's Party (DPP) respectively contested as candidates in the

Lilongwe City South East Constituency. The Petitioner filed affidavits and skeleton arguments submitting that there 150 votes polled in his favour at Chilinde Polling Station were not taken into account in the final tally. In addition, that 470 valid votes in his favour were declared null and void at Area 12 City Assembly Site Office and Mlodza Polling Stations. According to the Petitioner, there were various irregularities at different polling stations, which, if corrected, put him ahead with over 100 votes with the Interested Party. The Petitioner had expressed his dissatisfaction with the results to the Respondent and the Respondent admitted that the Petitioner had raised issues that the Respondent failed to respond before making the final announcement on the results of the said elections on 2nd June 2014. On 26th June 2014 when the matter came before Honourable Judge Mwale the parties consented to a recount of the ballot papers and the relevant court order was executed. Under the said consent order, the Respondent was to identify the relevant ballot boxes between 27th June and 7th July 2014. As the Respondent was in the process of making arrangements for identifying the relevant ballot boxes the Interested Party obtained an ex parte order on 7th July 2014 before Honourable Judge Muhara staying the enforcement of the consent order as the Interested Party had not been heard prior to the consent order being obtained. An order by the Interested Party to join the proceedings was also granted. However, before the recounting could be done an unexplained fire at the Respondent's warehouse gutted down the warehouse side where the ballot boxes in issue were destroying all evidence and frustrating the exercise of recounting the ballot papers.

The parties have all filed extensive affidavits with various attachments. It was submitted by the Petitioner that the affidavits filed by the Respondent and Interested Party go beyond the irregularities raised by the Petitioner. The parties' prayer is that the court should consider all the documents and make its determination. However, after a perusal of all the affidavits and the attachments, thereto I am afraid that I am of the strong view that that would be a very difficult exercise for the court for a number of reasons:

1. The Petition was originally in respect of four stations only, however, the Respondent and the Interested Party have unearthed evidence of other polling stations that unveils irregularities that may not be dealt with on paper. This may be an indication that what has surfaced may only be a tip of the iceberg.
2. Considering the documents that the parties seek to rely on one is at a loss as to their authenticity. Most of them have cancellations, writing over, and wrong additions, just to highlight a few anomalies that are not signed for unexplained and questionable. In my view, reliance on these documents may result in total miscarriage of justice.
3. A serious consideration of the allegations of the Petitioner shows that the determination cannot be made by a mere review of the papers presented in court. This

can be exemplified by the Petitioner's submissions which include the following: (extracted from 'Affidavit in Response to the Affidavits of Lillie Longwe, Edna Kaludzu, Mercy Mwale and Bandire Moyo' paragraphs 10, 11, in respect of Chilinde Polling Station and 12, 13 and 16 in respect of Kaliyeka II Ground)

The Respondent has conceded that 50 votes were indeed left out in posting the final tally in the system. On the 100 votes the Respondent has all but fallen short of also agreeing with my contention. The Respondent agrees that the result sheet LL2 as presented has a clear discrepancy of 100 votes. That the 100 votes are due to mistake on stream 3 where the result sheet indicates 31 votes instead of 131 votes in my favour. That copy of my official result sheet, result sheets for the People's Party candidates and UDF candidates which were all duly signed by monitors for all parties including the Interested Party and the Respondent's Presiding Officer show that I polled 131 votes on stream 4. I further refer to the affidavit of my monitor and another monitor for independent candidates, which also show that I polled 131 votes on stream 4. Apparently the Respondent also confirmed the same with the records from NICE, another stakeholder who also had monitors at the Polling Station.

In the circumstance it is clear that there is a total of 150 votes in my favour that were not taken into account by the Respondent in the official result that declared the Interested Party winner by 98 votes.

This is one of the alleged irregularities that was never part of the petition but has been raised by the Interested Party and the Respondent. They allege that the totals (sic) number of votes for me and the Interested Party as indicated do not tally with the totals for the streams as indicated, However, the Respondent and Interested Party are making wrong conclusions.

If you have totals, which do not tally with the results for the streams, there are two conclusions that can be drawn; either the totals are correct and the figures for the streams as indicated are wrong or the vice versa. The objective of this case is to establish what were the actual votes polled in favour of me and the Interested Party on the day. This should have been the objective of the Respondent's alleged audit exercise. The objective is not to just correct figures on the result sheet.

All the records of all these monitors show that I polled 510 votes and the Interested Party polled 382 votes. What is actual (sic) wrong on the result sheet

is not the totals but the posting of the results from the streams on the result sheet. In fact the mistake was in the recording of the votes on stream 1, instead of recording 120 votes that were cast in my favour on my column the same was recorded in the column for the Interested Party who had 85 votes cast in his favour and the vice versa.

The Respondent did not dispute the Petitioner's submissions.

4. Considering the position of the Respondent, specifically to the affidavit of The Chairperson's affidavit, it is clear that determination based on the documentary evidence would not achieve equity and fairness in this matter. It would be pertinent to quote the relevant parts of the said affidavit:

- *THAT during the tallying of the Parliamentary results, the Respondent's attention was drawn to alleged irregularities for the Parliamentary elections for Lilongwe City South East Constituency.*
- *THAT the results sheet for Chilinde School Polling Centre which was submitted to the Respondent, showed that in Stream 6 the Petitioner had received 31 votes. The Commissioners noted the inconsistency of Stream 6 results when compared with other streams which gave results in the hundreds in favour of the Petitioner....*
- *THAT given the 8 days limited time within which results for all the three elections (namely 686 races) had to be determined, the Respondent was not able to mount proper investigation prior to announcement of official results.*
- *THAT nevertheless the Respondent considered that there appeared to be something wrong with the authenticity of the result sheet. It considered and encouraged the challenged of those results.*
- *THAT the Respondent, as an election managing entity, has been of the view that the recount ordered by the court and scheduled to take place on 8th July 2014 was the best way of verifying the results.*
- *THAT in the circumstances where the subject matter of the recount was unfortunately destroyed by fire, the Respondent is of the view that some of the irregularities where were alleged can be resolved by the Court by examining anew the records of the election from Chilinde School Polling Centre.*

- THAT, in the alternative, the Respondent is of the view that a rerun of the Parliamentary election should be undertaken in the constituency.
- WHEREFORE the Respondent is constrained to place this prayer before the Court. The Respondent is constrained by the duty on it to take measures to ensure that elections are free and fair. Such measures would include targeted steps to establish the true result of Stream 6 of Chilinde School Polling Centre (all underlining supplied)

It can safely be concluded that the Respondent has substantiated the Petitioner's allegation of irregularity.

The burden on the Petitioner is to show that the irregularity, mistake or error complained of would affect the results of the elections. In *Laston Thawale v Malawi Electoral Commission and Phillipho Chinkhondo*¹ the court held that:

It would not be enough to establish an irregularity that might have affected an election result for the court to declare the election result a nullity. The irregularity must in fact have affected the election result for it to lead to annulment of the election. The burden is on the petitioner to establish that an alleged irregularity affected the result.

The submission of the Petitioner is that the difference of the votes between him and the Interested Party are about 150. While this court has not established the certainty of the differences in the votes between the two parties what is clear is that the Petitioner has established that there were irregularities and that such irregularities could affect the election result. The court would like to make it clear that this finding by no means seeks to declare that the Petitioner is or be declared the final winner in the said constituency but that the irregularities are so glaring that any reasonable person would question the results thereof.

In the circumstances, and a recount having been frustrated, there is only one course of action left, a re-run of the elections. And I so order. This would consequently nullify the results of the said Lilongwe City South East Constituency pronounced by the Respondent on 2nd June 2014.

When the Petitioner challenged the results of the election, it was only the Interested Party that showed interest and no other political parties' representatives or independent candidates. The assumption is that the other parties were not interested in the outcome, however this could be a costly assumption on the part of the court. This court therefore leaves the matter of who will contest in this re-run to the Respondent. The Respondent, as the body managing the elections

¹ Misc. civil Case No. 41 of 2009

will therefore lay down the procedures to be followed by all contestants for the re-run of the elections.

MADE in court this day of our Lord 28th October 2014

A handwritten signature in blue ink, appearing to be 'Chombo', written in a cursive style.

CHOMBO

JUDGE