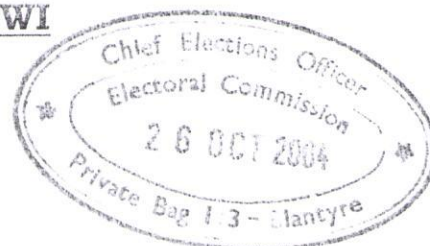


IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY



CONSTITUTIONAL CASE NO. 7 OF 2004

IN THE MATTER OF THE CONSTITUTION OF MALAWI

Presidential and Parliamentary Elections Act. The plaintiff.

AND

**IN THE MATTER OF THE PRESIDENTIAL AND
PARLIAMENTARY ELECTIONS ACT, CAP 2:01 AND THE
ELECTORAL COMMISSION ACT, NO 11 OF 1998**

BETWEEN:

ALEKE KADONAPHANI BANDA PETITIONER

- and -

MALAWI ELECTORAL COMMISSION RESPONDENT

CORAM: POTANI, J.

Mvalo/Chibambo, Counsel for the
Applicant/Appellant

✓ Kaphale assisted by Chokhotho, Counsel for the
Respondent

Jere, Court Clerk

JUDGEMENT

On August 31, 2004, the Assistant Registrar rejected a prayer by the applicant/appellant, Honourable J Z U Tembo, to be jointed as a party/petitioner in these proceedings. Being dissatisfied with the Assistant Registrar's decision the applicant lodged an appeal before this court.

It is imperative to bear in mind at the outset that the appeal being one from the decision of a Registrar to a Judge in chambers, it has to be dealt with by way of a rehearing of the application which led to the decision being appealed against. In other words, this court has to treat the matter as if it is coming before it for the first time. This entails subjecting the matter to a fresh scrutiny.

A preliminary issue arose in this matter as to whether the applicant should be allowed to introduce additional evidence as contained in the supplementary affidavit of the applicant sworn on September 20, 2004. The view of the respondent is that such evidence ought not be allowed in this appeal. In terms of practice note 58/1/3 of Rules of the Supreme Court, the usual practice, subject to the issue of costs, is that the judge exercising appellate jurisdiction in chambers would allow further or additional evidence by affidavit to that which was before the Registrar. However, if a party has taken his stand on the evidence as it stood before the lower tribunal, the appellate judge may in his discretion, by analogy with the practice in the Court of Appeal, refuse to allow that party to adduce further evidence. The legal position, therefore, is that as a general rule, additional or further evidence ought to be allowed in an appeal like the one before the court except where the party wishing to introduce further or additional evidence has taken his stand on the evidence as it stood in the court below. The obvious question that needs to be considered is therefore whether or not the applicant has taken his stand on the evidence as it stood in the court below. If the answer is no, then the applicant ought to be allowed to use the evidence in the supplementary affidavit. Should the answer be in the affirmative, it would not automatically mean that the evidence can not be used; the court has the discretion to allow the use of the evidence or not. In his written submission filed on September 28, Mr. Mvalo for the applicant on pages 8 and 9 submitted that the words "**has taken a stand**" mean standing as a witness and probably having been subjected to cross examination. He went on to argue that since in this case no witness gave oral evidence before the Assistant Registrar, the applicant cannot be said to have taken a stand on the evidence before the Assistant Registrar. With respect, this court differs with Mr. Mvalo's

understanding of the words "***has taken a stand***." In the case of ***Krakauer v Katz*** (1954) 1 WLR 278 in dealing with the question as to whether or not the court should exercise its discretion to allow further affidavit evidence the court had the following to say on what "***has taken a stand***" means:

"In exercising our discretion in this case, there is an overwhelming obstacle on the way of the defendant. At the hearing below the judge in chambers asked his counsel whether he wanted to answer the affidavit of the plaintiff and whether he wanted an adjournment so to do, and counsel said he did not. Counsel thus took a stand on the evidence as it then stood before the judge; and it would be contrary to the right exercise of our discretion if we were to allow counsel for the defendant to go back on that position and to introduce further evidence in this court.

We must, therefore, proceed with the case on the evidence as it stood before the judge."

It comes out clearly from the above dictum that "***has taken a stand***" means accepting the evidence as it is without any challenge. It matters not whether that evidence is parol or by affidavit. In the instance case, the applicant in the court below filed an affidavit in support and the respondent filed an affidavit in opposition. There was no affidavit by the applicant in reply to the affidavit in opposition which means the applicant accepted the evidence as it was before the court and therefore took his stand on the evidence. However, as stated earlier, the fact that the applicant took his stand on the evidence does mean that he must be precluded from adducing further or additional evidence. The court still has the discretion to allow or refuse the applicant to adduce further evidence.

It is the respondent's submission that in exercising its discretion whether or not to allow further evidence, the court is to be guided by the practice obtaining in the Court of Appeal as set out in order 59 rule 10 (2) of Rules of the Supreme Court. According to counsel, such ought to be the approach in the light of what is in practice note 58/1/3 as follows:

"The judge in chambers may in his discretion by analogy with the practice in the Court of Appeal, refuse to allow him to adduce further evidence." (Emphasis supplied).

The question that has greatly exercised the courts mind is to what extent does the practice in the Court of Appeal apply in this court. The Oxford Advanced Learner's Dictionary of Current English defines the word **"analogy"** as **"partial likeness or agreement"**. It therefore does not mean **"the same as"**. The point being made in that much as this court can seek guidance from the practice obtaining in the Court of Appeal, that should only be to the extent that the practice in the Court of Appeal is in harmony with that in this court. Order 58 of Rules of the Supreme Court which governs appeals like the one under consideration clearly states that such an appeal has to be dealt with by way of a rehearing. In the view of the court, a rehearing by its very nature ought to accommodate as much evidence as possible. It would defeat the whole principle of rehearing if parties were to unreasonably be refused to bring further evidence. The view of the court is therefore that while the conditions set down in the case of **Ladd v Marshall** (1954) 3 All ER 745 cited by the respondents would apply with full force in an appeal before the Court of Appeal, their application in an appeal like the present one ought to be with some modification. Looking at the affidavit evidence that was before the lower court, there were no matters that were in dispute and looking at the evidence the applicant now seeks to introduce, it merely seeks to beef up the evidence the applicant adduced in the lower court. It is such evidence which would probably have an influence on the result of the appeal and on that account it is the inclination of this court that the applicant be allowed to

NO!!
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meaning
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introduce such evidence as it will enable the court have all the relevant material to assist it in arriving at a just decision.

Moving on to the substantive issues of the appeal, there can be no doubt whatsoever that the matter essentially revolves on the construction and interpretation of order 15 rule 6 of the Rules of the Supreme Court. Going by the arguments that ensued during the hearing of the appeal, it is more particularly order 15 rule 6 (5) and (6) which are most relevant to the determination of the matter and it is imperative to reproduce those provisions which are as follows:

***“Order 15 r 6 (5)— No person shall be added
..... as a party after the expiry of any relevant
period of limitation unless either:***

- (a) the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party be added
..... OR (Emphasis Supplied)***
- (b) the relevant period arises under the provisions of section 11 or 12 of the Limitation Act 1980 and the court directs that those provisions should not apply to the action***

In this paragraph, “any relevant period of limitation” means a time limit under the Limitation Act 1980 or a time limit which applies to the proceedings in question by virtue of the Foreign Limitation Periods Act 1984.

15 r 6(6)— Except in a case to which the law of another country relating to limitation applies and the law of England and Wales does not so apply, the addition or substitution of a new party shall be treated as necessary for the purposes of

paragraphs 5 (a) if and only if the court is satisfied that:

- (a) the new party is a necessary party to the action in that the property is vested in him*
- (b) the relevant cause of action is vested in the new party and the plaintiff jointly not severally;*
- (c) the new party is the Attorney General*
- (d) the new party is sued jointly with the defendant"*

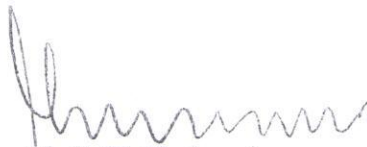
There is no dispute that the application by the applicant to be joined as petitioner was brought after the expiry of the limitation period as laid down in the Parliamentary and Presidential Elections Act being within 48 hours from the declaration of the election results. Be that as it may, since the petition to which the applicant seeks to be joined was brought or commenced when the limitation period was still current, the application can still be entertained in terms of order 15 rule 6 (5) (a). Counsel for the parties seem to be in agreement on this point. What the parties differ on is on the meaning of the word "**necessary**" for purposes of order 15 r 6 (5) (a). It was the contention of Mr. Kaphale for the respondent that for the addition of a party to be treated as necessary for purposes of order 15 r 6 (5), one of the conditions laid down in order 15 r 6 (6) (a) to (e) must be satisfied. On his part, Mr. Mvalo for the applicant argued that order 15 r 6 (6) (a) to (e) would not apply to this case because it is expressly provided for in that provision that it only applies in cases where the applicable law of limitation is that of England and Wales.

It comes out clearly from the reading of order 15 rule 6 (6) that the conditions set out therein to be satisfied before a new party can be added after the expiry of the period of limitation are to apply only in cases where the applicable law of limitation is that of England and Wales. Furthermore, "**relevant period of limitation**" as defined in order 15 r 6 (5) refers to the Limitation Act 1980 and the Foreign Limitation Periods Act 1984 which acts are not part of this country's laws

as they came into force after the reception date. The court would, therefore, agree with Mr. Mvalo that the relevant limitation law in this case is the Parliamentary and Presidential Elections Act such that for the applicant to be joined as a party, it is not necessary for him to satisfy any of the conditions set out in order 15 r 6(6) (a) to (e) which includes the condition that the relevant cause of action must be vested in him jointly with the petitioner. It is enough for the applicant to simply show that it is necessary or desirable for the determination of the action that he be added as a party. Has the applicant shown this? Looking at the affidavits filed by the applicant, the applicant adopts the complaints made by the petitioner. The complaints which the applicant adopts related to the manner the respondent handled the electoral process. The applicant contested in the elections to which the complaints relate as a presidential candidate. Certainly it is not just necessary that but also logical in the circumstances to for him to be joined as a party more so considering that the matter is of immense national interest and therefore requires proper determination which can only be had if the court would have before it all the relevant material including the evidence to be brought up by the applicant. Counsel for the respondent expressed some reservations with the applicants assertions that if joined as a party he would bring further evidence to support his cause of action. In the view of counsel, that evidence should have featured brought in the affidavits relating to the application to be joined. The court begs to disagree with that view. All that the applicant needs to show at this stage is that he has a cause of action as against the respondent a kin to that of the petitioner. It is only after he obtains an order to be joined that he would be required to bring evidence. In conclusion the appeal succeeds and it is hereby ordered that the applicant be joined as a party to these proceedings.

On costs it is ordered that although the applicant has succeeded, he be condemned to costs firstly because the application to which the appeal relates is of the making of the applicant and secondly to cover costs occasioned by the introduction of fresh evidence by the plaintiff in the hearing of the appeal.

MADE in Chambers this day of October 18, 2004 at
Blantyre.



H S B Potani
JUDGE