IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Constitutional Cause No. 1 of 2009

Between:

Dr Bakili Muluzi……...1st Plaintiff

And

The United Democratic Front…….2nd Plaintiff

And

The Malawi Electoral Commission....……Defendant

Coram: Honourable Justice A.C. Chipeta
Honourable Justice Dr M.C. Mtambo
Honourable Justice S. Kalembera
Kaphale, Nyimba, Assani, Mwakhwawa, Jai Banda, and Kanyenda, of Counsel for the Plaintiffs
Justice Dr Ansah SC Attorney General, A. Kamanga SC Solicitor General, Kanyuka (Mrs), D. Nyamirandu, Dr Nkowani, P. Kayira, et.c, of Counsel for the Defendant
Manda, Official Interpreter
Chingota (Mrs), Chief Court Reporter

RULING

In just under six weeks from today Malawi is due to hold its fourth multiparty Parliamentary and Presidential Elections. It is thus in the middle of its Electoral Calendar. On 20th March, 2009 the Electoral Commission rejected the nomination of the former President of Malawi, His Excellency Dr Bakali Muluzi, who had submitted nomination papers for the office of President under the sponsorship of the party he leads, namely the United Democratic Front (hereinafter simply referred to as the UDF). In consequence of this, the said Dr Bakili Muluzi and the UDF, respectively as first and second Plaintiff, are before the High Court sitting in a Constitutional matter with an Originating Summons, complaining against the Electoral Commission's determination on the Presidential nomination herein. The Electoral Commission is the Respondent in the proceedings, and it is being represented by the Office of the Honourable the Attorney General. The Originating Summons is supported by an Affidavit in support with exhibits, an Affidavit in Reply to the arguments of the Defendants, and with submissions. On the part of the

Defendant, there are, apart from an Acknowledgement of Service of the Originating Summons, three Affidavits in Opposition with exhibits, three Affidavits Authenticating Documents also with exhibits, and Skeleton Arguments.

The matter herein was duly certified, on its commencement on 23rd March, 2009, by the Honourable the Chief Justice as a Constitutional matter. In the said Certification it was, *inter alia*, pointed out that in dealing with the matter raised the parties, and the Court, should act in accordance with Practice Direction No. 2 of 2009, which the Honourable the Chief Justice issued on 6th February, 2009, replacing Practice Direction No. 1 of 2009. It abridges the time within which matters pertaining to elections, whether they are considered to be of a Constitutional nature or not, should be handled and disposed of in our Courts. It is on this account that today, on the 15th day after the commencement of the matter, it has been called for the hearing.

The Defendant soon after acknowledging service of the Originating Summons herein, by its own Summons raised a preliminary issue in the matter, which by our this morning's ruling we decided to first deal with in the matter. The said party has raised a challenge against the manner in which the Plaintiffs have commenced their matter in the Court. The Defendant believes that the commencement of this matter *via* Originating Summons, as the Plaintiffs have done, amounts to a wrong mode of commencing the proceedings. It acknowledges that the matter in issue is electoral in nature, and that there currently are procedures in place for the expeditious handling of such matters, but argues that such proceedings ought to be brought to Court through processes other than Originating Summons.

In this regard, by its skeleton arguments, the Defendant contends that bringing the matter under the Originating Summons procedure relegates it to the realm of ordinary suits, that ought to be governed by the Civil Suits (by or against the Government or Public Servants) Act (cap 6:01) of the Laws of Malawi, and that that fact would entail a need for the Plaintiffs to give to the Government notice, which they have not done, before they can commence their action. During oral presentation today, however, the Defendant has not dwelt on that line of argument. Instead it has only complained that commencing the action in the way the Plaintiffs have done is not in line with the Courts (High Court) (Procedure on Interpretation or Application of the Constitution) Rules, 2008, published under Government Notice No. 20 of 2008. In light of these arguments, the Defendant prays to the Court, that the Plaintiffs not having complied with the requirements that apply to commencement of proceedings of the nature they have commenced, the Court should strike off their proceedings.

The Plaintiffs oppose the preliminary application that so advocates the striking off of their matter. They contend that there is nothing wrong with the mode of commencement of proceedings they have adopted in this instance. Referring to the general Law governing complaints related to elections, and in particular to the Practice Direction No. 1 of 2009, which as we say has since been replaced, they accuse the Defendant of complaining against their mode of commencement of the matter unjustifiably. They refer to a number of Constitutional Cases in the past that commenced and were concluded

under Originating Summons procedure. They also justify the Originating Summons procedure on basis that the Honourable Chief Justice certified the matter as Constitutional when they had already issued the proceedings under that procedure. The matter, they argue, deserves speedy disposal in line with the abridged procedure promulgated by the Practice Direction, and that even if this Court might find that they employed a wrong mode of commencement of proceedings, the error should be curable through provisions for amendment under Order 20 rule 5 of the Rules of Supreme Court.

We have read all the material placed before us *vis-à-vis* this preliminary issue by both sides of the divide in this matter. We also listened attentively to all the oral arguments the parties advanced before us this morning at the hearing of the preliminary application. Time constraints will disable us from recounting in any real detail all the arguments learned Counsel for the two sides lucidly presented, but we must assure them that nothing that is significant in their said arguments has escaped our attention. We are thus quite indebted to them for their profound arguments, and exemplary advocacy in bringing out in the limited time we gave them for making presentations all that was material for our consideration. We proceed therefore, in making our ruling on the issue, from a platform of their wealthy submissions.

However, before we can embark on the task of adjudicating on the preliminary issue herein, there is one matter that has captured our attention as we were reading all the processes and submissions in preparation for the hearing of both the main matter and this application. We note that the Defendant sued in the matter has been named "The Malawi Electoral commission." It has taxed our minds whether at Law there is in existence any legal entity going by that nomenclature, regardless of what name people loosely use when referring to that organization. In our observation, the creature the Constitution establishes under its Section 75, is the Electoral Commission. Even the Act that follows up on the Constitution to further expound on the institution so created, i.e. the Electoral Commission Act (cap 2:03) of the Laws of Malawi, applies to the Electoral Commission, and not to the Malawi Electoral Commission. At Section 2 of this Act, the several words and expressions used in the Act are said to have the same meanings as assigned to them in the Constitution, and in the Parliamentary and Presidential Elections Act (cap 2:01) of the Laws of Malawi. The Constitution does not define the words "Electoral Commission," but we know for certain that it does not prefix the word "Malawi" to the "Electoral Commission" it creates.

Under the Parliamentary and Presidential Elections Act, in its Section 3, what is defined is the word "Commission," and it means the "Electoral Commission" established by the Constitution. Specifically, in terms of Section 3 of the Electoral Commission Act, what we notice is that what is recognized as a body corporate with perpetual succession, and a common seal, and which is capable, among other things, of "suing and being sued in its own name" at paragraph (b), is the Electoral Commission established by the Constitution, and not any differently named Commission. In a nutshell, therefore, we are of the view that the name "Malawi Electoral Commission," even if it might refer to the same institution as the Constitution created, and even if it may be in common use, is as good as a nickname. It certainly is not the legal name the constitution gave it at birth, and by

which the generality of electoral Law refers to it with. The act, therefore, of the Plaintiffs in these proceedings suing, so to speak, a body corporate in a name other than its legal name, comes to us, as a Court, with a sense of surprise.

We felt we should point this out, even though we are presently dealing with a different application. We are incidentally being asked, in the said application, to strike out a mater, but a matter is only such, if it has legally recognized parties before the Court. Depending, therefore, on the outcome of the present preliminary application, the point we are concerned about, which we would of our own motion have all the same raised for the parties to clarify on, had it not been for their own preliminary issue, will need attention from those it concerns. In any given proceedings before us, we can only properly exercise our adjudicative authority over persons and bodies with capacity to sue and be sued according to Law. We repeat, therefore, that names used in common parlance, when it comes to matters legal in Court, ought to give way to legal names or legally recognized names.

Reverting to the business at hand, the first observation we want to make is that as a Court we fully appreciate the urgent nature of the matter before us. At the same time, however, we wish also to observe that in any type of proceedings that come before the Courts, issues concerning Mode of Commencement are fundamental. The Law, as all its Practitioners ought to appreciate, clearly makes the effort to classify proceedings that may be brought before Courts of Law either by the Cause of Action that gives rise to them, or by the subject-matter they relate to. It then duly assigns to each category or class of action, or proceedings, the particular mode or particular modes by which proceedings can be tabled in a Court of Law. For example, no party can come to the High Court to commence divorce proceedings through a Writ of Summons, just as a party cannot apply to this Court for the winding up of a Company through an Originating Motion. The substantive Law governing a given state of affairs, as read with the available procedural law, in the ordinary course of things, is ever in place to guide a litigant as to the best applicable mode of commencing his/her action or proceedings in a Court of Law. Commencing proceedings in a correct manner, therefore, is like boarding the right bus or train when traveling, because it is capable of getting you to the destination you want. In like manner, commencing an action or proceedings in a wrong manner, is like boarding the wrong bus or train, because it does not have prospects of getting you to the destination you desire, unless you disembark and restart the journey on the correct bus or train. It is important, therefore, that urgent as this matter is, we need at the outset to carry out a candid assessment of the preliminary objection raised against these proceedings, as argued and counter-argued before us with the rich arguments we have earlier adverted to.

Acknowledging, as we have already done, and as both parties are at *ad idem* on, that this matter is electoral in nature, we apprehend the answer to the question whether or not it has been commenced in the right mode lies nowhere else than in the electoral Law in force in Malawi on this subject. We need to point out that this Law is not to be found in one place. It is scattered. We ought therefore to scrutinize the arguments the parties have made before us from all perspectives this electoral Law provides. On top of all this Law is the Constitution, but as in certain respects the Constitution has left it to Statutes to

make provision for finer details, we need also to have at the back of our minds the supporting Acts of parliament that are in place, as well as subsidiary Law in the form of rules and Practice Directions, to be sure that we are addressing the issue raised thoroughly and effectively. In this regard, the Constitution aside, relevant Acts of Parliament that might give guidance include the Parliamentary and Presidential Elections Act (above-referred), and the Electoral Commission Act (also above-referred).

Now, as we all know, in our hierarchy of Laws, the Constitution takes precedence over all other forms of Law. In this regard, we are somewhat concerned that while the parties have done their best to provide us with quality arguments, they mostly based those arguments on subordinate Law. The Applicant in this application, i.e. the Defendant, to advance its concerns, mainly dwelt on the Procedure Rules for Constitutional matters, while the Plaintiffs, as Respondents in the application, mainly dwelt on the success of old cases that had proceeded on Originating Summons procedure, and on the saving provisions of the Rules of Supreme Court in an application like this. The Constitution, being superior Law, and being a document that has primary provisions on Elections in its chapter VII, we found it essential to address our minds to it, lest we determine the matter raised purely on subordinate Law, when the Constitution may well have superior provisions on the matter at hand. Indeed, as we had expected, we found Section 76, which provides for the functions and powers of the Electoral Commission, openly providing the answer to all the arguments we have heard in this application in its subsection (5).

The said subsection reads, and we quote: *"Without prejudice to subsection (3)- (a) the High Court shall have jurisdiction to entertain applications for judicial review of the exercise by the Electoral Commission of its powers and functions to ensure that such powers and functions were duly exercised in accordance with this Constitution or any Act of Parliament..."* Considering that under the Parliamentary and Presidential Elections Act, it is one of the functions and powers of the Electoral Commission to receive and determine nominations of Presidential candidates (see: among others, Section 51 of the Act), and that in this case it is the exercise of this function or power that has aggrieved the Plaintiffs, it occurs to us that the solution to their concerns clearly lay in using the superior Law we have just referred to, which, as can be seen, is not speaking in any ambiguous way about how they should have brought their complaint to the High Court.

We thus tend to think, that if only both sides to the present proceedings had looked at this provision, we need not have had addresses that totally omitted any reference to it, as we have done. The Constitution having spoken to the effect that Judicial Review is the mode of commencement open to the Plaintiffs in this case, we do not think their argument is valid in contending, as they do, that their complaint does not fall in the category of complaints that can utilize that mode of commencement of proceedings. After all we note, that the complaint they are raising in this case is against the determination of the Electoral Commission on their Presidential nomination being based (i) on a wrong interpretation of the relevant Constitutional provision, and (ii) on use by the said Commission of wrong considerations in reaching its said determination. We wonder, therefore, how this cannot be understood to be a faulting of the decision-making process.

We hold, therefore, that the Plaintiffs commenced their proceedings in total neglect of a clear Constitutional provision when they plucked the Originating Summons process from old cases, which were not on elections, and which took place at a time when the procedure Law on Constitutional cases had not yet been conceived.

Finding therefore, as we have just done, that the Plaintiffs utilized a wrong mode of commencement for their action, a question that immediately arises is whether their error is at all curable or not curable. We are mindful that under Order 2 rule 1(3) of the Rules of Supreme Court, 1999, on which the application to strike out is based, a Court ought not to rush to wholly set aside proceedings, or their Originating Process, on the ground that the proceedings were required to be begun by a different Originating process, if that can be helped. A Court, in our understanding of this provision, is only supposed to take such drastic step, if the irregularity committed is so fundamental and serious, that it renders the proceedings in which it has occurred, a nullity. See: Practice Note 2/1/3 under Order 2 rule 1 of the Rules of Supreme Court on this. Further, a reading of the Practice Notes under this rule, informs us that taken as a whole, from the existing authorities, Order 2 rule 1 ought to be applied liberally by the Courts in order, so far as reasonable and proper, to prevent injustice being caused to one party by undue adherence to technicalities. Among the considerations to be taken into account, therefore, when employing this Order and Rule, we are aware, are questions such as whether the other side has suffered prejudice as a direct consequence of the irregularity applicable, in this instance prejudice as a result of wrong mode of commencement of the case. This rule, we understand, is meant to give to Courts the widest possible power to do justice in any appropriate scenario. See: Practice Note 2/1/6 of Order 2 rule 1 herein. We have accordingly borne all this in mind when considering this application.

In deciding the fate of the present wrongly commenced proceedings, we have incidentally noted that the question of prejudice does not really arise, as the Defendants have been able to answer on the complaint brought to the Court almost as thoroughly as we believe they would have, even if they had more time. Considering the tightness of the Electoral Calendar, and the applicable abridged time-table of dealing with these types of matter Practice Direction No. 2 of 2009 makes provision for, in supplement to the Constitution and electoral Law in general, and as the application and affidavit of the Defendant did not even particularize what prejudice, if any came it way by virtue the error of the Plaintiffs herein, we hold that no prejudice has in fact been suffered.

In terms of applying Order 2 rule 1(3) of the Rules of Supreme Court in a manner befitting the practice we have alluded to, however, we stumble across a number of complications, if we were to employ the saving provisions on amendment or conversion of the matter from its Originating Summons process mode to Judicial Review mode. Now, since the Judicial Review manner of commencing proceedings mentioned in Section 76(5) of the Constitution would, in the Rules of Supreme Court, fall under Order 53, we have also perused that Order and its rules, as well as the Practice Notes thereunder, in determining this matter. We note that whereas Order 53 of the Rules of Supreme Court 1999, requires that a party, before commencing such proceedings, ought first to seek the leave of the Court *ex-parte*, in Originating Summons matters there is no

such preliminary requirement. Converting this matter just like that, therefore, to Judicial Review procedure, would have the effect of side–stepping the requirement for advance leave. Further, we note that Judicial Review proceedings in their unique feature allow parties using their procedure, apart from the reliefs the Plaintiffs can and have in this case brought under the Originating Summons procedure, to additionally pray for like Orders as Mandamus, Prohibition, and Certiorari. A plain conversion of an Originating Summons matter to a Judicial Review, we observe, cannot accommodate these types of Orders, in case the Plaintiffs would have asked for them had they initially resorted to this mode of commencement of their action.

The bottom line in, our judgment, is that the Originating Summons procedure employed in these proceedings, is so fundamentally different from the Judicial Review procedure that should have been employed, that the two cannot easily just exchange places for the case to proceed without experiencing hitches. To ensure, therefore, that the Plaintiffs have before the Court the Judicial Review the Constitution prescribes in its Section 76(5), and that the said Judicial Review is properly preceded, in terms of order 53 rule 3 of the Rules of Supreme Court, with the requisite leave, and further that the said process is drawn in the correct fashion, with the peculiar procedure that is applicable to it, which special features the Originating Summons procedure does not readily fit into, we find that we cannot set aside these proceedings in part only. The procedure that was adopted by the Plaintiffs, of commencing this action in Originating Summons style cannot be converted by our Order into the desired form, as at this stage we are not the forum that would deal with issues of leave, and as certain prayers could be cut off the action if the correct procedure is not allowed resorted to right from its beginning. On these grounds therefore, rather than on the grounds raised by the Electoral Commission, we must, and we hereby do, strike off the Originating Summons with costs, but also with liberty to the Plaintiffs to recommence their action by Judicial Review procedure, under the dictates of Section 76(5) and Order 53 aforesaid.

Pronounced in Open Court the 7th day of April, 2009 at Blantyre.

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A.C. Chipeta
JUDGE

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Dr M. C. Mtambo
JUDGE

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S. Kalembera
JUDGE