



IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

MISCELLANEOUS CIVIL CAUSE NO. 41 OF 2009

BETWEEN:

THE STATE

-AND-

MALAWI ELECTORAL COMMISSION

RESPONDENT

EX PARTE YEREMIAH CHIHANA

APPLICANT

CORAM: The Hon. Mr. Justice L.P. Chikopa
Mr. R. Kasambara, of Counsel for the Applicant.
M. Kachule/Kayuni Senior State Advocates, for the Respondents
P Msiska Court Clerk
C B Mutinti Court Reporter

Place and Date of Hearing: Mzuzu, March 24, 2009 and April 8,
2009

Date of Ruling: 8th April, 2009

RULING

INTRODUCTION

The respondents are the body tasked with running elections in this country. The applicant is a citizen of Malawi. He seeks to run in the May 19, 2009 parliamentary elections. He to that effect presented nomination papers to the respondent on February 2, 2009. This was done through the Returning Officer for his constituency. He also paid a nomination fee of K100000.00 as per law required. This was acknowledged by the said Returning Officer on February 6, 2009. The applicant says on March 20, 2009 the respondents announced through Malawi Broadcasting Corporation and Television Malawi that the applicant's candidature had been rejected. According to the applicant the reason given was that he had in the seven years preceding the impending election been convicted of a criminal offence. Not content with such decision the applicant has brought the present proceedings seeking to judicially review the Respondents' holding that **'the applicant is not qualified to be elected as a Member of Parliament'**. [Sic]

He seeks the following reliefs:

- I. *'A like order to certiorari quashing the said Respondents' decision; and*
- II. *And order for costs'*. [Sic]

The Respondents are contesting the applicant's case. Two affidavits were filed in support of their case. One by Martin Mononga Principal Secretary in the Ministry of Home Affairs and Internal Security and another by David Chisala Bandawe the Respondents' Chief Elections Officer. We do not at this stage go into the details of the Respondents' case. Suffice it to say at this stage that it is clear from our understanding of the parties' positions that this matter revolves around whether the applicant should have been heard or was heard before the decision complained of was made; whether the applicant's conviction the alleged basis for his disqualification was spent courtesy of a

presidential pardon and whether unlawful wounding is a crime involving dishonesty or moral turpitude.

THE LAW

We find it necessary that we make reference to the following sections of our Constitution and case law.

Section 40(3) provides *inter alia* that every person shall subject to the Constitution have the right to vote, to do so in secret and to stand for election for public office. The right to vote in our view includes the right to vote for a candidate of one's choice.

Section 51(3)(c) provides that no person shall be qualified to be nominated or elected as a member of Parliament who has within the last seven years been convicted by a competent court of any crime involving dishonesty or moral turpitude.

Section 44(1) provides that there shall be no derogation, restriction or limitation with regard to the right to equality and recognition before the law.

Section 44(2) provides that no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in the Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society. And in accordance with the cases of *Friday Jumbe & Humphrey Mvula v Attorney General* Constitutional Case Number 1 of 2005 [unreported] and *Maggie Kaunda v Republic* Criminal Appeal Number 8 of 2001 [High Court Mzuzu Registry unreported] the burden does not lie on the one whose right is being limited, restricted or derogated from to show that they are entitled to the exercise of their right. Rather it is for those seeking to limit, restrict or derogate from the right to show that the limitation, restriction or derogation they are seeking to place on a person's enjoyment of their right is prescribed by law, recognized by international human rights standards, reasonable and necessary in an open and democratic society.

Section 9 provides that the Judiciary shall have the responsibility of interpreting, protecting and enforcing the Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.

In *Fred Nseula v Attorney General and Malawi Congress Party* MSCA Civil Appeal No. 32 of 1997 the Supreme Court held that the Constitution should be interpreted in a generous and broad fashion as opposed to a strict, legalistic and pedantic one.

In *Attorney General v Dr Mapopa Chipeta* MSCA No. 33 of 1994 the courts were implored to interpret the Constitution in a manner that gives force and life to the words used by the legislature and to at all times avoid interpretations that produce absurd consequences. In the words of late Lord Denning the courts should not only avoid absurd consequences but also avoid subjecting the words used in the Constitution to destructive analysis. See also the case of *The State v The President of the Republic of Malawi, The Minister of Finance and the Secretary to the Treasury ex parte Malawi Law Society* Constitutional Case Number 6 of 2006 [unreported].

Section 41(3) of the Constitution entitles all successful litigants to an effective remedy.

Section 89(2) provides that the President may pardon convicted offenders, grant stays of execution of sentence, reduce sentences, or remit sentences.

Section 90 provides in subsection one that decisions of the President shall be expressed in writing under his signature. In subsection 2 it says where law or practice requires the signature of the President shall be confirmed by the Public Seal.

ISSUES AND THE COURT'S DETERMINATION THEREOF

We feel obliged to point out that this matter is not just about the applicant's candidature. It is about human rights as provided for in Chapter IV of our Constitution. Specifically about political rights as conferred in section 40 of the Constitution. We are not in this case merely considering whether or not the

applicant is eligible to stand but also his right to stand for elective office, his right to vote and the right of persons in his constituency not only to vote but to vote for a candidate of their choice.

In so far as we are concerned the applicant like all other persons acquired on attaining the age of twenty one [21] the right to, *inter alia*, stand for public [elective] office of which membership to the National Assembly is one. Such right in our judgment subsists until either derogated from, limited or restricted in accordance with section 44(2) of the Constitution. And because it is as we have shown above for the one seeking the limitation, restriction or derogation to justify the same in terms of section 44(2) abovementioned it is, in the instant case, for the respondents to show on a balance of probabilities that their barring of the applicant from the May 19, 2009 parliamentary election is in its totality prescribed by law, reasonable, recognized by international human rights standards and necessary in an open and democratic society. See also the case of *Wavunduka Mwenitete v Fishani Khumbo Mkandawire* Civil Appeal Case Number 29 of 2000 [High Court, Mzuzu Registry unreported].

The decision complained of is the respondents' barring of the applicant from contesting in the May 19, 2009 parliamentary polls. The applicant contends that such decision is not supported by any evidence and does not go to ensuring and promoting his human rights. Secondly that the said decision is unconstitutional, *ultra vires* and unreasonable. The reasons advanced therefor are that the criminal conviction the basis of the respondents' decision does not involve dishonesty or moral turpitude, secondly that the said conviction is spent the State President having pardoned him and thirdly that the said decision is procedurally fatally flawed the applicant not having been heard before the said decision was made. The issues that come up for our consideration are on the one hand whether the decision complained of:

- i. is not supported by any evidence; or
- ii. does not ensure or promote the applicant's human rights; or
- iii. is unconstitutional, *ultra vires* and unreasonable.

On the other hand the issues are whether;

- i. unlawful wounding is an offence involving dishonesty or moral turpitude;
- ii. the applicant's conviction for unlawful wounding is spent by virtue of the applicant having been pardoned by the State President;
- iii. the applicant should have been heard before the decision complained of was made; and
- iv. if the answer to the immediately above be yes he was heard at all.

Looking at this matter in its totality we think it shall be resolved if we answered the following questions:

Should The Applicant Have Been Heard Before He Was Declared Ineligible To Stand?

The applicant feels he should have been heard before the respondent decided to bar him. That in so far as the same was not done the respondents' decision is a nullity for procedural impropriety.

The respondents are of the view that the applicant should not have been heard. In their view a person will only be granted an opportunity to be heard if the decision to be made affects the person's rights, freedoms, interests or legitimate expectations. The applicant has not established the existence of such rights, freedoms, interests or legitimate expectations. The respondents conclude that they were therefore not obliged to afford the applicant an opportunity to be heard. They were within their rights to, on the facts before them, make the decision complained of without hearing the applicant. The case of *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 was cited. The late Lord Denning said therein:

'an administrative body may in a proper case be bound to give a person who is affected by their decision an opportunity of making representations. It all depends upon whether he has some right, or interests or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say'.

Much the above is according to the respondents to be had from Lord Diplock's opinion in *Council for the Civil Service Unions v Minister for the Civil Service* [1985] AC 374. His Lordship said:

'the decision must affect some other person either:

- a. *by altering rights or obligations of that person which are enforceable by or against him in private law;*
- b. *by depriving him of some benefit or advantage which either:*
 - i. *he had been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do unless there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or;*
 - ii. *he has received assurances from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn;'*

It was also argued that it was a practical impossibility to hear orally all candidates because of the sheer numbers involved. The case of *R v Aston University, ex parte Roffey* [1969] 2 QB 538 was cited. In it Donaldson J accepted that a University could not be expected to interview all of its

applicants. It was enough that the University had recourse to all information submitted on the students' behalf. We understood the respondents to have been arguing that it was impossible to interview all parliamentary candidates. That instead they resorted to whatever information was submitted in their behalf. Applying the above to the instant case the information before the respondents was that the applicant had in 2005 been convicted of the offence of unlawful wounding. That according to the respondents makes the applicant ineligible to contest in the May 19, 2009 parliamentary elections.

If we must repeat the applicant has a right to stand for elective office. See section 40(3) of the Constitution. He must also be taken to continue having such right until the same has been derogated from, restricted or limited in accordance with section 44(2) of the Constitution. It is not, even now that the respondents have decided that the applicant is ineligible, for the applicant to prove that he is eligible. He has at law always been eligible since he turned twenty one [21]. And he will continue to be such unless and until the one seeking to restrict, limit or derogate from such right, in this case the respondents, shows on a balance of probabilities that such derogation, restriction or limitation is prescribed by law, reasonable, recognized by international human rights standards and is necessary in an open and democratic society. The process of derogating, restricting or limiting such right should, in our view, itself comply with section 43 of the Constitution. The process should therefore not only be lawful it should also be procedurally fair. More than that the decision must also be justifiable in relation to the reason[s] given. The question is did or does the applicant have some right, interest or legitimate expectation of which it would not be fair to deprive him without hearing what he has to say? Our answer is in the affirmative. His rights [to stand for elective office and to vote], those of persons who want to vote for him [let us not forget that he was nominated], his interests and legitimate expectations are clearly at stake here. He could not therefore have been deprived of such rights without the respondents hearing what he had to say regarding either whether he had a conviction or whether such conviction was

one involving dishonesty or moral turpitude. In accordance with the views of Lords Denning and Diplock quoted above the applicant should have been heard before the decision to bar him ie to deny him the right to stand for public/elective office was made. In fact, and if we may say so we doubt whether the respondents can lawfully make an adverse decision on one's eligibility to contest without hearing them. Eligibility is primarily a matter of law but it is also a matter of fact. The person whose eligibility is at stake should therefore be given a chance to challenge both the facts and the respondents' understanding of the law. That way if there is mutuality of thought the matter will be at an end. If however there is a lack of mutuality the matter will then come to the courts for review but only on matters of substance e.g. whether the respondents' understanding of the law or facts is correct and not of procedure namely whether or not one was heard as is the case herein.

The Roffey case is distinguishable. Whereas in Roffey's case the University faced the specter of interviewing all applying students such was not the case herein. Nobody asked and it was not necessary that the respondents hear from all parliamentary candidates. The allegations from Alliance for Democracy [AFORD] were specific to the applicant. The only person that therefore needed to be heard was the applicant and no other. Secondly, it is also clear that the University dispensed with oral hearings in Roffey's case because it considered some other information submitted by the students. Such was not the case herein. There was no information sought from or submitted on behalf of the applicant to the respondents in relation to the allegations against him from AFORD. Thirdly, Roffey's case just like our respondents proceeded on the premise that the applicant was seeking an oral hearing. Like we said in **SOBO v Gracian Kalengo** Civil Appeal Cause Number 38 of 2008 [High Court Mzuzu Registry unreported] an oral hearing will not always be possible or necessary. In the instant case the applicant was not seeking an oral hearing. Just a hearing. Fourthly it is clear that Roffey's case was about a privilege. Nobody has a right of admission into a university. Even under our own admirably liberal

Constitution we doubt whether one can argue that they have the right of admission into for instance Mzuzu University. The instant case is about rights. The right to stand for public/elective office and the right not only to vote but also to vote for a candidate of one's choice. To that extent Roffey's case is not applicable herein.

The conclusion in our most considered judgment is inescapable. The applicant should have been heard before the decision to bar him from the elections was made.

Was The Applicant Heard Before The Decision Complained Of Was Made?

Perhaps we should first answer the question what is a hearing? In *Mwandenga v Secretary for Health & Population* Miscellaneous Civil Case Number 9 of 2003 [High Court Mzuzu Registry unreported] and the Kalengo case we essayed to answer that question. Simply put the person against whom the allegations have been made should not only be given advance notice of such allegations he should also be given a reasonable opportunity to challenge them before an independent and impartial tribunal. In the instant case the applicant was not, according to Bandawe's affidavit, told of the allegations from AFORD. He was also not given a chance to respond to such allegations. The respondents say they saw no need to do so. The facts in their view spoke for themselves. The applicant had a conviction. He was therefore not eligible to stand. The conclusion is again inescapable. The applicant was not heard in relation to the allegations from AFORD. He therefore has a point when he argues that the respondents' decision is unconstitutional and a nullity for being procedurally flawed.

Is The Respondents' Decision Supported By The Evidence?

Another way of looking at this issue is to ask the question whether the respondents' decision is justifiable in relation to the reasons given.

In paragraph 6 of his affidavit Bandawe said:

'that at the same time the Commission wrote a letter to Mr. Chihana to inform him of the reasons for his ineligibility to run for the 2009 Parliamentary Elections. Attached hereto and marked DB2 is a copy of the said letter'.

The letter DB2 is short. We quote the more relevant parts thereof.

'20th March, 2009

*Mr. Yeremiah Chihana
Mzimba North Constituency Aspirant
C/O NARC
MZIMBA.*

Dear Sir,

RE: INELIGIBILITY TO CONTEST IN THE 2009 GENERAL ELECTIONS

I write to inform you that at its meeting on 20th March, 2009, the Commission found your nomination ineligible following your conviction by a competent court of law in early 2005.

You have therefore been disqualified to contest in the forthcoming 2009 General Elections.

Yours faithfully

D.C. Bandawe

CHIEF ELECTIONS OFFICE

CC: THE DISTRICT COMMISSIONER, MZIMBA
THE REGIONAL ELECTIONS OFFICER, NORTH" [sic]

If we may the reason for barring the applicant is because he was 'convicted by a competent court of law'. There is no mention here, as was the case in the affidavit of one Bandawe and in the respondents' submissions of pardons, remissions, dishonesty or moral turpitude. The question is can an aspirant be lawfully barred from contesting merely because they have been convicted by a competent court of law?

In its submissions the respondents correctly make reference to section 51(3)(c) which we have quoted above. Under that section an aspirant can only be barred if he has in the last seven years been convicted by a competent court of a crime involving dishonesty or moral turpitude [our emphasis]. Was the respondent correct in barring the applicant for merely having been convicted by a competent court of law? The answer is clearly in the negative. The decision by the respondent in our judgment is neither supported by the law or evidence. It is also not justifiable in relation to the reason[s] given. Yet again the applicant has a point when he contends that the respondents' decision is unconstitutional and *ultra vires*. The respondents have no power to disqualify anyone to stand merely because they have a criminal conviction. It has to be a conviction for an offence involving dishonesty or moral turpitude.

Is the Applicant's Conviction for Unlawful Wounding Spent? Is Unlawful Wounding An Offence Involving Dishonesty Or Moral Turpitude?

Strictly speaking we should not be considering the above questions. We have already found the respondents' decision untenable for being procedurally flawed and not justifiable in relation to the reasons given. For what they are worth we however think our views useful *obiter*. The respondent might

consider taking them into consideration should they be minded to reconsider this issue.

The applicant contends that his conviction for unlawful wounding is spent the same having been pardoned by the State President. The respondents dispute such contention. In their view the State President did not pardon the applicant. He only granted him, together with 412 other deserving prisoners, a remission of sentence as part of Malawi's independence celebrations in 2005. An affidavit was sworn by one Mononga seeking to show that the applicant was not pardoned. Attached to such affidavit was a copy of a memorandum to 'His Excellency the President' from Uladi B Mussa MP Minister of Home Affairs and Internal Security. We will not reproduce the memorandum verbatim. Suffice it to say that the memorandum's subject was the 'release of 413 prisoners in commemoration of Malawi's 41st independence'. The gist of the memorandum was that a Committee called the Advisory Committee on Granting of Pardon had met under the Chairmanship of 'Your Excellency'. The Committee resolved *inter alia* that 413 prisoners be released from prison; that one prisoner Aroni Manda be not released. In view of the fact that 'the power to pardon convicted offenders is constitutionally vested in 'Your Excellency' the Committee, through the Minister of Home Affairs and Internal Security, sought approval for the release of 413 prisoners as part of Malawi's 41st independence celebrations. The question we should answer is whether or not the applicant's conviction is spent. Within the four walls of this case the specific questions are initially whether the applicant was pardoned or remitted. If it be the latter we shall also opine on whether unlawful wounding is an offence involving dishonesty or moral turpitude. If it be the former we may give our opinion on whether a pardon spends a conviction or not.

We do not want to be accused of being pedantic. We will therefore say nothing about the obvious lack of clarity in the memorandum on whether the prisoners were released by way of remission or pardon. We will however be rightly accused of dereliction of duty if we did not raise certain facts. Firstly nowhere in the memorandum is the applicant's name mentioned. The question being is

the said memorandum indeed about the applicant? If, as the respondents argues, the applicant was among the 413 prisoners would not the memorandum have made mention of such fact? A simple list of the 413 or 414 prisoners involved would have done the trick we think. Secondly section 90 of the Constitution provides that all Presidential decisions shall be in writing under his signature. That where law or practice requires the Presidential signature shall be confirmed by the Public Seal. We think that those alleging that the State President only remitted the applicant should have brought some evidence complying with section 90 to prove that the applicant was remitted as opposed to being pardoned. We are aware that the memorandum MM1 has on the margin the words 'Approved' and some signature or initial which we presume to be the State President's [nobody saw it necessary to depone to that effect]. Some might argue that that complies with section 90 abovementioned. Maybe but we have serious doubts. We are here talking about prisoners. They were being kept at a place of detention. To go into such place needs a committal warrant. To be released before the expiry of their sentence needs a release order if the release is by court. Is the mere signing, even by the State President, on a memorandum enough to secure the release of prisoners from their various places of detention? We think not. Good practice and the law would demand that a more officious looking and sounding document [most likely a warrant or release order] would be issued to the Prisons Department requiring them to release the prisoners named therein before such release could be effected. That is the document which in our judgment can put to rest the questions surrounding the manner in which the respondent was released. Namely whether he was pardoned or remitted. Thirdly if we go back to the sequence of events provided by the memorandum MM1 it becomes clear that the applicant was convicted in February 2005 and sentenced to serve 18 months IHL. The sentence was on appeal reduced to 14 months IHL. The Advisory Committee on Granting of Pardon met on July 1, 2005. On July 4th, 2005 the Minister of Home Affairs and Internal Security wrote the memorandum seeking the State President's approval to release 413 prisoners as part of the

independence celebrations of 2005. The State President approved the release on July 5th, 2005. The prisoners were released on July 7th 2005 the same day the applicant was released. In paragraph 2 the memorandum set out clearly the criterion used to select prisoners to be released on remission. We quote it in full:

'the 414 prisoners were carefully selected by a Committee of Senior Prison Officers after having demonstrated good conduct in the course of serving at least half of their prison sentences on offences classified as minor'. [Sic]

Had by July 1st 2005 the applicant served half [seven months] of his fourteen months sentence? The answer is in the negative. Is unlawful wounding a minor offence? Both parties agree it is a felony. It is doubtful very doubtful therefore whether it can be said that it is a minor offence. Did the applicant qualify to be on list of these 414 prisoners? Could he have been on that list? Again we think the answer should be in the negative. Could these Senior Prison Officers in their careful selection of the 414 prisoners to be considered for remission have put the applicant's name before the Advisory Committee on Granting of Pardon? Indeed could the Committee have lawfully deliberated on the applicant's name? In the alternative could the State President have lawfully remitted the applicant? In the absence of a clear indication that the applicant was one of the 413 nameless prisoners considered for and granted remission and also of the above concerns there is, in our judgment, still the probability that the applicant was not one of those that were granted remission of sentence. But because he was released barely five months into a fourteen months sentence the conclusion must be that he was released by the State President in exercise of his powers, other than those of remission, under section 89(2) of the Constitution. The probability still remains that the applicant was indeed granted a pardon as opposed to a remission. It is impossible therefore to conclude on a balance of probabilities that the

applicant was granted a remission and not a pardon. Similarly we can also not conclude that the conviction was not spent.

Does A Pardon Spend A Conviction?

We are a tad reluctant to answer this question in case the respondents wish to revisit the applicant's eligibility. We do not want the respondent or indeed any Court sitting to review the respondents' decision to be burdened with our views. Suffice it to say however that we have serious doubt whether a conviction can survive a pardon. A pardon in our view wipes the slate clean. But that is for another day another forum.

Is Unlawful Wounding An Offence Involving Dishonesty Or Moral Turpitude?

We had occasion in **John Tembo & Kate Kainja v The Attorney General** Civil Cause Number 50 of 2003 [High Court Mzuzu Registry unreported] to define the words **dishonesty** and **moral turpitude**. The respondents have actually made reference to such definition. On appeal the Malawi Supreme Court of Appeal did not express an opinion one way or the other on such definition. They found that contempt was not a crime and thus saw no reason to comment on our definitions of dishonesty and moral turpitude. We, on our part, have seen no reason over the years to depart from such definition. In the instant case we however doubt whether we should go so far as to specifically give our opinion, much less decide, on whether unlawful wounding is an offence involving dishonesty or moral turpitude. Not because, like the Supreme Court, the respondents have not shown that the conviction against the applicant is still alive but due to the fact that dishonesty and moral turpitude are irrelevant to the resolution of this case. The letter DB2 quoted above did not mention dishonesty or moral turpitude as being part of the reasons the applicant was held ineligible to stand. Strictly speaking therefore the matter of whether unlawful wounding is an offence involving dishonesty or moral turpitude is not an issue before us. Secondly, and like we have intimated above, there is the possibility that this is not the last the respondents and the courts have seen of

this matter. The words moral turpitude and dishonesty might again come up for determination in relation to unlawful wounding. We do not think it prudent therefore that we burden the respondents or any court with our opinion on whether unlawful wounding is an offence involving dishonesty or moral turpitude. For the moment we think it enough that we have defined the words dishonesty and moral turpitude as used in section 51(2)(c) of the Constitution.

CONCLUSION

Clearly the respondent has not shown on a balance of probabilities that there is reason justifiable in terms of section 44(2) of the Constitution to warrant the limitation, restriction or derogation from the applicant's right to stand for elective office. Or the rights of such of his constituents as want to vote for him. The applicant and they remain free to exercise such rights unless and until the respondents show on a balance of probabilities that whatever derogation, limitation or restriction they seek is prescribed by law, reasonable, recognized by international human rights standards and is necessary in an open and democratic society. The decision complained of is indeed not supported by law or evidence, is unconstitutional, *ultra vires* and unreasonable in the circumstances.

RELIEFS SOUGHT

The Applicants sought a like order to *certiorari* quashing the respondents' decision. We think it an effective and appropriate remedy in the circumstances. It is granted. The said decision is hereby quashed. As we have shown in our discussion above the applicant was never granted a hearing in respect of such decision. Neither is such decision justifiable in relation to the reasons given or at law.

COSTS

These are in the discretion of the court. We grant them to the Applicant.

Pronounced in Open Court this 8th day of April, 2009 at Mzuzu.



L P CHIKOPA
JUDGE

IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
MISCELLANEOUS CIVIL CAUSE NUMBER 2 OF 2009

IN THE MATTER OF SECTIONS 71(1), 84(1)(2) AND 100 OF THE
PARLIAMENTARY AND PRESIDENTIAL ACT CAP 2:01

AND

IN THE MATTER OF SECTIONS 77(4) AND 76(2)(c) OF THE
CONSTITUTION

HARRY MKANDAWIRE

PETITIONER

AND

BILLY KAUNDA

1ST RESPONDENT

AND

MALAWI ELECTORAL COMMISSION

2ND RESPONDENT

ORDER

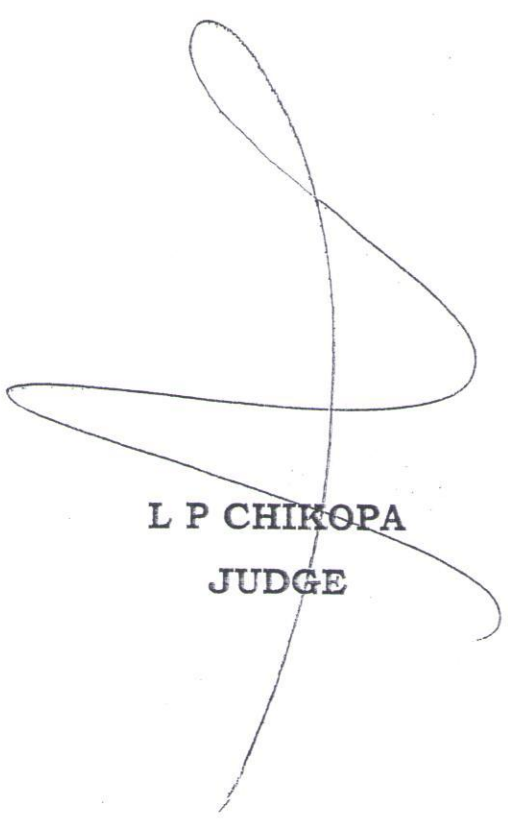
Following our interim order of October 14, 2009 that the vote in Mzimba West constituency should be revisited with a view to expunging therefrom all toxic votes and unaccounted for ballots the petitioner brought an *ex parte* application seeking an order that all voting material from Mzimba West constituency be transferred from MEC's custody into that of the High Court Mzuzu Registry until the finalization of this

matter. This was according to the petitioner in order to prevent the second respondent tampering with the said material.

We can understand the petitioner's concerns. It seems to us though that he might have sought this interlocutory relief a bit late in the day. Closing the gates after the horses had bolted so to speak. If the second respondent was minded to tamper with the vote they could have done so by now. We say this not to suggest in any way that the same has been done but to exhibit the futility, to some extent, of the present application. Secondly it is suggested that this Court should have custody of the voting material in issue. We are aware that such an application was made and granted at the Principal Registry. It was however soon realized that such an order created logistical challenges which the Registrar was not capable of handling. It had to be drastically varied. That order was in respect of a national election. This is at a constituency level. One might think therefore that the logistical challenges will be somewhat diminished. We do not think so. From the testimony we heard in court these materials are in Blantyre. They would have to be brought to Mzuzu. Who will pay for their movement? Their security enroute to here? Where will they be kept here? And who shall attend to their security during the time they are with us? These are all concerns we do not have ready answers to. Thirdly we think there is a way of addressing the petitioner's concerns may not wholly but in such a way as not to let matters be subject to undue suspicion. At the close of the poll on May 19, 2009 these materials were loaded into boxes and sealed. They were then sent under guard to MEC Blantyre to be kept by the second respondent. They remain there to date. Those seals were recorded. Those that sealed the boxes are alive. They should be able to assure stakeholders that the seals now present on the boxes are the same ones that they affixed on polling day. They should also be able to say whether the seals have since polling day been tampered with or not. That should go a long way in assuring the petitioner and the first respondent that the process will not be

massaged to anyone's advantage or disadvantage. But to ensure that we make a formal order to the effect that the second respondent should immediately formally inform the petitioner and the second respondent where the boxes containing the election material the subject of the inspection ordered by this court herein are. It should also afford them a chance to verify such information. Wherever they are the said boxes should remain thereat in the state they are in until they have been inspected as ordered by this court. If this involves putting security over them the same shall be done at the expense of the second respondent. Just that the petitioner and the first respondent shall be at liberty to provide extra security at their cost.

Dated at Mzuzu this October 15, 2009.



L P CHIKOPA
JUDGE

IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

MISCELLANEOUS CIVIL CAUSE NO. 08 OF 2009

**IN THE MATTER OF S. 100 OF THE PARLIAMENTARY AND PRESIDENTIAL ELECTIONS
ACT**

AND

IN THE MATTER OF MZIMBA WEST CONSTITUENCY

BETWEEN:

LOVENESS GONDWE.....PETITIONER

-AND-

ELECTORAL COMMISSION.....RESPONDENT

CORAM: His Honour D.H. Sankhulani

F. Mninde, for the Respondent

Petitioner, absent

Mrs. Msiska, Official Interpreter

RULING

This is an application by the Respondent to have the Petition herein dismissed for want of prosecution, or for disclosing no reasonable cause of action or for being frivolous and vexatious. By Petition dated 22nd May 2009, the Petitioner sought a declaration that the Parliamentary Elections in Mzimba West Constituency were not free and fair and for a recount of votes cast in the said constituency. There was filed, together with the Petition, an affidavit sworn in support of the Petition. The said affidavit just stated that the statements set forth in paragraphs 1 to 6 of the Petition are true to the best of the Petitioner's information, knowledge and belief. The petitioner never filed any evidence to substantiate the said allegations. In fact, the petitioner never took any other step with a view to

having the Petition set down for hearing. That prompted the Respondent to take out a summons to dismiss the matter for want of prosecution which was returnable on 19th August 2009. The summons was not heard on the said date because there was a change of legal practitioners on the part of the Petitioner. Thereupon, the Respondent filed and served a notice of adjournment, the adjourned date to be given by the court. The summons was dismissed for non-attendance on 3rd September 2009, but there was no proof on the court file of due service on the parties concerning the said date. The said summons was later restored to the cause list by an order of the court dated 18th January 2010. The present summons is that restored summons.

The leading authority on applications of this nature is the case of **Allen -v- Sir Alfred McAlpine & Sons Ltd.** [1968] 1 All E.R. 543. In that case, the cause of action arose in 1959. Pleadings were delivered in 1961 and no further action was taken until 1967 when the defendant applied to strike out the action. **Lord Denning M.R.** had the following to say:

"The delay of justice is a denial of justice. Magna Carta will have none of it...To put right this wrong, we will in this court do all in our power to enforce expedition; and, if need be, we will strike out actions when there has been excessive delay...The principle upon which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight."

From the above dictum, it is clear that the court will dismiss for want of prosecution where the default has been intentional or inordinate and

inexcusable and there is a resultant substantial risk of there not being a fair trial or of there being serious prejudice to the defendant. In the matter at hand, after the Petition and affidavit in support, the Petitioner has, to date, never taken any step to have the matter set down for hearing, in total disregard for the Practice Direction on election cases that was issued by the Chief Justice of the Republic of Malawi. The court record herein shows that legal practitioners for the Petitioner were duly served with notice of hearing of the present summons. They, however, did not show up at the said hearing. They never communicated to the court the reason for failure to attend. They did not bother to at least file with the court affidavit evidence explaining all the circumstances of the delay and, possibly, excusing the delay. It is nine months now since the matter herein was commenced. I am of the opinion that the Petitioner is fully aware that if today her petition was to be successful, and if the consequent vote re-counting was to go her way, she would only have four years in office. With that in mind, one would have expected the Petitioner to prosecute the matter herein with expedition, which has not been the case here. In view of the Petitioner's conduct in the present matter, I find the delay by her to set the matter herein down for hearing to have been inordinate and inexcusable in the circumstances. Which takes us to the next question as to whether the said delay by the Petitioner has resulted in there being a substantial risk of there not being a fair trial or of there being prejudice caused to the Respondent. In regard to this question, it should be noted that the rationale behind the jurisdiction to dismiss for want of prosecution is that, as time goes by, witnesses may no longer be available and memory will fade. The elections in question herein took place nine months ago. It is my most considered opinion that that period of time is long enough for anything to have happened. It is highly probable, in my view, that material witnesses for the Respondent may, during the period, have died or relocated to some non-traceable places of abode. Also, it is highly probable, in my view, that material witnesses both for the Petitioner and the Respondent may not be able to recall what happened at the material time as vividly as they

would have done had they testified much earlier, thereby creating a real risk of there not being a fair trial. Such being the case, therefore, I find that the delay by the Petitioner herein to have the matter set down for hearing has resulted in there being a real risk of there not being a fair trial or of there being prejudice caused to the Respondent if the matter were to go on. On the question whether the Petition herein discloses a reasonable cause of action, it should be noted, as it has already been observed earlier on, that the Petitioner never filed any evidence to substantiate the allegations made in the Petition. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered (per **Lord Pearson** in **Drummond-Jackson -v- British Medical Association** [1970] 1 W.L.R. 688). Because of the Petitioner's failure to file evidence substantiating the allegations made, the same does not, in my most considered opinion, disclose a cause of action with any chance of success. In that regard, therefore, I find that the Petition herein discloses no reasonable cause of action, and that it ought to be dismissed for that reason.

In view of the foregoing, I dismiss with costs the Petition herein for want of prosecution and for disclosing no reasonable cause of action.

Delivered in Chamber this 22nd day of February 2010.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the end, positioned above a dotted line.

D.H. SANKHULANI
ASSISTANT REGISTRAR