

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

RESPONDENT/PETITIONER

AND

BILLY KAUNDA

1ST APPLICANT/1ST RESPONDENT

AND

MALAWI ELECTORAL COMMISSION

2ND APPLICANT/2ND RESPONDENT

CORAM:**THE HON. MR. JUSTICE L P CHIKOPA**

Silungwe of Counsel for the First Applicant/First Respondent

Mninde/Namanja Senior State Counsels for the Second Applicant/First Respondent

Lameck of Counsel for the Respondent/Petitioner

Kahonge (Mr.), Official Interpreter

Silavwe (Mrs.) Court Reporter

Chikopa J.

RULING**BACKGROUND**

On October 14, 2009 we *inter alia* ordered that the vote in Mzimba West constituency be reopened and certain toxic votes expunged therefrom. We also ordered that the second respondent put simply, do account, for all votes cast in that constituency. The results of such exercise, to be done within 45 days from the date of our order, were to be brought before this court for it to decide whether or not such irregularities as we had found proven in the vote under scrutiny had affected the results in the said constituency. We now have before us four applications from the two respondents. Two seeking leave of this court to appeal against our order of October 14, 2009 from the Attorney General on behalf of the second respondent and from the first respondent and another two seeking a stay pending an appeal against such order.

ISSUES

Leave to Appeal

In terms of section 21 of the Supreme Court of Appeal Act any appeal from our order of October 14, 2009 to the Malawi Supreme Court of Appeal should be with leave of this court. The respondents have both applied for such leave. The order sought to be appealed against is *inter alia* to the effect that the vote be reopened and certain toxic votes expunged and an account given of all voting material used in the constituency pending our decision on whether or not the proven irregularities affected the result of the vote in Mzimba West constituency. Can the respondents appeal against such order? If yes should leave to appeal be granted?

The law applicable is the above mentioned section 21. Accordingly a party can only appeal in our view against a judgment. In the proviso to section 21 paragraph (d) an appeal can also be made against an interlocutory order or judgment. Did this court make a judgment? In the alternative did it make an interlocutory order or judgment such as can be appealed against? In our view a judgment is a court's final decision on the issues before it. An interlocutory judgment or order similarly is an interim judgment or order on the issues before the court. In Black's Law Dictionary 6th edition page 841 - 842 a judgment is defined *inter alia* as:

'The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. The final decision of the court resolving the dispute and determining the rights and obligations of the parties. The law's last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceedings.'

An interlocutory judgment on the other hand is defined on page 843 as:

'One given in the progress of a cause upon some plea, proceeding or default which is only intermediate and does not finally determine or complete the suit. One which determines some preliminary or subordinate point or plea or settles some step question or default arising in the progress of the cause but does not adjudicate the ultimate rights of the parties or finally puts the case out of court'.

The only appeal in respect of which we can grant leave in this matter therefore is one against a final judgment or an interlocutory order/judgment on the issue[s] before us. The question being 'what was the issue[s] before this court?

In our view there was only one issue. That is the propriety of the election in Mzimba West constituency. At page 16 of our 'judgment' we put the issue as being whether or not the first respondent was duly elected. The only decision interim, interlocutory or otherwise which the parties herein can lawfully appeal against and in respect of which leave can be or ought to be granted is the one that answers the question whether or not the first respondent was duly elected. We have so far not made that decision. It is clear in our mind that neither party can therefore appeal against our order of October 14, 2009. There is nothing to appeal against. The application for leave to appeal is as misconceived as it is premature.

Stay of Execution

We should not be debating this question seeing as we have declined to give leave to appeal. We do it nevertheless.

The applications from the respondents are grounded differently. The second respondent contends that the 45 days given are not enough to carry out the exercise ordered by the court. See paragraph 4 of the

affidavit sworn by Mr. Namanja in support of the application for stay. The second respondent has however not shown why it thinks the period is too short. It has not even shown what steps it has so far taken in order to comply with our order under discussion. The second respondent has instead since that order done nothing about it except to wake up twelve days later and start claiming that 45 days is not enough. With respect we have no doubt in our mind that the second respondent, sadly with the encouragement of the Attorney General seems in this case bent on frustrating the due process of the law. And we think the reason is not difficult to fathom. Attorney Generals have tended to misapprehend their constitutional mandate. Successive Attorney Generals feel they are the government's legal practitioners who must therefore at all costs defend their client's i.e. government's position. On the contrary the Attorney General's role is only advisory. He\she advises government in its widest sense and not just certain portions thereof. Including if the instant case were to be used as an example the petitioner and the first respondent. But the above notwithstanding the Attorney General's /second respondent's conduct herein reminds us of the wise words of the Malawi Supreme Court of Appeal in Miscellaneous Civil Appeal Number 10 of 2006 **The State v State President & Others** [unreported] where Their Lordships said:

'On the totality of the facts before us we agree that the impression left is that the State is deliberately refusing to obey the said court orders. In our view it would be not right, fair, and just for a court to grant a stay in such circumstances if the State has clearly disobeyed orders of the court. As the maximum goes he who comes to equity must come with clean hands.'

In the instant case it is clear that the second respondent has deliberately not taken any steps to comply with the order of this court made on

October 14, 2009. Its hands can not be clean. We would for that reason alone be most reluctant to grant it a stay herein. But more than that it is clear that the second respondent has advanced no cogent reason to justify a possible stay of the order in issue. Like we have said above it is one thing for the second respondent's Counsel to stand up and tell this court that 45 days is not enough and quite another to explain to this court why 45 is not or may not be enough and let us make our own conclusions on the matter. It should after all be remembered that the voting process in the constituency took only one day. How does a mere semi audit of the process fail to take place in 45 days? But the foregoing is perhaps much ado about nothing. If we may say so the testimony of Counsel, by affidavit or otherwise, as to the sufficiency, from the second respondent's point of view, of the 45 days is clearly hearsay. It is not admissible. There is therefore no factual basis on which we can find as a fact that 45 days is not enough. See **National Democratic Alliance & The Republican Party v TVM, MBC & Another**. There would for that reason be no justification for granting the second respondent's application for a stay.

In the matter of the first respondent's application for stay it would not make much sense to grant it us having declined to do so in respect of the second respondent's application. But that notwithstanding we think the first respondent advanced a most unconvincing reason to justify such a grant. In paragraph 6 it is alleged that if the stay is not granted the appeal will be rendered nugatory. How and why are the questions we ask? If the stay is not granted and the order in issue is carried out one of two results will out. Either it will be determined that the irregularities proven affected the result of the election in which case we will nullify the election or it will be found that the irregularities did not affect the result and we will uphold the election. If the latter is the result the question of an appeal, nugatory or otherwise, will not even arise. If the former is the

result an appeal from the first respondent might become necessary but surely the substance of such an appeal can only be known after this court has made the final order and given its reasons therefor. In the absence of such order and the reasons therefor how does the first respondent know that there shall be a need to appeal? Or know about the grounds of such appeal? Or indeed that such an appeal will be nugatory if the ballot boxes and/or the vote are reopened? Is the first respondent perhaps already aware of the consequences of the reopening of the vote? The first respondent appears to us to be too afraid of the unknown. In his skeletonals the first respondent speaks of a litigant not being needlessly denied the fruits of a successful litigation. There is no successful litigant at this stage in this matter. That can only happen if we make a pronouncement on the propriety of the elections in Mzimba West constituency. Nobody should therefore be spoken of at this stage as either enjoying or being denied the enjoyment of the fruits of a successful litigation. It is clear to us that the application for a stay is premature. It, the application for a stay, is as misconceived as it is unnecessary.

CONCLUSION

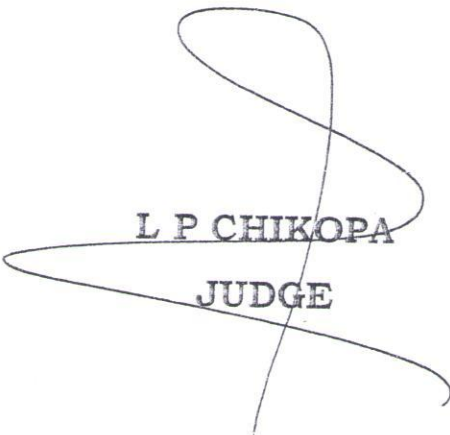
There is nothing at this stage to appeal against or to stay. And the respondents should have nothing to worry about. They will, when time for so doing is due, have all the freedom to appeal against whatever final decision[s] this court may make herein. On the other hand granting a stay or leave to appeal now will have the effect of preventing this court from answering and the petitioner from knowing the answer to the ultimate question in this case which is whether or not the first respondent was duly elected. Both the application for leave and stay are dismissed for prematurity and a lack of justification.

We should emphasize however that we expect when we meet on December 1, 2009 that we shall have had full compliance with our order

by all parties concerned in this matter. We want to make it clear that we shall not hesitate to uphold the law to the fullest including by imposing appropriate sanctions if we as much as get a sniff of a willful disregard of lawful court orders.

COSTS

For these applications they are the petitioner's in any event.
Delivered in Chambers at Mzuzu this November 13, 2009. •



L P CHIKOPA
JUDGE