

IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

Civil Cause No. 46 of 2009

Between:

Omar Paison Kaisi.....Petitioner

and

Abubakar Mbaya.....1st Respondent

And

Electoral Commission.....2nd Respondent

Coram: Honourable Justice A.C. Chipeta

Ngwira, of Counsel for the Petitioner

1st Respondent/ Counsel, Absent

Chilemba, Senior State Advocate, of Counsel for the 2nd Respondent

Ndanga (Mrs), Official Interpreter

T. Simwayi, Court Reporter

RULING

On 2nd June, 2009, through the Legal House M/S Nicholls and Brookes, the Petitioner, Omar Paison Kaisi, filed the present Election petition against Abubakar Mbaya as first Respondent and the Electoral Commission as second Respondent. He did so in the Lilongwe District Registry of the high Court of Malawi, and he based his said Petition on Section 100 of the Parliamentary and Presidential Elections Act, hereinafter referred to as the PPEA. It appears that the petition in question was soon after transferred to the Zomba District Registry of the same Court, where it now is, for further processing. I observe that the petition in issue does not disclose the Constituency to which it relates, but its Affidavit in Support links it to Mangochi District.

The Petitioner claims in the Petition herein that he was an independent Candidate in the may 19th, 2009 Parliamentary and Presidential Elections for the office of a Member of Parliament, and that the 2nd Respondent, the Electoral Commission, in the Constituency he so contested declared Abubaker Mbaya, the 1st Respondent winner in the said election. The Petition, I note, does not mention when the Electoral Commission so made this declaration. The Petitioner's complaint, however, is that the election in question was marred with various irregularities, which he claims adversely affected him. He claims as such that the result declared is not genuine. His prayer to the Court thus is for an Order that the 1st Respondent was not duly elected Member of parliament for the Constituency in question, for a Declaration that the said elections were null and void, and for an Order that fresh elections be held for the seat of Member of Parliament in that Constituency.

There are five Affidavits that have been filed in support of this Petition. They bear the date stamp of the Court of the date 12th June, 2009, but one of them, the one sworn by the Petitioner in person, was sworn on 15th July, 2009, while the remaining five were sworn on 16th July, 2009. The Petitioner's explanation for this discrepancy is that the equivalents of these Affidavits were duly filed together with the Petition, but that in the course of the transfer of the matter between the Lilongwe and Zomba District Registries, they were among the processes that went missing. In fact, it was claimed on behalf of the Petitioner that for a while the whole file of the matter was missing, and that it was only found on 14th or 15th July, 2009 with, *inter alia*, Affidavits in Support missing. An arrangement had to be made to let the Deponents herein swear fresh Affidavits, which were then backdated to 12th June, 2009 for purposes of conforming with the date the Petition was filed, as *per* the original Affidavits they were replacing. The other four Deponents of the Affidavits herein are Haroon Bernard, Tabley Alick, Rose Peter (M'Bwana), and Mustafa Matola. I should, however, point out that notwithstanding the explanation some discrepancy still remains. If the petition was fled on 2nd June, 2009, and the Affidavits in its support replacing the Affidavits that are said to have gone missing have been backdated to 12th June, 2009, then either they have been wrongly backdated to that date, or if that is the correct date, then the original Affidavits they are replacing were filed ten days after the filing of the Petition.

Be this as it may, both through the Return of Service on record and through an Affidavit of Service to the same effect, the petition herein and all its supporting Affidavits, as well as a Notice of petition date-stamped 2nd June, 2009, were only served on the 1st Respondent on 4th August, 2009, and on the 2nd Respondent on 20th July, 2009. The Petitioner then followed this up with the filing of Skeleton Arguments on 22nd September, 2009, which Skeleton Arguments he served on the 1st Respondent on 28th September, 2008 after having served the same on the Electoral Commission on 23rd September, 2009. The petitioner next had his Petition first set down for hearing on 9th November, 2009. It was unfortunately not called that day because I failed to visit this Registry on account shortage of diesel in the cities of Blantyre and Zomba. It was thus next set down for 14th November, 2009.

I note from the record that neither of the Respondents to the Petition have this far put forward any viable reaction to the proceedings. In relation to the 1st Respondent, I see

that on 19th October, 2009, some two and a half months after being served with the petition and its supporting processes, M/S Denning Chambers filed a Notice in Court to the effect that they had been appointed to act for that party in the matter. No other step has this far been taken by the said party or his Legal Representatives. As for the Electoral Commission, it was only on 29th October, 2009, some three months and a week after being served with the Petition, Notice of petition, and Affidavits in Support, that the Honourable the Attorney General filed a Notice in Court to the effect that her Office has been appointed to represent the said Respondent in these proceedings.

Unlike the 1st Respondent, however, the 2nd Respondent has, *post* the appointment of Legal Counsel, taken some additional step in the matter. I recall on 9th November, 2009 being approached with an *ex-parte* Summons from the said 2nd Respondent for extension of time within which to file Affidavits in Response. The application was premised on Order 3 rule 5 of the Rules of Supreme Court, and on the inherent jurisdiction of the Court, as read with Practice Direction No. 2 of 2009. Bearing in mind that Direction 1 in the material Practice Direction only gives the Respondent in an Election Petition seven days after being served with such a Petition within which to file and serve an Affidavit in Response and Skeleton Arguments, I found the delay the 2nd Respondent was guilty of in this instance to be quite inordinate. I thus directed that the *ex-parte* application herein should instead come *inter partes*, so that there is participation and balanced argument from both sides on the proposed extension of time before I can decide on the same to the pleasure or chagrin of any party. As a result the Summons in issue was then set down for hearing on 23rd November, 2009. Of necessity, therefore, the Summons was going to overtake the hearing of the substantive matter, as its business was supposed to take care of further processes the parties would need to have an effective hearing of the said substantive matter. Indeed this matter was not called on the date initially reserved for the substantive hearing, i.e. 14th November, 2009. It was only next called on 23rd November, 2009, for purposes only of hearing the 2nd Respondent's Summons for Extension of Time.

As the parties were about to start addressing me having, at the time I was perusing the file in preparation for the hearings that had been set down, noted something amiss about the whole Petition in this matter, since I had just dealt with a similar Petition and disposed of it only as late as 26th October, 2009, my memory was still fresh on the date of publication of the national result of the May 19th, 2009 General Elections, which date had been vouched for in that case. The Petitioner in this case not having himself bothered to specify the date of the said publication of the national result, which would naturally include the result in the Constituency he and the 1st Respondent stood as candidates, I felt entitled to take judicial notice of that date from the said case, to wit, Civil Cause No. 40 of 2009 **Jane Namalomba Kumwanje vs Electoral Commission and Shamil Asibu** (unreported), believing as I do that as *per* Section 99 of the PPEA that date would be uniform for all concerned in the said elections throughout Malawi. The date I so took judicial notice of is 28th May, 2009, and it happens to have come to pass some five days earlier than the date the Petitioner filed his Petition herein with the Court i.e. 2nd June, 2009. Since Section 100 on which this Petition is based in part reads: "*Any complaint alleging an undue return or an undue election of a person as a member of the National*

Assemblyby reason of any irregularity or any other cause whatsoever shall be presented by way of petition directly to the High Court within forty-eight hours, including Saturday, Sunday, and a public holiday, of the declaration of the result of the election..."

I was of the *prima facie* view that the Petition herein having been filed more than the forty-eight hours prescribed for such petitions in the PPEA, I needed to be addressed by the parties on the question whether at all the proceedings resulting from it are valid, even as the 2nd Respondent was trying to get extended time for responding to the Petition. I thus informed the parties that I would find it most useful if, in the course of attending to the Summons for Extension of Time that was before me, they also addressed me on this question *vis-à-vis* the substantive proceedings, in the light of Section 100 aforesaid, and also in the light of the Practice Direction No. 2 of 2009. Incidentally, the Practice direction in question specifically deals with the subject of abridgment of time periods for taking of the various steps parties have to take in Election Petitions or other complaints under the PPEA.

I must say that there was a concerted attempt on the part of the 2nd Respondent when presenting its Summons for Extension of Time to avoid or to postpone the address I required on the question of the validity of these proceedings. I insisted that this question was preliminary to the question whether I should at all be considering giving parties extended time for steps in the matter, in case it should turn out that no extension might in fact be due, should the proceedings be invalid. At that point learned Counsel Chilemba submitted that in his reading and understanding of Section 100 herein going by the date the Court was taking judicial notice of as the official date for the declaration of the national result of the elections the petitioner took part in, his Petition of 2nd June, 2009 was filed outside the time frame allowed by the Law. Bringing the Petition to the Court five days after the date of publication of official results was clearly outside the forty-eight hours within which the petition should have been filed. It was accordingly the 2nd Respondent's view that the present proceedings invalid in their entirety, and that their said invalidity goes to the root of the proceedings. Mr Chilemba, therefore, in concluding his submissions on this point indicated that ordinarily the Petitioner's proceedings would therefore have to be dismissed. No representation was made whether on this subject or on the Summons for Extension of Time generally from the 1st Respondent's part, as neither he nor his Legal Practitioner was present at Court despite service on 10th November, 2009.

When it became his turn to address me on the validity of the Petition, through Mr Ngwira, of Counsel, the Petitioner indicated that it is M/S Nicholls and Brookes, Legal Practitioners, that filed this Petition. M/s Barnett and James came in only after the case file had missed and been found. On the Court's view that official national results of the elections held on 19th May, 2009, including those under contest in this matter, were released by the Electoral Commission on 28th May, 2009, he offered an alternative date for their release. Noting that exhibit "OPK 5" of his Client's Affidavit in Support is a copy of a page of results published in The Nation newspaper of 31st May, 2009 he pointed out that this could be the date of official release of election results, and that in the absence of proof of the date 28th May, 2009 by a gazette or by other evidence, the Court could start reckoning time from 31st May, 2009. He thus prayed that the Court should

deem the filing of this petition on 2nd June, 2009 as having been achieved within forty-eight hours of the newspaper publication of 31st May, 2009, and to be therefore within the requirements of Section 100 of the PPEA. The bottom line of this argument was that I should find the petition herein and the proceedings it was bringing up to be valid.

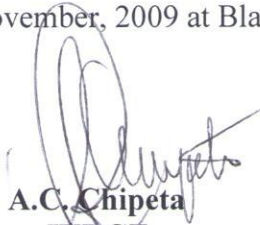
As will have been noted, I have so far contented myself with discussing the arguments the parties have presented to me on the issue I raised with them. It is deliberate that I have this far not yet gone into the arguments they advanced on the 2nd Respondent's Summons for Extension of Time that I concurrently heard with the preliminary issue. This is because I am of the mind that it will only be useful for me to recount these arguments and to make a determination on them once it is clear to me that I am dealing with a valid petition and valid proceedings. It could easily amount to an academic exercise for me to go deep in the arguments on extension of time only probably to end up with a conclusion that the Petitioner did not effectively commence any proceedings, and that accordingly attempts to extend time in void proceedings would also be void adventure.

Focusing on the preliminary question I raised with the parties in this matter, it will be seen that the Petitioner, whether wittingly or unwittingly, did not make any effort in his Petition to cite the date of the official declaration of election results by the Electoral Commission. It strikes me that having left the date details of the official declaration of results, the Petitioner purchased himself room to argue that his filing of the Petition on 2nd June, 2009 was all the same within forty-eight hours of the declaration of the national result by referring to the nearest newspaper publication he stumbled on. As is obvious, even the copy of the publication of the election results that is his exhibit "OPK 5," i.e. The Nation newspaper of 31st May, 2009, was more for purposes of showing a discrepancy in the number of votes announced in relation to the competing Candidates than for purposes of claiming or confirming that the date appearing on it is the date of the official declaration of the national result as *per* Section 99 of the PPEA. Knowing, as he ought to have done, that Section 100 of the PPEA creates a tight and strict timetable for all who want to commence Election Petition proceedings, including him, he ought to have appreciated that it was incumbent on him to demonstrate to the Court that he had not run foul of the Section 100 requirements rather than wait to be discovered as possibly not having complied with the provision under the initiative of the Court. Certainly between a date, i.e. 28th May, 2009, that was shown to be the Section 99 PPEA declaration of the national result of the elections in question, which as I have observed would not be peculiar to the case I decided on 26th October, 2009, but be applicable to the results in any other Constituency in Malawi where this election took place on 19th May, 2009, including the Constituency of the Petitioner, and a date the Petitioner has just plucked from a newspaper publication just to defend his position from my probing, I opt to stick by the date I have so taken judicial notice of, which date remains the subject of an existing judicial determination until such time as it might be overturned by a superior Court.

Going, therefore, by the date 28th May, 2009 as the date the 1st Respondent, Abubaker Mbaya, was declared winner over the Petitioner by the 2nd Respondent, the Electoral

Commission, as I did in the **Namalomba** case, I hold that the forty-eight hours the law permitted the Petitioner herein to directly lodge his Petition with the High Court, weekends and public holidays notwithstanding, expired sometime on 30th May, 2009. His presentation of the petition herein on 2nd June, 2009, therefore, was way out of the time prescribed, and did not amount to a valid commencement of Election Petition proceedings. The Petition herein having been invalidly filed on the word "Go," it is my judgment that the proceedings herein are void *ab initio*. It also follows, in my judgment, that one cannot validly seek to have the Court's authority to extend time for compliance with any step in proceedings which are null and void. The late filing of the Petition clearly rendered it invalid on the spot of filing under Section 100 herein. The late filing and service of supporting documents and of Skeleton Arguments, as well as the delayed reaction of the Respondent(s) simply compounds in breach of Practice Direction No. 2 of 2009, simply compounds the error that was beyond redemption. In the final analysis, I cannot preside over an invalid matter, whether in interlocutory proceedings for extension of time or in substantive proceedings, and try to determine what has not effectively risen for judicial determination. I thus first dismiss with costs the 2nd Defendant's Summons for being taken out in invalid proceedings. I at the same time also dismiss the substantive Petition with costs for being invalid from commencement of the action.

Made in Chambers the 14th day of November, 2009 at Blantyre.



A.C. Chipeta
JUDGE