



REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

MISC CIVIL CAUSE NO. 31 OF 2009

IN THE MATTER OF PARLIAMENTARY AND PRESIDENTIAL
ELECTIONS ACT (CAP 2:01 OF THE LAWS OF MALAWI)

-AND-

IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR NKHATABAY
CENTRAL CONSTITUENCY HELD ON 19TH MAY 2009

BETWEEN

RAPHAEL JOSEPH MHONE

PETITIONER

-AND-

ELECTORAL COMMISSION

1ST RESPONDENT

SYMON VUWA KAUNDA

2ND RESPONDENT

CORAM:

HON. JUSTICE D.T.K. MADISE

Mr. T. Chokoto Counsel for the Petitioner,
Mr. T. Nyirenda Counsel for the 1st Respondent,
Mr. V. Gondwe Counsel for the 2nd Respondent,
Mrs. P.F. Msiska Official Interpreter,
Mrs. F. Silavwe Court Reporter.

Madise, J

RULING

Introduction

The Petitioner in this matter, Mr Raphael Mhone petitioned the High Court under **section 100** of the **Presidential and Parliamentary Election Act** hereinafter referred to as the **PPEA**. He prayed to this court to declare the return and or the election of Hon. Vuwa Kaunda MP for NkhataBay Central, as a nullity. The Petitioner alleged that there was an undue return or an undue election of Hon. Vuwa Kaunda as member of the National Assembly by reason of irregularity. For purposes of clarity the word Act in this case shall mean the PPEA.

Brief Facts

The notice and the actual petition were filed on 22nd May 2009. It is worth noting right at the outset that Malawians went to the poll on 19th May 2009 to elect a new president and new members of the National Assembly. The petition was accompanied by numerous affidavits of the petitioner himself and others who alleged that there were several irregularities in the election of Hon. Vuwa Kaunda. The Petitioner wanted this court to declare that the Honourable member was not duly elected. The Respondents, the Malawi Electoral Commission and Hon Vuwa Kaunda filed affidavits in opposition stating that there were no irregularities in the election of the member of the National Assembly for NkhataBay Central.

Before a date was set for the hearing of the petition, the Respondents moved this court raising a preliminary objection that the matter should not proceed to trial. They prayed to court to dismiss the petition on point of law. The Respondents cited **O.14 A RSC** which provides that:

The court may upon the application of a party or of its own motion determine any question of law or construction of any

- document arising in any cause or matter at any stage of the proceedings where it appears to the court that –
- a) such question is suitable for determination without full trial of the action.
 - b) such determination will finally determine (subject only to any appeal) the entire cause or matter or any claim or issue therein.
 - c) upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.

The Respondents argued that their objection/application was likely to have the effect of terminating the proceedings at that stage without proceeding to a formal hearing and final determination.

The Objection/Application

The Respondents contend that the petitioner had filed the notice and petition on 22nd May 2009. That the petition was filed prematurely as the declaration of the elections was on 28th May 2009. They argued that as per section 100 of the PPEA a petition must be filed **within 48 hours** of the declaration of the results. Since the declaration was on 28th May 2009, the petition was prematurely filed and therefore did not comply with section 100 of the PPEA. They further cited two cases (the Kamwanje and Kayira cases) in which my elder brother **Chipeta, J** held that any petition filed before the declaration of the results by the Malawi Electoral Commission can not be entertained by our courts on the basis of prematurity. The Respondents prayed to court to dismiss the petition with costs.

In the alternative the Respondents argued that the Petitioner failed to observe the directions given by His Lordship the Chief Justice in dealing with election matters. They argued that the Petitioner had continued to file documents way outside the time frame granted by the Practice Direction without obtaining an order of court for extension of time as per **O.3 r.5 RSC**. The Practice Direction No 2 of 2009 provides that:

1. *within 7 days of the date of service of an application on the respondent, or on the Attorney General as necessary the respondent or Attorney General shall file with the court and serve on the applicant a response with an affidavit where applicable and with skeleton arguments.*
2. *within 3 days of being served with the affidavit in response the applicant may file with the court and serve on the respondent or on the Attorney General as necessary an affidavit in reply with skeleton arguments*

The Response

The Petitioner on the other hand stated that the Respondents were misdirecting the court in that the period of 48 hours was the maximum allowed time and that the announcement of the results by the returning officer of the Commission duly authorized in that behalf under **section 95 (4)** of the **PPEA** was tantamount to declaration and that section 95 (4) and section 100 of the PPEA should be read in consonance and not in isolation of each other. They argued that the 48 hour period started running as soon as the returning officer under section 95 (4) made the announcement. They argued that the law did not intend to create one period of 48 hours for all constituencies in the country. They prayed to court to overrule the

objection, disregard the application and proceed to set a date for the hearing of the substantive issues in the petition.

On His Lordship the Chief's Practice Direction the petitioner was of the view that the Respondents had suffered no damages and by continuing to file documents into court, they were condoning and correcting any irregularity that might have occurred. They prayed to court not to allow matters of procedure override the attainment of substantive justice.

Skeleton Arguments.

It should be mentioned that Mers, T. Chokoto for the Petitioner, T. Nyirenda for the 1st Respondent and V. Gondwe for the 2nd Respondent did a commendable job in preparation for this case. The amount of time that they had invested in producing the affidavits and skeleton arguments cannot go unnoticed. The many case authorities and statutes that have been cited in this case have gone a long way in assisting this court arise at a proper and just decision. I'm very grateful to the three gentlemen for the quality work that has been displayed. Suffice to say that the oral presentations for and against were those I have not seen in recent times. The three gentlemen fought as if it was their last.

The Issues

There are basically two issues for determination before this court.

1. Whether the Petitioner filed his petition following the proper procedure, if not
2. Whether this irregularity is so fatal as to terminate these proceedings.

The Facts and the Law

Was the petition properly filed?

The starting point in dealing with this matter is to holistically look at part VIII of the PPEA which deals with determination of results of the elections.

Section 100 (1) PPEA provides:

Any complaint alleging the undue return or election of a person as a member of the National Assembly or to the Office of President by reason of irregularity or any other cause whatsoever shall be presented by way of petition directly to the High Court within 48 hours including Saturday, Sunday and a public holiday, of the declaration of the result of the election in the name of the person

- (a) claiming to have had a right to be elected at that election
or
- (b) alleging himself to have been a candidate at such election.

The provision is clear. The petition must be filed within 48 hours of the declaration of the results. There are two words within and declaration which must be construed within the spirit of the PPEA.

What is Declaration in Section 100 of the PPEA?

In answering this question, I must first look at the preceding provisions which form part of the determination of results under part VIII of the PPEA. Once voting has taken place the presiding officers under **section 93 (1)** shall cause to be prepared by the polling station officer

- (a) a record of the entire polling process at his polling station

containing -

- i. the full particulars of the polling station officers and representatives of political parties;
- ii. the total number of voters;
- iii. the total number of votes for or under each classification of votes;
- iv. the number of unused ballot papers;
- v. the number of ballot papers which have been the subject of complaints, if any;
- vi. the discrepancies, if any, between votes counted and the number of voters;
- vii. the number of complaints and responses thereto and decisions taken thereon by the polling station officers;
- viii. any other occurrence which the polling station officers consider to be important to record;

Thereafter the presiding officer shall post at the polling station a copy of the duly signed summary of the final results of the poll at that polling station as required by **section 93(3)** of the **PPEA**. Is this declaration of the results? In the absence of the other results from other polling station the answer is in the negative.

After that the presiding officer of a polling station under **section 94** of the Act shall with all dispatch, deliver to the office of the District Commissioner of his district under conditions of absolute security against loss, tampering or interference-

- a) the record prepared under section 93

- b) all the ballot papers collected in separate lots corresponding to the classification under which they were counted;
- c) all unused ballot papers, and
- d) all voters registers and other work items provided to that polling station.

On receipt of such records from the polling stations, the returning officers or an officer of the commission duly authorized in their behalf shall, at the office of the District Commissioner compile the results of the elections in his district as provided for under **section 95 (1)**. After all the other procedures under **section 95 (1) (a) (b) (c) (d) and (e)** have been complied with, the Commission duly authorized in that behalf under **section 95 (4)** shall publicly announce the results of the election in each constituency and in the entire district in accordance with the record prepared under sub section (1). Is this declaration of the results? I reserve my ruling.

After the public announcement of the results at District level, the returning officer shall under **section 95 (5)** with all dispatch, deliver to the Chief Election Officer the record prepared under sub section (1) and all items received from all polling stations in the district concerned. Before the results are out, the Malawi Electoral Commission shall determine and publish the national results of the general elections based on records delivered to it from the district and polling station and the determination of the national results of a general election shall begin immediately after the Commission has received records from all district and shall so continue uninterrupted until concluded (see **section 96 [1] and [2]**).

My own take is that the purpose of the determination process under **section 97** of the Act is to cater for complaints received by the Commission and in so doing the Commission shall examine the votes which have been classified as null and void and may affirm or correct the determination thereof at the polling station and at the District Commissioner but without prejudice to the right of appeal conferred under section 114.

It is clear that before the final results are out there should be scrutinising and purifying process and the Act has called it the determination process. The first stage is determination at the polling station and then at the District Commissioner's office. Both of which can be affirmed or corrected by the Commission under section 97. The final authority to determine election results lies with the Commission and it can overrule or affirm any such determination at station or district level. This therefore means that the public announcement by a returning officer under section 95 (4) cannot be and is not final and no petition can be filed based on results which are subject to further scrutiny by operation of law. In simply terms no petition can and must be filed where there is no cause of action.

The framers of this law were people of high integrity. The Parliament which passed this law was composed of honourable members. Can it be said that the Legislature intended that the statement publicly announce should be construed to mean and or include declaration? If this was the case, the Honorable members of the August House could have specifically said so. Why did the Legislature use the word announce in section 95 (4) and used the word declaration in section 100 of the PPEA? It is clear they expressly wanted these words to have different meanings.

In my considered opinion, the Commission will determine all the results and summarize the determination of the national results of a general election in a written record as per **section 98 (1)**. Thereafter the Chairperson of the Commission shall legibly seal the national results by signing the summary and lastly in pursuance to **section 99**, the Commission shall publish in the Gazette and by radio broadcast and in at least one issue of a newspaper in general circulation in Malawi, the national results of an election within 8 days from the last polling day and not later than 48 hours from the conclusion of the determination thereof.

I'm convinced that the declaration of the results is that described in section 99 of the PPEA as it is the final exercise before parties or individual can start complaining. I therefore agree with the Respondents that declaration of the results can not be done by a returning officer at district level.

Date of Declaration of Results May 2009 General Elections.

My elder brother **Chipeta, J** in the **Kayira case** took judicial notice of the fact that the declaration of the May 19, 2009 General Election in this country was done by the Malawi Electoral Commission on 28th May, 2009. Like my brother before me, I also take judicial notice of the same. In those premises, declaration of elections was done on 28th May, 2009.

Meaning of "Within 48 hours" in section 100, PPEA.

Section 100 of the PPEA provides that a complaint alleging an undue return or election of a person or member of the National Assembly or to the Office of the President by reason of irregularity or any other cause whatsoever shall be presented by way of petition directly to the High court within 48 hours of the declaration of the results of the election.

"The Petitioner argued that the 48 hours mentioned in section 100 creates the maximum period one should file the petition and not otherwise the word declaration notwithstanding. That no person should be condemned for coming to seek the aid of the court earlier. The Respondents argued otherwise. To them the term 'within' creates a given period which must start after declaration and end at 48 hours.

In section 99 the Legislature specifically mention that publication of the results shall be done within 8 days from the last polling day and not later than 48 hours from the conclusion of the determination. The language used is two fold, within and not later than. Can it be said that in section 100 the Legislature intended that the word within should have the same effect as not later than in section 99. I do not think so. In section 100 there is a given time frame which must start after declaration of results. If the legislature had wanted a different meaning they could have specifically and expressly stated so and to imply otherwise would frustrate the intendment and spirit of this Act.

My own understanding of the term within 48 hours is that at the moment of declaration, that is to mean after all the results have been published, the clock starts ticking from a second, to a minute to an hour until the 48 hours lapses. During this period persons aggrieved may petition the High Court and on the hearing of such a petition, the High Court may make an order declaring that a member of the National Assembly or the president as the case may be was duly or not duly elected and such election shall be valid or invalid and notice of that fact in the latter case shall be given to the Commission which shall publish a notice in the Gazette stating in the case of invalidation, the effect of the order of the High Court [see section 100 (3)(a)(b)].

'In my' considered opinion the Legislature wanted to create an atmosphere of order in presenting the petitions to the High Court. To allow every aggrieved person to file at any time of their choosing would create chaos in our courts. I therefore agree with **Chipeta, J** as he stated in Manifesto Kayira and Godfrey Munkhondya vs. Electoral Commission Civil Cause No. 47 of 2009 that:

The official declaration of election results was 28th May 2009 and that it would not be a matter where each Parliamentary candidate would have his/her personal and peculiar date for the official declaration of results in his /her constituency, my prima facie impression in this case was immediately that that any petition presented before declaration is by operation of law premature, and can not be entertained by courts in this country.

This is what the Legislature had wanted and courts in this country cannot interpret otherwise as to do so would ultimately usurp Legislative powers. On a different note, I would agree with the petitioner that the 48 hours is not enough for aggrieved persons living in the remotest corners of Malawi. The best forum to make any changes to the law would be in the National Assembly. To use the courts to amend a specific provision by altering its meaning would be operation outside the jurisdiction and mandate of the Judicature.

The Practice Direction No 2 of 2009

To avoid unnecessary inconveniences the law has clearly spelled out that the High Court shall receive these petitions regardless of whether it is a Saturday, a Sunday or a public holiday. To further aid the law the Chief Justice issued a Practice Direction No. 2 of 2009 abridging time periods for

all matters falling within the PPEA. If any party fails to meet the requirement set out in the Practice Direction, the only legitimate thing to do is to apply ex parte for an order of extension of time from a judge in chambers. The period allowed by Practice Direction No 2 of 2009 is as follows:

1. within 7 days of the date of service of an application on the respondent, or on the Attorney General as necessary the respondent or Attorney General shall file with the court and serve on the applicant a response with an affidavit where applicable and with skeleton arguments.
2. within 3 days of being served with the affidavit in response the applicant may file with the court and serve on the respondent or on the Attorney General as necessary an affidavit in reply with skeleton arguments

in this matter, the Respondents argued that the Petitioner had failed to meet the requirements not only of section 100 of the PPEA but also of the Practice Direction issued by His Lordship the Chief and that they did not apply for an order of extension of time from a Judge in chambers. To be frank, I need not answer this question now unless and until I answer the earlier question whether the Petitioner should be allowed to proceed to trial regard being had to the issues raised by the Respondents. If the answer is that the Petitioner should be allowed to proceed to trial section 100 notwithstanding, the next question would be to investigate whether the Petitioner had also violated Practice Direction No 2 of 2009 and whether the violation was fatal. To answer this question now will be crossing a bridge when we have not reached a river.

Is the Irregularity Fatal?

O. 2 r. 1 RSC provides as follows: Where in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceedings, there has by reason of any thing done or left undone being a failure to comply with the requirements of **THESE** rules, whether in respect of time, place, manner, form or content or any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document judgment or order therein.

Should these proceedings be allowed on the basis of **O. 2 r. 1 RSC**? Can section 100 of the PPEA be overruled by Rules of the Supreme Court? **Section 29 Court Act** clearly state that the practice and procedure of the High Court shall, so far as local circumstances admit, be the practice and procedure provided in the Rules of the Supreme Court –
Provided that-

- a) Rules of the Supreme Court may at any time be varied, supplemented, revoked or replaced by rules of court made under this Act.
- b) If any provision of the rules of the Supreme Court is inconsistent with any provision of any rules of court, the later shall prevail and the Rules of the Supreme Court shall to that extent of such inconsistency be void.

The PPEA is an Act of Parliament. Section 100 of the same has expressly provided a procedure that election petitions should be filed in the High Court. A specific time frame has been expressly mentioned to wit "within 48 hours". In my considered view this rule of court must supersede any rule of the Supreme Court which purports to give jurisdiction to a different court or

give a different time frame or allow irregularities to be cured as a matter of course. Therefore to invoke O. 2 r. 1 RSC so that irregularities in filing process should not nullify these proceedings is to do injustice to principles of construction. For all intents and purposes the procedure in respect of time mentioned in section 100 PPEA can not be replaced by Rules of the Supreme Court.

O. 14 A RSC provides that the court at any stage of the proceedings may order that proceedings should terminate where there has been an irregularity in the filing of process. The Petitioner moved court that the Respondents have suffered no damages during the premature filing of the petition and that by filing an affidavit in response the Respondents had waived their right to invoke O. 14A RSC. Again what was the intention of the framers of this law? Why was the word within put there? Should this court allow the Petitioner to proceed to trial without due regard to the specific limitation imposed by section 100 (1) PPEA?

Conclusion

Is it true that by filing an affidavit in response the Respondents had waived their right to invoke O. 14A RSC? For O. 14A RSC to apply the defendant or respondent must have filed a notice of intention to defend (O. 14A /2/3). The defendant or respondent must have taken some steps as the law will not allow him to invoke O. 14A RSC without filing any document. It can not therefore be said that by filing an affidavit in response and skeleton arguments the Respondents had waived their right to invoke O. 14A RSC or that they had regularized the errors in the filing of process.

I do not think the Petitioner should be allowed to rape the procedures in section 100 PPEA. He has not shown reasons why the petition was filed

prematurely with the view to creating an implied exception on a case to case basis why the law should not apply to him strictly. Like others before him, namely, Kumwanje and Kayira this petition must be dismissed for failure to meet the requirements of the law. In Jane Kumwanje vs. Electoral Commission -and- Shanil Asibu, Civil Cause No. 40 of 2009, Chipeta, J stated as follows:

The matter in issue, to be quite candid was irregularly commenced with the filing of an electoral petition in court on 22nd May 2009 well before any official results of the Parliamentary Election had been announced in the general election that took place on 19th May 2009 in Malawi which was contrary to the dictates of section 100 of the PPEA.

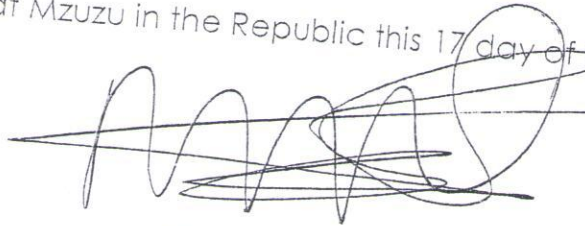
A matter of procedure which forms part of substantive law is good and courts should be slow to question its validity unless it violates specific provisions of our constitution. For this court to proceed to hear the substantive petition would be legitimizing serious errors of procedure. At the time of filing this petition, there was no cause of action known to the law. The fact that the cause of action finally came to reality on 28th May 2009 can and should not cure the process which was taken prematurely.

Much as I agree that the period is rather short and that the law appears to be too strict, we who practice the law have a duty to it to ensure that there equality before the law and that the rule of law must prevail at the end of the day and at all costs. This court will not be part of a plot to rape the period of time set by the law to govern law and procedure. I therefore terminate these proceedings without proceeding to trial. The objection on point of law raised by the Respondents is sustained.

Costs

As it is evidenced that each party contributed to the chaos of this irregularity by proceeding to file affidavits and skeleton arguments despite the irregular filing of process, each party will bear its own costs.

Made in Chambers at Mzuzu in the Republic this 17 day of May 2010.

A handwritten signature in dark ink, consisting of several loops and a long horizontal stroke, positioned above the judge's name.

D.T.K. Madise
JUDGE