



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1008 OF 2004

BETWEEN:

STANLEY BILLIATI PLAINTIFF

- and -

MALAWI ELECTORAL COMMISSION DEFENDANT

CORAM: POTANI, J.

Masiku, Counsel for the Plaintiff

Chokotho, Counsel for the Defendant

Ngwale, Recording Officer

RULING

The plaintiff, Stanley Billiati, is an aspiring parliamentary candidate and the defendant, the Malawi Electoral Commission, is a public body charged with the responsibility of managing the electoral process. On April 2, 2004, the plaintiff obtained an interlocutory injunction restraining the defendant from disqualifying him as a parliamentary candidate for Ntcheu South constituency. The injunction order was obtained through an *ex parte* summons. The matter is now before court for the determination of the plaintiff's *inter partes* summons for the continuation of the injunction. Each of the parties has filed two affidavits for purposes of the application.

Briefly, the facts as they are relevant to the present application are as follows: On February 11, 2004, the plaintiff, then working in the civil service as a counsellor at the Malawi High Commission in Tanzania came to Malawi with a view to contest as a parliamentary candidate. Subsequently, on February 24, 2004, he submitted his nomination papers as an independent candidate before the District Commissioner for Ntcheu who also is designated as the Returning Officer for the Malawi Electoral Commission for Ntcheu District. The Returning Officer, however, refused to accept the nomination papers on the ground that he

had knowledge that the plaintiff had not yet resigned from the civil service. The plaintiff was advised that his nomination papers would only be accepted if he produced a letter of his resignation. The plaintiff dutifully wrote a letter of his resignation and faxed it there and then to the relevant Ministry being the Ministry of Foreign Affairs. He then left for Tanzania in order to collect his personal effects. To the surprise of the plaintiff, he later noticed that the list of names of parliamentary candidates published in the local media by the defendant never included his name. He queried the defendants whereupon he was advised that he was disqualified because he submitted his nomination forms before first resigning from the civil service by December 31, 2003, contrary to Government Circular Reference 11/05/4 of December 2, 2003. Being dissatisfied with the defendant's decision, the plaintiff commenced this action by originating summons seeking a number of declarations and orders.

Counsel for both parties made very lengthy submissions. In some instances, counsel delved into matters which raised fears in the mind of the court that it might be dragged into deciding the merits of the case on the affidavits which should never be the case on an application for an injunction. See ***American Cyanamid Company v. Ethicon Limited***, 1975 AC 396. It is not the duty of the court at this stage to determine whether or not the defendant's decision disqualifying the plaintiff is right or wrong. The issue the court has to consider is whether the plaintiff has established that he has a good arguable claim to the right he seeks to protect and in considering this question, no attempt should be made to decide the claim on the affidavits filed herein as a good claim is said to have been established if the plaintiff shows that there is a serious issue to be decided or tried. Once that has been demonstrated, it becomes a matter for the exercise of the courts discretion on a balance of convenience to grant or refuse the injunction. In arriving at what would be a balance of convenience, the court has to consider whether or not damages will be sufficient remedy for the wrong the plaintiff seeks to prevent from being perpetrated. Obviously, damages will not be a sufficient remedy if the defendant will not be able to pay them or where the claim is outside the scope of monetary compensation or where damages will be difficult to assess and also where the wrong is irreparable. The court also considers whether more harm will be done by granting or refusing the injunction.

Reverting to the present application, the plaintiff's claim is essentially that if his disqualification to contest as a member of parliament by the defendant is allowed to stand, he would be denied his constitutional right to take part in the political activities as enshrined in section 40 of the Constitution. There can be no doubt at all from the reading of section 40 of the Constitution that every person, including the

plaintiff has a right to engage in political activity and more specifically section 40(3) gives a person the right to stand for election for public office. Thus, to extent of the provisions of section 40 of the Constitution, the plaintiff has established that he had a good arguable claim to the right he seeks to protect. It should, nonetheless, be observed that in terms of section 193 of the same Constitution, those serving in the civil service are barred from taking part in active politics unless they resign from the service. The defendant in this case asserts that it decided to disqualify the plaintiff because he filed his nomination papers before resigning from the civil service. It is, however, significant to note the defendant's Returning Officer for Ntcheu in his own affidavit admits that he all the same accepted the plaintiff's nomination forms although he knew that the plaintiff was still serving in the civil service. It is the plaintiff's averment that it was only after he wrote and faxed a letter of resignation as directed by the Returning Officer that the Returning Officer accepted his nomination forms. The plaintiff's argument is therefore that he submitted his nomination papers after resigning. It is clear from the parties' versions regarding the circumstances in which the plaintiff's nomination papers were accepted that there is a serious issue or question to be tried especially since section 193 does stipulate at what point in time civil servants should resign before they participate in active politics. It is this court's view that the Government Circular on which the defendant based its decision does not have the legal force that would justify the taking away of a person's constitutional right. Indeed the circular itself states that those who breach it would be subject, to disciplinary action. It does not say they would not be allowed to contest in parliamentary elections.

Having found that there is a serious question to be tried, it then has to be considered whether the balance of convenience tips for or against ordering the continuation of the injunction herein. The quick and obvious observation to be made is that the issue herein is about participation in an election and it does not require one to overstretch one's imagination in order to appreciate that the loss one would suffer for wrongly being denied to participate in an election is not just irreparable but also outside monetary compensation. This, therefore, is a proper case to order the continuation of the injunction the plaintiff obtained *ex parte* and so it is ordered on the usual undertaking by the plaintiff to compensate the defendant in damages should it later transpire that this order was wrongly or irregularly obtained.

There is a point that came up in the course of the arguments relating the procedure followed by the plaintiff in commencing the action. Counsel for the defendant was of the view that the proper procedure of commencing the action would have been that provided for in section 40 of the Presidential and Parliamentary Elections Act. It should be noted

that the procedure in section 40 relates to instances in which the Returning Officer has notified a prospective candidate of his opinion regarding the non suitability of that candidate's nomination. In this case the Returning Officer although he doubted the plaintiff's suitability went ahead to receive and accept his nomination. This was after he advised the plaintiff to write a resignation letter. Thus, the conduct of the Returning Officer made the plaintiff to believe that all was well thereby he never thought of asking the Returning Officer to draw up and sign a statement of the facts and his opinion on the plaintiff's non suitability for transmission to the Registrar of the High Court as provided for in section 40 of the Presidential and Parliamentary Elections Act. The plaintiff, therefore, cannot be faulted for commencing the proceedings in the fashion he did.

Costs of this application are to be in the cause.

MADE in Chambers this day of May 12, 2004, at Blantyre.



H. S. B. Potani

JUDGE