



**JUDICIARY
IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
ELECTION CASE No. 1 OF 2019**

BETWEEN:

DAVID CHIKOMENI CHIRWA.....APPLICANT

-AND-

MALAWI ELECTORAL COMMISSION.....RESPONDENT

CORAM: THE HONOURABLE JUSTICE JACK N'RIVA

Counsel for the Applicant, Mr. Msuku, Mr Taulo and Mr. Chijozi
Counsel for the Respondent, the Attorney General & Mr. Banda.
Mrs. D Mtegha, Court Clerk and Official Interpreter

RULING

David Chikomeni Chirwa, the applicant, intended to contest as a presidential candidate in the forth-coming presidential and parliamentary elections. He failed to meet some two requirements set by the respondent, the Malawi Electoral Commission, the respondents. The requirements were the payment by a candidate of a 2 Million Kwacha fee and collection by a candidate of ten signatures from each district. As a result, the respondent dismissed the applicant's candidature for the presidency.

He commenced this case against the respondent seeking declaratory orders against the decision. He also sought further orders compelling the Commission to revise the nomination fees and to extend the period within which to receive nomination papers.

The applicant sought the grant of the orders, without notice to the respondent. However, being an election case, the rules require that such an application has to be made "*inter partes*". See Order 19 rule 19 of the Courts (High Court) (Civil Procedure Rules).

Both parties are in agreement, and so do I, that the applicant's case raises constitutional questions making it necessary that the case should be decided by a panel of Judges.

The parties, however, agreed that, sitting alone, I should consider the question of interlocutory reliefs that the claimant sought. These are an order compelling the respondent to revise the K2 million presidential nomination fee and another order compelling the respondent to extend the period for the applicant to obtain nominations from the districts. In essence, the claimant seeks the order compelling the respondent to extend the period within which it should receive presidential nominations.

The Attorney General raises two issues in opposing the application. First, he argues that the defendant delayed in making the application. Secondly, he argued that the applicant was claiming a mandatory injunction and he failed to meet conditions required for a mandatory injunction.

Otherwise, applicant's counsel presented several arguments most of which, I believe, are for the hearing of the substantive constitutional questions that the applicant has raised. Otherwise, the relevant questions are whether there is a serious question for trial in this case, whether damages or monetary compensation would adequately recompense the applicant's claims and whether the balance of convenience favours the granting of the relief the applicant is making. See Order 10 Rule 8 of the Courts (High Court) (Civil Procedure Rules).

To begin with, it is not in dispute that the claimant is raising a constitutional question. He is raising a question whether the electoral requirements do not discriminate against some individuals. For that reason, the question is of constitutional importance and the question of monetary compensation may not necessarily arise. Money cannot redress the claims the applicant is raising. As Mr. Tauro, one of applicant's counsel stated, the applicant intends to pursue a public interest litigation case concerning rights of poor masses to contest in presidential elections. In short, the claimant's claim cannot be remedied by monetary compensation.

The other issue is that of convenience. The respondent tackled the issue from the angle of elections calendar. The respondents stated that the order the applicant is seeking might inconvenience the electoral calendar. Ms Chijozi attacked the arguments as being inconsistent. She argued that in the sworn statement, the representative of the respondent argued that they had embarked on procurement of the ballot box. However, she said, in the skeleton arguments, the respondent argued that there would be need for finalisation of particular candidates for the procurement process of the ballot paper.

Mr. Msuku argued that the commission only released presidential candidates on Friday before the hearing of this application the following Monday. He therefore argued that procurement process could not be prejudiced.

I will deal with the issue of prejudice later. This is because the parties also discussed the issue under the head of delays.

On the issue of delay in bringing the application, Ms Chijozi said the rule of laches cannot apply to the applicant. She said that for the rule to apply, the applicant must be idle and that the delay must inconvenience the respondent to the applicant. She said the applicant was diligent in exercising his rights against the respondent. She said the applicant did all he could to assert his rights to participate in the presidential election. She said the applicant engaged the respondent but the respondent did not respond to him on time. Counsel argued that the applicant could not just rush to the court because the laws require complainants to engage the Commission first.

In response, the Attorney General argued that delay in questions of injunctions apply in cases of bringing cases to court, and no to bringing complaints to other bodies. He argued that the applicant sat on his rights and he did not exhibit why he delayed in approaching the Court.

On the facts before me, it is quite apparent that the applicant delayed to approach this Court. The applicant did not approach the Court with immediacy required in cases of this nature. First, the requirement to have signatures for presidential aspirants has been around for some time. Secondly, the respondent promulgated the requirement for payment of K2 million in July, 2018. Surely, the claimant had to lodge his application, before the Court, at an earlier time. Alternatively, he would have raised the issue immediately the Commission dismissed his complaint. I believe that this issue was administrative. It was not quasi-judicial. Not all that

the respondent does is quasi-judicial. I believe that the applicant should have approached the Court against Malawi Electoral Commission as an administrative decision maker (by the way of review) and not as a case handling institution.

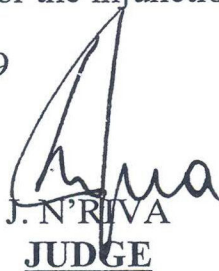
On this aspect I find that the applicant sat on his rights. He was not vigilant in asserting his right. Therefore, the applicant failed the test of diligence. He is guilty of delays.

On the issue of convenience, it suffices to say that it appears to me that extending nomination period has a potential of inconvenience the electoral calendar, the other electoral players and the nation at large. The applicant argued the respondent was in contradiction when they said they had embarked on the procurement of ballot yet elsewhere they said they had not finalised the list of candidates for the presidency.

Whichever way, it is more of the case that extending the period would be detrimental to the electoral calendar.

In summary, on the ground that the applicant delayed in making the application, and that the order he is asking the Court to make would inconvenience the electoral calendar, I dismiss the application for the injunction.

Made today the 25th February, 2019


J. N'RIVA
JUDGE