IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE
CIVIL APPEAL NO. 27 OF 2010

(Being Lilongwe High Court Registry Misc. Civil Cause No. 565 of 2009)

BETWEEN:

SPEAKER OF THE NATIONAL ASSEMBLY EX-PARTE ..... APPLICANT

HON. JOHN Z. U. TEMBO ..... RESPONDENT

CORAM: HON. JUSTICE A. K. C. NYIRENDA, SC, JA

Dr. Nkhowani, Counsel for the Applicant
Kasambala and Kita, Counsel for the Respondent
Mr Mwale, Official interpreter
Ethel Matunga Chisale (Ndunya) Senior Personal Secretary

RULING

NYIRENDA, SC, JA

This is an application for stay of execution of the Order of Hon. Justice Mzikamanda made on the 7th May 2010 at Lilongwe where the court made declaratory orders and further orders for the applicant to comply with. Before I go any further with the application Counsel for the respondent has

raised preliminary points of objection to the application for consideration. Several such points have been raised but the main points are that the summons is not sealed and that the jurat to the applicant's affidavit in support of the application is on a separate and its own page to the rest of the affidavit. It has also been submitted that the respondent has not been given sufficient time in accordance with the Practice Direction of the Court. It is yet submitted that the applicant does not come to court with clean hands because to date he has not complied with the Order of the court. In all and for these reasons, it is prayed that the application be dismised or unless orders be made for compliance before the application can be heard.

I acknowledge these observations by Counsel and the response made by Counsel for the applicant. I would have wished to deal with each one of these matters at some length for what they are worth; but I will only deal with those points that seem to be of some substance. For those that I will not discuss my conviction is that the irregularities do not go deep into the substance of the application and can be cured without undue hardship to the respondent.

The Practice Direction *(Arguments in the Supreme Court of Appeal)* provides that when presenting skeleton arguments in the Supreme Court, Counsel shall, with regard to interim Orders and related matters, exchange skeleton arguments as between parties within 14 days from the date of filing the appeal. While the parties indeed have latitude of 14 days and might wish to insist on the 14 days, the Direction does not stop the parties from exchanging skeleton arguments sooner and have their matter dealt with soonest. This is the impression the Court had about this matter and therefore allowed for a hearing soonest. The Court observed that both parties were moving in fairly swiftly. In anycase what the Court would have thought is that both the applicant and the respondent should have been insisting on a speedy determination of the matter than insist on the exhanstion of the 14 days.

The only other matter I should consider is that the applicant does not come to Court with clean hands. I can well see the delema this matter has posed. Since the Order of the Court below the applicant has been seeking stay of execution. So determined are the applications that the present application was filed on the same day that the lower Court refused to grant the applicant stay of execution of Court Order. I have had occasion to look at the ruling of Justice Mzikamanda on the application for stay before him. It sets out the chronology of events. The Honourable Judge delivered his Order on Friday the 7th May 2010. The ruling shows that the application for stay before the learned Judge was filed ex-parte on Wednesday following, the 12 May 2010, together with an application for leave to appeal. The Honourable Judge granted leave to appeal but ordered that the application for stay be made inter-partes. That process led to the hearing of the application on 21st May 2010 and eventually the ruling of the 28th May 2010. Meanwhile on the 10th of May 2010 the Malawi Congress Party presented the applicant with the results of an election that was conducted for Leader of the Opposition pursuant to the direction of the Order. It is acknowledged that the applicant was expected to immediately attend to that matter in line with the Court Order. He did not but instead proceeded to court two days later and applied for stay of execution. Although this event speaks for lack of heed and care on part of the applicant, I do not get the impression that the applicant was all out to a contumacious disregard of the Order of the Court as Mr Kasambara puts it. The applicant has tried to move in very quickly at every stage to seek stay of execution of the Order. Obviously while the applicant is chasing stay of execution of the Order he cannot be expected at the same time to comply with the same Order.

I am not persuaded by any of the preliminary objections to be compelled to dismiss the application on that basis alone, neither do I find it prudent on what is before me already to give any unless order. I will therefore proceed to the substance of the application.

In giving a background to this matter I should do no more that extract the relevant part in that regard from the Order of Justice Mzikamanda. He summarises the matter in this way:

> *The factual background in so far as the Applicant is concerned is that following the May 2009 General Elections in this country the Applicant was elected Member of Parliament for Dedza South Constituency. He is also President of the Malawi Congress Party. The said Malawi Congress Party was the largest opposition party in Parliament with 26 members. Being the largest opposition party in Parliament, and under the National Assembly Standing Orders, it was supposed to elect among its members someone to be Leader of Opposition. That is the way things have been during 1994, 1999 and 2004 during the first sitting of new Members of Parliament.*
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> *On 21st June, 2009 as had been the case in the past, the Malawi Congress Party presented the Applicant to the Respondent as their endorsed Leader of Opposition. Around the same time the following members of the Malawi Congress Party informed the respondent that they were disassociating themselves endorsing the Applicant as the Leader of Opposition, namely Honourables Chafukira, Kayembe, Malipa and Thyolera. They however did not proceed to propose any name they wished should be considered as Leader of the Opposition. Again on 29th June, 2009 all members of Malawi Congress Party, minus the persons mentioned, endorsed the Applicant as the Leader of Opposition and presented his name to the Respondent to recognize him as such.*
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> *However instead of doing so, the Respondent tabled this internal dispute within the Malawi Congress*

Party before the whole House and allowed Members of Parliament on the Government side to discuss it. The result was that a motion was moved to amend the Standing Order providing for the Leader of Opposition. It was however referred to the Legal Affairs Committee, which was not yet in place at the time.

The definition of Leader of Opposition which was current was found in Clause 3 (3) of the National Assembly Standing Order which provided thus:

Leader of Opposition means the parliamentary leader of the largest party, elected by the parliamentary membership, which is not in Government or in coalition with a Government party, and which is recognized by the Speaker as such.

These attempts by the disgruntled group were intended that the above definition be amended to read:

Leader of Opposition means the parliamentary leadership of the largest party which is not in government or in coalition with the Government party who is also elected by all members of parliament present and voting.

On these facts as stated by the Applicant, it is the Applicant's contention that in a democratic set up it is the majority who rule. The majority of the members of Malawi Congress Party having endorsed the Applicant the Respondent was bound to recognize him. A Standing Order amended after the majority endorsement would have retrospective effect and retrospective application of a law is unlawful. The Applicant contended that the Respondent had acted unfairly, illegally, unreasonably and

unconstitutionally in not recognizing the Applicant as a Leader of Opposition.

The Standing Order on election of the Leader of Opposition has since been amended and reads as follows:

Every member present in the National Assembly shall indicate on a ballot paper to be supplied by the clerks, the name of the proposed person who he or she desires to be the Leader of the Opposition.

Upon consideration of all these matters the learned Judge made the following Orders:

I declare that under Standing Order 3 (3) the Respondent was duty bound to recognize as Leader of Opposition a person whose name is submitted to him from the largest opposition party in Parliament and that that responsibility is for the Speaker alone. He only needs to satisfy himself that the said person was elected by the parliamentary membership of that largest opposition party. I also declare that the Respondent failed in his responsibility under Standing Order 3 (3) and acted unlawfully, ultra vires, unreasonably, abdicated his responsibility and acted in violation of the democratic principle that majority rules as well as in violation of the human rights of the Applicant and therefore unconstitutionally when he referred the demand for recognition to the National Assembly for debate and resolution. I have already observed that the responsibility to recognize the Applicant as Leader of Opposition is with the Speaker and the Speaker alone. It would be usurpation of powers of the Speaker if the Court was to grant such recognition.

However, what this court can do it to direct recognition where Standing Order 3 (3) has been fully complied with by the Applicant. The Respondent is duty-bound to recognize a person duly elected by the largest opposition party in Parliament. To be fair to the Respondent the word used in the demand letter of the Applicant was ***"endorsed"*** *instead of* ***"elected"*** *and this may have created doubt on his mind whether there had been an election at all. To clear any doubt that there had been an election or not by the Malawi Congress Party as to who the Leader of Opposition should be, I direct that the matter goes back to the Malawi Congress Party who should conduct an election within the meaning of Standing Order 3 (3) of the National Assembly. That election must be done within 14 days hereof and the name of the elected person be submitted to the Speaker, the Respondent, who shall recognize the elected person to be Leader of Opposition within the meaning of Standing Order 3 (3) of the National Assembly.*

The present application is supported by the affidavit of Dr Zolomphi Nkhowani who informs the Court that this is a second attempt to have stay of execution, the first attempt before the court that made the Order having been declined. The paragraphs of the affidavit upon which the application is premised contend as follows:

12 That the appellant being dissatisfied with the judgment of the lower court has appealed to the Malawi Supreme Court and among other grounds of appeal challenges the nullification of both the amendment to the Standing Orders 3.3 and the subsequent election of Hon. Kayembe as Leader of Opposition.

13 That the Appellant also challenges the jurisdiction of the Court to enquire into the legislative

process and the fitness of the matter for judicial review.

14 That the consequence of the appeal is that if the appellant succeeds, the annulled Standing Order 35 (A) (6) of the National Assembly will be restored as the operative standing order for the election of Leader of the Opposition in the House. Also Hon. Kayembe will be restored to the position of Leader of the Opposition.

15 That the judgment of the lower court appealed against compels the appellant to recognize the respondent as Leader of the Opposition in terms of the repealed Standing Order 3.3 of the National Assembly.

16 That if the said judgment is complied with, it will render the outcome of the appeal pointless or nugatory if the appellant succeeds. Thus it will rob the appellant of the fruits of a successful appeal.

17 That the interests of justice and balance of convenience requires that the execution of the said judgment be stayed pending the hearing and determination of the appeal by the Malawi Supreme Court.

Dr Nkhowani depones, by a supplementary affidavit, to the following facts:

4 That on 7th May 2010, the Honourable learned Justice R.R. Mzikamanda delivered a ruling in Miscellaneous Civil Cause Number 565 of 2009 in which among other things the court quashed the amendment to Standing Order 3.3 of the National Assembly and nullified the election of Honourable Kayembe as Leader of Opposition.

5 That in the said Judgment the court ordered the Parliamentary membership of the Malawi Congress Party to hold an election within 14 days from 7th May, to elect among them a person to be presented to the Speaker to be recognized as Leader of the Opposition in terms of the repealed Standing Order 3.3 of the National Assembly.

6 That on 10th May 2010, the respondents conducted an election that not only included the Parliamentary membership of the Malawi Congress Party, but also independent members of Parliament in contradiction of the court's ruling of 7th May, 2010. Exhibited hereto is a communication from the respondent to the appellant showing members that conducted the election, marked CMN 1.

7 That I repeat paragraph 6 above and state that the last three members of parliament i.e. Hon. Joyce Azizi Banda, MP Lilongwe Mpenu Nkhoma, Hon. Jorome, Gervanzio Waluza, MP Mchinji South and Hon. Vasco Chimbalu, MP, Kasungu South are independent members of parliament. Exhibited are print outs from the Malawi Government Gazette Volume, XLVI No. 25 of 28th May 2009, pages 396, 399 and 400 Marked CMN 2. Also exhibited are print outs from the list of the current composition of the National Assembly, posted at the National Assembly's official site at www.parliament.gov.mw marked CMN 3, CMN 4 and CMN 5.

I should now set out the response to these matters by Mr Kita, Counsel for the respondent, who by his affidavit states, referring only to relevant paragraphs:

11 That more importantly, I refer to Paragraph 11 of the Affidavit in Support and aver that following and complying with the Judgment of the Court of the 7th of May, 2010, the Malawi Congress Party

parliamentary membership on the 9th of May, 2010 conducted an election at Capital City Motel within the meaning of Standing Order 3 (3) which saw the Applicant winning the position of Leader of Opposition by 25 votes against Hon. Mrs Maureen Bondo and Hon. Paston Mthyoka who also contested and got no votes. The deponent attended and witnessed the said election and is thus deponing to matters which are directly within his personal knowledge.

12 That on the 10th of May, 2010, on behalf of the Malawi Congress Party I served on the Respondent the result of the election together with the Judgment of the Honourable Court herein. The Respondent personally acknowledged in writing to have been served thus. I attach and exhibit a copy of the letter from the Malawi Congress Party which was served on the Respondent marked "WK2".

13 That in view of the foregoing, there is nothing to be stayed, the Judgment having already been complied with. The concluded enforcement renders the present application nugatory and therefore ought to be dismissed ***ex dibito justiciae****.*

14 That I refer to paragraph 15 of the Affidavit in support and aver that the Appellant has totally misconstrued the Judgment of the lower which he wants stayed in that nowhere in that Judgment does the Judge compel the Appellant to recognize the Respondent as Leader of Opposition. Rather, the Judge ordered Malawi Congress Party to within 14 days conduct an election to elect the Leader of Opposition whose name was to be submitted to the Appellant for recognition. It could as well have been that any of the contestants could have won the election.

15 That furthermore, I refer to Paragraph 16 of the Affidavit in support and aver that the Appellant does not substantiate how the appeal would be rendered nugatory in the event of it succeeding. Neither the Judgment of the Honourable Court, nor the grounds of appeal suggest there is or there will be an abolishment of the Office of the Leader of Opposition. A successful appeal would simply mean the Applicant leaving the Office of Leader of Opposition which he has assumed and it being filled up in whatever way the Supreme Court would rule.

16 That the Appellant has also not demonstrated any hardship in complying with the Judgment of the honourable Court since the 10th of May, 2010 when he was served with the Results and the Judgment. He is thus coming to the Court for this Application with dirty hands showing that already he is not ready to obey it, a conduct which takes us back to what was the Applicant's cause of action in instituting the within judicial review proceedings.

17 That even after the Order dismissing their application for Stay on the 28th of May, 2010, the Appellant has continued for no reason at all to disobey the Order of the Court with impunity.

18 That in view of the foregoing, there is no basis for staying the Judgment of the Court other than denying the Respondent the fruits of his litigation which he is entitled to enjoy. The interests of justice and pendulum of convenience lie in dismissing the Application in its entirety".

Stay of execution of judgment pending appeal has become common place in our courts and over the years clear principles for consideration have emerged. The guiding principles however are in Order 59 r. 13/1 of the Rules of the Supreme Court. That Order cites a number of cases specifically dealing with stay of execution of

judgments. Some of the cases have been referred to by Counsel in this matter from which the following cardinal principles resonate:

i. *The Court does not make the practice of depriving a successful litigant fruits of his judgment.*

ii. *The Court should then consider whether there are special circumstances which militate in favour of granting the order for stay and the onus will be on the applicant to prove or show such special circumstances.*

iii. *The Court is likely to grant stay where the appeal would otherwise be rendered nugatory or the appellant would suffer loss which would not be compensated in damages.*

iv. *Where the appeal is against an award of damages the established practice is that stay will normally be granted where the appellant satisfies the court that if the damages were paid, then there will be no reasonable prospect of recovering them in the event of the appeal succeeding.*

Fortunately for me from the skeleton arguments by Counsel it is apparent that we are all conversant with the practical application of these principles. It was emphasized in **Ulalo Capital Investment Limited v Southern Africa Enterprise Development Funding**, MSCA, Civil Appeal No. 45 of 2009 that when determining an application for stay of execution it is important to bear in mind always that there is at the time a binding judgment which even the Court of Appeal must respect until set aside or otherwise modified. In **City of Blantyre v. Manda and Others** Civil Cause No. 1131 of 1990 the court summarized the principles in this passage:

I think it is always proper for the Court to start from the view point that a successful litigant ought not to

be deprived of the fruits of his litigation ----. The Court should then consider whether there are special circumstances which militate in favour of granting the Order of stay and the onus will be on the applicant to prove or show such special circumstances.

As for special circumstances it is trite that such would vary from case to case and expectedly so. Further more the same set of facts could result in different consequences and have different implications in different cases. It has long been acknowledged though that the paramount consideration in applications of this nature is whether the appeal will be rendered nugatory if the application for stay is refused. Once the court is satisfied that the appeal will not be rendered nugatory by refusing the application to stay the judgment, it would be wrong to deny the successful litigant the fruits of his litigation on any other fanciful and capricious considerations, see **Tembo v Industrial Development Group (2)** [1993] 16 (2) MLR 878. The justness of this is in the fact that while it is the duty of the court to see to it that a successful litigant should access the fruits of his litigation as quickly as possible, it is also the court's duty to ensure that it does not come about that a successful appeal is rendered nugatory. **The Minister of Finance and The Secretary to the Treasuury v Hon. Bazuka Mhango and Others,** MSCA Civil Appeal No. 17 of 2009.

This Court attempted to explain what could possibly amount to an appeal being nugatory in **Auction Holdings Limited v. Sangwani Judge Hara and Others** MSCA Civil Appeal No. 69 of 2009. It is there stated:

According to Bryan Garmer in "A Dictionary of Modern Legal Usage" Second Edition, 'nugatory' is not a legal word per se, but it is a learned word favoured by lawyers. It means 'of no force, useless, invalid and so forth. In other words nugatory is a state of affairs. A state of affairs where the appeal will not yield results; where the appellants efforts, even if successful, will be a wasted effort for lack of

> *remedy. Pursuant to these considerations, as the court put it in* ***Circle Plumbing Ltd v Taulo*** *[1993] (16) 2 MLR 506 an appeal can only be rendered nugatory if for example the subject matter of the appeal is destroyed or ceases to exist or changes substantially or where if the appeal succeeds it would be impossible to recover the damages that would be sought. The real question for the court is whether the appellant will engage in an exercise in futility.*

Honourable Justice Mzikamanda by his Order nullified Standing Order 35 (A) (6) and restored Standing Order 3 (3) as the Standing Order of the National Assembly by which Leader of the Opposition would be elected. In consequence the Judge also nullified the election of Honourable Kayembe who had been elected Leader of Opposition pursuant to Standing Order 35 (A) (6). The Court then directed that the matter goes back to the Malawi Congress Party to conduct an election in accordance with Standing Order 3 (3) within 14 days of the Order. The final direction of the Court was that the respondent shall recognize the elected person to be the Leader of the Opposition within the meaning of Standing Order 3 (3).

Peragraphs 15 and 16 of Dr Nkhowani's affidavit in support of the application are the operative paragraphs. Apparently Counsel has missed the point. The Order by Justice Mzikamanda does not compel the applicant to accept the respondent as Leader of the Opposition. Infact the Honourable Judge took the trouble of specifically clarifying that point in case he would be misunderstood in the way Counsel has misunderstood the Order. The Order merely compels the applicant to recognize whoever was to be elected as Leader of the House following an election. That person need not be the respondent.

By paragraph 16 it is said if the judgment was complied with it will render the appeal nugatory if the appeal were to succeed. In explaining this paragraph this is what Counsel says by his skeleton arguments:

The majority of the cases or line of authorities cited has evolved from a jurisprudence stemming from either financial or tangible subject matters of litigation. In such cases the tests requiring a party seeking a stay to show that either the subject matter will be destroyed or cease to exist by the time the appeal court hears and determines the appeal, for it to be nugatory are appropriate. However, there will be cases involving intangibles such as rights or an office. In such cases it would be erroneous for a court to adopt a rigid application of the 'destruction of subject matter' test. In such cases these courts should look at the practical implications notwithstanding that the subject matter would remain intact. In the present case the subject matter is the office of the Leader of the Opposition. On the strict application of the 'subject matter destruction' test, this cannot be destroyed; however it leads to absurd results. In this case Honourable Kayembe has been asked to step down and Hon. Tembo is being asked to ascend to the position. Should the appeal succeed Hon. Tembo will be asked to step down and enter Hon. Kayembe again. Theoretically this is no big deal, but practically it is.

A clear demonstration in our history is the case of ***Hon. Rev. W. Ndomondo vs The State and Speaker of the National Assembly,*** *Misc. Civil No. In that case the applicant had won a seat as Member of Parliament for Machinga South East in the May, 19, 2009 Parliamentary elections. However he was prior to the election convicted and in the process lost the seat by operation of law under section 63 of the Constitution of Malawi. The Electoral Commission then sought to conduct by-elections. Mr. Ndomondo applied for an injunction to stop the by-election till his appeal against conviction was heard. The application was declined by the High Court. Later the High Court quashed his conviction. Unfortunately, even though the subject matter (the office of Member of Parliament for Machinga South East) was not destroyed, his right to it had been destroyed or was made*

unattainable. Meanwhile someone had been sworn in as MP for the constituency. Such a tragedy could have been avoided if the court had granted the stay or injunction. From this case we see similarities to the present case. A similar scenario would emerge in which if the appeal succeeds; the respondent may have to be asked to step down and if he does not the successful appeal would be inconsequential or nugatory. The negative implication of such a scenario speaks in favour of the court's exercising its discretion to grant a stay pending the determination of the appeal.

The argument by Counsel is clearly flawed and the analogy with the Ndomondo case completely misplaced. In the Ndomondo situation there are now two individuals, both of them lawfully elected to the same constituency as Members of Parliament. Certainly the process was rushed in that case. The Ndomondo case, in my view, was a proper case where stay of execution of judgment should have been allowed, if sought, because of the possibility that the appeal would be nugatory in the event of someone else being lawfully elected as Member of Parliament for the same constituency.

In the present case, if the appeal were successful the applicant will not even have to bother and ask the incumbent Leader of the Opposition to step down. A successful appeal will in itself be a directive to such person to step down and by the same decision the austed Leader of the Oppostion will once more ascend to power. It is not clear to me what will make this process practically a big deal as Counsel wants us to believe.

As stated above the applicant made a supplementary affidavit which to this court seems to be an afterthought. I have no difficulties myself with afterthoughts, if only they bear a logical and meaningful contribution to the original thought or explanation the original thought. If an afterthought is a contradiction to the original thought then it must be made clear that the original position is being abandoned.

By the supplementary affidavit it would appear it is being suggested that the reason why the applicant has not complied with the Order of the Court is that the elections conducted by the Malawi Congress Party to elect Leader of the House were irregular. Unfortunately Counsel does not come out very clearly in paragraphs 5, 6 and 7 that touch on the matter if indeed this is what the applicant is saying. One would have to read the skeleton arguments by Counsel on that point to understand the applicant's position. The position of the applicant on this point, reading the affidavit together with the skeleton arguments, and I am sure I am right, is that his failure to comply with the Order is because the results of the election that were brought to him were irregular. In other words if the results were valid, he would have accepted them and in turn accept the chosen Leader of the Opposition. This is where I have difficulties to reconcile the applicant's original position and the afterthought.

The applicant's original position is simply that the Order should not be complied with because of the irreparable damage it will cause. In that case therefore the results of any election, valid or invalid, regular or irregular would be of no consequence. The applicant's subsequent position is that if he was given a valid or regular election result he would accept and recognize the Leader of the Opposistion and thereby comply with the Order. Obviously these two positions taken by the applicant are not just paradoxical, they are clearly contradictory.

Let us look as the situation in this way. If the position of the applicant is that he is ready to comply with the Order except that so far he has been given results of an invalid election, need the applicant take out an application for stay of the court Order? Obviously that would not have been necessary. The applicant would simply have sat back and said to Malawi Congress Party please give me a valid election result and I will comply with the Order of the Court. As a matter of fact the Order made by the Court below is lucid and guides both the applicant and the respondent on how to go about filing the position of Leader of the Opposition. Part of it should be quoted again to make the point here. The Order says:

I have already observed that the responsibility to recognize the applicant as Leader of Opposition is with the Speaker and the Speaker alone. It would be unsurpation of powers of the Speaker if the Court was to grant such recognition. However, what this court can do it to direct recognition where Standing Order 3 (3) has been fully complied with by the Applicant. The Respondent is duty-bound to recognize a person duly elected by the largest opposition party in Parliament. To be fair to the Respondent the word used in the demand letter of the Applicant was ***"endorsed"*** *instead of* ***"elected"*** *and this may have created doubt on his mind whether there had been an election at all. To clear any doubt that there had been an election or not by the Malawi Congress Party as to who the Leader of Opposition should be, I direct that the matter goes back to the Malawi Congress Party who should conduct an election within the meaning of Standing Order 3 (3) of the National Assembly.*

The Order of the Court clearly recognizes and endorses the authority of the applicant to verify if there was a **due** election and not merely indorse what he has been presented with.

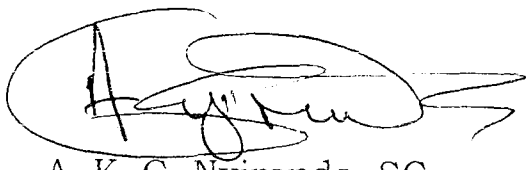
I called upon Counsel for the applicanat to confirm to the Court whether the applicant had at all communicated to the respondent that the reason why he had not accepted the result is that the election was invalid for including Members of Parliament who did not belong to the Malawi Congress Party. There was no clear answer from Counsel. It became obvious to the Court that there was no such communication. It is worth noting that the letter from Malawi Congress Party to the applicant communicating the results of the election has been exhibited by the applicant. The letter is dated 10th May 2010 and was received by the applicant on same day. If there was a response to that letter it would equally have been exhibited.

I do not want to be drawn into commenting on whether indeed the election by the Malawi Congress Party was valid or invalid.

That is not what we are here for. For purposes of this application it will suffice for me to conclude that the applicant is being less than sincere, to say the least, in advancing the elections as a ground in support of this application. My candid finding is that the applicant is seeking stay of execution of the Order of the Court irrespective of an election by the Malawi Congress Party and the outcome thereof.

The position of this Court, as earlier conluded, is that recognition of a validly elected Leader of Opposition pursuant to the Order of the Court would not render the appeal nugatory. Therefore and for all that has been discussed herein and all the conclusions made, I see no merit in this application and I dismiss it with costs to the respondent.

MADE in Chambers at Blantyre this 11th day of June 2010.



A. K. C. Nyirenda, SC,
JUSTICE OF APPEAL