IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Constitutional Case No. 3 of 2009

Between:

The Registered Trustees of the Women & Law (Malawi) Research & Education Trust……Applicant

And

The Attorney General……Respondent

And

Malawi Human Rights Commission……1st Amicus Curiae

Southern Africa Litigation Centre……2nd Amicus Curiae

Canadian HIV/Aids Network……3rd Amicus Curiae

Ralph Kasambara……4th Amicus Curiae

Coram: Honourable Justice A.C. Chipeta
Honourable Justice J. Katsala
Honourable Justice J.M. Chirwa
Tembenu, of Counsel for the Applicant and for the 2nd and 3rd Amici Curiae
S.Kayuni, Thabo Nyirenda, and Joseph Chiume, Senior State Advocates, of Counsel for the Respondent
Malera (Mrs) and Sibande, of Counsel for 1st Amicus Curiae
Kasambara, as and of Counsel for 4th Amicus Curiae
Gangata (Mrs), Official Interpreter
Gondwe (Mrs), Court Reporter

Chipeta J:

RULING

After due certification by the Honourable the Chief Justice under Section 9(3) of the Courts Act (cap 3:02) of the Laws of Malawi, the matter herein was

commenced by Originating Motion. The Applicants are the Registered Trustees of the Women and Law (Malawi) Research and Education Trust, and the Respondent is the Attorney General. By the said Originating Motion, the Applicant Trust has raised a number of demands as well as made some statements before this Court.

First, the Applicant seeks a Declaration to the effect that Section 17 of the Married Women Property Act, 1882 (an English Statute of General application –as applied to Malawi) is inconsistent with the rights of equality and women's property rights as enshrined in Sections 20(1), 24(1)(b)(i), and 28 of the Constitution of Malawi. Alternative to the making of this declaration, the Applicant Trust has stated that the Statute which contains this provision should be read in the light of Constitutional provisions that safeguard women's property rights. An immediate observation we would like to make is that it is not readily clear what relief, be it also a Declaration, an Order, or other pronouncement, the Applicant wishes to urge the Court to give it in respect of the alternative statement it has made *vis-à-vis* the request for a Declaration on Section 17 of the Married Women property Act, 1882. The alternative paragraph herein appears to us to be a plain statement that is devoid of a demand for relief, and it merely carries with it a quotation of part of the relevant Section 17.

Secondly, the Applicant seeks Declaratory Orders in terms of Sections 13, 20(2) and 24(1)(2) of the Constitution of Malawi. In this vein the Applicant has stated that Government is obliged and has undertaken to:

(i) adopt and implement legislation aimed at promoting gender equality for women and men, and in particular, policies that address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation, and rights to property;
(ii) pass legislation that addresses inequalities in society and prohibiting discriminatory practices; and
(iii) eliminate laws that discriminate against women on basis of gender or marital status, particularly those that deprive women of their property rights.

The Trust has then next sought a Declaration that for the purposes of protection of the (Constitutional) rights of women on property acquired during the subsistence of marriage, Government is obliged to pass legislation in terms of Sections 20(2) and 24(2) of the Constitution in order to address inequalities in

society whereby women are deprived of a share in matrimonial property solely on the basis that there was no monetary or substantial contribution made towards the acquisition of the property in question.

Finally, the Trust has wound up its Originating Motion with a statement asserting that the failure by Government to pass such legislation, since the adoption of the Republican Constitution in 1994, has resulted in inequalities and discrimination being perpetrated against women. Here also, we would like to observe that it is equally not quite clear what relief, if any, the Applicant is after, making as it has done the observation about the absence of certain legislation since 1994. The Applicant is represented by Mr Tembenu, of Counsel from the Legal House M/S Tembenu, Masumbu, and Company. The Respondent is represented by various State Advocates serving in the Chambers of the Attorney General.

Subsequent to the filing of the Originating process herein, purportedly in terms of Rule 5(5) of the Courts (High Court) (Procedure on Interpretation or Application of the Constitution) Rules, 2008, a Notice was filed for issue by the Registrar, and it was duly set down to be called for hearing on 9th March, 2010. Our observation here is that rule 5 of the Rules cited has only got two subsections. Surely, the party that filed this Notice must have been referring to rule 6(5) of the Rules in question, which provides for the holding of a pre-hearing conference. For some reason, however, the pre-hearing conference intended by this Notice did not take place on the date so set. It equally failed to take place the second time it was set down for. On that occasion it so failed because, although by then there had been filed an application also set to be heard during the pre-hearing conference, the said application was only coming to the Court's attention on the very day it was so due to be heard. Besides, the Attorney General, as Respondent in the matter, had by then not even been served with the Application in question.

The application then so filed was jointly made by the Southern Africa Litigation Centre and the Canadian HIV/Aids Legal Network, for these two organizations to be admitted as *amici curiae* in the case. They had given Notice of this intent in terms of rule 10 of the same Rules as cited above pertaining to Constitutional Cases. Their said application was supported by the Affidavits of Priti Patel and Sandra Chu. Now, although these Affidavits did not satisfy the requirements of Order 41 rule 11 of the Rules of Supreme Court in terms of the manner of documents that were to be used in conjunction with them, they did attempt to

exhibit the arguments the applicants were intending to make once they were admitted. Curiously, however, the two intending *amici curiae* were also represented by Mr Tembenu, the very learned Counsel that is representing the Applicant in the matter.

We recall seizing the opportunity on the day we so adjourned the matter, to address the parties on a number of the concerns that we were having at the time. First, we urged them to trace all the documents they had thus far filed in the matter, so that as the Judges empanelled to hear the matter, we could read the said documents in advance. We next urged the parties, if there was a way of publicizing the proceedings, to go ahead and do so. Our announced intention for this request to them was that in case there were other interest groups in the Country, especially local ones, in a position to effectively contribute to the case, they should be made aware of the opportunity that existed for them to apply and be considered for such participation in the case. We had incidentally observed that up to that point in time only external interest groups had evinced the desire to become *amici curiae* in the case. Our last observation on the day was that it had struck us as being somewhat peculiar that learned Counsel for the Applicant was doubling as Counsel for the two external interest groups that wanted to join the case as *Amici Curiae.* We wondered whether this scenario did not create room for learned Counsel to experience a conflict of interest in the discharge of his duties. We thus asked him to check on the law, and to ascertain whether ethically he could represent both the Applicant and the intending *amici curiae,* or whether the *amici curiae* needed to be represented independently.

Now, as for multifarious reasons dates for the holding of the pre-hearing conference kept shifting forward, in due course the Court received yet another *amicus curiae* application. This one was filed by the Malawi Human Rights Commission. Its Affidavit in Support was sworn by the Commission's Principal Legal Officer, one Chrispine Ulemu Kam'mayani. We noted, therefore, when the matter was next due to be called for the pre-hearing Conference, that we had a total of three applicants to attend to for the role of *amici curiae* in it. We noted also that there were further developments in the matter that were earmarked for our immediate attention at the same time as these applications and conference. Fearing that confusion might rein if we just walked into open Court with multiple issues being concurrently due for our attention, we decided to first call all the

parties into Chambers, so that we could sort out the order in which we would tackle all these issues.

Having observed that we now had three applicants to contend with on *amici curiae* concerns*,* we decided that we would first deal with this subject, and that we would do so separately from all other interlocutory issues that we were due to look into that day. We ordered, therefore, that the hearing of these *amici curiae* applications would proceed that very morning once we got assembled in Open Court. At the same time we made it clear that we would give directions in the matter only when we were sure on the question how many of the applying *amici curiae* we would be admitting to participate in the case. This was in order to enable us to make the giving of directions a one-off exercise for the benefit of all its parties in the matter.

One development we discovered had just taken place that very morning, was the fact that the Attorney General, as Respondent, had filed an *ex-parte* Summons for Leave to file an Affidavit in Opposition to the Originating Motion out of Time. In so seeking this leave, the Attorney General made it plain that she was blaming the Applicant for causing her to fail to prepare the opposing Affidavit in time. It was her allegation that the Applicant Trust herein had not given her Office the requisite three months' Notice to sue, as *per* Section 4 of the Civil Procedure (Suits by or Against Government or Public Officers) Act (Cap. 6:01) of the Laws of Malawi. We felt, therefore, that it would not be just for us to deal with this application *ex-parte,* with the allegation made by the Respondent accepted on face value, without getting any comment from the party it was being made against. We thus felt that it was imperative for us to allow the parties to trade arguments on this allegation, before we could make any decision on its basis. In the result, we directed that the application herein should come up on a later date, and that it be instead made *inter-partes.*

This done, we went into Open court. Our Agenda, as pre-decided, was to first hear the applications then on record for the admission of *amici curiae.* The first to address us when the matter was called was Mr Chrispine Sibande, of Counsel, from the Malawi Human Rights Commission. He indicated that he was going to represent all three *amici curiae* applicants. Of necessity, he first advanced the application from his Organization, although its application had been filed later in time than the joint application of the two other Organizations he had just

undertaken to also represent on this very day. It is thus only after he had concluded the Malawi Human Rights Commission presentation, that he then moved the joint application of the Southern Africa Litigation Centre and the Canadian HIV/Aids Network.

At this point it next came to our attention that there was a fourth *amicus curiae* applicant present in Court. This was an individual in the person of Mr Ralph Kasambara, of Counsel. He sought to be entertained, although he had not filed any process in Court showing intent to join the case as a friend of the Court. Under the relevant rules 10 and 11 of the Rules earlier cited, he asked for the indulgence of the Court to allow him to present his application orally. He founded his said application on the qualifications he holds in Human Rights Law, his research and his publications in the area, and on the fact that he is a husband and a parent, who thus would be liable to be affected by the outcome of the decision in this matter. He made it clear that his aim was to oppose the application that has been made by the Applicant. We agreed to hear him out, and he also duly so applied to join the case as an *amicus curiae*.

In responding to the four applications herein, the Attorney General indicated that she had no objection to the application of the Malawi Human Rights Commission and to that of Mr Kasambara. As regards the joint application of the Southern Africa Litigation Centre and the Canadian HIV/Aids Network, however, while not objecting to their applications, the Attorney General expressed discomfort with them on account of their not being based in Malawi. Learned Counsel representing the Attorney General, therefore, said the Respondent has reservations to this joint application from the *locus standi* point of view. On the part of applicant (i.e. The Trust), it had no objections to register against any of the four applying to be *amici curiae*. It in fact urged the Court to admit all of them, believing as it did that their submissions on the matter would greatly add value to the Court's determination of the matter. In replying on behalf of the *amici curiae* applicants that had met with the Attorney General's resistance, Mr Siwande pointed out that the two externally based organizations were not applying to join the case in the capacity of litigants. All they wanted, he said, was to assist the Court. He argued, therefore, that the issue of *locus standi* was neither here nor there in respect of their application. *Vis-à-vis* the Malawi Human Rights Commission and Mr Kasambara's applications, since they did not meet with any objection from any quarter, Mr Sibande had nothing to say in reply.

In our *ex-tempore* ruling on the four applications, we observed that all the applicants had argued that they were closely associated with the area of law this matter relates to, and that they had briefly described to us their interest in the matter at hand and indicated the positions they would take in it. We additionally observed that they all claimed that they were thus in a position to offer meaningful contribution to the case at hand, so that the Court should come up with a balanced decision in it. We took note of the fact that for the two local Applicants, i.e. the Malawi Human Rights Commission and Mr Kasambara, there was undisguised support from the parties in the case for them to be admitted as *amici curiae*. As regards the two external bodies, i.e. the Southern Africa Litigation Centre and the Canadian HIV/Aids Network, however, we noted that although the Attorney General registered reservations against their application for admission, she all the same duly acknowledged that, if admitted, the two bodies could in this matter benefit the Court by drawing valuable lessons for it from their experiences in the area of law earmarked for scrutiny from the other jurisdictions they have worked in.

As a Court, we took the view that friends of the Court are nothing more than their name suggests. We accordingly observed that as such, *amici curiae* are parties who claim a certain level of expertise in the area of law that has fallen due for the consideration of the Court, and that all they seek is to give to the Court advice, well knowing that the Court is absolutely free either to take up, or to reject, such advice. Noting, as we did, that the matter brought before us was likely to generate public interest in society at large, we believed that it would be helpful for us as a Court to be as widely informed on the issues we have to decide on as we can, so as to come up with a sound decision. We further took the view that like in any other matters that revolve around the interpretation or application of constitutional provisions, *per* sections 11(2) and 211 of the Constitution, well apart from local jurisprudence we stood to benefit from current norms of public international law and of comparable foreign case law. We thus felt that it would be beneficial for us to tap from the knowledge and experiences of local applicants as well as applicants with the ability to add in a perspective of international, regional, and comparative foreign law to the question under consideration. On this account, therefore, we did not think we should allow the Attorney General's observations on the *locus standi* of the two foreign organizations to be a stumbling block against their joint application. Believing all four Applicants had

useful insights to share with the Court that could enrich its decision on the subject at hand, we in the end admitted all four as *amici curiae* in the case.

We, at that juncture, decided to give directions that would ensure that the matter progresses smoothly. We reminded the parties of our decision in Chambers to the effect that the Attorney General should hereafter bring her application for extended time to file an Affidavit in Opposition *inter partes.* We next ordered the Applicant to serve all four *amici curiae* with its Originating Motion and all the supporting documents within 14 days from that day. We then directed that all *amici curiae* should each file, and serve, their Affidavits in the matter along with their Skeleton Arguments on all the other parties in the matter within 14 days thereafter. We next gave the applicant seven days more beyond the two sets of 14 days' duration each, for it to put in an Affidavit in Reply. As for the Respondent, depending on the outcome of her application to file an Affidavit in Opposition out of time, we made it clear that we expected her to strictly abide by the calendar she would be given for filing documents upon a determination or otherwise resolution of her quest for such extended time. We also set the date by which the Applicant should have a full Trial Bundle before us, and we also set down the date of hearing.

As it turned out, after we had so given these directions in the matter, the parties found it unnecessary to come to Court *inter-partes* for the Respondent's Summons for enlarged time within which to file her Affidavit in Opposition. Between the Applicant and the Respondent they reached a consensus on this matter. In the result, they filed a Consent Order that paved the way for the Respondent to file the required Affidavit. Indeed the Respondent did so file an Affidavit in Opposition along with Skeleton Arguments. The next thing we noticed, however, was the filing of a Court Bundle and the setting down of the matter for substantive hearing. Now, although the Court file did not bear any returns of service as *per* the directions we had given in the matter, the filing of the Court Bundle was, to us, a sign that the parties were ready to substantively proceed with the hearing of the matter. To our surprise, however, while the Applicant and the Respondent had their Skeleton Arguments/Submissions on record the Court Bundle in relation to the matter in question, all *amicus curiae* had not filed any such Skeleton Arguments/Submissions in terms of rule 12 of the governing Rules herein.

Mr Tembenu, of Counsel for the Applicant, had claimed orally, however, that he had complied with the directions we had last given for his client to serve all *amicus curiae* with the Originating Motion and its supporting documents. He said he had so served those processes and that *amici curiae* had confirmed receipt by e-mail. He, however, had not made any return of service of any sort on that service. In the circumstances it was very difficult to tell whether indeed all four *amici curiae* had been served as we had ordered.

There was cause for us to be anxious about the absence of rule 12 submissions from all *amici curiae.* As may be recalled, Mr Tembenu is the one who prepared and filed the joint application of two of these *amici.* Thus, in relation to these two his oral claim to have effected service on them could easily have been a loaded statement, as it did not immediately reveal what steps he had taken to achieve such a feat. As for the Malawi Human Rights Commission, their Lawyer who we learnt was this time round going to be the Commission's Mrs Malera in place of Mr Sibande, t so happened that she was not in attendance on the material day. Learned Counsel for the Applicant informed us that Mrs Malera could not make it to Court because she had been involved in a road accident as she was on her way to Court from Lilongwe to Blantyre for this matter. We were, however, assured at the same time that she was not so badly affected by the accident. Strictly speaking, therefore, we thus had no opportunity to cross-check with Mrs Malera on Mr Tembenu's claim of successful service on the Malawi Human Rights Commission as an *amicus curiae* in the case. We had the same difficulty in cross-checking in respect of the service we had ordered in respect of Mr Kasambara, the 4th *amicus curiae.* He was absent and unrepresented on this day, and we could therefore not ascertain, in the absence of return of service, whether learned Counsel for the Applicant indeed duly served him. In the case of this 4th *amicus curiae,* since his admission was upon presentation of an oral application, there was therefore nothing at all filed by him in written form. We must point out that egen after we had admitted him as an *amicus curiae* he did not file any submissions in the matter.

As it turned out, both by the Affidavit in Opposition and by the Skeleton Arguments she had filed, the Respondent Attorney General made it plain that she would first raise a preliminary issue in the matter. The issue in question was one that doubted the Applicant's *locus standi* in bringing up this matter in Court. In brief, the Respondent's concern was that the matter the Applicant has so brought

up appeared to her to be hypothetical, moot, or academic. Taking it that the contest on such issue is mainly between the main litigants in the matter, i.e. the Applicant and the Respondent, rather than it being between either of the two litigants and the four *amici curiae,* we decided to go ahead and hear arguments on the preliminary issue, even though there was still some lingering uncertainty in our minds about whether indeed the 1st and the 4th *amicus curiae,* i.e. the Malawi Human Rights Commission and Mr Kasambara had truly been served with originating processes, as verbally claimed by Mr Tembenu, of Counsel.

If we may say so, in articulating the preliminary issue herein, the Respondent's main focus was on Section 15(2) of the Constitution, under which she believed the Applicant Trust must have based its application. On the basis of the provision in question, it was the Attorney General's view that the matter herein has been brought to the Court prematurely. She pointed out that no dispute has been shown to have arisen to warrant a determination of the case so commenced. While duly acknowledging the important role the Applicant Trust plays in the advancement of women's rights in Malawi, the Respondent observed that the Applicant has been vague on whether the complaints it claims to have received from divorced/widowed women (as from paragraph 13 of its Affidavit in Support) arose from judicial decisions, or from determinations on dispositions of property upon dissolutions of marriage or inheritances contested in different *fora.* It has been contended that such lack of clarity renders it difficult to ascertain whether there is an inherent problem with the current constitutional regime, or with civic education on the judicial protection and remedies available.

It was the Respondent's further observation, upon reference to paragraph 21 of the same Affidavit in Support, that there is no factual basis behind the present proceedings. There is, it was argued, no identifiable aggrieved party or victim in the present case, in the sense that no single woman has sued in it, or been singled out in the Affidavit in Support, as claiming that in a given Court decision her rights were affected by the Court's use of Section 17 of the Married Women Property Act or otherwise. The issues raised, the way the Respondent saw them, are purely moot, hypothetical, and imaginary, as through them the Applicant is basically seeking an advisory opinion from the Court, which would be an abuse of the Court's process.

In this regard, the Respondent has *inter alia* cited Constitutional Case No. 13 of 2005 **Maziko Sauti Phiri vs Privatisation Commission** and Constitutional Case No. 1 of 2008 **James Phiri vs Muluzi and Another,** to advance the principle that it is not the business of the Court to give out gratuitous legal opinions. Parties, it was pointed out, should not go to Courts just to seek such opinions. Rather, parties should engage Courts only if the need arises for them to decide on real issues in real disputes. In the instant matter, in the absence of a dispute involving a woman claiming to have been affected by the Court's employment of the impugned legislation, the Attorney General's contention is that the Applicant Trust has no independent *locus standi* in the matter it has commenced. All in all, therefore, the Respondent prayed that this matter be dismissed with costs.

On its part, *vis-à-vis* the preliminary issue that was raised by the Respondent, the Applicant Trust began by adopting its submissions in the Court Bundle, and in particular by adopting its section on *locus standi.* In this regard, the Applicant argued that it was entitled to commence this matter as a public interest action, and to do so in its own right, as it has done, under Section 15(2) of the Constitution. As a Trust that has work extending beyond the borders of Malawi in Southern Africa, the Applicant claimed that it had come across glaring inequalities between men and women in relation to property rights. It had as a result discovered, it claimed, that in Malawi a married woman, more often than not, becomes dispossessed of any share in family property upon the dissolution of her marriage, especially if the title to such property is in the name of the husband only. In the same vein, the Trust further claimed to have received *numerous complaints from women* in this respect. Its findings, it said, show that this position has been exacerbated by the existence of *certain laws* that have made it difficult for women to claim entitlement to property jointly acquired during marriage, in the absence of them proving that they made a financial contribution in such acquisition. The Applicant has therefore, so to speak, raised the questions it has posed in this action in consequence of the complaints it so claims to have received, and in consequence of the situations it claims its research has exposed.

Vis-à-vis the Section 15(2) that has been cited, the Applicant laid emphasis on the fact that the latest amendment to this provision received Presidential Assent on 8th January, 2010. According to this party, the provision now makes it clear that it incorporates natural and legal persons or groups of persons if they happen to have *sufficient interest* in the promotion, protection and enforcement of human

rights. Such persons or groups of persons, it was argued, are entitled to the assistance, *inter alia,* of the Courts in promoting, protecting, and enforcing those rights and redressing grievances in respect of the same. The Applicant Trust then disclosed that in the objectives captured by its Constitution/Trust Deed (a document it has exhibited to its Affidavit in Support), it is engaged in the promotion of the socio-economic status of women in Malawi, through proselytizing and spreading the word about the importance of women's rights. It contends, therefore, that its activities bring it within the ambit of Section 15(2) herein, and that in addition an abundance of case law gives it the necessary *locus standi* to bring up these proceedings.

As a leading case in support of the contention it was making, the Applicant Trust cited **Civil Liberties Committee vs Minister of Justice** Civil Appeal No. 12 of 1999. This case is now reported, and it can be found in [2004] MLR 55. In that case, the Applicant pointed out that the Non Governmental Organization that had brought up the matter had its action dismissed in the High Court on *locus standi* grounds, and that this dismissal was upheld on appeal in the Supreme Court. The Applicant's solace, however, in citing this case authority appears to lie in the *dicta* of the Supreme Court to the effect that there were other organizations than the one that took up the matter, which could have shown sufficient interest in the subject matter, or in the outcome of the action. Next, after making reference to a case authority each from South Africa and from Tanzania, the Applicant resorted to the High Court's decision on *locus standi* in **Malawi Human Rights Commission vs Attorney General,** being Miscellaneous Civil Cause No. 1119 of 2000, which echoed the sentiments expressed in the Tanzanian authority on the subject. The Applicant Trust thus claimed that having demonstrated that its work and activities revolve around women, their rights, and their welfare, and as it has received and continues to receive complaints from women on property deprivation and dispossession against the enjoyment of their constitutional rights, it has a substantial interest in the matter and in its outcome, and that it therefore has the requisite *locus standi* to commence and maintain these proceedings.

Moving on to answering the points the Respondent had raised on her presentation of the preliminary issue, the Applicant read out Section 15(2) of the Constitution, as amended, and contended that it is clear from it that the complainant does not have to be a woman. To it, under this provision the Applicant could be a woman, or it could be a group of women or of men

complaining about a state of affairs as regards the law. The Applicant herein, it was emphasized, should be seen as a public interest litigant. The Applicant Trust being an organization whose mandate extends to the promotion, protection and enforcement of the rights of women, it was argued that it then falls within Section 15(2) herein, and that it therefore has the *locus standi* to bring up proceedings like these in its own right. Once again, the Applicant referred to its written submissions, and to the arguments it has made therein on the authorities it has cited, and it then urged the Court not to view *locus standi* from a narrow angle. In the end, the Applicant submitted that the issue of *locus standi* herein should not be an impediment in these proceedings.

In the light of the detailed arguments we have received from both sides on the matter, we have looked at the matter that was brought to us by the Applicant Trust with keen interest. We have thus deeply considered the matter in the light of the amended version of the Section 15 (2) of the Constitution both parties have linked it to. Our considered view is that whilst the amendment the Applicant has emphasized has *inter alia* gone a long way in elaborating on, and also clearing, whatever mist might have been lingering regarding the type of person(s), natural and legal, that could fall within the provision in question, what has not changed about it, however, is that it further demands that such person or persons ought to have a *sufficient interest* in the matter they so bring to the Court. The existing authorities on *sufficient interest* have, therefore, not necessarily been overthrown, or overtaken, by the amendment that has mainly added the description "natural or legal" to the types of litigant Section 15(2) accommodates. We remain obliged, therefore, to follow whatever the existing precedents say on this topic.

The way we have followed the arguments, the Applicant and the Respondent are pulling on the opposite ends of the preliminary issue that has been raised. They are doing so, not necessarily because one side understands the expression *"person or group of persons natural or legal"* differently from the other, but because they hold opposing views on the question whether the Applicant herein has demonstrated a *sufficient interest* in the matter it has brought to the Court. According to the Respondent, only a woman who has previously been a victim of the Court's use of Section 17 of the Married Women Property Act, 1882 in a dissolution of her marriage, or who has been a victim of the Court's otherwise myopic construction of women's Constitutional rights has the requisite *locus*

standi to commence an action like the present, being both a natural person as envisaged in Section 15(2), and a person who has a *sufficient interest* on account of having suffered a personal disadvantage she is seeking a remedy on. On the Respondent's part, therefore, it is only such a woman that can bring proceedings like the present, otherwise groups of people like the Applicant Trust can only participate in such proceedings by riding on the back of this type of woman through suing alongside her so as to benefit from her *locus standi* in such matter.

In contrast to this, however, the Applicant Trust believes that it easily fits in the description "…group of persons, natural or legal" Section 15(2) covers. As regards its *interest* in the matter at hand, it also believes that it has a *sufficient* amount thereof. It so concludes from the fact that championing the rights of women falls within its objectives as laid down in its Trust Deed/Constitution, also because it claims that it has been showered with complaints from women (although it has neither specified any nor involved anyone of them in the case), and further because it has discovered the need for such a case through the research it has been conducting, even if there is no *"personal"* disadvantage the Trust has itself suffered at the hands of the Court in using the law that has been complained against. The question we must answer is which of the two arguments holds water in the light of the governing precedents on the subject.

Luckily for us, in the superior Courts of Malawi contests on the subject of *locus standi* are not new. In encountering the question in this matter, therefore, we are not treading on new territory, as both the High Court of Malawi and the Supreme Court of Appeal have ever handled the issue and made some pronouncements on it. In order, however, to reach a reasonably quick resolution we think, without necessarily meaning any disrespect for the High Court authorities that are available on the subject, that it would be best if we paid more attention to such authorities as there are in the Supreme Court of Appeal, as these undoubtedly bind us.

As noted earlier on, the Applicant referred us to the case of **Civil Liberties Committee vs Minister of Justice** (supra) as the leading case on *locus standi* in Malawi. We would only observe that it is the latest authority on the subject, even though the Respondent did not make any reference to it. As can be easily ascertained from the judgment in that case, it simply follows in the path of two earlier Supreme Court of Appeal authorities. If we may say so, however, our

observation is that the authority cited herein is more against, than in favour of, the Applicant's position in this case. Indeed, as matters stand, the Applicant Trust's reliance on the case has been placed on the *obiter dictum* portion of the judgment than on the *ratio decidendum* of the same. As well conceded by the Applicant, the Civil Liberties Committee's claim to *locus standi* in its quest to litigate in the public interest was outright rejected both in the High Court and in the Supreme Court of Appeal.

We do need to point out that the statement in passing by the Court, to the effect that there are other organizations which could successfully have brought up the suit in place of the Civil Liberties Committee, did not constitute the *ratio* of the decision the Court reached. What this authority really stands for, therefore, is the opposite of what the Applicant has advanced it for, and advocated before us. In fact, the Supreme Court made it quite plain as it pronounced the decision in question that, consistent with the legal position of *locus standi* in the public law area as obtains in the United States of America and in some Commonwealth Countries, its position on the matter was exactly the same as earlier Supreme Court decisions on the issue had held it to be. In particular, it referred to MSCA Civil Appeal No. 22 of 1996 **The Attorney General vs The Malawi Congress Party and Others** and in MSCA Civil Appeal No. 20 of 1995 **The President of Malawi and Another vs Kachere and Others.** Based on the authority cited and on the precedents preceding it, therefore, establishing *locus standi* or *sufficient interest* entails that the litigant must show that it is his/her right or freedom that has been violated as a basis for taking up an action.

Reverting to the case the Applicant Trust commenced herein, it is clear that in the absence of its having suffered a violation of its rights by the Court's use or misuse of the legislation complained against or cried for, and in the absence of a woman who has suffered this type of disadvantage being in the driving seat of the intended public interest litigation, such *interest* as the Applicant has claimed it has for commencing this matter is all distant and remote. Suing on the basis that the Trust Deed's objectives coincide with women's rights in the Republican Constitution, and on the basis that women (not mentioned and not involved in the case) have been complaining to the Trust, and on the basis that the Trust's research has led to the conclusion that there is a problem, is not *sufficient interest* in the manner the existing authorities construe that expression under Section 15(2) of the Constitution. We, therefore, find ourselves in agreement with the

observation of the Attorney General to the effect that the Applicant's interest in the matter it has raised is hypothetical, moot, or academic, and that it indeed rather seeks the advisory opinion of the Court, than a judicial determination from it on an issue that is truly in dispute. In the circumstances, we have no option but to dismiss the Applicant's Originating Motion herein, which we now do with costs.

Pronounced in Open Court the 28th day of February, 2014 at Blantyre.

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Honourable Justice A.C. Chipeta

I have had the advantage of reading in draft form the decision that has just been read. I do confirm that it reflects this Court's unanimous conclusion on the preliminary issue that was raised in this matter. I therefore concur with it.

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Honourable Justice J. Katsala

I too have had the advantage of reading the above-rendered decision when it was in draft form. I agree that it reflects the unanimous decision we reached as a Court on the issue of *locus standi.* I accordingly concur with my Brother Judges on it.

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Honourable Justice J.M. Chirwa