



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

Constitutional Case No. 5 of 2015

[Being Criminal Case No. 444 of 2015 at the Blantyre Magistrate's Court]

IN THE MATTER OF:

MAYESO GWANDA

APPLICANT

-AND-

THE STATE

RESPONDENT

PARALEGAL ADVISORY SERVICE INSTITUTE

1ST AMICUS CURIAE

CENTRE FOR HUMAN RIGHTS EDUCATION,

ADVICE AND ASSISTANCE (CHREAA)

2ND AMICUS CURIAE

LEGAL AID BUREAU

3RD AMICUS CURIAE

NOTICE OF PRELIMINARY OBJECTION TO THE CONSTITUTIONAL
CHALLENGE AND NOTICE OF APPLICATION TO STRIKE OUT THE
RESPONDENT PURSUANT TO ORDER 15 r.6 (12) AND TO SET ASIDE
PROCEEDINGS PURSUANT TO O.2 r. 2 OF THE RULES OF THE SUPREME
COURT AND THE COURT'S INHERENT JURISDICTION

TAKE NOTICE that at the hearing of the proceedings herein the Respondent shall raise the following preliminary objections:

[Signature]
... on behalf
of Mardiana & Co. Advocates,
Attorneys-At-Law
dated this 26th August

- a) The Respondent does not have legal capacity to sue or be sued and therefore the proceedings are a nullity and void *ab initio*;
- b) The proceedings herein are irregular as there are currently no pending proceedings in the High Court.

TAKE FURTHER NOTICE that the Respondent shall apply for an order striking out the Respondent and dismissing the proceedings herein.

TAKE FURTHER NOTICE that the affidavit of **APOCHE ITIMU** attached hereto shall be used in support of the preliminary objections and the application to strike out the Applicant and the proceedings

Dated this ^{25th}.....day of August, 2016



Apoche Itimu

Senior State Advocate

For: **ATTORNEY GENERAL**

TO : Messrs. Mambulasa & Co. Advocates
1st Floor, Right Wing,
Plantation House,
P.O. Box 31250,
Chichiri,
Blantyre 3.

: Paralegal Advisory Service Institute
ADL House,
P.O. Box 30311,
Lilongwe 3.

: Messrs. Chief Legal Aid Advocate
Legal Aid Bureau,
P.O. Box 675,
Lilongwe.

: Human Rights Education, Advice and Assistance (Chreaa),
P.O. Box 30250,
Chichiri,
Blantyre.



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AFFIDAVIT IN SUPPORT OF THE PRELIMINARY OBJECTIONS

Accepted by
[Signature]
on behalf of
Munirulana I. M. Attorney

1, APOCHE ITIMU, Senior State Advocate IN THE Attorney General's Chamber, Private Bag 333, Lilongwe, state on oath:

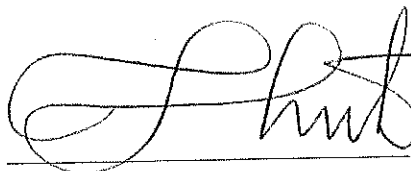
1. THAT I am of full age.
2. THAT I act for the Respondent in this matter and therefore I am duly authorised to swear this Affidavit.
3. THAT the matters set out below are within my personal knowledge as a Senior State Advocate, and except where I indicate to the contrary, I verily believe the same to be true to the best of my knowledge and belief.
4. THAT the Respondent herein is and does not have legal capacity to sue or to be sued, therefore it ought to be struck out.
5. THAT since the Respondent has no capacity to sue or be sued, the proceedings herein are void *ab initio*.
6. THAT further, there are currently no proceedings pending in the High Court but in the Magistrates Court as such this matter cannot be disposed of as a Constitutional challenge under Section 9(2) of the Courts Act.
7. WHEREFORE I pray for an order dismissing the present proceedings.

SWORN by the said APOCHE ITIMU)
At Blantyre on this ^{26th} day of August 2016



DEPONENT

BEFORE ME:



LUCIANO M. MICKEUS LLB (Hons) MA
LEGAL PRACTITIONER
COMMISSIONER FOR OATHS
P.O. BOX 234, BLANTYRE

COMMISSIONER FOR OATHS



REPUBLIC OF MALAWI
 IN THE HIGH COURT OF MALAWI
 PRINCIPAL REGISTRY

Constitutional Case No. 5 of 2015

(Being Criminal Case No. 444 of 2015 at the Blantyre Magistrate's Court)

IN THE MATTER OF:

MAYESO GWANDA

Att
 of Malawi
 26th day of August
 2016
 15:45
 APPLICANT

-AND-

THE STATE

RESPONDENT

PARALEGAL ADVISORY

SERVICE INSTITUTE

1ST AMICUS CURIAE

CENTRE FOR HUMAN RIGHTS EDUCATION,

ADVICE AND ASSISTANCE (CHREAA)

2ND AMICUS CURIAE

LEGAL AID BUREAU

3RD AMICUS CURIAE

**THE RESPONDENT'S SKELETAL ARGUMENTS IN SUPPORT OF
THE PRELIMINARY OBJECTIONS**

May it please your Lordships?

1. BACKGROUND FACTS

- 1.1. The Applicant herein was arrested on 20th March 2015.
- 1.2. On 23rd March 2015 he was taken to Blantyre Magistrates Court where he was charged with the offence of rogue and vagabond contrary to section 184(1)(c) of the Penal Code. On 25th March 2015 he was granted bail.
- 1.3. On the same date, 25th March 2015 the proceedings in the Magistrates Court were stayed following an application by the Applicant pending a Constitutional petition by the Applicant challenging Section 184(1)(c) of the Penal Code.
- 1.4. On the same date a referral was made to the Chief Justice under Section 9(3) for certification and was duly certified.
- 1.5. The Respondent opposes the present proceedings from being determined and disposed of as a constitutional matter on the grounds

that the Respondent is not a correct party to the present proceedings and further on the grounds that there are no pending proceedings in the High Court.

2. THE EVIDENCE

- 2.1. The Respondent shall at the hearing of the originating motion rely on the affidavit of Apoche Itimu dated the 25th day of August, 2016.

3. THE ISSUES

3.1 Whether or not the Respondent is the correct party to these proceedings; and

3.2 Whether or not the present proceedings are irregular and so ought to be struck out.

4. THE LAW AND ARGUENDO

5. Whether or not the State is the correct party to these proceedings

- 5.1. A court will not entertain an action by a wrong party or against a wrong party (see *The State v The Speaker of the National Assembly Ex-parte Democratic Progressive Party* Judicial Review Case No. 34 of 2012, HC, PR, (Unreported); *Tembo and Kainja v The Speaker of the National Assembly* MSCA Civil Appeal No. 1 of 2003 (unreported)).

5.2. A defendant joined improperly may be struck out (Order 15/6/12 RSC; *Vacher & Sons v. London Society of Compositors* [1913] A.C. 107; *Sadler v G.W. Ry.* [1895] 2 Q.B. 688.

5.3. Tambala JA in *Tembo and Kainja v The Speaker of the National Assembly* MSCA Civil Appeal No. 1 of 2003 (unreported):

“A decision regarding which party to sue is an important decision which is made by a party or his Counsel after careful consideration of the facts of the case. The task of which party to sue must be performed by the litigant and not the court. It is no business of the court to assist a litigant in choosing for him the correct party to sue. Where a litigant is represented by Counsel it would not be proper for the court to assist Counsel in making a decision regarding the correct party to sue. To do otherwise would undermine the essence and spirit of our adversarial system of litigation.”

[See also *The Anti-Corruption Bureau v Chinkhadze and Kantema* [2002–2003] MLR 288 (SCA).]

5.4. So in *The State v The Speaker of the National Assembly Ex-parte Democratic Progressive Party* Judicial Review Case No. 34 of 2012, HC, PR, (Unreported), Chipeta, J_vacated leave for judicial review which the Applicant, Democratic Progressive Party obtained on account that the Democratic Progressive Party had no legal capacity to sue or be sued.

5.5. In the State v Registrar of Financial Institutions ex parte Credit Data Reference Bureau Ltd Miscellaneous Civil Cause Number 4 of 2013, (High Court, PR, Commercial Division), Katsala, J made the following observations:

“In my judgment the position is no different in the present case. The applicant is non-existent. The leave was granted to a non-existent applicant. It was thus granted to no body. Thus no judicial review proceedings could commence or can continue today. In the premises it is my considered view that amending the name of the applicant cannot remedy the situation. In the first place there is no applicant, so whose name will be amended? You cannot amend the name of a non-existent entity. Further, there are no proceedings which can be continued with, none having commenced, in the first place. In the circumstances it is my view that the issue of res judicata cannot arise. I therefore dismiss the application to amend the name of the non-existent applicant and the purported judicial review proceedings are null and void and are terminated forthwith.”

5.6. Section 3 of the Civil Procedure (Suits by or against the Government or Public Officers) Act (Cap 6:01 of the Laws of Malawi) provides that:

(1) Save as may otherwise expressly be provided by any Act, suits by or against the Government shall be instituted by or against the Attorney General. Such suits shall be instituted and tried in the same manner as suits to which the Government is not a party.

(2) The Attorney General or other person authorized by the Attorney General to act for the Government in respect to any judicial proceedings shall be deemed to be the recognized agent by whom appearances, acts and applications may be made or done on behalf of the Government.

5.7. In terms of section 3 of the Civil Procedure (Suits by or against the Government or Public Officers) Act suits by or against Government shall be instituted by or against the Attorney General. The Respondent in the present case is the State. The State therefore does not have legal capacity to sue or to be sued. It is thus clear here that the State is an improper party to the present proceedings and ought to be struck out as a party to the present proceedings on account of misjoinder. [See *Vacher & Sons v. London Society of Compositors* [supra] and *The State v The Speaker of the National Assembly Ex-parte Democratic Progressive Party* [supra] and *the State v Registrar of Financial Institutions ex parte Credit Data Reference Bureau Ltd* [supra].

6. Whether or not the present proceedings are irregular

6.1. Section 9(2) of the Courts Act provides as follows:

“Every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be

heard and disposed of by or before not less than three judges.”

6.2 In the case of **The State and The Director of Public Prosecutions Ex-Parte: Gift Trapence and Timothy Pagonachi Mtambo** Misc Civil Cause No. 16 of 2016, Justice Kapindu in his ruling following an application for leave for judicial review commented as follows in relation to disposing a matter under Section 9(2) of the Courts Act when the proceedings were in the Magistrates Court:

“...the Parties in the Court below were geared to make an application and representations in respect thereof before the Senior Resident Magistrate Court for that Court to make a referral decision to the Chief Justice for certification of the matter as a constitutional cause. My reading of Section 9(2) of the Courts Act is that this seems untenable. Section 9(2) of the Courts Act is very clear. It provides that...Section 9(2) of the Courts Act clearly confines itself to business arising out of the ‘High Court.’ There is nothing in that Section that suggests that this should be understood as extending the scope of its application beyond the High Court to any other courts such as the subordinate courts. The legislature itself confined itself to business ‘in the High Court.’ I am not entirely sure why the provision was drafted this way. But the result is that we were left with a clear text. It seems to me, without deciding, that in so far as Rule 8(1) of the Courts (High Court) (Procedure on the Interpretation or

Application of the Constitution) Rules extends its scope of application to Magistrate or Chairperson of a Court (these being subordinate to the High Court); that would be ultra vires Section 9(2) of the Courts Act.”

6.3 If the Applicant was so minded to lodge a Constitutional Challenge of Section 184(1)(c) of the Penal Code, following the stay of proceedings in the Magistrates Court, he should have commenced proceedings by way of originating summons in the High Court.

6.4 This is provided for under **Order 5 Rule 3 of the Rules of the Supreme Court** that provides as follows:

“Proceedings by which an application is to be made to the High Court or a judge thereof under any Act must be begun by Originating Summons except where by these rules or by or under any Act the application in question is expressly required or authorised to be made by some other means.”

6.5 This position was confirmed in the case of **Umia Margaret Mlombwa v. Attorney General and the Minister of Local Government and Rural Development** Civil Cause No. 933 of 2006 which cited with approval the case of **Maurice Maulidi v. Hanif Motani** Civil Cause Number 612 of 1989 where the Court held as follows:

“First, learned counsel argued that the plaintiff was wrong in instituting the present proceedings by Originating Summons. He contended they should have been begun by Writ of Summons. He cited Order 5 of the Rules of the

Supreme Court in support of the submission. With respect, i do not agree. As I understand it, proceedings by which an application is made to this court under An Act should normally be instituted by Originating Summons, unless the relevant Act expressly says the proceedings should be begun otherwise."

7

SEBMISSION AND PRAYER

7.1. In view of the foregoing, it is submitted that the Respondent is not the correct party to these proceedings and that the present proceedings are irregular as there are no pending proceedings in the High Court.

7.2 It is thus the Respondent's prayer that these proceedings should be struck out.

Dated this 25th day of August 2016



Apoche Itimu

Senior State Advocate

For: ATTORNEY GENERAL