

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

MISC. (ELECTORAL) CASE NUMBER 64 OF 2014

BETWEEN

ULEMU MSUNGAMA.....PETITIONER

AND

THE ELECTORAL COMMISSION.....RESPONDENT

BENTLY NAMASASU.....INTERESTED PARTY

CORAM: HON. JUSTICE CHOMBO

Chapo, Counsel for the Petitioner

Mkwamba, Counsel for the Respondent

Gondwe , Counsel for the Interested Party

Kalambo, Court Interpreter

RULING

Ulemu Msungama, by his petition seeks a court declaration as follows:

- That the Interested Party was not duly elected member of the National Assembly for Lilongwe City South East Constituency, and
- That the Petitioner was duly elected; or in the alternative
- That fresh elections be ordered

The petition was made pursuant to section 100 of the Presidential and Parliamentary Elections Act.

The brief facts of the case arose from the parliamentary elections conducted by the Respondent on 20th May 2014. The Petitioner and the Interested Party, representing the Malawi Congress Party (MCP) and Democratic People's Party (DPP) respectively contested as candidates in the

Lilongwe City South East Constituency. The Petitioner filed affidavits and skeleton arguments submitting that there 150 votes polled in his favour at Chilinde Polling Station were not taken into account in the final tally. In addition, that 470 valid votes in his favour were declared null and void at Area 12 City Assembly Site Office and Mlodza Polling Stations. According to the Petitioner, there were various irregularities at different polling stations, which, if corrected, put him ahead with over 100 votes with the Interested Party. The Petitioner had expressed his dissatisfaction with the results to the Respondent and the Respondent admitted that the Petitioner had raised issues that the Respondent failed to respond before making the final announcement on the results of the said elections on 2nd June 2014. On 26th June 2014 when the matter came before Honourable Judge Mwale the parties consented to a recount of the ballot papers and the relevant court order was executed. Under the said consent order, the Respondent was to identify the relevant ballot boxes between 27th June and 7th July 2014. As the Respondent was in the process of making arrangements for identifying the relevant ballot boxes the Interested Party obtained an ex parte order on 7th July 2014 before Honourable Judge Muhara staying the enforcement of the consent order as the Interested Party had not been heard prior to the consent order being obtained. An order by the Interested Party to join the proceedings was also granted. However, before the recounting could be done an unexplained fire at the Respondent's warehouse gutted down the warehouse side where the ballot boxes in issue were destroying all evidence and frustrating the exercise of recounting the ballot papers.

The parties have all filed extensive affidavits with various attachments. It was submitted by the Petitioner that the affidavits filed by the Respondent and Interested Party go beyond the irregularities raised by the Petitioner. The parties' prayer is that the court should consider all the documents and make its determination. However, after a perusal of all the affidavits and the attachments, thereto I am afraid that I am of the strong view that that would be a very difficult exercise for the court for a number of reasons:

1. The Petition was originally in respect of four stations only, however, the Respondent and the Interested Party have unearthed evidence of other polling stations that unveils irregularities that may not be dealt with on paper. This may be an indication that what has surfaced may only be a tip of the iceberg.
2. Considering the documents that the parties seek to rely on one is at a loss as to their authenticity. Most of them have cancellations, writing over, and wrong additions, just to highlight a few anomalies that are not signed for unexplained and questionable. In my view, reliance on these documents may result in total miscarriage of justice.
3. A serious consideration of the allegations of the Petitioner shows that the determination cannot be made by a mere review of the papers presented in court. This

can be exemplified by the Petitioner's submissions which include the following: (extracted from 'Affidavit in Response to the Affidavits of Lillie Longwe, Edna Kaludzu, Mercy Mwale and Bandire Moyo' paragraphs 10, 11, in respect of Chilinde Polling Station and 12, 13 and 16 in respect of Kaliyeka II Ground)

The Respondent has conceded that 50 votes were indeed left out in posting the final tally in the system. On the 100 votes the Respondent has all but fallen short of also agreeing with my contention. The Respondent agrees that the result sheet LL2 as presented has a clear discrepancy of 100 votes. That the 100 votes are due to mistake on stream 3 where the result sheet indicates 31 votes instead of 131 votes in my favour. That copy of my official result sheet, result sheets for the People's Party candidates and UDF candidates which were all duly signed by monitors for all parties including the Interested Party and the Respondent's Presiding Officer show that I polled 131 votes on stream 4. I further refer to the affidavit of my monitor and another monitor for independent candidates, which also show that I polled 131 votes on stream 4. Apparently the Respondent also confirmed the same with the records from NICE, another stakeholder who also had monitors at the Polling Station.

In the circumstance it is clear that there is a total of 150 votes in my favour that were not taken into account by the Respondent in the official result that declared the Interested Party winner by 98 votes.

This is one of the alleged irregularities that was never part of the petition but has been raised by the Interested Party and the Respondent. They allege that the totals (sic) number of votes for me and the Interested Party as indicated do not tally with the totals for the streams as indicated, However, the Respondent and Interested Party are making wrong conclusions.

If you have totals, which do not tally with the results for the streams, there are two conclusions that can be drawn; either the totals are correct and the figures for the streams as indicated are wrong or the vice versa. The objective of this case is to establish what were the actual votes polled in favour of me and the Interested Party on the day. This should have been the objective of the Respondent's alleged audit exercise. The objective is not to just correct figures on the result sheet.

All the records of all these monitors show that I polled 510 votes and the Interested Party polled 382 votes. What is actual (sic) wrong on the result sheet

