

Kaunda & Ors v Malawi (provisional measures) (2021) 5 AfCLR 174

Application 013/2021, *Symon Vuwa Kaunda and 5 Others v Republic of Malawi*

Ruling, 11 June 2021. Done in English and French, the English text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, BENSAOULA, ANUKAM, NTSEBEZA, and SACKO

Recused under Article 22: CHIZUMILA

The Applicants, who are all nationals of the Respondent State, brought an Application against the State alleging that the nullification by the domestic court, of the 1st Applicant's election to parliament was a violation of their human rights. In this request for provisional measures, the Applicants asked the Court to make an order directing the Respondent State not to conduct by-elections until the main Application was finally determined. The Court dismissed the request for provisional measures on the grounds that the Application did not reveal a situation of potential irreparable harm to the Applicants.

Jurisdiction (*prima facie*, 11-15)

Provisional measures (discretion of court, 20; urgency, 21-22; irreparable harm, 23-28)

I. The Parties

1. Symon Vuwa Kaunda, Getrude Mnyenyembe, Daniel Tula Phiri, Mzata Shadreck Tayani, Nkhasi Esaau Msinawana, and Kayafa Phiri (hereinafter referred to as "the Applicants"), are Malawian nationals who allege that their rights have been violated. The Applicants aver that these violations ensued from the decision of the Supreme Court of Appeal of the Republic of Malawi to order the nullification of the election of Mr Symon Vuwa Kaunda (hereinafter referred to as "the First Applicant") as a Member of the National Assembly and the holding of a fresh election.
2. The Application is filed against the Republic of Malawi (hereinafter referred to as "Respondent State") which became party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 23 February 1990 and to the Protocol on 9 October 2008. Furthermore, on 9 October 2008, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications filed by individuals and Non-Governmental Organisations having observer status with the

African Commission on Human and Peoples' Rights.

II. Subject of the Application

3. It emerges from the main Application dated 5 May 2021 that, following the election held on 21 May 2019, the Malawi Electoral Commission declared the First Applicant, Mr Symon Vuwa Kaunda, elected as a Member of the National Assembly of the Respondent State for the Nkhatabay Central Constituency. Pursuant to a petition filed by Mr Ralph Joseph Mbone who contested in the same Constituency, the High Court of Malawi, on 16 September 2019, dismissed the petition on the ground that there was insufficient evidence to overturn the First Applicant's election. However, Mr Mbone appealed the High Court's decision before the Supreme Court of Appeal, which, on 21 April 2021, set aside the lower court's judgment and ordered the nullification of the First Applicant's election as well as a fresh election.
4. In the present request, the Applicants are seeking an order for provisional measures directing the Respondent State to not conduct the by-election until the main Application is finally determined.

III. Alleged violations

5. In the main Application, the Applicants allege that the Respondent State violated their rights as follows:
 - i. The right to equal protection before the law guaranteed under Article 3(2) of the Charter;
 - ii. The right to be heard protected under Article 7(1) of the Charter; and
 - iii. The right to participate freely in government guaranteed under Article 13(1) of the Charter.

IV. Summary of the Procedure before the Court

6. The Registry received the main Application on 5 May 2021 including the request for provisional measures. On 13 May 2021, the Application was served on the Respondent State, which was granted ten (10) days to file its observations on the request for provisional measures. Upon request, the Respondent State was granted an additional time of ten (10) days effective 27 May 2021.
7. On 5 June 2021, the Registry received the Respondent State's response to the request for provisional measures, which was

transmitted to the Applicants on 6 June 2021 for information.

V. *Prima facie* jurisdiction

8. The Respondent State submits that the Court lacks jurisdiction to order provisional measures as requested by the Applicants given that this Court does not have the power to nullify the decision of the Malawi Supreme Court of Appeal.
9. The Applicant did not make any observation on the jurisdiction of the Court.

10. Article 3(1) of the Protocol provides that
The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
11. Rule 49(1) of the Rules¹ provides that “the Court shall preliminarily ascertain its jurisdiction ... in accordance with the Charter, the Protocol and these Rules.” However, in ordering provisional measures, the Court need not ascertain that it has jurisdiction on the merits of the case, but it simply needs to satisfy itself that it has *prima facie* jurisdiction.²
12. Regarding the Respondent State’s objection on jurisdiction, this Court observes that its jurisdiction in relation to the decision of the Malawi Supreme Court of Appeal is an issue for full determination on jurisdiction while considering the merits of this matter. This objection is therefore dismissed for purposes of examining the present request for provisional measures.
13. The Court notes that, in the instant matter, the Applicant alleges violation of rights that are protected under Articles 3(2), 7(1) and 13 of the Charter, an instrument to which the Respondent State

1 Formerly Rule 39(1) of the Rules of Court, 2 June 2010.

2 See *African Commission on Human and Peoples’ Rights v Great Socialist People’s Libyan Arab Jamahiriya* (provisional measures) (15 March 2013) 1 AfCLR 145, § 10; *Charles Kajoloweka v Republic of Malawi*, ACtHPR, Application No. 055/2019, Order of 27 March 2020 (provisional measures), § 10.

is a party.

14. The Court further notes that the Respondent State is a party to the Protocol. It has also made the Declaration by which it accepts the Court's jurisdiction to receive applications from individuals and Non-Governmental Organisations having observer status with the African Commission on Human and Peoples' Rights in accordance with Articles 34(6) and 5(3) of the Protocol read jointly.
15. In light of the foregoing, the Court holds that it has *prima facie* jurisdiction to hear this Application.

VI. Provisional measures requested

16. The Applicants request the Court to order that the Respondent State and its organs should refrain from taking any measures to implement the decision of the Malawi Supreme Court of Appeal including to conduct the by-election at the Nkhatabay Central Constituency until the matter is finally determined. The Applicants submit that, pursuant to Article 63(2)(b) of the Constitution of the Respondent State, where the seat of a Member of the National Assembly falls vacant, a by-election shall be held within sixty (60) days, which in the present case will be no later 21 June 2021.
17. The Applicants aver that should a by-election be held before the determination of the main Application in the present matter, the First Applicant, that is Mr Symon Vuwa Kaunda, would be severely prejudiced and would suffer irreparable damage as he would have incurred financial costs in contesting the by-election. The Applicants further allege that the holding of the by-election and the uncertainty of its outcome may subject Mr Kaunda to unquantifiable reputational damage, which is his main asset as a politician and there is no appropriate or adequate remedy to redress the loss should it occur. The Applicants also submit that they expended time and continue to incur unforeseen legal and other costs in the processing of this Application.
18. The Respondent State avers that the First Applicant does not provide reasons to justify gravity and urgency in support of the present request for provisional measures. Regarding the alleged harm of financial loss, the Respondent State submits that the First Applicant does not seek the nullification of the decision of the Supreme Court of Appeal and that a stay of the said decision will only delay an inevitable election process. In respect of the First Applicant's contention that he would suffer reputational damage, the Respondent State avers that the fresh election is a lawful process to which the First Applicant is well accustomed and that uncertainty of the outcome only lasts for the period within which

the ballots are being counted. The Respondent State thus prays this Court to dismiss the request for provisional measures and condemn the Applicants to costs.

19. The Court recalls that
[P]ursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and *where necessary* to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.³
20. It follows from the foregoing that the Court has discretion to decide in each case whether, in the light of the particular circumstances, it should make use of the power vested in it by the aforementioned provisions.
21. In the present case, the Applicants challenge the decision by which the Respondent State's Supreme Court of Appeal nullified the election of the First Applicant, Mr Kaunda, as a Member of the National Assembly and ordered that a by-election be held for his constituency. The Court recalls that, in examining whether a request for provisional measures should be granted, it is required to establish urgency and irreparable harm. The Court further recalls that the Applicants bear the onus of proving that their request meets the requirements of both urgency and risk of irreparable harm.⁴
22. Regarding urgency in the present matter, the Court notes that the harm that the Applicants seek to prevent in this case is contingent on the holding of the by-election, which is to be conducted on 21 June 2021. The Court observes that the main Application, including the request for provisional measures, was filed on 5 May 2021, which is one (1) month and sixteen (16) days to the occurrence of the aforementioned election. In light of the imminent

3 Rule 59(1) of the Rules of Court, 2020. Emphasis of the Court.

4 *Legal and Human Rights Centre and Tanganyika Law Society v United Republic of Tanzania*, ACTHPR, Application No. 036/2020, Ruling of 30 October 2020 (provisional measures), §§ 27-28.

- nature of the election, the Court finds that urgency is established.
23. With respect to irreparable harm, the Court recalls that it is established in instances where the impugned acts are capable of seriously compromising the rights whose violation is alleged in a way that prejudice would be caused prior to the Court making a determination on the merits of the matter.⁵
 24. In the present case, the Applicants aver that the holding of the election would cause irreparable harm to the First Applicant, Mr Kaunda, namely in respect of i) the financial cost of contesting the election; ii) reputational damage due to the uncertainty of the outcome; and, to all the Applicants, iii) time and costs in legal proceedings related to this Application.
 25. Regarding the financial cost of contesting the election, the Court notes that the Applicants do not specify the loss that is foreseen neither do they supply evidence in support of such loss. Having said that, the Court observes that, as a general practice, when vying for any public elective position a candidate incurs the costs of his campaign and other related costs. Ultimately, the Court observes that any costs that the First Applicant might incur due to the fresh election do not represent harm that would compromise the rights involved in an irreparable manner should this Court find in his favour with respect to the merits of the matter. The Court therefore finds that this averment does not stand the test of irreparable prejudice.
 26. With respect to “unquantifiable reputational damage” due to the uncertainty of the election’s result, the Court observes that uncertainty is inherent in any election. Furthermore, the decision of the Supreme Court of Appeal does not prevent the First Applicant, Mr Kaunda, from contesting. The Court consequently finds that the risk of reputational damage due to uncertainty is not established.
 27. The Court finally examines the Applicants’ claim that the time and costs incurred in legal proceedings related to this Application constitute irreparable harm that warrant an order that the election be stayed. On this point, the Court notes that the present matter is only at the stage of the filing of the Application. The Court also observes that, as much as the Applicants might have incurred the costs of availing themselves the services of counsel both in Malawi and Tanzania as it emerges from the file, such costs and

5 *Harouna Dicko and Others v Burkina Faso*, ACtHPR, Application No. 037/2020, Ruling of 20 November 2020 (provisional measures), § 29; *Guillaume Kigbafori Soro and Others v Côte d’Ivoire*, ACtHPR, Application No. 012/2020, Ruling of 15 September 2020 (provisional measures), § 29.

the time involved are inherent in legal processes. Furthermore, the determination of these alleged costs is an issue that falls under the merits of the matter. As such, the Court finds that the time and costs related to this Application do not fulfil the requirement of irreparable harm.

28. In light of the above, the Court finds that, while they indisputably bear urgency, the circumstances in the present Application do not reveal a situation of potential irreparable harm to the Applicants that warrants the adoption of provisional measures.⁶
29. Consequently, the Court declines to exercise its powers under Article 27(2) of the Protocol and Rule 59(1) of its Rules, to order the Respondent State to stay the conduct of the by-election ordered by the Supreme Court of Appeal for the Nkhatabay Central Constituency pending the determination of the Application on the merits.
30. For the avoidance of doubt, this Ruling is provisional in nature and does not in any manner prejudice the findings of the Court on its jurisdiction, on the admissibility of the Application and the merits thereof.

VII. Operative part

31. For these reasons,
The Court,
Unanimously:

- i. *Dismisses* the Applicants' request for provisional measures

6 *Ghati Mwita v United Republic of Tanzania*, ACtHPR, Application No. 012/2019, Judgment of 9 April 2020, § 21; *Tembo Hussein v United Republic of Tanzania*, ACtHPR, Application No. 001/2018, Judgment of 11 February 2019, § 21.