

# Mchali v Kajawa and Electoral Commission

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<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice Dorothy nyaKaunda Kamanga.
<b>Cause Number:</b>	Electoral Case Number 15 of 2014
<b>Date of Judgment:</b>	March 06, 2015
<b>Bar:</b>	Mr. Chipeta, Counsel for the Petitioner Mr. Mpombeza, counsel for the 1st Respondent Mr. Mkwamba, counsel for the 2nd Respondent

## Head Notes

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**Electoral Law** – Parliamentary Elections – High Court Appeals – Mode of commencing appeal – Lodging complaint with Commission then appealing to High Court upon dissatisfaction with the Commission's determination.

**Electoral Law** – Evidence – Affidavit Evidence – Requirement to support appeals in electoral matters by affidavit evidence is mandatory.

**Civil Procedure** – Practice and Procedure – statutory provisions/Rules of Practice – Practice Directions do not override applicable statutory provisions or established rules of practice and procedure.

## Summary

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The Appellant lodged an appeal by way of petition to the High Court, Civil Division, challenging the results of the May 2014 tripartite general elections for the Lilongwe Mpenu Nkhoma constituency. The Appellant, who came second in the parliamentary race, filed the petition on 6 June 2014 against the 1st Respondent, the declared winner, and the 2nd Respondent, the electoral body, alleging irregularities in the poll results. The background to the dispute involved the 2nd Respondent declaring the 1st Respondent the winner, prompting the Appellant to seek various declaratory reliefs. After the Court granted leave to amend a party's name in August 2014, the 1st Respondent subsequently raised a preliminary objection on 12 February 2015 concerning the proper mode of commencing the proceedings. The Court, aiming for a just and fair determination on the merits, decided to deliver a ruling on all outstanding preliminary issues and give directions on the way forward.

The principal legal questions for the Court were whether the proceedings were properly commenced under the relevant statute, whether a bundle of documents obtained through a notice of inspection was admissible as evidence, and the effect of a Practice Direction.

The Court held that the proceedings were properly commenced under section 114 of the Presidential and Parliamentary Elections Act (PPEA), as the Appellant had followed the correct procedure by first lodging a complaint with the 2nd Respondent, who then declined to rectify the problem and advised an appeal to the High Court, a procedure. However, while the Appellant was permitted to proceed with the inspection of documents specifically referred to in the Petition and supporting affidavit under Order 24 rule 10 of the Rules of the Supreme Court, the Court found the manner in which those documents were introduced onto the record to be irregular. Consequently, they

were declared inadmissible as evidence, and the 2nd Respondent was similarly precluded from relying on them in their submissions. The decisive rationale was that section 114(1) of the PPEA clearly stipulates that appeals of this nature must be supported by affidavit evidence. Furthermore, the Court affirmed the proposition that a Practice Direction cannot override or supersede applicable statutory provisions or established rules of practice and procedure. The Court did not allow or dismiss the appeal, but rather ordered the matter to proceed to a hearing on the merits, which was adjourned to 27 March 2015. The Court directed the exchange of outstanding affidavits and skeleton arguments to be completed by 25 March 2015 and awarded the costs occasioned by the adjournment to the 1st Respondent, to be suffered equally by the Appellant and the 2nd Respondent.

## **Legislation Construed**

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### **Statute**

Presidential and Parliamentary Elections Act (PPEA) (s 114(1))

### **Subsidiary Legislation**

Rules of the Supreme Court, Supreme Court Practice (Order 15 rule 6, Order 20 rule 5 and Order 24 rule 10)

### **Judgment**

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## **RULING ON PRELIMINARY**

### **ISSUES**

The petitioner, Mr. Mchali, and the first respondent, Mr. Kajawa, contested as independent parliamentary candidates in Lilongwe Mpenu Nkhoma constituency in Lilongwe district during the May 2014 tripartite general elections. After tallying the results the electoral body declared the first respondent as the winner of the parliamentary elections in the said constituency, out of the seven candidates who contested, while the petitioner came second in the parliamentary race. On 6 June 2014, the petitioner being dissatisfied with the return, brought an appeal by way of petition alleging irregularities in the poll results and claiming for various declaratory reliefs in the event of the irregularities being established by the court. On 14 August 2014 the court granted a summons for leave to amend by correcting the name a party under the authority of Order 20 rule 5 of the Supreme Court Practice, Rules of the Supreme Court as read together with Order 15 rule 6 of the Supreme Court Practice, Rules of the Supreme Court.

On 12 February 2015 when this petition was set down for hearing the 1st respondent raised a preliminary objection relating to the mode of commencement of the proceedings. Having heard the parties the court made a decision that the preliminary objection should be dealt together with the substantive issues for purpose of speeding up the proceedings. In the course of reading the submissions of the parties the court noted that the 1st respondent in their paragraph 5 .1 of their submissions raise a concern that this court has failed to deliver an outstanding reserved ruling on the issue whether the petitioner can use the bundle of documents filed in pursuance of the notice of inspection of documents issued by the petitioner on 11 July 2014. Since this court is of the view that this petition should be determined on merits and in order to achieve a just and fair decision in this matter, the court has decided that today it will

deal with all the outstanding preliminary issues and give directions on the way forward in this petition.

The findings on the preliminary issues that have been identified are as follows:

1. The provisions of a Practice Direction do not over ride or supersede applicable statutory provisions or rules of practice and procedure.
2. The petitioner is allowed by the rules of practice and procedure to proceed under Order 24 rule 10 of the Rules of the Supreme Court, Supreme Court Practice, hereinafter RSC, since the documents required to be produced for inspection are specifically referred to in the Petition and the affidavit of Lellie Longwe that was filed on 16 June 2014.
3. However, the petitioner having proceeded under Order 24 rule 10 of RSC, the manner in which the petitioner has introduced the documents that were produced by the 2nd respondent on the record of the case is irregular and cannot be used as part of the evidence in these proceedings. Similarly, the counsel for the 2nd respondent cannot in their submissions rely on such documents as evidence in support of their arguments. Section 114(1) of the Presidential and Parliamentary Elections Act, hereinafter PPEA is very clear that appeals of this nature shall be supported by affidavit evidence.
4. The present proceedings were properly commenced under s 114 of the PPEA because the 2nd respondent made a decision with regard the complaint that the appellant registered with them which is contained in the 2nd respondent's letter dated 3 June 2014 which was attached to the affidavit of Lellie Longwe and marked as exhibit 'WK2'. From that letter it is clear that the 2nd respondent clearly declined to rectify the problem raised by the petitioner citing that 'there was no evidence' and advised the petitioner to appeal to the

High Court. The directions provided in the case of *Chisi v Electoral Commission* [1] confirms that the petitioner followed the proper procedure by lodging a complaint with the 2nd respondent then making an appeal to the High Court once he was dissatisfied with the decision made by the 2nd respondent.

Having determined what were considered by the court to be outstanding preliminary issues it is ordered and directed that this matter proceeds as follows:

1. That the petitioner files and serves on the respondents any outstanding affidavits in support of the petition and skeleton arguments that it deems necessary in this petition by Friday 13 March 2015.
2. That the 1st and 2nd respondents are at liberty to respond to the petitioner by filing and serving affidavits and skeleton arguments by Friday 20 March 2015.
3. That the petitioner can exercise his right to reply to the two respondents by filing and serving affidavits and skeleton arguments by Wednesday the 25 March 2015.
4. The hearing of this petitioner is further adjourned to Friday 27 March 2015 at 9 am in open court. The petitioner is to file a notice of adjournment on the respondents by Friday 13 March 2015.

This court exercises its discretion and awards the costs of occasioned by this adjournment to the 1st respondent to be suffered equally between the petitioner and the 2nd respondent.

Pronounced in open court this 6th day of March 2015 at Chichiri, Blantyre.

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[1]

HC/PR Electoral Case no 1 of 2014 ( unreported 4 April 2014).