REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

CIVIL CAUSE NO. 328 OF 2022

(Before Honourable Justice Mambulasa)

BETWEEN:

ANGLICAN DIOCESE OF UPPER SHIRE…..……...…….1ST CLAIMANT

-AND-

BISHOP BRIGHTON VITA MALASA…….2ND CLAIMANT

-AND-

REVEREND EDWARD KAWINGA
(ON HIS OWN BEHALF AND ON BEHALF OF DIOCESEAN STANDING COMMITTEE OF THE ANGLICAN DIOCESE OF UPPER SHIRE)…….…….3RD CLAIMANT

-AND-

PETER SALAMBA
(ON HIS OWN BEHALF AND ON BEHALF OF THE BOARD OF FINANCE OF THE ANGLICAN DIOCESE OF UPPER SHIRE)……..…….4TH CLAIMANT

-AND-

MARY MAKANDE
(ON HER OWN BEHALF AND ON BEHALF OF MEMBERS OF THE MOTHERS' UNION OF THE ANGLICAN DIOCESE OF UPPER SHIRE)…….…….5TH CLAIMANT

-VS-

CHURCH OF PROVINCE OF CENTRAL AFRICA……1ST DEFENDANT

-AND-

HIS GRACE ARCHBISHOP ALBERT CHAMA……..…..2ND DEFENDANT

CORAM: HON. JUSTICE MANDALA MAMBULASA

Ms. Lozindaba Mbvundula, Advocate for the Claimants

Mr. Davis Mthakati Njobvu, Advocate for the Defendants

Mr. Obet Chitatu, Court Clerk

RULING

MAMBULASA, J

Introduction

[1] The Claimants filed with the Court a without-notice application for an interlocutory order of injunction restraining the Defendants from implementing their decision excommunicating the 2nd Claimant, members of the Diocesan Standing Committee (DSC) of the Anglican Diocese of Upper

Shire and members of the Board of Finance (BoF) of the Anglican Diocese of Upper Shire and anyone who signed or appended their name to a letter dated 10th October, 2022 addressed to the 2nd Defendant protesting a meeting with the 2nd Defendant and appointing Reverend Canon Grant Timpunza Tebulo as Vicar General of the 1st Claimant and further restraining the Defendants from adjudicating in grievances in the 1st Claimant Church until the procedures of the Diocesan Standing Committee of the 1st Claimant and the Constitution and Canons of the Church of the Province of Central Africa are complied with and fully adhered to.

[2] The application was supported by a sworn statement made by Reverend Canon Emmanuel Master, the Diocesan Education Secretary of the 1st Claimant. It was taken out under Order 10, rules 27 and 28 of the Courts (High Court) (Civil Procedure) Rules, 2017 and under the inherent jurisdiction of the Court.

[3] Simultaneously, the Claimants filed a without-notice application seeking declaratory orders that:

3.1 The Defendants' decision excommunicating Bishop Brighton Vita Malasa, members of the Diocesan Standing Committee (DSC) of the Anglican Diocese of Upper Shire and members of the Board of Finance (BoF) and anyone who signed or appended their name to a letter dated 10th October, 2022 addressed to the 2nd Defendant protesting a meeting with the 2nd Defendant unless and until the 2nd Defendant advised the agenda for the said meeting is void *ab initio* and of no effect.

3.2 The Defendants' conduct throughout the process of settling disagreements in the 1st Claimant has been in breach of applicable procedures of the 1st Claimant and the Constitution and Canons of the 1st Defendant; and

3.3 The Defendants' decision is void *ab initio* for violating the Constitution and Canons of the 1st Defendant and therefore has no force and effect and be considered as not having been made;

3.4 That the Defendants do pay costs of this action at an indemnity scale to be assessed by the Registrar.

[4] The application for declaratory orders was also supported by a sworn statement made by Reverend Canon Emmanuel Master. He also filed a supplementary sworn statement in support of both the application for an interlocutory order of injunction as well as for the declaratory orders. When the Court considered both applications and as part of its active case management,[1] it directed that they should come on a with-notice basis to the Defendants. The Claimants duly complied with the direction of the Court.

[5] The Defendants however, brought an application to strike out the Claimants' two applications for an interlocutory order of injunction and declaratory orders for non-compliance with the Courts (High Court) (Civil Procedure) Rules, 2017 and for costs occasioned by the said applications. The application was taken out under Order 2, rules 3 and 4; Order 8 rules 3, 8 and 30; and

[1] *See* generally, Order 1, rule 5 (5) of the Courts (High Court) (Civil Procedure) Rules, 2017.

Order 18, rules 7 (4) and 7 (5) of the Courts (High Court) (Civil Procedure) Rules, 2017 and under the inherent jurisdiction of the Court.

[6] The grounds for the Defendants' application were as follows:

6.1 The application for declaratory orders is fundamentally defective as contrary to Order 5, rule 1 and Order 19, rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 there is no proceeding duly commenced under the Courts (High Court) (Civil Procedure) Rules, 2017 in respect of the application. Resultantly, the application for interlocutory injunction is also fundamentally defective;

6.2 The purported service of the Claimants' application on the Defendants who are based outside Malawi, is ineffective and was done contrary to Order 8, rule 30 of the Courts (High Court) (Civil Procedure) Rules, 2017 requiring that permission of the court should be obtained prior to service of a claim on foreign Defendants;

6.3 The purported service of the Claimants' application on the Defendants by e-mail was done contrary to Order 8, rule 8 (c) of the Courts (High Court) (Civil Procedure) Rules, 2017 as the Defendants were not served personally but by electronic mail, although they had not provided an address for service by electronic mail;

6.4 The 1st Claimant and the other parties said to be represented by the 3rd, 4th and 5th Claimants other than the 3rd, 4th and 5th Claimants themselves, cannot validly sue the Defendants as they are not legal entities capable of suing and being sued. In any event, the said parties have no *locus standi* in the matter as they lack sufficient interest under the law; and

6.5 The sworn statements in support of the applications are defective on the grounds that: (i) the date on which the sworn statement was sworn does not appear on the first visible page of the sworn statement or on any page at all contrary to Order 18, rule 7 (4) of the Courts (High Court) (Civil Procedure) Rules, 2017; and (ii) the authorizing part at the end of the body of the statement does not comply with Order 18, rule 7 (5) of the Courts (High Court) (Civil Procedure) Rules, 2017.

[7] The Defendants' application was supported by a sworn statement made by Advocate Mr. Davis Mthakati Njobvu.

[8] This is now the Court's determination on all the three applications, namely, for an interlocutory order of injunction and declaratory orders on the part of the Claimants and to strike out these two applications on the part of the Defendants. The delay in rendering the ruling is deeply regretted. It is because the Court is overwhelmed with matters and one can only do so much.

The Claimants' Case

[9] The 1st Claimant is a gathering of Anglican Christians in Malawi.

[10] The 2nd Claimant is a Bishop responsible for the 1st Claimant.

[11] The 3rd Claimant is the Vicar General of the 1st Claimant and chairs the Diocesan Standing Committee of the 1st Claimant. The Diocesan Standing Committee is the supreme body of the 1st Claimant.

[12] The 4th Claimant is the chairperson of the Board of Finance of the 1st Claimant in charge of all financial matters.

[13] The 5th Claimant is the President of the Mothers Union of the 1st Claimant representing interests of all women in the 1st Claimant.

[14] The 1st Defendant is the main governing body of the Anglican Church in Central Africa covering Malawi, Zambia, Zimbabwe and Botswana.

[15] The 2nd Defendant is the Archbishop of the 1st Claimant. He is the overall head/leader of the 1st Defendant in Central Africa.

[16] For some time now, there has been friction in the 1st Claimant. One parish, called St George in Zomba, petitioned for the removal of the 2nd Claimant.

[17] Subsequently, the said Parish was joined by 60 other churches. There are 217 churches in the 1st Claimant. In short, 157 churches did not join the petition. In fact, these majority churches oppose the petition. The St George Parish petition does not have the support of the majority of the churches, the laity and the pastors.

[18] It is the St George Parish petition that got the Defendants involved in this matter.

[19] The Defendants deliberately breached the applicable procedures in the 1st Claimant and the Constitution and Canons of the 1st Defendant.

[20] The 2nd Defendant has always been aware of this breach through the position of the 3rd Claimant. It is important that the question of procedural impropriety be addressed by this Honourable Court.

[21] It is important that pending determination of the question of procedural impropriety, the *status quo* has to be maintained.

[22] In matters of faith, damages are not adequate remedy. In any case, damages are not the ultimate goal of the Claimants. The ultimate goal is good governance.

[23] The balance of convenience favours granting the interim relief of an order of injunction herein until the eventual determination of this matter.

[24] The normal process is that where any church has any grievances, it lodges them with its parish. Where the parish fails to address the grievances, they are referred to the arch-deaconry council. Where the referral fails, the grievances are escalated to the Diocesan Standing Committee. From there, if still the grievances are not resolved, the same are escalated to the Holy Synod of the Diocese. From the Holy Synod of the Diocese, the grievances if still unresolved are escalated to the Defendants.

[25] From the St George Parish, the above procedure was not followed. St George Parish went straight to the Defendants.

[26] The Defendants instead of guiding St George Parish as to the correct procedure, entertained the grievances and begun adjudicating on the same. They intimated that they did so out of fatherly love.

[27] The 2nd Defendant had several meetings with the 3rd Claimant. The 3rd Claimant made its stand clear that the Defendants could not entertain grievances that have violated the procedure set out in the Constitution and Canons of the 1st Defendant.

[28] Despite the protestation by the 3rd Claimant, the Defendants decided to force/compel the 2nd Claimant to resign.

[29] The 3rd Claimant decided/resolved that it had no problem with the 2nd Claimant and would therefore not accede to or recommend or accept his resignation holding that procedure per the Constitution and Canons of the 1st Defendant were not followed by the Defendants.

[30] On or around 17th September, 2022 the 2nd Defendant communicated that he would be coming to Malawi for meetings with the 3rd Claimant and the 4th Claimant.

[31] The agenda for his coming was not stipulated. A copy of the communication was exhibited and marked as, “REM1” to the sworn statement in support of the applications.

[32] Per Chapter 2, Act 2.2 (f) of the Acts of the Dioceses of the Anglican Council in Malawi, a written notice of meetings of the Diocesan Standing Committee must be given by the Diocesan Secretary at least (14) days before any meeting of the DSC can be held. Relevant part of the copy of the Acts of the Dioceses of Anglican Council in Malawi, clearly outlining the need for prior communication of agenda of any meeting of the DSC was exhibited and marked as, "REM2" to the sworn statement in support of the applications.

[33] In short, the DSC cannot hold meetings without a prior notice of agenda of any such meeting.

[34] The 1st Claimant, through the 3rd Claimant responded to the 2nd Defendant on or around 5th October, 2022. They requested the 2nd Defendant to provide an agenda for his coming to Malawi so that they would be duly prepared for the meeting.

[35] Noting the dead silence, the 3rd Claimant wrote a follow up letter to the 2nd Defendant on 10th October, 2022. The Claimant noted that the Defendant did not respond to the request for an agenda for the meetings and made it clear that if the agenda is not provided, they would not attend the meetings with the 2nd Defendant. A copy of the letter was exhibited and marked as, "REM3" to the sworn statement in support of the applications.

[36] The Defendants did not even respond to the 3rd Claimant's letter of 10th October, 2022.

[37] Despite all the above-outlined breach of procedures and despite not responding to the so many letters that the 3rd Claimant wrote to the Defendants, the 2nd Defendant insisted to still come to Malawi and hold meetings with the Claimants without providing an agenda for the said meetings and tainted with bad faith.

[38] The Claimants' view is that this is unfair for the following reasons:

38.1 The Defendants are clearly in breach of the procedures for resolving grievances under the Constitution and Canons of the 1st Defendant. Participating any further in the process would actually be vindicating or supporting breach of the procedures. The Claimants believe that tolerating such breach of procedures is unhealthy for the Anglican Church.

38.2 The Defendants' approach breaches principles of natural justice. Meetings require no ambush. All cards should be on the table. The Defendants are deliberately not responding to the Claimants' letters. This was on purpose so that the Claimants are ill-equipped for the meetings. This is unfair and breach of principles of transparency and accountability. The 2nd Defendant conducted himself in this manner so that eventually he can find justification for excommunicating the Claimants.

[39] The Defendants are acting in bad faith. Every time the 2nd Defendant came to Malawi, it is the 1st Claimant that takes care of the travel arrangements. The

1st Claimant pays for air fares and it picks him up from the airport and even arranges his hotel accommodation and caters for meals.

[40] However, on this trip, the 2nd Defendant did not request for any travel arrangements, accommodation or meals. This points to premeditated decisions meant to excommunicate the Claimants from the Anglican Church.

[41] By a letter dated 23rd October, 2022 the 2nd Defendant excommunicated the 2nd Claimant, the 3rd Claimants and the 4th Claimants from the Anglican Church. A copy of the letter was exhibited and marked as, "REM4" to the sworn statement in support of the applications.

[42] It is clear from exhibit, "REM4" that the excommunication is borne out of bitterness on the part of the 2nd Defendant that the 3rd Claimants and 4th Claimants did not meet him in Malawi. Yet, the 2nd Defendant himself is the cause for the decision of the 3rd Claimants and 4th Claimants not to meet him. He simply did not respond to the 3rd Claimants' letters requesting for an agenda of the 2nd Defendant's visit to Malawi.

[43] Further, out of bitterness, the 2nd Defendant has appointed Reverend Grant Timpunza Canon Tebulo to be Vicar General who has already began discharging his duties. A copy of the letter to that effect has been exhibited and marked as, "REM5" to the sworn statements in support of the applications.

[44] It is in view of the foregoing that the Claimants humbly and respectfully pray that the Honourable Court would be pleased to grant the applications for the interlocutory order of injunction and the declaratory orders sought.

The Defendant's Case

[45] The 1st Defendant, the Church of the Province of Central Africa is based in Zambia at No. 2, 12th Street, Nkana West, Kitwe.

[46] The 1st Defendant has 15 dioceses in Botswana, Malawi, Zambia and Zimbabwe. There are 4 dioceses in Malawi, namely, Diocese of Upper Shire (identified in this matter as the 1st Claimant), Diocese of National Malawi, Diocese of Lake Malawi and Diocese of Southern Malawi.

[47] The 1st Claimant is not registered as a legal entity. As such, the 1st Claimant does not have the legal capacity to sue and the "claim" by the 1st Claimant must be struck out.

[48] Similarly, the Diocesan Standing Committee of the Anglican Diocese of Upper Shire, the Board of Finance of the Anglican Diocese of Upper Shire, and the Mothers' Union of the Anglican Diocese of Upper Shire, on whose behalf the 3rd, 4th and 5th Claimants, respectively, are purportedly suing, have no legal capacity to sue and their "claims" must be struck out.

[49] In any event, the 1st Claimant and the bodies on whose behalf the 3rd, 4th and 5th Claimants are suing have no interest in this matter as the decision to ex-communicate affects individuals who are at liberty to sue in their own right.

Similarly, the issue regarding the handling of a petition against the 2nd Claimant concerns the 2nd Claimant, and not the other parties.

[50] As stated above, the 1st Defendant is based in Zambia.

[51] The 2nd Defendant is the Archbishop of the 1st Defendant. He is a Zambian citizen and is resident in Zambia. A copy of his Zambian passport was exhibited and marked as, "DMN1" to the sworn statement in support of the application to strike out the Claimants' applications.

[52] The Defendants were not served with an order of the court granting permission to serve the originating court documents on the Defendants, which indicates that the Claimants did not obtain the said permission.

[53] The applications by the Claimants were served on the 2nd Defendant by electronic mail on 28th October 2022. A copy of the email was exhibited and marked as, "DMN2" to the sworn statement in support of the application. Neither of the Defendants had provided their email addresses to the Claimants for purposes of service of court documents on them. As such, the said service was contrary to the applicable rules.

[54] In view of the above and on the grounds set out in the notice of application, it is humbly prayed that the Claimants' applications for declaratory orders and interlocutory order of injunction should be struck out entirely with costs to the Defendants.

The Claimants' Response

[55] The Claimants filed a sworn statement in opposition to the application to strike out applications for declaratory orders and an interlocutory order of injunction. The same was made by Advocate Ms. Lozindaba Mbvundula.

[56] The 1st Claimant is a division of the Registered Trustees of the Anglican Council in Malawi which has capacity to sue and to be sued in its own name. A copy of the registration certificate of the said Council was exhibited and marked as, "LM1".

[57] The 1st Claimant derives its capacity to sue from the legal personality of the said Anglican Council in Malawi and courts have over time acknowledged use of the name, "Anglican Diocese of the Upper Shire" as capable of being sued. A copy of one of the Orders of the Court in which the 1st Claimant was sued, under the legal personality of the Anglican Council in Malawi, but in its name, "Anglican Diocese of the Upper Shire" was exhibited and marked as, "LM2".

[58] The 1st Claimant can, therefore, maintain an action in its name as a division of the Anglican Council in Malawi which has a legal capacity to sue and to be sued in its own name.

[59] The use of the name, "Anglican Diocese of the Upper Shire" is precisely for purposes of convenience and for distinguishing the 1st Claimant from all other parishes and dioceses of the Anglican Church in Malawi.

[60] The 2nd, 3rd, 4th and 5th Claimants actually sued in their own names as natural persons affected by the impugned decisions of the Defendants. This is clear

from the first page of the applications themselves which were exhibited and marked as, “LM3”.

[61] The 3rd, 4th and 5th Claimants have a right to sue the Defendants in respect of the decisions affecting them. It is clear that each one of them has sued in their respective names as natural persons even though they are also suing on behalf of other members of the respective Boards of the 1st Claimant.

[62] The Claimants initially served the applications via electronic mail on 28th October, 2022. That was made as a matter of courtesy, for the Defendants’ noting while the Claimants applied for permission to formally serve the documents. The Claimants in fact prepared a draft application for service of legal process outside the jurisdiction by electronic mail. A copy of the draft application was exhibited and marked as, “LM4”.

[63] Before the Claimants could file the application for service of legal process outside the jurisdiction, the Defendants appointed *DNC Chambers* as their legal practitioners in the matter. Upon receipt of the Notice of Appointment of Legal Practitioners, the Claimants served both applications for an interlocutory order of injunction and for declaratory orders physically on *DNC Chambers* who are the Defendants’ legal practitioners.

[64] Even though they have not disclosed this fact in their sworn statement, the Defendants’ Legal Practitioners on 3rd November, 2022 accepted physical service of both applications for an interlocutory order of injunction and for declaratory orders. Exhibit “LM3” clearly shows that *DNC Chambers* duly accepted service of both applications.

[65] By virtue of serving the process on the Defendants' appointed legal practitioners, service of process in the matter was properly effected.

[66] The 3rd, 4th and 5th Claimants sued in their capacity as natural persons affected directly by the Defendants' decision.

[67] The 3rd, 4th and 5th Claimants were excommunicated by the 2nd Defendant without being afforded the right to be heard and other tenets of natural justice.

[68] The said letter of excommunication, the Defendants expelled from the 1st Claimant 500 people which number includes the 3rd, 4th and 5th Claimants.

[69] The 3rd, 4th and 5th Claimants have sufficient interest to come before the Court with grievances in respect of the decision of the Defendants which affected their rights.

[70] The absence of a date on the sworn statement is a curable defect and the Court has discretion to accept or refuse defective sworn statements in a proceeding.

[71] In the premises, the interests of justice weigh against granting the Defendants' application to strike out applications for declaratory orders and for an interlocutory order of injunction.

[72] The Claimants' therefore pray that the Defendants' application to strike out applications for interlocutory order of injunction and for declaratory orders be dismissed with costs.

Issues for Determination

[73] The issues for determination before this Court are:

73.1 Whether or not the Claimants' applications should be struck out for not complying with the Courts (High Court) (Civil Procedure) Rules, 2017?

73.2 Whether or not the Court should grant the interlocutory order of injunction and declaratory orders sought by the Claimants in this matter?

The Law

[74] Order 2, rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 is to the effect that the failure to comply with these Rules or a direction of the Court shall be an irregularity.

[75] Order 2, rules 3 and 4 of the Courts (High Court) (Civil Procedure) Rules, 2017 provide as follows:

> 3. Where there has been a failure to comply with these Rules or a direction of the Court, the Court may-
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> (a) set aside all or part of the proceeding;
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> (b) set aside a step taken in the proceeding;
>
> (c) declare a document or a step taken to be ineffectual;
>
> (d) declare a document or a step taken to be effectual;
>
> (e) make an order as to costs; or

(f) make any order that the Court may deem fit.

4. An application for an order under rule 3 shall-

(a) be made within a reasonable time and before the party making the application takes a fresh step in the proceeding after becoming aware of the irregularity; and

(b) set out details of the failure to comply with these Rules or a direction of the Court.

[76] Order 10, rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:

> The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court-
>
> (a) there is a serious question to be tried;
>
> (b) damages may not be an adequate remedy; and
>
> (c) it shall be just to do so,
>
> and the order may be made unconditionally or on such terms or conditions as the Court considers just.

[77] Order 10, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 is couched in the following terms:

> A party may apply for an interlocutory order at any stage, namely, before a proceeding has started, during a proceeding, or after a proceeding has been dealt with, and whether or not the party mentioned the particular relief being sought in his summons or counterclaim.

[78] Order 10, rule 8 (1) of the Courts (High Court) (Civil procedure) Rules, 2017 states as follows:

> A person may apply for an interlocutory order before a proceeding has started by filing an application in a proceeding and the application shall-
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> (a) set out the substance of the claim;
>
> (b) have a brief statement of the evidence on which the applicant will rely on;
>
> (c) set out the reasons why it is appropriate that the order be made before a proceeding has started; and
>
> (d) have with it a sworn statement in support of the application.

[79] Where an interlocutory order of injunction is sought before a proceeding has started, and the party seeking the said order has not complied with Order 10, rule 8 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 the Court does not grant the order sought. That was the holding in *Mike Nkhoma –vs- Sarah Mtanga Nkhoma*.[2] The rationale is that the Court must be satisfied first that the Claimant has a cause of action before it can grant an interlocutory order of injunction as such a remedy cannot stand on its own.[3] Even directions on filing the main action can only be competently made after Order 10, rule 8 (1) has been fully complied with by the Claimant.

[80] Likewise, this Court takes the view that declaratory orders can only be made or granted in an existing proceeding. In other words, they can only be granted

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[2] Civil Cause No. 378 of 2021 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

[3] *See* for instance, *The Siskina* [1979] AC 210 where Lord Diplock stated as follows:

> A right to obtain an [interim] injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the [claimant] for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an [interim] injunction is merely ancillary and incidental to the pre-existing cause of action.

where there is an action or a proceeding. That is the import of Order 19, rule 27 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017. In this connection, the Court is fortified by the case of *Chandrakant Makadia et al – vs- Illovo Sugar (Malawi) Plc*[4] where Malonda, J stated that:

> …[T]his provision [sic]…assumes that there is already an existing proceeding, hence the declaratory order is applied for, within an existing proceeding.

[81] However, Order 19, rule 27 is silent on the mode of commencement of a proceeding in which a declaratory order may be sought. That is a matter for the Claimant to decide depending on the nature of his or her case and the parties involved. For instance, a declaratory order may be sought in a proceeding commenced by summons under Order 5 of the Courts (High Court) (Civil Procedure) Rules, 2017 if it involves private individuals or indeed originating motion under Order 53 of Rules of the Supreme Court as read with Order 19 Part III of the Courts (High Court) (Civil Procedure) Rules, 2017 if it involves government or public officers or authorities.[5]

[82] Order 8, rule 30 of the Courts (High Court) (Civil Procedure) Rules, 2017 deals with service of summons or other process outside the jurisdiction. It provides as follows:

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[4] Commercial Cause No. 52 of 2020 (High Court of Malawi) (Lilongwe District Registry) (Commercial Division) (Unreported).

[5] On the continued application of Order 53 of Rules of the Supreme Court in part, *see The State and Malawi Communications Regulatory Authority, ex parte Francis Bisika,* Judicial Review Case No. 71 of 2017 (High Court of Malawi) (Principal Registry) (Unreported) and *State and Lilongwe Water Board and others, ex parte Malawi Law Society*, Judicial Review Case No. 16 of 2017 (High Court of Malawi) (Zomba District Registry) (Unreported).

(1) A party may apply to the Court for an order that a summons in the Court be served outside Malawi.

(2) The Court shall, on application, order that a summons or other process be served outside Malawi where the Court is satisfied that the party seeking permission has a good and arguable case for the relief sought by the party in the proceeding, and-

(a) the claim concerns land in Malawi;

(b) an Act of Parliament, deed, will, contract, obligation or liability affecting land in Malawi is sought to be interpreted, rectified, set aside or enforced;

(c) the claim is against a person who is domiciled or ordinarily resident in Malawi;

(d) the claim is for the administration of an estate of a person who was domiciled in Malawi at the date of the person's death;

(e) the claim is for the execution of a trust, the person to be served is the trustee, and the trust concerns property in Malawi;

(f) the claim concerns a contract made in Malawi or governed by the law of Malawi;

(g) the claim is based on a breach of contract committed in Malawi, whether or not the contract was made in Malawi;

(h) the claim is based on a tort committed in Malawi;

(i) the claim is for the damage suffered in Malawi, whether or not the tort causing the damage happened in Malawi;

(j) the claim is for an amount payable under any law to a public institution in Malawi;

(k) the proceeding is brought against a person in Malawi and the other person outside Malawi is a necessary party to the proceeding;

(l) the proceeding is for an injunction ordering the person to do or not do anything in Malawi, whether or not damages are claimed; or

(m) for any other reason the Court is satisfied that it is necessary for the claim to be service on a person outside Malawi.

[83] Order 8, rule 8 of the Courts (High Court) (Civil Procedure) Rules, 2017 is on service of documents other than summons. It states that:

> Subject to any specific provision in these Rules or any other written law, a document, other than a summons and a response, may be served-
>
> (a) on a party personally;
>
> (b) by leaving it at the party's address for service; or
>
> (c) by sending it to the party's address for service by prepaid post, registered mail, courier service, facsimile, or, **if the party has given an address for service by electronic mail**, by electronic mail *(Emphasis supplied).*

[84] Order 18 of the Courts (High Court) (Civil Procedure) Rules, 2017 is on sworn statements. Rule 7 sub-rules 4 and 5 provide as follows:

> (4) The full name of the deponent and the date on which the sworn statement was sworn shall appear on the first visible page of the sworn statement.
>
> (5) A sworn statement shall contain an authorizing part at the end of the body of the statement that-
>
> (a) states whether the sworn statement was sworn or affirmed;
>
> (b) states the place the person made the sworn statement;
>
> (c) states the person making the sworn statement understands the sworn statement shall be used in a proceeding;

(d) states the person who made the statement acknowledges that if he made a false statement he may commit perjury and be liable to a substantial penalty; and

(e) is signed by the person taking the sworn statement, above a statement of the person's full name, address and capacity to take the sworn statement.

[85] It is trite law that only persons with legal capacity to sue can commence actions in court. In *Muluzi & Another –vs- Malawi Electoral Commission*[6] Chipeta J, as he then was, said:

> In any given proceedings before us, we can only properly exercise our adjudicative authority over persons and bodies with capacity to sue and be sued according to law. We repeat, therefore, that names used in common parlance, when it comes to matters in Court, ought to give way to legal names or legally recognized names.

[86] In *The State and The Speaker of National Assembly, ex parte Democratic Progressive Party*[7] it was held that Democratic Progressive Party had no capacity to sue or to be sued then, and consequently, the court vacated leave for judicial review that was granted.

[87] The decision in the case of *The State and The Speaker of National Assembly, ex parte Democratic Progressive Party* (*supra*) must be understood in its context as the law stood then. In the real world, the law is never static. It changes and progresses over time. There is now a new piece of legislation in

[6] Constitutional Cause No. 1 of 2009 (High Court of Malawi) (Principal Registry) (Unreported).

[7] Judicial Review Case No. 34 of 2012 (High Court of Malawi) (Principal Registry) (Unreported).

Malawi regulating the registration, financing and functioning of political parties and matters incidental thereto called, *Political Parties Act.*[8] In terms of section 13 (2) of this Act, once a political party is registered, it becomes a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name.[9]

[88] It is also the law that a person who has no sufficient interest in a matter has no right to ask the court to give him a declaratory judgment. A case in point is *President of Malawi & Another –vs- Kachere & Others*.[10]

[89] In *Australian Conservation Foundation –vs- The Commonwealth*[11] it was stated as follows:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*.

[8] Act No. 1 of 2018.

[9] *See* for instance, *The Democratic Progressive Party –vs- The Attorney General (on behalf of the Office of the President of the Republic of Malawi)*, Constitutional Referral No. 3 of 2021 (High Court of Malawi) (Principal Registry) (Unreported).

[10] [1995] 2 MLR 616.

[11] (1980) 146 CLR 493.

[90] The Courts in Malawi have held that to establish standing, a party must satisfy the Court that the conduct of the Defendant adversely affects his or her right over and above others. The authorities for this proposition include *The State and George Chaponda and another, ex parte Mr. Charles Kajoloweka and others*[12] and *Civil Liberties Committee –vs- Minister of Justice and another*[13] where the Supreme Court of Appeal for Malawi stated that the *locus standi* requirement:

> …is so basic that we sometimes take it for granted that a person who has no legal right or interest to protect would not commence an action in a court of law. Courts exist to conduct serious business. They deal with real life issues affecting parties to an action.

[91] The postulation of the law on *locus standi* by the Supreme Court of Appeal for Malawi has not been without criticism, especially from academics.[14] In fact, in some cases, the High Court bench has decided differently from the Supreme Court of Appeal for Malawi decisions on the point.[15]

Analysis and Application of the Law to the Facts

[12] MSCA Civil Appeal No. 5 of 2017 (Unreported).

[13] [2004] MLR 55 (SCA).

[14] *See* for instance, Mwiza Jo Nkhata, "Come, let us all ride the *locus standi* carousel" February (2017) *The Malawian Lawyer* 29; Mwiza Jo Nkhata, "Public interest litigation and *locus standi* in Malawian constitutional law" (2008) 2 (2) *Malawi Law Journal* 209.

[15] *See* for instance, *Thandiwe Okeke –vs- Minister of Home Affairs and Controller of Immigration,* Miscellaneous Civil Application No. 73 of 1997 (High Court of Malawi) (Principal Registry) (Unreported). *See* also *Gift Trapence et al –vs- The Democratic Progressive Party et al,* Miscellaneous Civil Cause No. 41 of 2017 (High Court of Malawi) (Zomba District Registry) (Unreported).

[92] The first issue to be dealt with is whether or not, the Claimants' applications should be struck out for failing to comply with the requirements of the Courts (High Court) (Civil Procedure) Rules, 2017. The first to be considered shall be the application for an interlocutory order of injunction. The Court is satisfied that the Defendants took out its application within a reasonable time and before taking a fresh step in the proceeding after becoming aware of the irregularities in the Claimants' applications.

[93] Ordinarily, in any application in which a claimant is seeking an interlocutory order, in this instance, an interlocutory order of injunction, there must first be a proceeding or an action or a lawsuit. This is clear from Order 10, rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017. The reason is simple. An interlocutory order cannot stand on its own without a proceeding or an action or a lawsuit. This proposition is a general rule. Under our civil procedure law and practice, it has an exception, which is the next point that the Court deals with.

[94] The exception is specifically provided for by Order 10, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 which is to the effect that a party may apply for an interlocutory order at any stage, including before a proceeding has started. This Court understands, "a proceeding" under this specific rule to mean an action or lawsuit.

[95] Order 10, rule 8 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 imposes a mandatory obligation in a situation where a party decides to apply for an interlocutory order before a proceeding has started. Such a party is required to set out the substance of the claim; have a brief statement of the

evidence on which the applicant will rely on; set out the reasons why it is appropriate that the order be made before a proceeding has started; and have with it a sworn statement in support of the application.

[96] In terms of Order 10, rule 8 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017 the Court may make the order if it is satisfied that (a) the applicant has a serious question to be tried and, if the evidence brought by the applicant remains as it is, the applicant is likely to succeed; and (b) the balance of convenience favours the making of the order.

[97] By Order 10, rule 8 (3) of the Courts (High Court) (Civil Procedure) Rules, 2017 when making the order, the Court may also order that the applicant file an application by the time stated in the order. The Court poses here and wonders what other "application" this is that this particular sub-rule is referring to. It appears to this Court that the draftspersons had in mind documents by which civil actions or lawsuits are commenced when they referred to "an application" in that sub-rule. At least, that is how this Court has understood and applied this sub-rule before.[16] If that be correct, then, there does not appear to be any good reason why the application of this sub-rule should be limited to proceedings commenced by way of summons. That is so because the Courts (High Court) (Civil Procedure) Rules, 2017 themselves recognize other modes of commencement of actions or lawsuits. For instance, Order 1, rule 3 (2) is clear that other rules of practice and procedure shall so apply as long as it is so provided by an Act or any other written law. Further,

[16] *Centre for Environmental Policy (CEPA) et al -vs- Southern Region Water Board* Miscellaneous Cause No. 9 of 2022 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

under Order 19, rule 3 (2) a referral by the President under section 89 (1) (h) of the Republican Constitution is commenced by a notice of referral. Furthermore, under Order 19, rule 13, an election matter shall commence in the manner specified under the Parliamentary and Presidential Elections Act, the Local Government Elections Act, or in any other event, by an application.[17] These are just some of the modes of commencement of proceedings that the Court could highlight from the Courts (High Court) (Civil Procedure) Rules, 2017.[18]

[98] In the instant case, the Claimants brought their application for an interlocutory order of injunction before a proceeding, or an action or a lawsuit had been commenced. In terms of the law, at a minimum, the Claimants were required to comply with the dictates of Order 10, rule 8, more particularly, sub-rule 1, of the Courts (High Court) (Civil Procedure) Rules, 2017. This sub-rule is principally meant to give the Court a glimpse of the existence of a substantive cause of action. However, they did not do so. In such a situation, where there are no documents by which proceedings are initiated in a court of law and Order 10, rule 8 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 has not been complied with, this Court cannot grant the order sought as it held

[17] The Parliamentary and Presidential Elections Act and the Local Government Elections Act referred to under Order 19, rule 13 of the Courts (High Court) (Civil Procedure) Rules, 2017 have since been repealed by Parliament in a new piece of legislation called: *Presidential, Parliamentary and Local Government Elections Act,* No. 10 of 2023 more particularly by section 123 (1). Similarly, the definition of an "election matter" under Order 1, rule 4 of the Courts (High Court) (Civil Procedure) Rules, 2017 which makes reference to the repealed pieces of legislation has to be read and understood in the context of the new legislation. It is hoped that these matters will be addressed during the review of the Courts (High Court) (Civil Procedure) Rules, 2017.

[18] The *Makadia* decision discussed other modes of commencement of proceedings under the Courts (High Court) (Civil Procedure) Rules, 2017.

in the *Mike Nkhoma* (*supra*) case because an interlocutory order of injunction being a remedy, applications for it have to be founded on a substantive cause of action.

[99] The Court is acutely aware that failure to comply with the Courts (High Court) (Civil Procedure) Rules, 2017 or a direction of the Court is an irregularity and that an irregularity in a proceeding shall not render a proceeding a nullity. In the view of this Court, the irregularity in this case is so grave that it goes to the very root and substance of the application herein. The interlocutory order of injunction would not have anything to stand on if it was to be granted. The Court has not been able to fully appreciate and have a glimpse of each of the Claimant's substantive cause of action as required by law. For this reason, the Court rather than striking out, dismisses the application for an interlocutory order of injunction sought by the Claimants.

[100] Furthermore, even if it was not for the failure to comply with Order 10, rule 8 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 the Court would also not have granted the interlocutory order of injunction on another ground. That ground is that granting the order sought would not have served any useful purpose in this case. It is in evidence that the 2nd Claimant, 3rd Claimant and 4th Claimant were excommunicated by the 2nd Defendant on 23rd October, 2022 according to exhibit marked as, "REM4". They first came to Court on 25th October, 2022 when the Court directed a with-notice hearing. By 25th October, 2022 the decision excommunicating the concerned Claimants had already been implemented or effected and was in place. It is trite law that an interlocutory order of injunction cannot be granted where an action sought to be restrained has already taken place or been implemented. Equity does not

act in vain.[19] For this reason too, the Court would dismiss the application for an interlocutory order of injunction sought by the Claimants.

[101] This brings the Court to the second application for the Claimants, namely, for declaratory orders. The Defendants argue that it is fundamentally defective in the absence of a summons. They contend that in terms of Order 5, rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 a proceeding should have been commenced by a summons. As stated in the *Makadia* case (*supra*) that ensures fairness between the parties and predictability in terms of court processes, so they argued.

[102] The Defendants further argued that proceeding by way of an application, instead of a summons, deprives a Defendant of the opportunity to consider a statement of case containing relevant assertions and lists of documents. Further, it improperly circumvents the requirement of personal service of the summons on the Defendant.

[103] The Defendants also contended that it deprives a Defendant of the opportunity to file a defence within 28 days of being served with a summons, even longer in the case of a foreign based Defendant, depending on the directions of the Court and is tantamount to unlawful abridgment of time. In addition, commencement of an action by summons requires a Claimant to comply with Order 7 of the Courts (High Court) (Civil Procedure) Rules, 2017 which sets out requirements for a statement of case. These requirements, among others, ensure that the material facts are set out and the cause of action is clearly

[19] *Attorney General –vs- Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109.

identified. This application for declaratory orders by the Claimants identifies no cause of action under the law against the Defendants. This illustrates the impropriety of simply filing an application without a summons and statement of case.

[104] The Defendants went on to state that the law provides for other modes of commencement for other types of cases and in some cases, the processes are expedited. For example, in judicial review cases the processes are expedited but one can only commence judicial review after obtaining the Court's permission. One cannot evade rules on the commencement of an action by summons and all other processes that follow by simply making an "application".

[105] In the *Makadia* case, the Claimants made an application for declaratory orders without filing a summons and a statement of case. Malonda, J held that the mode of commencement was irregular and the irregularity was incurable and could not be used to determine the rights of the parties and the reliefs sought and it was dismissed. The Defendants submitted that the application by the Claimants for declaratory orders in the absence of a summons is contrary to the Courts (High Court) (Civil Procedure) Rules, 2017 and that it is therefore fundamentally defective and incurable as well. As such, the "application" should be struck out as well.

[106] The Claimants, on the other hand, argued that the application for declaratory orders was not defective. They contended that the Courts (High Court) (Civil Procedure) Rules, 2017 provide for different avenues through which matters may be commenced. Order 19 provides for "Particular Proceedings" which

are commenced in different ways including summons for constitutional matters, petitions for electoral matters and applications for judicial review matters. This means it is recognized that a summons is not the only avenue for commencement of matters before the Court, particularly, in relation to particular matters under Order 19.

[107] Order 19, rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides that a person may make an application to the Court for a declaratory order. Unlike in the case of constitutional matters where Order 19, rule 3 specifically provides that such matters shall be commenced by way of summons, there is no indication of the requirement for summons when commencing declaratory orders. Thus, an action can be commenced simply through an application for declaratory orders. The Claimants submitted that by virtue of the application for declaratory orders, there is a matter before this Court.

[108] The Claimants further submitted that the above position was recognized and applied in the case of *Jean Mathanga and Linda Kunje –vs- Electoral Commission and The Attorney General*.[20] That matter was commenced through "an application" for declaratory orders and the Court considered it properly before it. The matter was determined to its finality. The Claimants therefore submitted that the application for declaratory orders herein is not defective at all as it is a peculiar mode of commencement under Order 19.

[20] Civil Case No. 45 of 2021 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

[109] This Court had an opportunity to read the *Jean Mathanga* (*supra*) decision. If truth is to be told, the mode of commencement for seeking declaratory orders under Order 19, rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 was not necessarily a live issue in that case. None of the parties raised it and the Court was not called upon to determine it. The issue that was raised by one of the parties was on the failure by the Claimants to give notice of intention to sue government as required by section 4 of the Civil Procedure (Suits by or Against Government or Public Officers) Act[21] and it was determined by the Court. With respect to the learned Advocate, this case does not aid the Claimants on the question that is before this Court now. In short, the Court does not find the case authority to be persuasive on the mode of commencement for a proceeding where one is seeking declaratory orders.

[110] On its part, this Court is persuaded by the *Makadia* (*supra*) decision. It exhaustively dealt with the question that is before the Court now. The Court agrees with the observation that Order 19, rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 assumes that there is already an existing proceeding. It further agrees with the finding that making an application for declaratory orders in the absence of a proceeding takes away the predictability and fairness that comes with legal proceedings. Declaratory orders made without a proceeding or an action would have no legs to stand on. That cannot be.

[111] In view of the foregoing, the Court holds that the application for declaratory orders by the Claimants is fundamentally defective and that the irregularity is

[21] Cap. 6:01 of the Laws of Malawi.

incurable because there is no existing proceeding or an action or a lawsuit for it as presumed by Order 19, rule 27 sub-rule 2 of the Courts (High Court) (Civil Procedure) Rules, 2017. Declaratory orders cannot be made without an existing action or proceeding. They must be made in an existing proceeding. In this case, the Claimants' application for declaratory orders too, has nothing to stand on. Consequently, the application fails and it too, is dismissed. Costs are awarded to the Defendants.

[112] In the circumstances, there is therefore no need to deal with the other issues raised by the Defendants as the substratum of the Claimants' applications has disappeared.

[113] Before concluding, the Court would like to put it on record that the Claimants' applications were filed and argued by Messrs Ritz Attorneys At Law. However, the Claimants have since changed legal practitioners. They are now represented by Messrs Robert Lexis Global Consultants. The coram still reflects Ms. Lozindaba Mbvundula of Messrs Ritz Attorneys At Law who argued the applications, the change notwithstanding.

[114] Made in Chambers this 31st day of August, 2023 at Blantyre in Malawi.

M. D. MAMBULASA
JUDGE