



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

ELECTORAL PETITION NUMBER 68 OF 2025

BETWEEN

LYNDA KHEMBO

PETITIONER

AND

MALAWI ELECTORAL COMMISSION

RESPONDENT

CORAM: HONOURABLE JUSTICE TEXIOUS S MASOAMPHAMBE

Cydrick McDonald, Official Court Interpreter

Background

[1] The petitioner commenced the present election petition under section 101 of the Presidential, Parliamentary and Local Government Elections Act (Cap. 2:01) (“the PPLGEA”), seeking a declaration that one Mr. Geoffrey Onsewa was unduly returned and elected as a Member of Parliament for Chikwawa North Constituency in the 2025 parliamentary elections.

[2] In the course of the proceedings, the petitioner filed an application under Order 6 rule 5, and Order 10 rule 1, 2, and 3 of the Courts (High Court) (Civil Procedure) Rules (“the CPR”), seeking to add (i) the said Mr. Geoffrey Onsewa and (ii) the Honourable the Chief Justice as parties to the petition.

Issue for Determination

[3] The question before the Court is whether, within the context of an election petition under section 101 of the PPLGEA, the Honourable the Chief Justice is a proper party to the proceedings for purposes of an injunction restraining the declared winner from taking the oath of office under section 52 of the Constitution.

Law and Analysis

[4] Section 101 of the PPEA is in the following words:

(1) A complaint alleging an undue return or an undue election of a person to the office of President, member of the National Assembly, or councillor, by reason of an irregularity or any other cause whatsoever shall be presented by way of petition to the High Court within seven days, including Saturday, Sunday and a public holiday, of the declaration of the result of the election in the name of the person—

(a) claiming to have had a right to be elected at that election;

or

(b) alleging to have been a candidate at such election.

(2) In proceedings with respect to a petition under subsection (1), the Commission shall be joined as a respondent.

(3) If, on the hearing of a petition presented under subsection (1), the High Court or any court of competent jurisdiction, makes an order declaring that—

(a) the President, the member of the National Assembly or the councillor, as the case may be, was duly elected, such election shall be and remain valid as if no petition had been presented against his or her election; or

(b) the President, the member of the National Assembly or the councillor, as the case may be, was not duly elected, the Registrar of the High Court shall forthwith give notice of that fact to the Commission and the Commission shall publish a notice in the Gazette stating the effect of the order of the Court.

(4) Pursuant to an order of the Court under subsection (3)(b) declaring that the President, the member of the National Assembly, or the councillor, as the case may be, was not duly elected, a fresh election to the office of President, or

for the seat of the member of the National Assembly, or the councillor, as the case may be, shall be held in accordance with this Act.

(5) The Commission shall not register new voters for the fresh election.

(6) The Commission shall not accept nomination of new candidates in a fresh election but shall allow nomination of a new candidate for a political party only if the political party candidate in the nullified elections—

(a) becomes disqualified;

(b) dies; or

(c) is otherwise incapacitated,

before the fresh elections are conducted.

(7) A declaration by the Court under subsection (3)(b) shall not invalidate anything done by the President before that declaration.

(8) A petition and any appeal arising therefrom shall be heard in accordance with Part II of Order 19 of the Courts (High Court) (Civil Procedure) Rules.

(9) Notwithstanding subsection (8), the Chief Justice may make rules for the practice and procedure for election petitions and appeals under this Act.”

[5] This provision sets out who may bring and who must be joined in an election petition. It stipulates that—

“A complaint alleging an undue return or an undue election... shall be presented by way of petition to the High Court... in the name of the person claiming to have had a right to be elected... or alleging to have been a candidate... The Commission shall be joined as a respondent.”

[6] The section therefore contemplates that the proper parties are the petitioner; the Malawi Electoral Commission, which must be joined as respondent; and the declared winner, whose election is in dispute.

[7] Order 6 rule 5 of the CPR empowers the Court to add a party only where the presence of that person is necessary to enable the Court fairly and effectively adjudicate the proceeding. The said rule 5 of order 6 is worded as follows:

“The Court may, on an application by a party, order that a person becomes a claimant in a proceeding where the person’s addition as a party is necessary to enable the Court to make a decision fairly and effectively in the proceeding.”

[8] Section 52 of the Constitution provides that members of Parliament shall, before taking their seats, take and subscribe to the oath of allegiance before the Chief Justice in the National Assembly. The said section provides as follows:

“Oath of allegiance

Every member of Parliament, before taking his or her seat, and every officer of Parliament, before assuming duties of his or her office, shall take and subscribe before the Chief Justice in the National Assembly—

- (a) the oath of allegiance in the form prescribed by law; and*
- (b) such other oaths for the due performance of their respective offices as may be prescribed by law.”*

Proper Parties

[9] The petitioner’s argument is that the Honourable the Chief Justice should be joined because it is his office which administers the oath of office to members of Parliament. It is contended that without joining him, any injunction restraining the oath-taking would be unenforceable.

[10] In my considered view, that reasoning is faulty and untenable. The issue before this Court concerns the validity of the election and the return made by the Malawi Electoral Commission. Under section 101 of the PPLGEA, the only mandatory respondent in an election petition is the Malawi Electoral Commission. The petition challenges the declaration of the result, not the administration of the oath. The Chief Justice’s role is automatic once a candidate is duly declared a winner. The Chief Justice plays no role whatsoever in the process of declaring the winner. The Chief Justice neither conducts nor validates elections and has no legal interest in the result. The appropriate respondents are, therefore, limited to the Malawi Electoral Commission and the declared winner.

[11] Counsel for the petitioner relied on Order 10 rule 2(1)(b) of the CPR, in arguing that the Chief Justice’s interests are affected by the order sought, as he administers the oath of office under section 52 of the Constitution. The said rule 2(1)(b) is couched in the following words:

*“An application in a proceeding shall—
(b) cite the same parties as in the proceeding and anyone whose interests are affected by the order sought.”*

[12] With respect, the interpretation of Order 10 rule 2(1)(b) suggested by counsel for the claimant is too broad. In my view, the rule contemplates persons whose legal rights or obligations will be directly affected by the Court’s order, not those whose administrative functions may incidentally be impacted by it. The Chief Justice’s role in administering the oath is purely constitutional. His legal rights are not in issue. The injunction, if granted, may be effectively enforced without his joinder. Accordingly, Order 10 rule 2(1)(b) does not justify the addition of the Chief Justice as a party.

[13] Furthermore, in my considered view, in the context of section 101 of the PPLGEA “*interests are affected*” should mean a legal interest. A legal interest exists where a party’s rights, duties, or liabilities will be directly determined or altered by the order. This distinction is reflected in authorities such as *Amon v Raphael Tuck & Sons Ltd* [1956] 1 QB 357, which has been applied in Malawi, see *Nseula v Attorney-General and another* [1996] MLR 401 (HC), and other common law jurisdictions. In that case, Devlin J held that a person is not a necessary party simply because they are affected commercially, they must have a legal interest in the subject matter of the action that will be directly affected by the outcome.

[14] It therefore follows that the performance of such a constitutional duty does not render the Chief Justice a necessary or a proper party to litigation challenging an election result.

Enforcement of an Injunction

[15] The petitioner argues that the Chief Justice must be joined to enforce an injunction against the taking of the oath. Even if the petitioner were to obtain an injunction restraining the taking of the oath, the order could be served upon the Clerk of Parliament. A person need not be a party for an order of the Court to bind them, provided they have notice of it, see *Mutharika and Another v Chilima and Another* [2020] MELR how the consequential orders bound nonparties. In other words, if the court grants an injunction restraining Mr. Geoffrey Onsewa from taking the oath, it is binding on all persons with notice, including public officials.

Joining the Chief Justice would be Premature and Unnecessary

[16] More importantly, this Court would like to emphasize that courts generally should avoid joining high constitutional offices unless their presence is strictly necessary to resolve the substantive dispute. The cases cited by the petitioner *Malawi Electoral Commission v Banda and another* [2005] MLR SCA 185 and *State and Lilongwe Water Board Ex-parte Malawi Law Society* MSCA Civil Appeal No. 59 of 2017 (unreported), do not support joining a non-disputant constitutional officer for the purpose of enforcing a future order. The court's authority under Order 6 rule 5 as read with Order 10 rules 1, 2 and 3 of the Courts (High Court) (Civil Procedure) Rules, should be exercised judiciously, not to accommodate speculative or premature requests. The core issue is whether Mr. Geoffrey Onsewa was duly elected. This can be fully determined between the petitioner and the Electoral Commission. The Chief Justice's role is separate and subsequent to the electoral process and does not affect the merits of the petition.

Order

[17] Accordingly, I find the application to add the Honourable the Chief Justice as a party to these proceedings ill-conceived and lacks merit. For that reason, it is disallowed.

[18] The application to join Mr. Geoffrey Onsewa, the declared winner, as a respondent in accordance with section 101 of the PPLGEA, is granted.

[19] Further, the court will proceed to hear the application for interlocutory injunction on Monday, 20th October, 2025 at 14:30 hours.

[20] The court makes no order as to costs

Made in Chambers this Thursday, the 16th of October, 2025 at Blantyre.



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JUDGE