



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

ELECTION CAUSE NUMBER 95 OF 2025

(Before Hon. Justice W.Y. Msiska)

BETWEEN:

GEORGE CHARLES ZULU PETITIONER

-AND-

ALFRED RUWAN GANGATA 1ST RESPONDENT

MALAWI ELECTORAL COMMISSION..... 2ND RESPONDENT

CORAM: HONOURABLE JUSTICE WILLIAM YAKUWAWA MSISKA

- : Mr. G. Kadzipatike and W. Munkhondya, of Counsel for the Petitioner
- : Mr. G. Khonyongwa and G. Ndhlovu, of Counsel for the 1st Respondent
- : Absent for the 2nd Respondent
- : Ms. T. Moyo Court Reporter
- : Mr. Mhango Court Clerk/ Official Interpreter
- : His Honour Wahabi Paison Shaibu, Principal Judicial Research Officer

RULING

Factual Background

[1] The petitioner (for the purpose of this Ruling called “respondent”), George Charles Zulu, commenced the present proceedings under section 101 of the Presidential, Parliamentary and Local Government Elections Act, 2023 (the Act)

alleging electoral irregularities, particularly concerning the handling of void votes by polling officials and seeking the nullification of the election and the holding of a by-election.

[2] Prior to this petition, there had already been litigation involving the same parties. In Election Cause No. 52 of 2025, the 1st respondent (“applicant” for purposes of this Ruling), Alfred Ruwan Gangata, by way of appeal, challenged the decision of the Malawi Electoral Commission which had nullified the election results. Election Cause No. 52 of 2025 was fully adjudicated upon and determined by the High Court resulting in a final judgment.

[3] In the present matter, in response to the petition, it is alleged by the applicant that despite being a party to the earlier proceedings, the respondent did not raise the current allegations of irregularities, particularly those relating to the alleged mishandling of void votes, at that time, even though the events complained of had already occurred during the electoral process leading up to the announcement of results on 30th September 2025.

[4] The matter was then set down for hearing. However, before the appointed day, the applicant filed an application by way of preliminary objection to strike out the petition on a preliminary point of law. The applicant contended that the petition was incompetent on the grounds that it was *res judicata*, frivolous, vexatious, and an abuse of court process. The application was premised on the argument that the issues raised were either or ought to have been litigated in Election Cause No. 52 of 2025 between the same parties.

[5] In response, the respondent opposed the application. He maintained that the petition was properly before the Court under section 101 of the Act and that it was raising issues distinct from those determined in Election Cause No. 52 of 2025.

Submissions by the Applicant

[6] Counsel Khonyongwa for the applicant submitted that the petition was incompetent and ought to be dismissed *in limine* on the grounds of *res judicata* and being frivolous, vexatious, and an abuse of the court process.

[7] In his elaboration, counsel submitted that the petition is barred as it was against the principle of *res judicata*, observing that the issues arise from the same dispute that was previously adjudicated upon in Election Cause No. 52 of 2025, involving the same parties and concerning the same election results. As defined by several case authorities, *res judicata* means that a final judgment by a competent court is conclusive and bars subsequent proceedings based on the same facts. It was, in that regard, contended that Election Cause No. 52 of 2025 was fully determined by a court of competent jurisdiction and that the respondent, having been a party to those proceedings, had the opportunity to raise all grievances arising from the electoral process, including the alleged irregularities in the handling of void votes. However, the respondent failed to do so at that time.

[8] It was further submitted that the law of *res judicata* is grounded in finality of litigation. It bars not only the matter actually litigated but also those which ought to have been raised in earlier proceedings, expressed in the maxim interest '*reipublicae ut sit finis litium*'. To underscore and reinforce the principle of finality in litigation, s. 100 of the Act was cited as authority that the decision of the High Court is final more particularly in circumstances where the petition was brought by way of appeal from the decision of the Malawi Electoral Commission.

[9] According to the applicant, all the requirements to satisfy *res judicata* are present in the application in that: (a) the parties are the same as was in Election Cause No. 52 of 2025; (b) the same subject matter dealing with a dispute on nullification of election results; and (c) the matter was conclusively determined by the High Court. Of crucial importance, the applicant contended that the respondent was ably represented in Election Cause No. 52 of 2025 and had the opportunity to raise the issues being advanced in the present matter. For the applicant, it was submitted that the law does not allow a litigant to get a second bite at the cherry. *See Henderson v Henderson (1843) 3 Hare 100*. On the justification for the finality principle, the Ontario Court of Appeal case of *Tsaoussis (Litigation Guardian) v Baetz (1998) 165 DLR 268* was cited as authority.

[10] It was the further argument of the applicant that the respondent was trying to circumvent the provisions of s. 100 (5) of the Act which states that a decision of the High Court is final and therefore no appeal can lie to the Supreme Court of Appeal. Submitting further, the applicant stated that the respondent is seducing the Court to

review a judgment of another Court of coordinate or equal jurisdiction which thing is not allowed or permitted under the law. The cases of *Democratic Progressive Party v Attorney General Constitutional Reference No. 3 of 2021* and *Kuseli Kulinji Holdings Limited v Mota Engil Civil Cause No 55 of 2024* were cited as authority for that proposition of law.

[11] The second ground on which the petition is being challenged is abuse of court process. Under this ground, it was posited that abuse of court process includes re-litigation of matters, litigation by instalments, tactical withdrawal of arguments and re-opening of concluded disputes as it seeks to re-open matters that have already been conclusively determined. The applicant then contended that the respondent deliberately withheld the present complaints in Election Cause No. 52 of 2025 and is now attempting to litigate them in a piecemeal fashion, thereby subjecting the respondents to duplicative and oppressive litigation. In such a situation, it was submitted that the Court has power under inherent jurisdiction to dismiss the action for being an abuse of court process. The applicant relied on the case of *Dyson v Attorney General [1911] 1 KB 410; [1912] 1 Ch 158* where it was held that the Court may terminate proceedings at an early stage if they are plainly unsustainable and would unjustly vex the opposing party. See also the cases of *Centre for Environmental Policy (CEPA) & Others v Southern Region Water Board Miscellaneous Civil Cause No. 9 of 2022; Yiannakis t/a GPY Investment v Inde Bank Limited [2016] MWHC 596; Attorney-General of Duchy of Lancaster v L & N W Railway [1892] 3 Ch 224; Day v William Hill (Park Lane) Ltd [1949] 1 KB 632; and and Law v Dearnley [1950] 1 All ER 124.*

[12] On the meaning of inherent jurisdiction, the applicant placed reliance on the case of *The State (on the application of Esther Kathumba & Others) v The President, Judicial Review Cause No. 22 of 2020*, where the Court explained that inherent jurisdiction is a residual power aimed at ensuring the proper administration of justice and preventing oppression. It was submitted that being a residual power, the Court may invoke its inherent jurisdiction to prevent misuse of its processes. see *Londwa v Standard Bank plc Commercial Case No. 32 of 2022.*

[13] The third limb of the argument of the applicant was that the petition is frivolous and vexatious as it does not have realistic prospect of success. In the same breath and adopting the submissions made in relation to abuse of court process, the

applicant maintained that the petition is legally barred. By using inherent jurisdiction, the Court is able to prevent waste of judicial time, oppression of the opposing party and undermining of the integrity of the judicial system. On the whole, the applicant concluded by stating that the petition should be dismissed with costs on the grounds of *res judicata*, and being frivolous, vexatious and abuse of court process.

Submissions by the Respondent

[14] In response counsel Kadzipatike started by agreeing with the applicant that there are indeed three elements or requirements to establish *res judicata*. However, those elements are absent for purposes of holding that the present matter is *res judicata*. Election Cause No 52 of 2025 is substantially different from the present petition or matter before the Court. Issues before the Court in the previous case between the parties had to do with legality or propriety of the decision by Malawi Electoral Commission to void or nullify the parliamentary election in Mtandire/Mtsiliza Constituency which was made on 30th September, 2025.

[15] According to the respondent, the issue before the Court in the present petition concerns the undue election or undue return of the applicant. There was no such issue before the Court in Election Cause No. 52 of 2025. The Malawi Electoral Commission had not declared winner or loser. The issue of undue election or undue return could therefore not have arisen at that particular time. The issue of undue election and undue return is a new one. It only surfaced after the Malawi Electoral Commission declared the applicant winner following an order of the Court in Election Cause No. 52 of 2025.

[16] The applicant argued that Election Cause No. 52 of 2025 was an appeal filed under s. 100 as read with s. 99 of the Act. The appeal was against the decision of the Malawi Electoral Commission and therefore the more reason that under s. 100 (5) of the Act, the decision of the High Court is final and not appealable.

[17] The respondent maintained his argument that the petition is properly before the Court having being brought under s. 101 of the Act. As such the respondent submitted that the issues raised in the petition have not been determined as alleged by the applicant and therefore warrants a full hearing on the merits. The respondent acknowledged that the parties are indeed the same but the causes of action are

different. Accordingly, the respondent prayed that the application by way of preliminary objection to strike out the petition on a preliminary point of law should be dismissed with costs.

Issues for Determination

[18] Having considered the petition, the respective responses to the petition, the application for preliminary objection on point of law, the rival sworn statements, skeleton arguments and the oral submissions of the parties, the main issues that fall for determination are:

- (a) whether or not the matter as commenced is *res judicata*; and
- (b) whether or not the matter frivolous, vexatious thereby being an abuse of court process warranting dismissal.

Law and Analysis

Preliminary objection

[19] It is the view of this Court that perhaps the starting point is to understand the meaning of the phrase 'preliminary objection'. According to the case of *Mukisa Biscuit Manufacturers Ltd -vs- West End Distributors Ltd (1969) E.A 696* the Court of Appeal in East Africa said that—

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact needs to be ascertained or if what is sought is the exercise of judicial discretion.”

It is imperative that before dealing with a preliminary objection, the Court should first be satisfied that the issue raises a pure point of law. A pure point of law is one which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. See *George Oraro -vs- Eston Mbaja [2005] eKLR*.

[20] From the general scholarship in law for which there is no need to cite any case authority, it is commonplace that the doctrine of *res judicata* just like jurisdiction, is

a pure point of law the resolution of which does not require a person to adduce evidence for its authentication. In that regard, the Court is satisfied that the present application raises a pure point of law the resolution of which will determine the future of the proceeding.

Whether the petition is res judicata

[21] It is trite that for the doctrine of *res judicata* to apply, certain essential elements must be satisfied, namely: (a) identity of parties; (b) identity of subject matter or issues; and (c) a final determination on the merits by a court of competent jurisdiction. The cases of *Thoday v Thoday [1964] P 181* and *Arnold v National Westminster Bank Plc [1991] 2 AC 93*, emphasize the point that the doctrine operates only where the very issue has been distinctly raised and finally determined. Also see *Democratic Progressive Party v Attorney General Constitutional Reference No. 3 of 2021*.

[22] In determining whether or not the present petition is *res judicata*, this Court will focus on whether or not the present proceeding is founded on the same cause of action as that which was litigated in Election Cause No. 52 of 2025.

[23] In that regard, it is necessary to undertake a thorough consideration of the legal framework under sections 99, 100 and 101 of the Act, as well as the nature, scope, and reliefs sought in Election Cause No. 52 of 2025.

Statutory framework: Sections 99, 100 and 101

[24] Section 99 of the Act provides for the primary mechanism for addressing electoral complaints. It provides that any complaint alleging an irregularity at any stage of the electoral process shall be submitted to the Malawi Electoral Commission, which is mandated to examine and determine the complaint and, where appropriate, take corrective action. Section 100 of the Act builds on this framework by providing a limited right of appeal to the High Court against a decision of the Malawi Electoral Commission '*confirming or rejecting the existence of an irregularity*'. Proceedings under section 100 of the Act are therefore appellate in nature; derivative of a complaint lodged under section 99 of the Act; and confined to reviewing the correctness, legality, and propriety of the determination of the Malawi Electoral Commission.

[25] It should also be acknowledged that s. 100 (3) and (7) of the Act empowers the Court to declare an election void. However, that power should only be exercised within the confines of the appeal, and only in relation to the irregularity that was the subject of the decision of the Malawi Electoral Commission. The irregularity should, upon proof to the satisfaction of the court, be one where: (a) the voters were corruptly influenced in their voting contrary to any provision of the Act, or had their ballot papers improperly rejected, or voted more than once; (b) persons not entitled were improperly granted ballot papers; (c) persons entitled to them were improperly refused ballot papers; or (d) the candidate who has won the election was at the time of his or her election not qualified for election, or that he or she was not properly nominated, or that a duly qualified candidate had his or her nomination improperly rejected.

[26] By contrast, s. 101 of the Act creates a *distinct cause of action*, permitting a petition to the High Court alleging an *undue election or undue return* by reason of an irregularity or any other cause whatsoever. A complaint alleging undue return or undue election of a person can only be presented to the High Court after the declaration of the result of the election and not otherwise. This provision is very broad in its import. When read together with section 2, which defines the word 'irregularity' as any noncompliance with the Act, the Constitution, or any other applicable law, s. 101 of the Act confers on the Court power and authority to inquire into the validity of an election in its entirety. It is for that reason, therefore, safe to state that the scheme under s. 101 of the Act is different from the one obtaining under s.99 as read with s. 100 of the Act.

Nature of Election Cause No. 52 of 2025

[27] It is not in dispute that Election Cause No. 52 of 2025 was an appeal under section 100 of the Act, commenced by the applicant against the respondent and the Malawi Electoral Commission. That appeal arose from a complaint processed under s. 99 of the Act and was aimed at challenging the decision of the Malawi Electoral Commission to void the election in the Mtandire/Mtsiliza Constituency. The grounds of appeal against the decision of the Malawi Electoral Commission to nullify the election thereby confirming the irregularity complained of were narrowly framed as follows:

(a) there is no valid reason for the said decision of the 2nd Respondent as the 2nd Respondent did not demonstrate that the result of the election was affected by any or the cited irregularity. In any event, section 96(1) of the Presidential, Parliamentary and Local Government Elections Act envisions a situation where the District tally centre is able to examine void votes and this can only be done by opening the sealed envelopes containing the same at the District Tally Centre; and

(b) the decision or determination was arrived at in a procedurally unfair manner and contrary to section 43(a) of the Constitution in that the Petitioner was not given notice of the complaint and was not invited to present his views in relation to the same. Further the decision is not justified by the reasons given.

[28] It is clear from the foregoing that the main issue in Election Cause No. 52 of 2025 was not in any way dealing with the question of undue return or undue election. Rather it was the decision of the Malawi Electoral Commission by failing to demonstrate that the alleged irregularity affected the result of the election; and that the decision was reached in a procedurally unfair manner, contrary to section 43(a) of the Constitution. It is no doubt that the complaint before the Malawi Electoral Commission and consequently the appeal to the High Court was anchored on a specific alleged irregularity, namely the unauthorised opening of sealed envelopes relating to void votes. For the matter to go to the High Court on appeal, it meant the Malawi Electoral Commission confirmed the existence of the irregularity.

Reliefs sought in Election Cause No. 52 of 2025

[29] Again, the limited nature of that cause of action is further demonstrated by the reliefs sought in Election Cause No. 52 of 2025 which were as follows:

“21.1. An order declaring the determination/decision by the Malawi Electoral Commission communicated in their letter of 30th September, 2025 to be null and void for:

21.1.1. Having been arrived at in a procedurally unfair manner; and

21.1.2. For being unreasonable and unjustifiable in fact, no material or grounds having been advanced showing that the alleged opening of the sealed envelopes at the Council was either contrary to the law or affected the result of the election one way or the other.

21.1.3. An Order mandating the 2nd Respondent to declare the Petitioner as the winner of the Parliamentary election in Lilongwe Mbandire-Mtsiriza Constituency."

[30] An analysis or consideration of these reliefs does point to the inescapable conclusion that the primary target of the proceeding was the decision of the Malawi Electoral Commission to void the election, not the validity of the election itself. The validity of the election was at no point in question. To the contrary, the Court was only invited to determine whether or not the Malawi Electoral Commission acted fairly and had sufficient evidential and legal basis for its decision to void the election in the Mbandire/Mtsiriza Constituency.

[31] Consequently, the Court in Election Cause No. 52 of 2025 was not called upon to: (a) undertake a comprehensive inquiry into the conduct of the election; or (b) determine whether the election was invalid on the basis of all possible irregularities within the meaning of the Act in the exercise of the broad jurisdiction or mandate contemplated under s. 101 of the Act.

Nature of the Present Petition under section 101

[32] It is the understanding of this Court that a petition brought under s. 101 of the Act, confers original jurisdiction or authority on the High Court as a court of first instance to determine whether or not there was an undue election or undue return of a person in an election on the basis of any irregularity or any other cause whatsoever. In the view of this Court, such jurisdiction or authority necessarily entails a broad and substantive inquiry into the validity of the election through a consideration of irregularities beyond the narrow issue of only dealing with the decision of the Malawi Electoral Commission confirming or rejecting the existence of an irregularity as envisaged under s. 100 of the Act. Put differently, the inquiry under s.101 of the Act is a detailed judicial evaluation or examination of the election complaint against the full scope of the Act, the Constitution, and applicable law. See *Chilima and another v Mutharika and another [2020] MELR*.

Findings

[33] Based on the foregoing analysis, this Court holds that there is a distinction between Election Cause No. 52 of 2025 and the present petition in that the two are founded on different causes of action or types of complaints notwithstanding that they arise from the same electoral process and involve the same parties. While under

s. 100 of the Act the Court is called upon by way of appeal to consider the decision of the Malawi Electoral Commission in confirming or rejecting the existence of an irregularity, s. 101 of the Act requires the Court upon being petitioned to look into the validity of the election arising from irregularities or any reason whatsoever. The complaint in s. 101 of the Act alleges undue election or undue return of a person in an election which is not the case under s. 100 thereof. The determination of a petition brought under s. 100 of the Act does not have any effect or bearing on the petition brought under s. 101 of the Act. The petitions brought under the respective provisions of the Act relate to each distinct and separate statutory cause of action.

[34] The Court also holds that there is no legal bar to a person who has invoked the s. 100 route from using the s. 101 to challenge the validity of the election after the result of that election has been declared. The Act has donated distinct and separate schemes for judicially dealing with irregularities. The two schemes are not in any way designed to be conflated. This understanding is supported by the case of *Mumba v Malawi Electoral Commission & Munthali, Election Cause No. 62 of 2025*, where the Court recognised that a litigant retains the freedom to invoke s. 101 of the Act where the grievance concerns the validity of the election, and is not confined to the procedural route taken under s. 100 of the Act in relation to decisions of the Malawi Electoral Commission.

[35] For that reason, the argument of the applicant that the petition is *res judicata* cannot be sustained. Likewise, the argument that this Court is called upon to review a decision of a court of coordinate jurisdiction is misconceived and lacks merit. The finality of the decision of the Court under s. 100 of the Act cannot in any way affect a petition or proceeding taken out under s. 101 of the Act.

Determination

[36] Having reached this far, this Court orders that the application to strike out the petition on the ground of *res judicata* is dismissed. The petition or proceeding herein cannot be said to be vexatious, frivolous and an abuse of the process of the court.

[37] Costs are in the discretion of the Court and normally follow the cause. Costs occasioned by this application are for the respondent. It is so ordered.

Delivered in open Court this 20th day of May, 2026 at Lilongwe.



W.Y. Msiska

JUDGE

