The State v Malawi Electoral Commission, on the application of The Democratic Progressive Party and Others

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Justice Matapa Kacheche
Cause Number:	Judicial Review Case No. 19 of 2025
Date of Judgment:	September 03, 2025
Bar:	E. Kaphale SC, F. Tambulasi, B. Chimkango, Counsel for the Applicant Hon. Attorney General, T. Nyirenda SC, E. Chapo, L. Lunguzi, Counsel for the Respondent

1. Before me I have two applications: the first one is for this Court to discharge the permission to apply for judicial review which was granted on 14th July, 2025. This application is filed by the respondent in the main matter. The second one is for this Court to end proceedings early under Order 10 rule 1 and Order 12 rule 4(1) of the Courts (High Court) (Civil Procedure) Rules, 2017 (CPR). The specifically cited Order 12 rule 4 authorises the Court to enter judgment for the

claimant without hearing. The application is filed by the applicants in the main matter. For easy following I will be referring to the parties in the capacities in which they appear in the main matter.

Background

2. The applicants commenced these judicial review proceedings seeking the following reliefs:

a. A declaration that the respondent’s decision to refuse the claimants an audit of the electoral process and the electronic management system is unlawful and unconstitutional as it goes against the administration of free and fair elections.
b. A declaration that the respondent’s decision to implement the use of electronic management device as a means of identifying voters at the 16th September, 2025 elections is unlawful and unconstitutional.
c. A declaration that the respondent’s decision to implement the electronic transmission of September 2025 Presidential, Parliamentary and Local Government results and to determine the national result using the result so transmitted is unlawful and unconstitutional.
d. A prohibitory order, prohibiting the Respondent from implementing its decision to refuse the claimants an audit of the electoral process and the electronic management system.
e. A prohibitory order, prohibiting the Respondent from implementing the use of electronic management device as a means of identifying voters at the 16th September, 2025 elections.
f. A prohibitory order, prohibiting the Respondent from implementing the

decision to use the electronic transmission of September 2025 Presidential, Parliamentary and Local Government results and to determine the national result using the result electronically transmitted.

g. An order like mandamus mandating the Respondent to allow the applicants to conduct an audit of the electoral process and the electronic management system in preparation for the September, 2025 elections.

h. An order like mandamus mandating the Respondent to use the voters register physically present at all polling stations as the only means of identifying voters in the September 2025 elections.

i. An order like mandamus mandating the Respondent to implement physical transmission of the September, 2025 Presidential,

Parliamentary and Local Government results and to determine the national result on using the result physically transmitted.

j. The applicants also applied for an order as to costs.

3. According to the information contained in the Notice of application for Judicial Review, the applicants are challenging the following decisions of the Respondent:

a. The decision to refuse the claimants an audit of the electoral process and the electronic management system against the principles of free and fair elections.

b. The decision to implement the use of the electronic management device as a means of identifying voters at the 16th September, 2025 elections.

c. The decision to implement the electronic transmission of September 2025 Presidential, Parliamentary and Local Government results and to determine the national result using the result electronically transmitted.

4. Despite the urgent nature of these proceedings, being election related and the elections planned to be within a few days from today, the parties have not dealt with the matter in an urgent manner at all.

5. Upon granting permission to apply for judicial review, I ordered that the judicial review be expedited and directed that the parties must strictly comply with rules but the parties have failed to do so. For example, the order granting permission to commence judicial review proceedings together with the notice of application were served on 23rd July, 2025, 9 days the after permission was granted.

6. The matter was set down for scheduling conference on 7th August, 2025. On that date, despite the fact that there were 14 clear days after service of the application for judicial review the Respondent pleaded that they were not given enough time to prepare for the scheduling conference. Further, it was only on that day that the respondent apparently raised an issue as to the validity of the documents which had been served on them. We do not know how it happened but it was alleged by the respondent that the documents served on them did not bear the official stamp or seal of the Court. Understandably therefore, the respondent was entitled not to respond to them as they were not official documents.

7. The parties filed an agreed order in which they agreed that the applicants should serve the defendant with the correct copies of the application for judicial review, grounds for judicial review and sworn statements in support of the

application for judicial review within seven days. Theparties agreed to adjourn the scheduling conference. I was disinclined to adjourn the scheduling conference. I therefore issued directions that the respondent should file its defence within 7 days after service of the regular documents and that the matter will proceed for Judicial Review on 28th August, 2025 at 14 hours. This was upon an undertaking by the applicants that they would immediately serve the correct copies of the Court documents.

8. As at 19th August 2025, the day on which the 7 days expired the respondent had not filed its defence: instead, on that day it filed an application to discharge leave. It is at this point that the applicants also filed their application to end proceedings early. Again looking at the urgency of the matter and considering my own time constraints, I simply set down the applications on the date that was initially set for the hearing of the Judicial review itself.

9. At the time I was hearing these applications, it was clear to me that parties seemed to be bent on concluding the matter or stalling it on technicalities rather than considering the merits. It was clear that the parties have the facts, and none of the parties would really be prejudiced by the technical failures but, instead of compromising and agreeing to proceed on the substantive issues, Counsel for the parties except Kaphale SC seemed bent on dealing with the technical issues. This is not good considering that the matter has real prospects of affecting the running of the elections. Nonetheless we had no choice but to stall the hearing of the judicial review application to deal with these two applications first.

10. The parties raised numerous issues in these two applications but, due to the substance of the order that I am going to make I will select just a few to rule on. The first has to do exclusively with the application to end proceedings early. Application to end proceedings early

11. The applicants have submitted that the respondent has failed to comply with the order of directions made on 7th August, 2025 by failing to file the defence within time. Therefore, upon expiry of the time given to the respondent, it is not allowed to file any documents in defence. In fact, the applicants submit, the respondent is hiding behind the application to discharge permission to enter defence through the back door.

12. On the other hand, the respondent argues that since the permission was granted without notice on it, it still had the right to challenge the permission upon being served with the correct documents. In this case it challenges the permission on the grounds that the same was granted on the basis of defective sworn statements, therefore irregular; that there was delay in applying for judicial review and that there was concealment of material facts.

13. The respondent submits that the rules allows to it to challenge any order, document or step taken in the proceedings if it is of the view that the same is irregular. I must also state that in its application to discharge the permission the respondent is also arguing that the Court at this point has no jurisdiction to hear

the application for judicial review as the applicants have an alternative remedy, that is an appeal to the Commission or to the High Court and not judicial review.

14. Order 2 rule 3 of the CPR provides as follows:

Where there has been a failure to comply with these Rules or a direction of the Court, the Court may__

(a) set aside all or part of the proceeding;

(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.

Most importantly rule 4 provides as follows:

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.

15. My understanding of this Order is that the party who takes any fresh step after becoming aware of the irregularity, before challenging the document or step taken, loses his right to challenge the irregularity. See Chilima and another

v Mutharika and another [2020] MELR 1 at 280. The right to mount such a challenge cannot be lost by virtue of a court order unless at the time the Court made such an order it had considered the objections or the factors that make the document, step, order or procedure irregular. To this extent therefore, I agree with the respondent that it had no obligation to file the defence until its concerns were resolved.

16. The question whether the objection was raised within reasonable time is one of fact. Admittedly, considering the urgent nature of the proceedings at hand and the fact that the respondent was aware of the strict time limits set for the proceedings, it ought to have acted with speed and not to leave it to the last hour before it mounted its objection. Be that as it may I think it was within the respondent's right to mount such an objection and not to file its defence until the issue of the irregularities was resolved.

17. The application to end proceedings early therefore falls on this point.

Application to discharge permission

18. The application to discharge permission was grounded on the following grounds:

a. Material non-disclosure and misrepresentation – that the claimants failed to discharge their duty of full and frank disclosure by suppressing material statutory provisions, omitting decisive factual context, and mischaracterising the defendant's lawful policies, thereby obtaining leave on a false and incomplete factual and legal premise.

b. Inordinate and unexplained delay – the application was filed outside the strict statutory limitation of there months prescribed under Order 19 Rule 20(5) of the Courts (High Court) (Civil Procedure) Rules, 2017 without any application for extension or demonstrating "good reason", rendering the leave irregular.

c. Absence of Locus Standi (Sufficient interest) – the claimants, whether as political parties, aspiring candidates, or citizens, have not established any direct, personal, and particularised legal injury, as required under Order 19 rule 20(2) and section 15(2) of the Constitution, beyond the general interest of the public at large.

d. Failure to exhaust Constitutionally mandated remedies – the claimants have bypassed the complaint and determination procedure under section 76(2)(c)-(d) of the Constitution, which vests the commission with quasi-judicial authority over the electoral disputes, thereby rendering the proceedings premature, incompetent and an abuse of the Courts supervisory jurisdiction.

e. Absence of an arguable case – the claim discloses no prima facie legal wrong, being contrary to express statutory powers of the commission and premised on speculative and anticipatory grievances incapable of judicial determination.

f. Prematurity and procedural abuse – the proceedings have been brought in disregard of alternative remedies and before the electoral process has reached a stage where any alleged prejudice could crystallise thereby inviting the court into an abstract and premature policy review.

g. Defective sworn statements – the sworn statement of Jean Mathanga fails to comply with Order 18 of the Courts (High Court) (Civil Procedure) Rules 2017 as

well as the Oaths, Affirmations and Declarations Act and all exhibits attached to all sworn statements fail to comply with Order 18 rule 7 of the Courts (High Court) (Civil Procedure) Rules, 2017.

Sworn Statements

19. Both parties have raised issues with each other's sworn statements. The applicants attacked the sworn statement of David Matumika Banda in support of the application to discharge the permission to apply for judicial review, on the other hand the respondent attacked the sworn statement of Dr. Jean Mathanga in support of the application for permission to apply for judicial review. I will deal with the issue of sworn statements together.

20. Most of the grounds in support of the application to discharge permission would require an establishment of a factual basis. This factual basis can only be discovered in the sworn statements. Although there is at least one ground that deals strictly with a legal issue, that is failure to exhaust constitutionally mandated remedies which could be dealt at this sitting, since the majority of the grounds are fact based, I have taken the position that I deal with the issue of sworn statements first and if I find the sworn statements to be valid then I will proceed with the rest of the issues. If not, then I think it would be more efficient to defer the rest of the issues to be determined after the hearing of the judicial review as we will see later in my ruling.

Sworn Statement of Dr. Jean Mathanga

21. The sworn statement of Dr. Jean Mathanga verifying facts upon which relief is

sought and in support of an order of injunction was commissioned by one Steven Mponda, Commissioner for Oaths. At the end of the sworn statement, after the authorizing part, Mr. Mponda includes a certificate in the following words:

“I, Steven Mponda, Commissioner for Oaths of PO Box 444, Blantyre, hereby certify that on the 11th day of July, 2025, the said Dr. Jean Mathanga appeared before me, via video link, on a whatsapp Call, and confirmed that the electronic signature appearing herein, belongs to her and was appended to the sworn statement herein, for use in a proceeding:”

22. It has been submitted by the respondent that this shows that the sworn statement was not signed by the deponent. The respondent starts with challenging the validity of a cropped image of a signature pasted on a document. Citing the case of Qingdao Recycling Limited v Bai Li and others Commercial cause Number 122 of 2025 (unreported) the respondent submits that such is not an electronic signature. As such, it is the respondent’s view that the sworn statement was not signed, therefore there is no sworn statement. The Respondent also challenged the evidential validity of the attached documents as they are not sequentially identified. They are therefore ineffectual as per the respondent’s submission.

23. I must point out that the documents on the Court’s file are properly and clearly identified. This shows that the applicants are not serious with their documentation. They probably do not do thorough checks before they are served. I say this because this is the second time that the served documents are

alleged to be irregular when the applicants and the court have regular documents. The applicants need to improve on this one.

24. Coming back to the signature of Dr. Mathanga the applicants contend that the signature is valid as it was authenticated by the Commissioner for Oaths. At the same time the applicants submit that even if there was an irregularity, this matter is of constitutional importance and it must not fall on minute irregularities. Citing the case of Pemba v Rab Processors Limited Civil Cause no. 30 of 2012 and Mutharika and another v Chilima and another [2020] MELR 406, among others, they submit that Courts “loath perdition of cases through technicalities” that the permission should not be discharged on the basis of the technicality.

Sworn statement of David Matumika Banda

25. On the other hand, the applicants challenge the sworn statement of David Matumika Banda on the grounds that it does not comply with the Oaths, Affirmations and Declarations Act, Cap 4:07 of the Laws of Malawi. The particulars of the irregularity are that the jurat does not contain the date on which the oath was taken. It has been argued on behalf of the applicants that it is a legal requirement that the jurat must show the date according to this Act. The jurat to the sworn statement of Mr Banda does not. They argue that the date shown on the first page of the sworn statement does not suffice.

26. The respondent submits that in so far as legal proceedings are concerned, the sworn statement does comply with Order 18 rule 7(5) of the CPR. This rule provides that 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. Further the applicants say that the date is already indicated on the first page.

27. The applicants contend that the CPR is subsidiary legislation and must give way to the Act, on the other hand, the respondent in a way is saying that the Oaths, Affirmations and Declarations Act does not apply.

28. It is my considered opinion that the Oaths, Affirmations and Declarations Act is the main legislation dealing with taking statements under oath. All subsidiary legislation on the subject is subordinate to it.

29. I take notice that the terminology used in the CPR is different from that used in the Oaths Affirmations and Declarations Act. It is not apparent why the Chief Justice opted to adopt the phrase 'sworn statement' instead of the 'affidavit' which used to apply and still appears in other legislation. Further the CPR does

not define what a sworn statement is. All that the CPR does is to state that whenever a reference is made in any law to an affidavit, the same shall be deemed to be a sworn statement – Order 18 rule 1. This means that the CPR considers an affidavit as an equivalent of a sworn statement. It does not necessarily mean that they are one and the same thing. My reasoning is affirmed by the fact that whenever we talk of an affidavit, the end part of it contains a jurat. In the CPR it is not called a jurat. It is an authorizing part.

30. However, in the absence of a definition of a sworn statement within the CPR I took liberty to look up for its meaning elsewhere. The Black's Law Dictionary, 9th Edition, defines a sworn statement as a statement given under oath; an affidavit. It seems therefore that there is no much difference between the affidavit and the sworn statement. They are equivalent in terms of meaning and form. The sworn statement under Order 18 must be deemed to be a statement under oath administered in accordance with Oaths Affirmations and Declarations Act. Any requirements under the CPR must be considered as supplementary to the requirements under the Act. The requirements under the CPR cannot supersede the requirements under the Oaths Affirmations and Declarations Act. In my view therefore, the Oaths, Affirmations and Declarations Act does apply to the sworn statement.

31. Order 18 is not exhaustive as to the manner in which a sworn statement has to be taken. Whereas it requires the sworn statement to be signed, it does not state at what point it must be signed. However, Rule 4(5) of the Commissioner for Oaths Rules made under section 8 of Oaths, Affirmations and Declarations Act require the signing or affixation of the signature to be in the presence of a

Commissioner for Oaths. Anything less will render the sworn statement or affidavit ineffectual. It would not be a sworn statement at all.

32. Further, Section 10 of the Oaths Affirmations and Declarations Act clearly require the Commissioner for Oaths to “state truly in the jurat or attestation at what place and on what date the oath, affirmation, affidavit, or declaration is made or taken”.

33. Having considered the relevant provisions mentioned above both sworn statements herein fall short of the requirements of the law. The certificate of Steven Mponda unequivocally confirms that Dr. Jean Mathanga did not affix her signature to the document in his presence. The two communicated via video link. We are not aware where Dr. Mathanga was at the time they were communicating but it could not be in the presence of the Commissioner for Oaths. The Commissioner for Oaths did not see the deponent affixing the signature in her own handwriting. In as much as the affixing of the signature has to be done in the presence of the Commissioner for Oaths and that the same was not the case the sworn statement is a nullity and ineffectual. Even if we were to agree that the signature is electronic, which in my view is not, as court documents are paper based, the fact that it was not affixed in presence of the commissioner for oaths makes purported sworn statement a nullity.

34. As concerns the sworn statement of David Matumika Banda, the same is not in accordance with section 10 of the Oaths Affirmations and Declarations Act. It is therefore defective. Of course I should say that the defect in the form of the

sworn statement by Mr. Banda is curable, but that of Dr. Mathanga is not. It has to be retaken altogether.

35. The legal implication of this finding is that the “sworn statements” herein cannot be used to prove the factual content therein. There is no factual basis for me to decide the application herein. As I stated earlier, although there is one legal issue that could be handled at this point I think that would be of no consequence and I prefer to dispose of it with the rest of the preliminary issues after the hearing of the substantive judicial review application. In the circumstances I dismiss this application but the respondent is at liberty to raise the issues during the hearing as I have not considered the merits.

36. This is not my first time to encounter statements that have a defective authorising part. It is becoming a trend that Commissioners for Oaths are “Commissioning” documents of the basis of an “electronic signature” on a paper document when in fact they were not present at the time the signature was being created or affixed to the document. This in my view is misbehaviour or being negligent or reckless in the performance of the Commissioner’s for oaths duties. It is in my view very important that Commissioner for Oaths take their duties seriously to avoid such inconveniences on the part of the parties. It may be high time that the Honourable the Chief Justice started disciplining the wayward Commissioners for Oaths to curb the malpractice.

37. So what is the fate of the judicial review proceedings in light of what I have stated concerning the sworn statement of Dr. Jean Mathanga? To resolve this

issue, I will start by looking at order 19 rule 20 (3) and rule 23. Rule 20(3) provides as follows:

“Subject to sub-rule (3), an application for judicial review shall be commenced ex-parte with the permission of the Court.”

38. Ignore the subjecting of the sub-rule to itself, I suspect that it is a typographic error. It should have been subjected to sub- ule (4) for it to make sense.

39. Rule 23 on the other hand provides as follows:

23.—(1) An application for judicial review shall set out the grounds for making the application and shall be supported by a sworn statement.

(2) An application under sub rule (1) shall name as defendant__

(a) for a declaration in relation to an Act or subsidiary legislation, the Attorney General;

(b) for an order that a person shall do or shall not do something, the person in question; and

(c) for an order about a decision, the person who made or should have made the decision.

(2) An application under sub rule (1) shall be served on__

(a) the defendant within 28 days from the date of filing the application;

(b) any other person who is directly affected by the application, within 28 days of filing the application;

(c) any other person the Court may order that he may be added as a party, within 28 days of the order.

40. What comes out of these two rules is that the application for Judicial review is a two tier process. There is an application for permission to apply for judicial review and then there is an application for the substantive process of judicial review. The first application is made ex-parte subject to the Court directing the application to be made interpartes. At this point the applicant is only commencing the process, they could or they could not be allowed to proceed with the process. In the Second part the applicant has had permission of the Court and what they are doing is filing the substance of their grievance. Whereas the procedure under rule 23 is detailed, the procedure under rule 20(3) is not.

41. As such, in my view, in the application for permission under rule 20(3) all that the applicant needs to show, prima facie, is that there is a decision by the public office or officer which is reviewable on any of the grounds allowable for judicial review and that they have a standing to challenge that decision. They need not go into minute details of the same. The details only come after they have been granted the permission and the said details are contained in the main application for judicial review under rule 23.

42. To this extent therefore the sworn statement of Bright Kawaga would suffice to establish that there is a decision or decisions by the respondent which are reviewable despite the fact that the same makes some reference to the impugned sworn statement of Dr. Mathanga. I therefore still uphold the permission for judicial review that I granted. The irregularity just affects the main application for Judicial review and not the permission.

43. When listening to the parties in their arguments in both applications, it was clear that no party will be prejudiced if the other is allowed to regularise their document and serve them on a short period of time. I will therefore proceed to set another date for the hearing of the Judicial review. The parties to regularise their documentation at least 48 hours before the hearing of the Judicial review.

44. I set Monday, the 8th September, 2025 as the date for the hearing of the judicial review. The time for the hearing is 10:00 in the forenoon. The defendants time for filing and serving defence is extended and shall expire on Friday, 5th September, 2025 at 16:30 hours.

45. That is my ruling. Each party to bear its own costs.

Made in Chambers this 3rd Day of September, 2025 at 15 hours.