

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

THE MATTER OF

CHARLES KAJOLOWEKA

v.

REPUBLIC OF MALAWI

055/2019

27/03/2020

(000241-000235) YJ

APPLICATION No. 055/2019

RULING
(PROVISIONAL MEASURES)

27 MARCH 2020



The Court composed of: Sylvain ORÉ, President; Ben KIOKO, Vice-President; Rafaâ BEN ACHOUR, Ângelo V. MATUSSE, Suzanne MENGUE, M-Thérèse MUKAMULISA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, and Imani D. ABOUD, Judges; and Robert ENO, Registrar

In accordance with Article 22 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 8(2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Tujilane R. CHIZUMILA, member of the Court and a national of Malawi, did not hear the Application.

In the matter of

Charles KAJOLOWEKA

Represented by:

Pan African Lawyers Union (PALU)

Versus

REPUBLIC OF MALAWI

Represented by:

- i. Honourable Kalekeni KAPHALE, SC, Attorney General, Ministry of Justice and Constitutional Affairs;
- ii. Mr. Nerverson CHISIZA, State Advocate, Ministry of Justice and Constitutional Affairs;
- iii. Ms. Lumbani MWAFULIRWA, State Advocate, Ministry of Justice and Constitutional Affairs;
- iv. Mr. Bonwel MLENGA, State Advocate, Ministry of Justice and Constitutional Affairs; and
- v. Dr. Zolomphi NKOWANI, Zolomphi & Company.

After deliberation,

Delivers the following Ruling:

I. THE PARTIES

1. Mr. Charles Kajoloweka, (hereinafter referred to as "the Applicant") is a national of the Republic of Malawi and Executive Director of the Registered Trustees of Youth and Society of Malawi.
2. The Respondent State is the Republic of Malawi which became party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 23 February 1990 and to the Protocol on 9 October 2008. On 9 October 2008, the Respondent State deposited the Declaration under Article 34(6) of the Protocol under which it accepts the jurisdiction of the Court to receive cases directly from individuals and non-governmental organisations.

II. SUBJECT OF THE APPLICATION

3. On 18 October 2019, the Applicant filed an Application before this Court alleging violation of Articles 1, 2, 3, 4, 5, 7, 16 and 22 of the Charter and other human rights instruments in connection with a public interest litigation he undertook in the Respondent State. A request for provisional measures was filed together with the Application.
4. It emerges from the Application that between January 2017 and February 2019, the Applicant filed a civil suit in the Respondent State's domestic courts in connection with an alleged corruption scandal involving the purchase of maize by the Respondent State from an unnamed Zambian company and which implicated the Respondent State's Minister of Agriculture and Food Security. In the suit, the Applicant challenged the said Minister's continued performance of his duties while a Commission of Inquiry was investigating the corruption scandal. On 13 February 2019, the Supreme Court of Appeal of the Respondent State dismissed the suit and ordered the Applicant to pay costs which were later assessed at a total sum of Malawi Kwacha twenty-one million six hundred forty-eight thousand six hundred seventy-five (MWK 21.648.675,00).

5. In his request for provisional measures the Applicant prays the Court to order the Respondent State to stay the enforcement of the order for costs by its Supreme Court of Appeal.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The request for provisional measures was filed on 18 October 2019 together with the Application.
7. On 24 January 2020, the Respondent State filed the Response to the request for provisional measures and the Response to the main Application.
8. On 11 February 2020, the Applicant filed the Reply to the Respondent State's Response to the request for provisional measures.

IV. JURISDICTION

9. In dealing with any Application filed before it, the Court must conduct a preliminary examination of its jurisdiction, pursuant to Articles 3 and 5 of the Protocol.
10. Nevertheless, for the purpose of issuing an Order for Provisional Measures, the Court need not establish that it has jurisdiction on the merits of the case, but must simply satisfy itself that it has *prima facie* jurisdiction.¹
11. Article 3(1) of the Protocol stipulates that: "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned".

¹ See, Application No. 002/2013.Order of 15/03/2013 (Provisional Measures), *African Commission on Human and Peoples' Rights v. Libya* § 10; Application No. 006/2012. Order of 15/03/2013 (Provisional Measures), *African Commission on Human and Peoples' Rights v. Kenya* § 16, and Application No. 020/2019. Order of 2/12/2019, *Komi Koutche v Republic of Benin* § 14.

12. The Court notes that the alleged violations, subject of the present Application, are all in respect of rights protected under the Charter and human rights instruments to which the Respondent State is a party.² The Court, therefore, holds that it has material jurisdiction to hear the Application.

13. In light of the foregoing, the Court is satisfied that it has *prima facie* jurisdiction to hear the Request.

V. ON THE PROVISIONAL MEASURES REQUESTED

14. The Applicant requests this Court to order the stay of enforcement of the order of costs by the Supreme Court of Appeal of the Respondent State against the Applicant pending determination of the present Application on the merits by this Court.

15. According to the Applicant enforcement of the order for costs could result in him losing immovable property and personal belongings that may otherwise never be recovered, which may cause him irreparable harm.

16. The Respondent State objects to the Applicant's application for stay of execution of the award of costs and urges the Court to dismiss the application for provisional measures on the basis that the Applicant did not exhaust domestic remedies.

17. The Court recalls that in accordance with Article 27(2) of the Protocol and Rule 51(1) of the Rules, it is empowered to order provisional measures "in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons", and "which it deems necessary to adopt in the interest of the parties or of justice."

² The Respondent State became a State Party to the Charter on 23 February 1990, to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa on 25 November 2005, to the African Charter on the Rights and Welfare of the Child on 29 November 1999, to the African Charter on Democracy, Elections and Governance on 24 October 2012 and to the International Covenant on Civil and Political Rights on 22 March 1994.

18. It lies with the court to decide in each case whether, in light of the particular circumstances, it must exercise the jurisdiction conferred upon it by the aforesighted provisions.³
19. In the present case, the Court notes that, should the Respondent State enforce the order of costs issued by its Supreme Court of Appeal against the Applicant, he could lose immovable property and personal belongings that may never be recovered, which may cause him irreparable harm. The Respondent State has not disputed this claim.
20. The Court therefore finds that a situation of extreme gravity and urgency exists necessitating the adoption of provisional measures to avoid irreparable harm to the Applicant before the Court decides on the merits of this Application.
21. The Court, accordingly, decides to exercise its powers under Article 27(2) of the Protocol and also Rule 51(1) of the Rules, to order the Respondent State to stay the enforcement of costs ordered by its Supreme Court of Appeal pending determination of this Application on the merits.
22. For the avoidance of doubt, this Order in no way prejudges the findings the Court might make as regards its jurisdiction, admissibility and merits of the Application.

VI. OPERATIVE PART

23. For these reasons:

THE COURT,

Unanimously, orders the Respondent State to:

- a) Stay the enforcement of the order of costs by its Supreme Court of Appeal against the Applicant pending the determination of this Application on the merits.

³ *Armand Guehi v United Republic of Tanzania (Provisional Measures)* (2016) 1 AfCLR 587 § 17.

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- b) Report to the Court within fifteen (15) days from the date of receipt of this Order on the measures taken to implement it.

Done at Arusha this Twenty-seventh day of March in the Year Two Thousand and Twenty, in English and French, the English text being authoritative.

Signed:

Sylvain ORE, President

Robert ENO, Registrar

