

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
MATRIMONIAL CAUSE NO. 738/2003**

BETWEEN

IN THE MATTER OF AN APPLICATION BY AMOS PHIRI

-AND-

JUDICIAL REVIEW

CORAM : HON. JUSTICE NYIRENDA

: Mr Chilenga, Counsel for the Interested Party
: Mr. Kachale, Counsel for the State
: Mr. Gonaulinji, Court Interpreter
: Miss Jalasi, Court Reporter

JUDGMENT

This is a very short case. It is an application for judicial review by the interested party Amos Phiri of the decision of the Minister for Lands in withholding consent to the sale of land Plot Number 210 in Mangochi District.

The facts from the affidavit in support of the application are that in January 2003 Paramount Estate Limited advertised for sale of the plot in question. The interested party submitted his tender to purchase the property at a price of K1,400,000.00. His tender was successful and he was offered the plot by letter Exhibit "API" written by the Estate Manager of Paramount Estate. The interested party subsequently paid the full amount of K1,400,000.00.

In the meantime Messrs Mpando Law Firm wrote to the Secretary for Lands seeking the Minister's consent to proceed with the rest of the transaction in terms of Section 24A of the Land Act.

The Minister withheld his consent for reasons which are questioned in these

proceedings and on which basis the interested party seeks an order of *mandamus* compelling the Minister to give consent to the sale of the plot.

What emerges from the facts is that the plot in question belonged to Mrs. Asedi. Mrs. Asedi mortgaged the plot to The New Building Society. What is apparent from the facts is that Mrs. Asedi failed to live up to the mortgage with the result that The New Building Society exercised its power of sale. It is in these circumstances therefore that the plot was sold. That is why there are letters exhibited by the interested party from The New Building Society which confirm that the interested party had bought the property.

In withholding consent the Minister had three considerations as can be fathomed from the letter Exhibit AP4 from The New Building Society to The Secretary for Lands that refers to a meeting between the Minister and officials of The New Building Society. The considerations were:

1. That Mrs. Asedi, the mortgagor, is a widow.
2. That in addition to being a widow she herself is an orphan.
3. That she is responsible of looking after four children.

It is these points of determination that the interested party has taken issue with and describes them as irrelevant considerations rendering the Minister's decision unreasonable in the *Wednesbery* sense. Counsel on behalf of the interested party has referred to the case of *Associated Provincial Picture Houses Ltd v Wednesbery Corporation [1948] IKB 223 at 229*, in support of his argument.

On behalf of the Respondent counsel Mphatso Kachule does not challenge the factual background. Counsel's submission is in the following paragraphs from his affidavit:

- a) That there has been a considerable lapse of time from the time leave for

judicial review was granted up to date and it would not be in the interest of good public administration for the relief of *mandamus* to be granted owing to material change of circumstances on the part of the Vendor as well as Mrs. Asedi.

- b) That in any event Mrs. Asedi who is not a party to these proceedings has relied on the decision of the Minister in withholding the consent.
- c) That the relief of *mandamus* being prayed for would not be appropriate in the circumstances of the case.

Section 24 A(1) of the Land Act provides as follows:

Any person who intends to offer for sale or otherwise to convey, lease, transfer or assign any private land shall, not less than thirty days before he makes such offer or otherwise conveys, leases, transfers or assigns, give notice in writing to the Minister of his intention. In this subsection "sale" includes any manner of selling or letting by bids.

This provision has two problems as I see it. The first one is that it does not attempt to guide the premise of the Minister's decision. Secondly and more importantly it is not all clear whether at all the Minister can withhold consent. A simple reading of the provision suggests that the notice to the Minister is really and merely for his information. It would appear however practice has emerged, for good or for bad, that the Minister has a say for any such transaction to proceed. As pointed out earlier this is probably where a whole host of problems began because ultimately the motive and purpose of the exercise of the Minister's discretion are unspecified. Could it be said that the statute in question gives the Minister an "unfettered discretion" and what would be the implications of such powers today.

Lord Upjohn in *Padfield v Minister of Agriculture Fisheries and Food* [1968]

AC 997 observed thus:

The use of that adjective (unfettered) even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely, that in exercising their power the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives

In this regard reference is also made to section 108 (2) as read with section 5 of the Constitution. Section 5 of the Constitution provides:

Any act of Government or any law that is inconsistent with the provisions of this constitution shall, to the extent of such inconsistency, be invalid.

Relevant to this matter is the administrative decision (act) of the Minister in withholding consent to the sale of the land here in question. The decision (act) of the Minister is required to comply with section 43 of the constitution which provides:

“Every person shall have the right to a lawfully and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened”,

Thus if a discretionary power is conferred without express reference to purpose, it must still be exercised in accordance with such implied purposes as the courts attribute to the legislation and in any event must be justifiable in relation to reasons given.

The real question as I see it in the instant case is whether the court agrees that the reasons given by the Minister were irrelevant and or unreasonable for the court to compel the Minister by order of mandamus to determine the matter on the basis of

legally relevant considerations. As often is the case in such situations courts run the risk of substituting the decision of the authority with that of the court or indirectly indicating the particular manner in which the discretion ought to be exercised. The correct position is that the role of the court is substantially and limited to ensuring that the discretion has been exercised according to law. A decision that is perverse is in itself unlawful and must be subject to further consideration.

From what I understand to be the position in our practice even after parties to a land transaction have drawn up a contract and money has changed hands the transaction is not complete until the Minister has endorsed its completion. The transaction at hand was therefore not complete. Such being the case the interested party herein was in no better position than the original owner of the land Mrs. Asedi or the New Building Society, the seller of the land. The Minister was therefore basically to consider the rights of an intended seller of the land and an intended purchaser of the land and all other persons who were likely to be affected by the transaction.

In considering the position of Mrs Asedi the Minister established that she was a vulnerable debtor who was compelled to let go her land because she could not meet her mortgage with the New Building Society. The Minister considered that she was placed in that situation because of a number of factors, that she was a widow, she was an orphan, she was responsible for four children. No doubt for the same reasons she needed the land that she was being compelled to let go even more.

On the other side is the interested party. In his case the relevant considerations are that he successfully bid for the piece of land. He actually paid for the land in question. The legitimate expectation of the interested party was in question.

As to what amounts to relevant considerations therefore will no doubt depend on the circumstances of each case which in turn can not ignore the circumstances of all parties likely to be affected by a transaction. The Minister could therefore not be

faulted in taking into account the circumstances of Mrs. Asedi.

We are now told that the New Building Society who is the seller of the land in question quickly withdrew from the transaction and paid back the full amount paid by the interested party. It is also on record that Mrs. Asedi started servicing the mortgage all over.

In all it is the judgment of this court that the considerations which the Minister made in withholding consent are not irrelevant nor can they be said to be unreasonable. The orders sought by the interested party are therefore declined.

This is an appropriate case where the court should order that each party bears own costs.

PRONOUNCED in Open Court at Lilongwe this 12th day of September 2007.

A.K.C. Nyirenda

J U D G E