IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 755 OF 1994

BETWEEN : M.S. KANJANGA (MALE) ..... PLAINTIFF

AND

THE ATTORNEY GENERAL ..... DEFENDANT

CORAM : CHIMASULA PHIRI, J.

Bazuka Mhango of Counsel for the Plaintiff

Attorney General (Unrepresented)

Selemani - Law Clerk

RULING

The plaintiff has sued the defendant for damages for unlawful detention and for loss of property. The statement of claim avers that the plaintiff was detained in 1967 and released in 1969. In 1972 he fled to Zambia to seek political asylum. The plaintiff has pleaded that during the time of his detention the Government confiscated his realty and personalty valued K6,959,780.00. The Attorney General served defence denying the allegations of unlawful detention and confiscation of the plaintiff's property. In the alternative the defendant raised defence of statute limitation. The Court ordered for the defence of statute limitation to be dealt with as a preliminary issue. As usual there was no appearance on behalf of the Attorney General despite there being personal service on Chief State Advocate in the Attorney General's Chambers. Furthermore the matter was adjourned twice despite there being proof of service just to allow the Attorney General to address the Court. As already indicated, there was no appearance. I proceeded to hear counsel for the plaintiff.

Mr Mhango submitted that there are judicial decisions of the High Court which indicate that the circumstances which existed in Malawi between 1964 and 1994 are such that the Attorney General cannot rely on the defence of statute limitation in suits against Government. He submitted that those cases indicate that the Courts have clearly shown that it would be inequitable to allow such a defence because the events which occurred and the atmosphere in Malawi then was such that it created a legal disability to the citizens and they should now be allowed to sue. He referred me to the cases of Ali Mohammed Waka vs. Attorney General: Civil Cause No 1855 of 1993 (unreported); L.

Chaponda vs. The Attorney General: Civil Cause No. 616 of 1994 (unreported); Ella Banda vs Attorney General: Civil Cause No. 1727 of 1993 (unreported); L.W. Masiku vs Admarc and Attorney General: Civil Cause No. 714 of 1993 (unreported) and Walter Chona vs Attorney General: Civil Cause No. 1325 of 1994 (unreported).

I have read and considered these judgments. It would be wrong to make a general statement that the defence of limitation does not apply. There must be evidence to show that the plaintiff was under a disability to sue within the time prescribed by the law. Further it must be shown that the disability was created by Government. This would bring the matter within the ambit of Masiku's case as discussed by Judge Villiera and followed by Judge Kumitsonyo in Ella Banda vs Attorney General. However, it will be noticed that the actions in all the cases referred to by counsel commenced before 18th May 1994. This date is crucial because it is when our Constitution of 1994 came into force. As such the observations of Judge Mwaungulu in Chona's case are very pertinent. The jurisdiction of this court can only arise from the Constitution or a Statute. It is clear in my mind and I concur with judge Mwaungulu's statement that after 18th May 1994 no actions for civil and criminal liability of Government should commence in the High Court or any Court without first reference to the National Compensation Tribunal. The High Court would only hear such matters on review of the decision of the Tribunal or where the Tribunal has transferred the proceedings to the High Court for determination on the grounds that the Tribunal has no capacity to determine the matter or that it is in the interest of justice so to do. These are Constitutional provisions and any statutory provision or rule which goes against this, is null and void. The question asked by many people is how then can this provision by reconciled with the Constitutional provision giving the High Court unlimited original jurisdiction. The Constitution does not create any conflict because it has clearly provided within the Constitution that the High Court shall not deal with certain matters unless first referred to the Tribunal, i.e., another Constitutional creature. The courts and the Tribunal must co-exist and co-function as per constitutional provisions. The cases of Waka and Chaponda did not go into deep analysis of this regulated constitutional practice. However, even if that were done, the result could not have been different because the proceedings commenced before 18th May 1994 although the judgments were delivered much later.

In my judgment I wish to stress that the Constitution of Malawi does not give a person who suffered an atrocity during the 1964-1994 MCP reign for which Government would be liable in civil or criminal proceedings a choice to go to Court or Tribunal. Such a person is compelled to go to the Tribunal first.

In the present case the proceedings commenced before 18th May 1994 and the Constitutional provisions compelling the litigant to go to the Tribunal do not apply. The only consideration would be whether or not the matter falls within the purview of Masiku and Ella Banda cases.i.e. was the plaintiff under a disability? Mr Mhango submitted that the plaintiff was forced into exile in Zambia and could only return to Malawi after the General Amnesty Act 1993 and that when he returned he immediately commenced legal

proceedings against the Attorney General. Prima facie there is evidence of disability which would entitle the plaintiff to proceed with the matter in the High Court. However, I will not spare caution that the plaintiff cannot pursue the same claim and at the same time in the Tribunal unless the claims are different.

PRONOUNCED in open Court this Day of February 2000 at Blantyre.

CHIMASULA PHIRI

JUDGE