IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 165 OF 2001

BETWEEN:

LEFA CHINSIMA...PLAINTIFF

-VS-

THE MINISTER OF LANDS AND HOUSING........................DEFENDANT

CORAM: TWEA, J.

Mr. Nyimba of Counsel, for the Plaintiff
Absent of Counsel, for the State
Mr. J.H.C. Balakasi, Official Interpreter
Mr. Nsomba, Recording Officer
Miss Vokhiwa, Recording Officer

JUDGMENT

The applicant herein obtained leave to go for judicial review against the Minister of Lands and Housing on 19th November, 2001. The applicant sought to have an order ***certiorari or mandamus*** and/or several declaratory orders against the Ministers decision to withhold his consent to her selling her parcel of land and development thereon.

The facts, as deponed, are that the applicant, together with her children, are the joint owners of a parcel of land held under lease of 99 years from 1st January 1986. This lease was issued on 10th May, 2001.

It is deponed that this parcel of land was allocated to the late Mr. Lyden Chinsima and was surveyed, according to the original deed plan certified on

22nd October, 1985, in July, 1985. It is curious to note that the lease agreement does not have any deed plan and that the deed plan cited therein is No. 79/85 when the deed plan that is annexed to this sale agreement is No. 179/85. Be this as it may, I find that there is no dispute about the identity of the land.

Clearly, the land was customary land up to 14th May, 2001 when it was registered at the Deeds Registry as leasehold land. This land is situated in Liwonde Town Planning area and subject to Town Planning notwithstanding the powers of the Chief under s.33 of the Town and Country Planning Act.

I did not have a fully hearing, because the State did not appear, after giving several excuses that were not valid at all to stop this court hearing the applicant, but it is clear in my mind that the right of user to this land passed from the late Lyden Chinsima to his surviving family. The development of the customary land having been commercial in nature, and having been approved, at time of survey, by the Minister for Trade, Industry and Tourism as it was then, subject to Town Planning rules, the family is also entitled to the use of the structures constructed thereon.

It is clear from the deponed evidence that this applicant was desirous of selling the parcel of land. It is deponed that in the year 2000 the Government was informed of her desire to offer the land for sale and that she offered it to Government. The Government declined the offer but instead supplied her with a list of probable buyers, this list was exhibit LC2. She made an offer to the listed companies by her letter of 27th July, 2000, but none was in a position to buy her out, until the current buyer was identified.

It is clear from the affidavit evidence that when the current buyer was identified, the question of her tenure became pertinent. She had customary tenure on the land, which is not secured enough for business. It is also clear to my mind that she converted the tenure to leasehold in order to effect the sale. I am justified in this finding because the lease was registered on 14th May, 2001 and the sale agreement was signed on 7th June, 2001. Further the sale agreement clearly stipulates in clause 11.1.1(iv) that documents of title should be in the name of the vendor. I have also carefully studied the sale agreement and, from the tone, it is clear to my mind that the vendee and definitely the vendor were aware of the legal problems that may face the sale

and tried to avoid them. Consequently, the sale was made subject to compliance with s.24A of the Land Act: clauses 8,10,11 and 12 make this quite clear.

The issue in this case is the withholding of consent by the Minister. I agree with Counsels submission that s.24A of the Land Act only requires one to give notice to the minister in writing and wait for 30 days before conveyancing or transfer or leasing; the land out. The requirement of consent is only implied, but unfortunately, it has became a practice in such matters to make the agreement subject to the ministerial consent. Consent therefore became a condition precedent as contractual term. In the absence of any regulations that the Minister may make under s.24A(4) of the Lands Act, this has been left as a matter of contract.

It was argued on behalf of the applicant that the purpose of s.24A was to give Government time to exercise its power to acquire the land before it changed hands to a new owner. The Act is silent about this although it is common knowledge that the bill that went before the Parliament cited this reason. I, therefore would feel constrained to find that this is the only factor that the Minister can take into account when making a decision in the absence of any such express provision in the Act. In the case of **Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24**, an Australian case, the court held that factors which a decision maker is bound to take into account when coming to a decision will be construed from the statute which confers the discretionary powers. Where the discretion is not precisely legislatively defined then the factors to be taken into account are similarly at large, but will be subjected to the subject matter, scope and purpose of the statute in issue. The purpose of the Land Act is stated to be “An Act to make provision with regard to land in Malawi and for matters incidental thereto”. This is very wide. One just has to look at the sort of orders: Prohibition orders, Land Control orders, trespass, land use, among others, that this Act caters for. In the absence of full argument I would be very slow to interpret the uses as, impliedly, limited to the arguments raised by the applicant. In any case I would say that, from the same case, the court was of the view that where a statute expressly states the considerations that a decision-maker must take into account it will be necessary for the court to construe whether the listed factors are exhaustive or merely inclusive: **Peko @ page 39.** I would therefore, still

be inclined not to attempt to limit the factors to be taken into account by the Minister.

The applicant raised arguments of discrimination on basis or the race of the purchaser, her gender and status as a widow. I have carefully examined her arguments and I find no basis for such arguments in view of the several controls that the Land Act provides for. One has to examine each control and its purpose to determine whether it is discriminatory or not. Further one has to look at the policy that rendered such control orders necessary to determined whether they are discriminatory or not. In my view to find the controls or policy on land discriminatory, one has to find that they are discriminatory at law not as applied to an individual. I should be very slow to find discrimination without the benefit of full argument.

Among the five principles enumerated by Mason J in **Peko's case supra)** two need to be taken into account when looking at administrative decisions. First that the courts must not fall into the temptation of substituting their authority and decisions for those of the administrative authority in which Parliament vested the discretion. Secondly, that in respect of Ministers' decisions, due allowance may have to be made for taking into account of broader policy considerations which may be relevant to the exercise of ministerial discretion. The memoranda exhibited to the affidavits, LC 13 and LC 8, clearly show that there are policy issues involved. Be this as it may, I find that the advise to the Minister in the exhibit LC 8, states the correct position at law, even where a policy matter is involved viz, that reasons for withholding consent even in the face of new policy must be disclosed and that consent should not be unreasonably withheld. If the Minister has reasons for withholding his consent then he must disclose them. This matter had been before the Minister for four months by the time the applicant was being heard. This is more than sufficient time for him to make a decision one way or the other. It is no longer proper for him to sit on the fence and decline to make a decision. It is now six months since the applicant notified the Minister and any further delay now would be unreasonable. Such further delay would tantamount to refusal to make a decision which may amount, in my view, to "Wednesbury unreasonableness".

I decline to make any declaratory orders in view of the fact that I did not hear the repository or the State. However, I find that it is proper to remit the

30 days of this order. Should consent be denied the applicant must be given reasons therefor.

Pronounced in open court this 5th day of February, 2002 at Blantyre.

E. B. Twea
JUDGE