



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CIVIL CAUSE NO 35 OF 2006**

BETWEEN:

THE STATE

AND

THE DISTRICT COMMISSIONER FOR THYOLO ...RESPONDENT
(EX PARTE HON. JUSTICE TAMBALA SC JAAPPLICANT)

CORAM: HON. JUSTICE M.L. KAMWAMBE

Mr Chokhoto of counsel for the Applicant

Ms. Kayuni of counsel for the Respondent

Mr Ben Luckson, Official Interpreter

JUDGMENT

Kamwambe, J

This is an application for judicial review. The applicant seeks the decision of the District Commissioner, Thyolo as Respondent to be reviewed due to trespass on his land on which some maize, cassava and banana crops were uprooted and the road which was being improved, encroached into his land at Nchima in Thyolo.

The Applicant seeks reliefs as follows:-

1. A declaration that the decision of the Respondent falling the Applicant's crops covering an area between

½ an acre and 1 acre during the week beginning 6th March, 2006 was unconstitutional and unlawful.

2. A declaration that the decision of the Respondent to construct a road partly on the Applicant's land without first hearing him or compensating him was unconstitutional, unlawful and therefore void.
3. A like order to certiorari quashing the decision of the Defendant to consider a road on the Applicant's land thereby effectively seizing land from him arbitrarily.
4. An order for compensation for the destroyed maize and other crops and construct a road on the Applicant's land.
5. If leave to apply is granted, an order staying the decision of the Respondent to construct a road on the Applicant's land and an order for an injunction restraining the Respondent by himself or by any other means whatsoever from proceeding to construct a road on the Applicant's land without first of all compensating the Applicant.
6. If leave to apply is granted, a direction that the hearing of the application for Judicial Review be expedited.
7. Compensation for land arbitrarily seized.
8. Further or other reliefs.
9. An order for costs.
10. And that all necessary and consequential directions be given.

Eventually the third relief sought as above was removed because of its ineffectiveness as the road had already been constructed. On 20th March, 2006 this Court granted leave to

apply for judicial review and at the same time ordered that the decision by the Respondent to construct the road be stayed and an injunctive order too was granted restraining the Respondent from proceeding to construct the road on the applicant's land without first of all compensating the Applicant. It was further ordered that the matter by judicial review be expedited. In my view it was indeed expedited. In this regard, reliefs number five and six were fulfilled.

The facts of the case are that members of the community of Nyalugwe village intended to improve the road that passes through the village. Through the District Commissioner as facilitator they were linked to the GOM/EU Income Generating Public Works Programme (IGPWP) – Special Programme for Investment in Need Times (SPRINT) for financial support. The community or villagers led by T/A Nchilamwera and village headman Nyalugwe started to construct the road on a self help basis, of course with financial assistance from GOM/EU programme stated above.

In the spirit of furthering decentralisation the community was expected to identify the specific project such as road improvement or construction, make contributions, such as land so as to avoid issues of compensation, and implement the project with financial support from GOM/EU financial support from GOM/EU (IGPWP). As the road was being constructed the complainant was informed by his worker who resided in a house in the village in which the Applicant's land is situated. It was discovered that about 48 maize cobs and some cassava and banana plants had been felled down and his land which was along the existing road that was being improved and extended had been encroached. Hence this claim by way of Judicial Review.

On the 17th March 2008 this Court granted the application to amend Notice of Motion for judicial review by including a claim for damages for loss of land as shown at number 7 above to the reliefs sought.

Issues that arise for determination are:-

1. Whether the Respondent was involved in choosing site for development.
2. Whether Respondent made a decision to arbitrarily acquire the Applicant's land.
3. Whether the Respondent abdicated from his duties to oversee public utilities within his jurisdiction.

It is not in contention that the Respondent was acting as a facilitator and therefore he had to give due guidance to the community. But may be the real question is how far his facilitation could go so that he is seen not to undermine the due operation of the community developmental venture. This can really be a tricky subject matter over which no sweeping conclusions need to be made.

Again it is not in contention that a strip of the applicants land was acquired and used by the community to which the applicant also belongs, and some plants felled. The question is whether there was justification for doing so in the light of the Respondent's position and the manner his decision, if any, arose. This question too is a tricky one. One will have to look at all the circumstances of the case.

Judicial review, as currently understood and accepted is a procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, or other persons or bodies which perform public duties or functions. (see Practice note 53/1- 14/1 under Order 53 rules 1 to 14 of the Rules of the Supreme Court). As aptly put by Lord Hailsham L.C. in **Chief Constable of North Wales Police vs Evans** (1982)1 WLR 1155 at 1160, judicial review is concerned with reviewing, not the merits of the decision the application relates to, but rather the decision – making process. (see note 53/1 -14/6). In the

application before us we should really be looking for decisions made or conducted and only if we find such should we check whether the decision-making process in them calls for the proposed review.

The way judicial review has developed is such that the Court can only fault the decision making process in the proceedings and decisions if the concerned Court or tribunal or public authority:-

1. had no jurisdiction to act or acted *ultra vive*
2. did not follow the rules of natural justice where such rules apply
3. made an error of law on the face of the record and/or
4. displayed unreasonableness in the Wednesbury sense on the conduct of the proceedings or the making of the decision.

The applicant through his counsel had the opportunity to cross-examine the then District Commissioner the Respondent herein, namely, Bester Crispin Mandele. He was made to read a letter exhibit P1 which was written on his behalf as follows:-

"REF. NO. TO/JUD/12/3/9

5TH APRIL, 2006

THE ATTORNEY GENERAL
P/BAG 333
LILONGWE 3

ATT: MR SANTHE R.

COPY: PRINICPAL SECRETARY
MINISTRY OF LOCAL GOVERNMENT AND
RURAL DEVELOPMENT
P.O. BOX 30312
LILONGWE 3

ATTENTION: DIRTECTOR OF LOCAL GOVERNMENT

Dear Sir,

INSTRCUTION ON A NOTICE OF ORIGINATING
MOTION FOR JUDICIAL REVIEW

I hereby submit facts related to the above mentioned notice.

The District Commissioner of this Assembly has been served with the above stated notice by the High Court of Malawi on a land issue related to a road construction project under GOM/EU Income Generating Public Works Programme for Investment in Needy Times (SPRINT). And the complainant of the case in question is Hon. Justice Tambala.

The complainant is that the Assembly is implementing the Thangadzuwa to Loti Road Construction Project in Nyalugwe village, T/A Nchilamwera and construction has partly passed along the plot of the complainant.

And in the implementation process of the programmes or projects, the roles of the Assembly are as follows:-

- i. To sensitize the local or traditional leaders on issues related to programme design, procedures and outcomes and in this case T/A Nchilamwera and the beneficiary village headman were sensitized.
- ii. To facilitate the consultations between the traditional leaders and their local people. This is done to allow the local people to know exact tract and site of the proposed project so that if the road will need widening, then that can be done. In this case T/A Nchilamwera organised the meeting of this kind and that the complainant was invited but he did not turn up.
- iii. Launching of the project where the beneficiary villagers were reminded that in the

*decentralisation set up, the communities identify their own projects, make contributions such as land and as such issues of compensation do not arise **vis-a-vis** claims on damages as a result of undertaking development activities on a particular land and this aspect was done.*

Once again it should be highlighted that the land for the project was identified by the communities themselves through T/A Nchilamwera and clarified that the road construction project in question is being implemented with financial support from GOM/EU Income Generating Public Works Programme and not World Vision International as cited by the complainant.

I hope you will find this information useful.

Yours faithfully

*E.H. Kaphuka
For: DISTRICT COMMISSIONER*

The Applicant contends that the Respondent abdicated his duties by saying that he was not involved at all in choosing sites. He states that District Commissioners have duties to oversee public works or utilities within their jurisdiction and not just to facilitate. He went further to say that the Commissioner has to see to it that proper consultations have been done. In support to this he cited section 211 of the Constitution which mentions about right to privacy and not to be arbitrarily deprived of your land. He also cites section 44(4) of the Constitution and states that expropriation of property permissible but to done where there is notification and due compensation.

Further he went on to cite section 3 of the Land Acquisition Act which vests power in the Minister and not District Commissioner, to acquire land and that only the District Commissioner can know about these powers. And that under the Act the Minister has to serve notice over the land to be acquired and yet the District Commissioner chose not to communicate with the Minister. Applicant emphasises

that this is the conduct to be reviewed. He also says notification must be in writing under section 9 of the Land Acquisition Act and under section 43 of the Constitution.

The Applicant dwelt further on the issue of the District Commissioner's abrogation of duties as shown by the letter above cited, to facilitate so that things are done orderly and in accordance with the law. He must therefore have ensured that the land is not expropriated without compensation and due notification. He continued to say that if the position is that communities themselves were making decisions and not the Respondent, then his decision to abdicate from his responsibility is conduct reviewable.

In response the Attorney General's office through Ms Kayuni responded simply that the Respondent never made any decision himself and she also referred to the concept of decentralisation. She referred to the duties of the District Commissioner as set out in exhibit P1 and presented that the Applicant was aware of the meeting called by T/A Nchilamwera through his worker. She brought out two things that if anything the decision by the community was not an administrative action so as to require it to be put in writing, and that the Respondent made no decision.

She further denied that there was expropriation of Applicant's land since it was a case of the community giving up their land and not government acquiring land requiring the Minister to come in under the Land Acquisition Act, hence no need for District Commissioner to follow the procedure of land acquisition. Further she said it is not for the District Commissioner to inquire as to who owns which piece of land when people themselves had identified the land.

I am compelled to consider the spirit of the project or programme. A programme of this nature is there to empower the communities in decision making and to promote the spirit of self help. This is why the communities are expected to identify their own project, make contributions such as land so that compensation does not

arise. There is a deliberate policy of decentralisation which vests decision making power in the communities. Government together with EU in partnership only comes in to give financial support.

The District Commissioner as per exhibit P1 sensitises the local leaders on programme concept or design and procedures. In my view this is why the Applicant's worker was informed to inform the Applicant to attend a meeting of the community so that the programme concept is transmitted to the rest of the beneficiaries and procedures and outcomes spelt out clearly to them. In the procedures are issues of land identification by the members of the community so as to avoid compensation. Whatever was passed by the District Commissioner to the local leaders was equally passed on to the members of the community so that there was harmony in understanding the whole project concept.

The District Commissioner was responsible also for facilitating consultations between the local leaders and their local people for the said purpose of harmonising understanding of the project. Once the community has been bestowed with knowledge of the project, implementation was solely the responsibility of the community leaders and their people. It was not up to the District Commissioner to know which piece of land belongs to who, or whether one villager has absconded or not or who has not been adequately addressed. It was sufficient that the District Commissioner advised the leaders that in such projects they should move along with the community since it is their project and they are themselves the implementers. The District Commissioner cannot be expected to know whether a perfect consensus has been reached. I thus fail to understand how the District Commissioner abrogated his duties.

The District Commissioner was not even expected to advise on the procedure on the Land Acquisition Act or on procedure of expropriation and compensation because these matters were outside the programme concept. These matters are irrelevant and alien to such a community

venture. It would be asking too much to involve the Respondent in such areas.

It is also interesting to note that the Applicant's worker did not receive message about a meeting to take place from the Respondent but from the community leaders because the project was community driven, hence they provided the labour. It is not disputed that village headman Nyalugwe went to the Applicant's worker's house (about 100 meters away from his house) telling him to inform the Applicant to come for the meeting or about the meeting to take place. The village headman deponed that he made a phone call to the Applicant and informed him about the meeting, but did not attend the meeting. How then does the Respondent come in as a decision maker? It is preposterous to say so in my view.

Having said what I have said above I see that there is no real evidence of abrogation of duties by the Respondent and that there is no clear decision which one can say he made so as to be amenable to judicial review. As such this Court declines to give the Applicant reliefs sought. The application is thus dismissed with costs.

Made in Chambers this 22nd day of July, 2008 at Chichiri, Blantyre.

M.L. Kamwambe
JUDGE