



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 91 OF 2016**



BETWEEN:

MARTIN ULEMU NKHATA PLAINTIFF

-AND-

MAJOR C. B. MNDALA 1ST DEFENDANT

THE ATTORNEY GENERAL (Malawi Defence Force) 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Hara, Counsel for the Plaintiff

Major Kamwendo and Ms. Mwafulirwa, Senior State Advocate, of Counsel, for the Defendant

Ms. Annie Mpasu, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is this Court’s ruling on a preliminary objection raised by the Plaintiff.

A brief outline of the background to this matter is as follows. On 2nd March 2016, the Plaintiff filed with the Court an expedited originating summons in the present case seeking various reliefs in respect of his eviction from House No. SM/201 in Saint Marys in the City of Zomba (the House) by officers of the Malawi Defence Force from Cobbe Barracks in Zomba under the alleged instructions of the 1st Defendant. According to paragraph 3 of the originating summons, the House belongs to Malawi Housing Corporation and was leased to the Plaintiff in his personal capacity. The relevant part of paragraph 3 is as follows:



- “2. *He secured a house Number SM/201/22 at St Mary’s in Zomba to live in from Malawi Housing Corporation on 23rd November 1999.*
3. *He was at the time an employee of the Malawi Defence Force.*
4. *On 6th June 2006, Malawi Housing Corporation wrote the Plaintiff that Government had stopped leasing houses for Civil Servants effective 30th June 2006.*
5. *The said Malawi Housing Corporation gave the Plaintiff in his personal capacity seven days to apply for the house if he so continued to stay in the house.*
6. *Following the letter, the Plaintiff wrote Malawi Housing Corporation to lease house Number SM/201/22 at St Mary’s in Zomba.*
7. *On 21st June 2006, the said Malawi Housing Corporation offered the said House Number SM/201/22 at St Mary’s in Zomba to the Plaintiff effective 1st July 2006 on rental basis.*
8. *The Plaintiff advised his employer not to pay him his house allowance but instead to channel the same towards payment of his rent to Malawi Housing Corporation.*
9. *In 2009, the Plaintiff was verbally discharged from the Malawi Defence Force without any pay or retirement package or otherwise. The Plaintiff continued to stay in his house which he had secured from Malawi Housing Corporation.*
10. *On 25th February 2016, the 1st Defendant wrote the Plaintiff giving him Notice that he will be evicted from his house at St Mary’s on grounds that the said house is leased to Malawi Defence Force and the Plaintiff’s stay is illegal.*
11. *The said house has never been leased to Malawi Defence Force. It was leased to the Plaintiff.*
12. *The agreement was between the Plaintiff and Malawi Housing Corporation. The Malawi Defence Force is a stranger to that agreement and cannot forcibly evict the Plaintiff on an agreement which it is not a party.*
13. *On or about the 27th day of February 2016, the said Malawi Defence Force on instructions from the 1st Defendant came to the Plaintiff’s house whilst he was away and highhandedly took all his property, clothing, cookery, entertainment, beddings, beds and personal artifacts and staked them in their truck and dropped the belongings at their barracks.*
14. *The Defendants agents chased the young children belonging to the Plaintiff away and they monitored the house so that the Plaintiff and family should not have access.*

15. *The Plaintiff and his children are homeless and without shelter, food, clothing and their personal belongings due to the acts of the Malawi Defence Force.*”

On 4th March 2016, the Plaintiff was granted an ex-parte injunction restraining the Defendants, Malawi Defence Force officers, either by themselves or their agents or employees or servants or principals, colleagues or by whomsoever and however otherwise from forcibly evicting the Plaintiff and his family from the House.

On 8th March 2016, there was filed with the Court an ex-parte summons for stay of execution of the interlocutory injunction and the same is supported by affidavit sworn by Major Atanzio Kamwendo (Summons for Stay). The Summons for Stay does not indicate the filing legal practitioner(s). I ordered the Summons for Stay to come inter-partes. On the following day, that is, 9th March 2016, two documents were filed with the Court, namely, Notice of Appointment of Legal Practitioners and an inter-partes Summons for Stay. The Notice is couched in the following terms:

“TAKE NOTICE that the defendants herein have appointed Major Atanzio Kamwendo and all legal officers in the Malawi Defence Force, as their legal practitioners in this matter

TAKE FURTHER NOTICE that their address for service is the Directorate of Legal Services, 93 Brigade of the Malawi Defence Force, Cobbe Barracks, Private Bag 50 Zomba.

Dated this 9th day of March 2016

**MAJOR ATANAZIO KAMWENDO
LEGAL OFFICER
MALAWI DEFENCE FORCE**

To: Messrs Ritz Attorneys, Blantyre”

With regard to the preliminary objection, the following part of the affidavit in support of the Summons for stay is material:

“I Major Atanzio Kamwendo, a legal officer with the 93 Brigade of the Malawi Defence Force, Cobbe Barracks, Private Bag 50 Zomba in the Republic of Malawi do make oath and declare as follows:

- “1. THAT as legal officer with second accuse (sic), I am authorized to swear this affidavit.”*

On 11th March 2016, there was filed with the Court a summons for an order of removal of the 1st Defendant from the action and the same is supported by an

affidavit sworn by Major Atanazio Kamwendo. This summons also does not indicate the filing legal practitioner(s)

The Plaintiff is opposed to the appearance of Counsel Major Kamwendo, trading as Tannalegal Associates, as counsel for the Defendants on the ground that he neither has authority to act for the Defendants as such or any other wise. The submissions by Counsel Hara were put thus:

“The Law, the Plaintiff’s Arguments and Prayer

Section 3(2) of the Civil Procedure (Suits By or Against the Government of Public Officers) Act (the Act), Cap 6:01 of the Laws of Malawi provides that the Attorney General or other persons authorised by the Attorney General to act for the Government in judicial proceedings shall be the recognized agent by whom appearances, acts and applications may be made or done on behalf of the Government.

By G.N. 47/1961 issued under s.3 (2) of the Act, the Attorney General has authorised the Solicitor General and all State Advocates to act for the Government in respect of any civil proceedings.

It is contended that Major Atanazio Kamwendo either as legal officer with 93 Brigade of the Malawi Defence Force or trading as Tannalegal Associates is neither a Solicitor General nor a State Advocate.

Accordingly, he is not recognized as an agent by whom any appearance can be made, or the application for stay for execution herein can be made or done on behalf of the Attorney General against whom the present case against 93 Brigade of the Malawi Defence Force, a government entity, has been instituted.

Further, having been made without the authority to make appearances, to act, and to make applications on behalf of the Attorney General, the application for stay of the order of injunction comprising of the summons and the supporting affidavit, is incompetent and must be set aside as void with costs to the Plaintiff.”

It is the case of the Defendants that the preliminary objection lacks merit and must be dismissed. Counsel Major Atanazio Kamwendo submitted that he has authority to represent the Defendants by virtue of being a legal officer in Malawi Defence Force. He cited section 195 of the Defence Force Act as his authority. It was his contention that section 195 (3)(c) of the Defence Force Act allows the Director of Legal Services to defend a member of the Defence Force in a civil court or other tribunal. He also opined that section 195 (3)(c) of the Defence Force Act is wide enough to enable the Commander assign the Director of Legal Services to represent the Defendants in this case.

The learned Senior State Advocate informed the Court that the Attorney General authorized Counsel Major Atanzio Kamwendo to act for the Government in judicial proceedings submitted that by virtue of section 3(2) of the Civil Procedure (Suits By or Against the Government of Public Officers) Act. It was her contention that the Attorney General Act decided to authorize Counsel Major Atanzio Kamwendo to act on his behalf because Counsel Major Atanzio Kamwendo is very much conversant with this case as the issues herein arise from what took place at Cobbe Barracks where Counsel Major Atanzio Kamwendo is also stationed.

I have considered the submissions made by Counsel. The sole legal issue is whether Counsel Major Atanzio Kamwendo is authorised to act as a legal practitioner for the Defendants in the present case.

I will start with the submissions by the Senior State Advocate. To my mind, it is not enough for counsel or any other person for that matter to come before the Court and seek to be given audience by orally stating, without more, that he is acting in the case before the Court by virtue of being authorized by the Attorney General. It seems to me that such authorization has to be embodied in a written document: see, for example, Government Notice No. 47 of 1961 whereby the Solicitor General and all State Advocates have been given authority by the Attorney to act for the Government in respect of civil proceedings.

In the present case, there is no evidence, written or otherwise, before this Court in support of the contention that Counsel Major Atanzio Kamwendo appeared in this case by virtue of being authorized to so act by the Attorney General under section 3(2) of the Civil Procedure (Suits By or Against the Government of Public Officers) Act. To the contrary, both the Notice of Appointment of Legal Practitioners and the affidavit in support of the Summons for stay show that he was relying on section 195 (3)(c) of the Defence Force Act.

I now turn to the contention of Counsel Kamwendo that he had due authority to appear in this case by reason of section 195 of the Defence Force Act. Section 195 of the Defence Force Act makes provision in respect of the Directorate of Legal Services and it is in the following terms:

- “(1) *There shall be a Directorate of Legal Services within the Defence Force.*
- (2) *The commander shall appoint an officer to be the Director of Legal Services within the Defence Force.*
- (3) *The Director of Legal Services shall, in relation to service law-*
 - (a) *advise the commander on all legal matters affecting the Defence Force;*

- (b) *prosecute and defend charges before a court-martial;*
- (c) *defend a member of the Defence Force in a civil court or other tribunal in matters pertaining to performance of military duties; and*
- (d) *perform such other duties as the Commander may assign to him in accordance with this Act.* – Emphasis by underlining supplied

The catchwords in section 195 of the Defence Force Act are “in relation to service law”. The duties of the Director of Legal Services are confined to matters in relation to “service law”, which is defined as the Defence Forces Act: see section 2 of the Defence Force Act. In this regard, even where the commander is minded to exercise his or her powers under section 195(3) (d) of the Defence Force Act, he or she has no legal mandate to assign duties to the Director of Legal Service that fall outside the ambit of the Defence Force Act.

In the present case, Counsel Kamwendo failed to establish how the issue herein pertain to the Defence Forces Act. I, therefore, agree with Counsel Hara that the application for stay of the order of injunction, comprising of the summons and the supporting affidavit, is incompetent and must be set aside as void with costs to the Plaintiff. It is so ordered.

Pronounced in Chambers this 28th day of June 2016 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE