MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CIVIL DIVISION
MISC. CIVIL APPLICATION NO. 97 OF 2015

BETWEEN

The State and Mzuzu City Council ..... Respondent

Ex parte
Amosi Gwedeza ..... 1st Applicant
Donald Jere ..... 2nd Applicant
Zebron Singini ..... 3rd Applicant
Ezelina Jere ..... 4th Applicant
Chrissy Chisiza ..... 5th Applicant
Annie Mhango ..... 6th Applicant
Movet Nyasulu ..... 7th Applicant

CORAM:
HONOURABLE JUSTICE D.A. DEGABRIELE

Mr. Phiri	for the Plaintiff
Mr. Mbotwa	for the Defendants
Mr. A. Kanyinji	Official Interpreter
Ms Msimuko	court Reporter

DeGabriele, J

RULING ON JUDICIAL REVIEW

Introduction

The plaintiff applied for leave to commence Judicial Review proceedings and were granted leave to proceed. This is the hearing of the Judicial Review. The seven applicants are challenging the decision of the respondent to evict them from their

homes during the rainy season and without paying them adequate notice. In the application for judicial review in accordance to Order 53 rule 1 of the RSC 1999, the applicants are seeking the following reliefs:

1. *An order for mandamus compelling the respondent to allow an independent body of valuers to assess the true market value of the applicants' properties.*
2. *An order of mandamus requiring the respondent to make sure that the applicants are compensated in full before vacating their houses.*
3. *An order of prohibition restraining the respondent from evicting the applicants on their land until they are compensated in full.*
4. *A declaration that the applicant are legitimate holders of the plots in question.*
5. *A declaration that applicants cannot be dispossessed of the land in question without sufficient compensation.*
6. *A declaration that the compensation that was given to the applicants was not sufficient.*
7. *A declaration that the applicants have the right to use and occupy the land in question.*

The application

The applicants swore affidavits in support of the judicial review and the affidavits contain similar information with slight differences on the years of inhabiting the plots, the crops and the type of structures they are claiming for compensation. The seven applicants herein had established their homes at various times from the year 2004 at the Luwinga Location known as Slaughter House. The applicants have erected various structures and planted trees and sugarcane. The applicants were also paying city rates as shown by a document marked as *AG4* in the affidavit of Amosi Gwedeza. In 2011 the applicants were informed that the land on which their plots were located had been sold to a Mr Kaunda and an assessment of the crops and structures was done but no compensation was paid. The applicants claim that they received a

notification on 15th October 2015 that a re-assessment was to be done on the 16th of October 2015, but no officials visited them to carry out the assessment on the appointed day. The applicants claim that a week later, the new owner and officials from Mzuzu City Council came to pay the compensation. The applicants initially refused to receive compensation but later on received the same even if it was inadequate and was paid without the second assessment. The applicants' grievances include the claim that their right to property was violated by the respondent who allowed compensation to be paid without an assessment by an independent valuer. They are further aggrieved that the 3 months' notice period was inadequate for them to relocate elsewhere as it was within the rainy season.

The Response

In the affidavits in opposition of the Judicial review, the respondent states that the plot in question was allocated to Mr. Saini Like Kaunda t/a Mwenela Transport as Commercial Plot Number 820 at Luwinga Industrial site. The applicants were issued the first notice to vacate the plot in 2011. The respondent decided that despite the encroachment the applicants had to be compensated for the structures, trees and the crops which they had on the land. The respondent claims that the applicants were aware of the whole process and that compensation was made and received in full without any issues being raised. The respondent also avers that the claim that the compensation was inadequate was not supported by any evidence. The respondent further argues that the matter does not fall under judicial review as there is no decision being challenged.

An assessment was duly done for the crops and slum structures as reflected in documents marked as ***FN1*** and ***FN2.*** The compensation was not paid in 2011 as the new owner had to raise enough money. A re-assessment was done on 16th October 2015 on the land and crops as the new owner was ready to pay compensation. The District Commissioners office and valuers from the Ministry of Lands and Housing Department carried out the assessment on 16th October, 2015. That the applicants themselves requested that they wanted the compensation quickly so as to avoid the

delay which occurred in 2011. The applicants were given their compensations on 27th October, 2015 in full, and they acknowledged receipt by signing without raising any concerns, as witnesses by the document marked as *FN6* and its attachments. Two reports were produced for the crops and the structures, and are marked as *FN3* and *FN4* respectively. The respondent then served the applicants with a second notice to vacate the land on 16th November 2015.

Issues for Determination

i. Whether this matter is amenable to judicial review?
ii. Whether applicants in this matter can benefit from remedies in judicial review?

The law

First and foremost, I must remind myself that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. At the outset I must state that the main complaint of the applicants is that they have not have not received adequate compensation to allow them to settle elsewhere. This in itself is not subject to judicial review. Judicial review concerns itself with the process of decision making which is what I will focus on.

The application for judicial review is made pursuant to Order 53 rule 1 of the Rules of Supreme Court 1999. The order provides as follows:

> *"(1) An application for -*
>
> *(a) an order of mandamus, prohibition or certiorari, or*
>
> *(b) an injunction .... restraining a person from acting in any office in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provisions of this Order.*
>
> *(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to -*

(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,

(b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and

(c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review."

There is numerous case law that has held that judicial review will lie where a public body acts without jurisdiction or exceeds its jurisdiction; or where a public body or a public decision maker has violated procedures in taking a certain action or making a certain decision; and where such a decision is illegal or irrational, see ***Kalumo v Attorney General (1995) 2 MLR 669*** where it was held that

"Where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or injunction or otherwise. See ***O'Reilly v Mackan [1983] 2 AC 237****. If a public authority charged with a public duty acts without jurisdiction or exceeds his jurisdiction judicial review will lie. Thus, where a decision of an administrative authority is founded, wholly or partly, on an error of law, the authority has acted outside its jurisdiction and accordingly its decision is liable to be quashed."*

Judicial review also lies against any person or bodies which perform public duties or functions, see ***Ridge v Baldwin [1964] AC 40; [1963] 2 All ER 66***. The purpose of a judicial review is for the court to examine the public decision process and establish whether the decision was made in a fair, reasonable, legal or correct manner

By its very definition, a judicial review is different from an appeal. This was stated in the case of ***Council of Civil Service Unions v Minister of the Civil Service [1985] 1 ALL ER 935***. Judicial review is a process by which there is judicial control exercised

over administrative action. The subject matter for such a judicial review process is the consideration of the legality of the decision made by some person or body of persons in the performance of their public duties. An appeal on the other hand is concerned with the merits of the decision under appeal. It was held in the case of ***Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223***, that courts could interfere with a decision that was so unreasonable that no reasonable authority could ever have come to it. The decision must be so irrational that any reasonable person could not perceive that the decision make made the same. In cases where a decision maker fails to observe procedural requirements, judicial review lies against the procedural impropriety.

The applicants herein were legitimate holders of various plots demarcated from Plot Number 820 situated in Luwinga Industrial site by virtue of their paying city rates. The following facts are not disputed: that the applicants have made several developments on the plots by building various structures on it and planting trees; that the respondent allocated the land to another person in year 2010 and the applicants were aware of the fact since the year 2011; and, that an assessment process was carried out and the applicants were paid compensation. However, looking at the evidence before this Court the applicants ceased to be legitimate holders of the plots demarcated out of Plot 820 from the time that plot was allocated to Mr Kaunda in 2011 because the applicants were notified and given notices of eviction. Further, their rights under Section 28 of The Constitution of the Republic of Malawi to acquire and own property and the right not to have that property arbitrarily taken from them was not infringed in this case as compensation was paid following a very clear and consultative process. Therefore, the applicants did not have sufficient interest and *locus standi* to institute a judicial review process because their legitimate interests were curtailed the time that the land was allocated to another.

The applicants have argued that rules of natural justice are were not followed. They specifically claim that the rule '*nemo judex in causa sua potest*' (no man can be a judge in his own cause), was breached because the respondent had a direct financial

interest in the matter and the respondent also acted both as prosecutor and judge. The applicants' major grievance is that the respondent did not engage an independent valuer in assessing the current value of the land. The applicants had participated in an assessment exercise in the years 2011 and 2012 and they did not at any point seek to have an independent assessment. The re-assessment was done in October 2015 and the applicants never raised the issue of independent valuers until when they received the notice to vacate the plots. This matter was filed in court on 17th December 2015. I am not satisfied that an order of mandamus compelling the respondent to engage an independent valuer will cure the purported claim that the respondent was biased in its decision because it had a direct financial interest. It has to be borne in mind that the respondent is a statutory body whose mandate includes allocating land and making transfers as well as collecting city rates. As such any valuation of property is done by the departments under the respondent that are mandated to do so. The applicants themselves had all the time in the world between 2011 and 2015 to engage an independent valuer. This they did not do so, nor did they apply to the respondent to have such an assessment carried out.

The applicants also claim that the rule '*audi alteram partem*' (hear the other side) was breached as the respondent carried out an adverse decision without consulting the applicants and without giving them prior notice. Again, as stated above, the applicants were aware of the allocation of Plot No 820 to another person in the year 2011 and were involved in the assessment processes. They were given notice to vacate on two occasions. Their clam that there was no adequate notice and no consultation cannot stand. It is indeed an abuse of the court to bring such a claim in face of the undisputed evidence before this Court.

It is not disputed that compensation was paid in accordance with the law. Under section 28 of the Constitution of the Republic of Malawi, every person has a right to acquire property that no property of any person shall be taken away from them be arbitrarily. However, section 44 (4) of the Constitution of the Republic of Malawi states that where such property has been expropriated for public use, there must be

adequate notice and appropriate compensation, and ant person who is so notified and compensated has a right to appeal to a court law if he or she is not satisfied with the process. In this matter herein, the applicants herein were given adequate notice and were paid compensation. The decision to compensate them was taken transparently and rationally with all parties being involved in the process. The issue as regards adequacy of compensation should have been addressed by a remedy other than a judicial review process. The fact that the sums under the first assessment were lower than the second assessment and that the sums under the second assessment were actually paid out shows that the respondent acted in good faith.

This court would need clear evidence that the respondent was guilty of fraud or misrepresentation or a serious departure from the ordinary way of carrying out their public functions to grant a remedy of judicial review. The applicants have failed to demonstrate that the respondent had departed from the accepted norms in the way the decision was made.

The applicants have argued that the decision by the respondents to evict the applicants during the rainy season was not reasonable, and that the respondents therefore violated the principle laid down in the case of ***Wednesbury case ([1948] 1KB 223)*** where it was decided that a decision by the public authority is liable to be declared unlawful if it is so unreasonable that no reasonable public authority would make it. Based on the facts before me, I do not agree that the notice period was inadequate, bearing in mind that the applicants were aware of the inevitable relocation from the year 2011.

Having considered the evidence before me, I am of the view that this was a case where great restraint should have been exercised in granting leave for judicial review. It was held in the case of *R vs. Hillingdon London BC exparte Puhlhofer* [1986] 1 ALL ER 467 that,

> *"I think that great restraint should be exercised in giving leave to proceed by judicial review. It is not in my opinion appropriate that the remedy of judicial review which is a discretionary remedy should be made use of to monitor the*

actions of local authorities under the Act save in exceptional case. The ground on which the courts will review the exercise of an administrative discretion is abuse of powers e.g. bad faith, a mistake in construing the limits of the powers, a procedural irregularity or unreasonableness in the Wednesbury sense .... i.e. unreasonableness verging on absurdity"

The *Wednesbury principle* finds relevance where a decision is so outrageous in its defiance of either logic, or morals, that no sensible person could have arrived at that conclusion on proper application of his mind. In ***Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.,*** Lord Greene, M.R. in a classic and oft-quoted passage held that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other following conditions were satisfied viz. the order was contrary to law, or irrelevant factors were considered, or relevant factors were not considered or the decision was one that no reasonable person could have taken. I find that the respondent herein did what the law conferred on them as their legal mandate. The applicants have failed to demonstrate that the respondent had departed from the accepted norms in the way the decision was made. I find that the selling and transfer of land is part and parcel of the respondent's services. Further there was consultation and compensation which was paid after duly being assessed. The notice of eviction for a period of 3 months was also reasonable at law and is part and parcel of the services of the respondent. The respondents herein did not breach the Wednesbury principles in any way and their decision was not and is not subject to judicial review. There was no absurdity or unreasonableness of indeed absurdity in their decision making process or the decision itself.

Section 43 of the Constitution of the Republic of Malawi. The section provides that

"*Every person shall have the right to:*

a) Lawful 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; and

b) Be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected or threatened if those interests are known.

Looking at the evidence before me, I do not find that section 43 was breached by the decision-making process of the respondent. I therefore declare that the decision of the respondent to evict the applicants from Plot Number 820 situated at Luwinga was rational, fair and just. I further declare that the decision process was transparent and known by all interested parties. I find that the decision to allocate and transfer of land is part and parcel of the respondent's services. Further there was consultation and compensation which was paid after duly being assessed. The notice of eviction for a period of 3 months was also reasonable at law and is part and parcel of the services of the respondent. The respondents herein did not breach the Wednesbury principles in any way in the process of carrying out their public functions. Any person aggrieved by that decision then would not be entitled to a remedy of judicial review, but to an ordinary legal suit. I find that the applicants application for judicial review was misplaced. To this end, the reliefs sought by the applicants in their motion fail in their entirety. I declare that the notice thát was given by the respondent was sufficient and I uphold the decision. The applicants are hereby ordered to vacate the land within 3 months of this order.

Made in Chambers at Mzuzu Registry this 6th day of December 2017

D. A. DEGABRIELE

JUDGE