



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY: CIVIL DIVISION
CIVIL CAUSE NO. 117/2016

Between
Mzuzu City Council.....Applicant
-and-
Friends of Mzuzu Community and Others Unknown.....Respondents

CORAM:

HONORABLE JUSTICE D. A. DEGABRIELE

Mr. Mbotwa

Counsel for the Applicant

Mr. Siadi

Counsel for the Respondents

A. Kanyinji

Court Clerk

E. Msimuko

Court Reporter

DeGabriele, J

RULING

Introduction

The Applicant herein was granted an *ex parte* order of interlocutory injunction pursuant to Order 29 of the RSC. The order was granted on 28th November 2016 and was valid for 14 days. The Applicant was further ordered to file *inter partes* application to extend the validity of the order and file the substantive action and was also ordered to specify the names of the so called "*Friends of Mzuzu Community*".

The Respondents filed an *ex parte* summons under O29 rule 1 of the RSC, and under the Courts inherent jurisdiction for an order to vacate the order of injunction granted on 28th November, 2016. The Court directed that the matter should be filed *inter-partes*. The Applicant also filed an *inter partes* application to have the injunction continued. This Court heard both parties. The Respondents had argued that the order of injunction be vacated as the Applicant had failed to fulfil the conditions under which the injunction was granted

and that the Applicant had suppressed material facts. The Respondents further argued that the Applicant had communicated to Friends of Mzuzu Community that the Mchengautuba dumpsite would be vacated by 31st March 2017, but the Applicant was still using the dumpsite as of April 2017. The Applicant had further not indicated when construction of the new dumpsite would be finalised. The Respondent further claim that while the Applicant had complied with filing the substantive action by 1st December 2016, he had failed to specify the names of the so called "*friends of Mzuzu*" and that this failure was fatal to their case. The Respondents claim that the Applicant suppressed the fact that the activity of dumping waste is causing health problems to the people of the area.

The Applicant sought to have the injunction continued so that the Applicant can continue to provide waste collection and disposal services while waiting for the new dumpsite at Dunduzu to be finalised by 31st March 2017.

After hearing both parties, this Court made a finding that failure by the Applicant to specify the names of the "*Friends of Mzuzu Community*" was not fatal to the Applicant's case. The so called "*Friends of Mzuzu Community*" was a grouping of people which was represented by their leader, Precious Mtambo. Unless a contrary intention is disclosed, the grouping was well and ably represented by its leader. On suppression of material facts, this Court stated that the Respondents needed to provide evidence that there was either a public outbreak of disease or bring a report of the Public Health Services condemning the dumpsite. Further the Respondents had to prove that the Applicant was in possession or had knowledge of the outbreak or report of the alleged outbreak at the time he applied for an order of injunction. This Court then ordered that the order of injunction should remain in force while the originating summons should be heard as a matter of urgency.

This the ruling following the hearing of the originating summons.

The application

Through an originating summons, the applicant sought the following declarations and reliefs:

- a) *A declaration that the Applicant is entitled to continue to use the piece of land at Mchengautuba in the city of Mzuzu which is in dispute herein as a dumpsite for solid waste collected from Mzuzu City Local Government.*
- b) *An order of permanent injunction restraining the respondents from blocking the access road to the Mchengautuba dumpsite in the city of Mzuzu or from in any way restraining officers of the Applicant from accessing the said dump site.*
- c) *An order for costs of this action*

The originating summons was supported by the affidavits sworn by Counsel Victor Gondwe and Mr Yona Simwaka. The affidavit evidence is to the extent that the Applicant is a legitimate City Council constituted under the Local Government Act and has a statutory duty to collect and dispose of waste thereby improving hygiene in the City. The Respondents are some of the residents of the township of Mchengautuba in the City of Mzuzu and members of the grouping known as Friend of Mzuzu Community (FOMCO). The Applicant states that the said dumpsite is on public land and has been operational for a number of years. In recent years, some of the Respondents have encroached on the public land bordering the dumpsite despite being advised through notices to cease encroaching on the land. At the time of applying for the order of injunction and filing the originating summons, the Respondents had been preventing officers of the Applicant from visiting the dumpsite in order to dispose of solid waste and incinerate accumulated refuse. The Respondents have further dug a trench to prevent waste disposal trucks from offloading waste at Mchengautuba dumpsite. The resultant piling of solid waste both at the dumpsite and in the City has produced a bad smell and has resulted in an un-hygienic environment and a health hazard to residents of the City of Mzuzu. The Applicant fears that water-borne diseases can easily be transmitted by microorganisms that are developing in and around the dumpsite and the markets within Mzuzu City as this is the rainy season.

The Respondents filed an affidavit in opposition of the originating summons, sworn by Precious Mtambo. The affidavit evidence was that the dumpsite at Mchengautuba was identified in the 1980s' mainly to fill a hole developed during land excavation for gravel by a road construction company. However, the Respondents submit that according to the Mzuzu City Structure and Land Use Plan of 2010 (*PM1*) the whole of Mchengautuba area

is designated as a high-density residential area and this included the area being used as a dumpsite. The Respondents claim that they are not encroaching at all as they do pay city rates to the Applicant.

The Respondents claim that the activity of dumping the garbage and waste at Mchengautuba is posing health and environmental hazard to the residents and this might lead to diseases like diarrhea, cholera and eye diseases which may arise due to environmental pollution. The dumping of garbage and other harmful substances is putting people's health at risk especially children, as there is no perimeter fence nor guards posted at the dumpsite. The Respondents claim that the order of injunction obtained by the Applicant was erroneous as it was against the right to clean environment and against the interest of justice. The Respondents claim that the construction of Msiro Waste Management site at Dunduzu is not of itself sufficient to warrant or require the Applicant to proceed violating the right of the community at Mchengautuba. The Respondents submit that the Msiro Waste Management Site at Dunduzu was officially opened on 18th May 2017, yet the Applicant was dumping waste at Mchengautuba on 19th May 2017. The Respondents conceded that the Applicant has a responsibility to keep the City clean by collecting garbage and other waste, but they insist that the Applicant should dump waste at the proper site like Msiro Waste Management Site at Dunduzu.

Issues to determine

This Court is called upon to determine the following;

- a) *Whether the Applicant is entitled to continue to use the piece of land at Mchengautuba which was designated as a dumpsite for solid waste collected from Mzuzu City Local Government Area.*
- b) *Whether the activity of dumping solid waste at Mchengautuba is putting people's lives at risk?*
- c) *Whether the Applicant is entitled to the costs of this action.*

The Law and evidence

The Constitution of the Republic of Malawi, 1994 lays down national principles under section 13 that promote the welfare and development of the people of Malawi by

progressively adopting and implementing policies and legislation aimed at achieving a number of goals. One such goal is the responsible management of the environment with the aim of, among other things, promoting and providing a healthy living and working environment for the people of Malawi. A number of laws have been passed with the aim of putting into effect Constitutional provisions. Section 3 of the Environment Management Act, 1996 outlines national policies that have a bearing on the protection and management of environment and places a duty on any person who is required by law to protect and manage the environment to so act in a manner, among other things, that promote a clean environment.

Section 5 of the Environment Management Act, 1996 stipulates that every person shall have the right to a clean and healthy environment. Under subsection 3, the law gives power to any person to bring an action in the High Court for purposes of enforcing and protecting the right to a clean environment. The law further gives such a person or person an option to file a written complaint to the Minister outlining the nature of his or her complaint and particulars and the Minister is obliged to respond in 30 days and institute an investigation into the complaint.

Under paragraph 2 (1)(a) of the Second Schedule to the Local Government Act of 1998, the Applicant who is a city Assembly, is given the power to establish, maintain and manage services for the collection, removal and treatment of solid and liquid waste, and the disposal thereof whether within or without its area and may compel the use of its services by anybody or person to whom the services are available.

Section 102 (a) of the Local Government Act provides *inter alia*, that any person who wilfully obstructs any officer of the Council in the execution of his duty shall be guilty of an offence and shall be liable on summary conviction and to a fine of K1, 000,00 or imprisonment for a term of three months or to both such a fine and imprisonment. Section 72 of the Town and Country Planning Act also provides that any person who, without lawful or reasonable excuse, obstructs or impedes any authorized officer or any member of the Planning Committee, lawfully exercising a power of entry into land or building, from entering any land or building shall be guilty of an offence punishable by a fine of K5, 000,00 or imprisonment for a term of twelve months.

From the facts outlined by the parties, this is an issue that is based on a Constitutional right of a specific community, as against the general populace of the City of Mzuzu and as against the statutory mandate of the City Council to collect and dispose of solid waste in designated places. I now proceed to examine the facts and apply the law as outlined above.

The Mchengautuba dumpsite was commissioned in 1979, to replace the old one at Masasa as shown by the document marked as YS4. The map of the boundary of the dumpsite area is exhibited and marked as YS5. It is not clear from the evidence tendered by the parties whether at the time of designating the dumpsite in 1979 Mchengautuba was a residential area. However, at the time of hearing this matter, Mchengautuba dumpsite remained the only operational dumpsite in Mzuzu City. The Respondents have exhibited the 2010 Structural Plan map of the City of Mzuzu (PM1) which shows that the dumpsite is but a very small portion of land within the Mchengautuba residential area. The only indirect evidence of Mchengautuba being a rapidly growing residential area comes from the evidence of Precious Mtambo, who stated that he moved into the area in the year 2000. He told the Court that at first the 'place' was small but now it is getting big and the dumpsite is posing health threats to people. He further stated that the concerns on the dumpsite began to be raised in the year 2013. The block leader of the area who adopted the sworn affidavit of Precious Mtambo, was appointed in the year 2016.

The Court would have benefitted from a clear history of how the dumpsite was established and whether or not the area of Mchengautuba was a residential area. The brief facts of Precious Mtambo as narrated above may lead to the conclusion that Mchengautuba was a 'small' residential area but as it is becoming densely populated, the presence of the dumpsite within the area is posing health risks. Regardless of the incompleteness of the historical background, it is clear that the Mchengautuba dumpsite was duly and legally designated in 1979. It was used for purposes of dumping solid waste as well as filling up the land that had been excavated for gravel by a road construction company. It is the finding of this Court that at the time of the injunction and at the time of hearing this matter, the Applicant was legally operating the dumpsite as there was no other dumpsite that was operational in the City of Mzuzu. Therefore, the Applicant is entitled under the law to

continue using the Mchengautuba dumpsite while the new Msiro Waste Management Centre is under construction.

The Respondents have claimed that solid waste should not be dumped at Mchengautuba and have relied on two documents to support their claim. The first document is the Mzuzu City Structural Draft Plan for the 2015 - 2030, produced on 30th July 2014. The Respondents submit that at page 50 of this Plan, the use of the Mchengautuba dumpsite was declared illegal by Government in 2013. This document, while showing that indeed the Mchengautuba dumpsite was declared illegal, also discloses that the Applicant and the Government of Malawi did not sit idle. The Respondents' assertion that by moving the dumpsite from Mchengautuba to Msiro, the Applicant had acknowledged that dumping waste at Mchengautuba was illegal, was wrong in law and in principle. There was a clear action plan which is being implemented; first an environmental impact assessment was done in 2013, then secondly a search for a new site was accomplished in 2014, and thirdly, the new site is under construction was being envisaged to be completed in March 2017. As stated above, it is the finding of this Court that the Mchengautuba dumpsite was legal and remained so, but its usefulness and operations have been overtaken by the growth of the City of Mzuzu. The Applicant and the Government of Malawi are actively addressing the situation.

The second document is a letter exhibited as *PM1* which the Applicant had written to Respondents, communicating that the Mchengautuba dumpsite would be vacated by 31st March 2017. The letter is dated 18th November 2016, addressed to the chairperson of FOMCO, stating that the Applicant is committed to stop using the Mchengautuba dumpsite as soon as construction of Msiro Waste Management Site is complete. The letter further stated that *"following the discussion we had with Plan Malawi, the contractor and Public Works directorate, construction of Msiro is projected to be completed by March 2017. Therefore, Mzuzu City is promising to start dumping waste at Msiro by 31st March 2017. We hope this will clarify the issue and enable the Council to resume disposal of waste at Mchengautuba"*

An examination of the letter shows that the construction of Msiro Waste Management Centre was 'projected' to be completed by March 2017. It became evident at the time of

hearing and the time of the scene visits that the Applicant was largely a beneficiary and the construction and launching of the Msiro Waste Management Centre was being done by third parties. To this end, the Applicant should not have used the words 'promising to start dumping waste at Msiro' bearing in mind that there were contractual, budgetary and political considerations that were not in the control of the Applicant. It is the finding of the Court that the Applicant was not in full control of the completion and launching of the Msiro Waste Management Centre, and should not have promised the 31st day of March as the final day to use Mchengautuba. Further, a reading of the letter dated 18th November 2016, and a closer look at all the surrounding facts and circumstances of the case leads to the conclusion that the failure to honour that promise as of 31st March 2017 did not mean that the Applicant was acting illegally in dumping waste at Mchengautuba.

Having established that the Applicant had legal right to use the Mchengautuba dumpsite pursuant to statutory obligations for the benefits of all citizens in Mzuzu City including residents of Mchengautuba, the question that arises is whether the Respondents acted in accordance with the law in obstructing the Applicant from accessing the dumpsite. It is not disputed in this case that the Respondents dug trenches on the road leading to the designated Mchengautuba dumpsite thereby physically impeding the Applicant from carrying out its statutory duties of disposing of solid waste.

The action of blocking the road to the dumpsite had two consequences; that (a) solid waste at the dumpsite piled up and the Applicant and its agents were unable to burn the waste, and (b) solid waste accumulated in the City especially at the market and public areas as the Applicant and its agents were unable to collect the solid waste and dump the same at Mchengautuba dumpsite. Therefore, the action by the Respondents of digging trenches and stopping the Applicant from doing his job was and is criminal in nature and must be condemned as such. As seen from the laws outlined above, the Respondents committed criminal offences under Sections 102 (a) of the Local Government Act and section 72 of the Town and Country Planning Act.

The question that arises next was whether there were any legal options available for the Respondents to seek redress when they perceived that the Applicant was dumping solid waste in a residential area, after the Government of Malawi had declared that the

Mchengautuba dumpsite was illegal. The Constitution of the Republic of Malawi and the Environment Management Act both give powers to any person to commence proceedings in the High Court in a bid to protect the environment or enforce the right to a clean environment. Indeed, section 15 of the Constitution of the Republic of Malawi recognizes that any person or any group of persons with 'sufficient interest in the protection and enforcement of rights' shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights. In cases of protection and management of natural resources, it is essential to allow any person or groups of persons to endeavour to protect the environment and natural resources, as these belong to all peoples of Malawi and from generation to generation.

From the evidence before this Court, there was no action or proceedings commenced by the Respondents, nor did they alternatively lodge their complaint with the Minister as is provided for under section 5 (2) of the Environment Management Act. What is clear is that there was some discussion between the Respondents and the Applicant which culminated in a letter dated 16th November 2016 exhibited as PM1. The letter is to the effect that the Applicant was projecting that the construction of Msiro Waste Management Centre would be concluded in March 2017 and that the Applicant would stop using Mchengautuba dumpsite by 31st March 2017. I find that the Respondents, who had the representation of legal counsel were ill advised, and they failed to protect or enforce the protection of their rights through duly available legal processes. Their attempt to resolve the matter in a criminal manner cannot be condoned, and it is condemned in the strongest terms. The Applicant was within his right, had he wished to do so, to criminally prosecute the Respondents.

The Respondents herein have claimed that they were not encroaching as Mchengautuba was primarily a residential area and not a dumpsite. At the *locus in quo* visit the Court had stated that it was essential that a map of the dumpsite and the immediate surrounding area be exhibited, showing the legitimate houses and the position of the illegal houses within the dumpsite. The Court further ordered that those with houses within the dumpsite who claim that they had been legitimately allocated the plots by the Applicant must present such evidence to the Court. The Court observed that

- a. There was no perimeter fence or guards patrolling the dumpsite.
- b. The trenches dug across the road were deep and made it impossible for refuse trucks to pass.
- c. There is heavy encroachment on the dumpsite itself that the area operating as a dumpsite has been reduced to less than a third of its original size.
- d. The dumpsite is surrounded by crops and houses, some of the maize and bananas are within 3 to 5 metres of the small area now being used as a dumpsite and the houses are as close as 10 metres from the dumpsite. The fruit trees and the houses are very recent
- e. On the other hand, it seems the Applicant has not acted strongly enough to ensure that there are no encroachers. Some of the houses have water and electricity, meaning that the Waterboard and ESCOM see these encroachers as legitimate users.
- f. It was noted and agreed by both sides that attempts to build a guard house or a perimeter fence did not materialise as the residents were very hostile and broke the fences.

In their supplementary affidavits, the Respondents stated that they lived in Mchengautuba and were tenants of the Applicant. The Respondents then exhibited demand notice and receipts for paid city rates and evidence of plot allocation for Brave Kanyinji (BK1 and BK2), Asher Qoma (AQ3 and AQ4), Songe Mwale (SM5, SM6 and SM7) and Dickson Mughogho (DM8 and DM9) as exhibits. The Respondents submit that these exhibits are proof that Mchengautuba is a residential area. In their supplementary affidavits the Applicant exhibited the original map of the dumpsite and eviction notices that had been issued and were marked as YS1 for a Mr G Kalagho issued on 4th March 2011, YS2 Mr J Msopole issued on 4th March, 2011 and YS3 Mr L. Banda issued 25th May, 2012. The Applicant did not actually mark the map to show where these houses were situated in relation to the dumpsite.

It was the observation of this Court that almost all of the houses built on the dumpsite land were recently built, and were not more than 3 years. Bearing in mind that the issue of the Mchengautuba dumpsite became heated from the year 2013, it is the opinion of this Court that the central issue is that the Respondents want the Applicant to vacate the

area and the dumpsite land be possessed by the Residents. Health concerns were secondary to the demand and desire to have the Applicant vacate the land so that the block leaders can parcel out the land, as has already been done. From sentiments aired at the scene visit, it seems that the senior block leader believes that the land has always been theirs and that the Applicant was the one encroaching. It is in evidence that in the year 2014, the Respondents also claimed the same land from Malawi Housing Corporation in a case registered as *Miscellaneous Civil Cause No 76 of 2014*, in which the Court found that the Respondent encroaching. While all land in Mzuzu was once in the ownership of the people living around Mzuzu City, the land was zoned and apportioned to different statutory corporations when the city of Mzuzu was established. It is wrong for the population to believe that they can just take any land around the city and claim it as theirs, without proper procedures as provided for by the law.

In my considered opinion, this malady would have been cured if there was a perimeter fence around the dumpsite. While the Applicant conceded that the failure to erect a perimeter fence was a mistake, the onlookers and the Respondents were vehemently against the idea of the perimeter fence as they saw it as a mark that the Applicant intended to use the dumpsite indefinitely. The people were very emotionally charged that they were not willing to have any interim measure to protect themselves and their children while the construction of Msiro Waste Management Centre is ongoing.

The Respondents have blamed the Applicant for the truancy and delinquency of their children because the children prefer the dumpsite and not the school. It is the opinion of this Court that the raising of children is the duty of the parents and the community. If anything, the Applicant had attempted to post a guard to ensure that children would not come into contact with harmful waste but the Respondents had chased the guards away. Therefore, I find that Respondents did not come to equity with clean hands, and they have continuously acted in bad faith and in disregard of the statutory obligations of the Applicants and their right to a clean environment and their own safety.

Having stated thus, the Applicants do not come out smelling of roses either. The Court observed that the process of building houses and connecting them to the Electricity grid and the central water supply takes a long time and requires some documentation of

ownership of the houses. The Applicants and its agents were on a daily basis dumping solid waste at the dumpsite and seeing these houses going up. There is no evidence of any action taken by the Applicant save sending the notices of eviction to a few people. I further find it is deplorable that service providers within the same city can be so blind to the violations of statutory regulations, and to the need to have a properly planned city. For a house to be certified as a fit abode, the Applicants and his agents have to certify it, the utility services will have to provide their services on proof that the house is in the right area and it is a fit abode. The houses seen within the dumpsite are not fit for human dwelling, they are water logged, built in the marshy waterway, infested with non-bio-degradable plastic papers etc. There is very serious lack of action to enforce the city by laws, and the reluctance by the Applicant and his agents has become costly even to the health of the people of Mzuzu City.

Following on the submissions made at the *locus in quo* visit and the supplementary affidavits, the Court comes to a number of conclusions. Firstly, it became evident that there are two claims by the residents. There are those who have been legitimately apportioned plots or residential homes outside the boundaries of the dumpsite. These are the ones with the legitimate receipts for payment of city rates. Their major complaint for them is that the dumpsite, which is not secured with a perimeter fence or patrolled by guards is becoming full and a potential health hazard, bearing in mind that children are playing there incessantly.

The other group of people are the encroachers, who have built their houses within the boundary of the dumpsite. While the encroachers are entitled to a clean and healthy environment like everybody else, they have illegally built houses in the wrong place and they have themselves to blame.

The Applicant has asked for a permanent injunction restraining the Respondents from disturbing the operation of the dumpsite by themselves or by their agents. They have also asked for an order allowing them to continue using the said dumpsite. Looking at the facts, this Court would not grant a permanent injunction because the Mchengautuba Dumpsite was already declared illegal, and the Court finds it to be an environmental and health hazard after the scene visit. This Court agrees with the Respondents' submission

that to grant such a permanent injunction would be against the interests of justice and will defeat the right to health and a clean environment of the members of the community at Mchengautuba. After visiting the Msiro Waste Management Centre, this Court concludes that the construction is nearly finished and the centre should be opened for business soon.

In other jurisdiction that have dealt with similar issues, the courts have been aware of the need to preserve the status quo, but to provide time limits within which parties are to rectify the problem. In the case of *New Jersey v City of New York, 283 US 473 (1931)*, the issue concerned the dumping of waste by the City of New York into the Atlantic Ocean, and consequently garbage would float into New Jersey waters and pollute the same. The State of New Jersey sought an order to stop the said disposal of waste. In its decision, the US Supreme Court issued the injunction but allowed for reasonable time to the City of New York to put into effect a proper waste disposal plan. The court stated as follows: -

"A decree will be entered declaring that the plaintiff, the State of New Jersey, is entitled to an injunction as prayed in the complaint, but that before injunction shall issue a reasonable time will be accorded to the defendant, the City of New York, within which to carry into effect its proposed plan for the erection and operation of incinerators to destroy the materials such as are now being dumped by it at sea or to provide other means to be approved by the decree for the disposal of such materials".

In the case of *African Centre for Rights and Governance (ACRAG) and 3 others v Municipal Council of Naivasha [2017] eKLR* the case concerning the operation of a dumpsite in Naivasha; petitioners arguing that the continued operation of the dumpsite violates their right to a clean and healthy environment. There was evidence showing that the dumpsite was poorly managed and a clear hazard. There was a question whether to immediately stop its operations. There was no alternative dumpsite. It was the finding of the court that stopping operations immediately would not be solving the problem and the court proceeded to make necessary orders to ensure that licensing for the dumping site was obtained and immediate mitigation measures be put in place.

What is common in the above cited cases, which are similar to the case at hand, is that councils were not granted the remedy of permanent injunctions due to illegal or poor waste management. However, the courts, in order to make sure that the councils continued to carry out their statutory duties, allowed for a planned and timed relocation of the dumpsites. Similarly, in this case, this Court will outline below the time limits within which the Applicant must completely vacate the Mchengautuba dumpsite. This Court therefore makes the following orders that allows the Applicant to phase out the dumping of solid waste at Mchengautuba:

- a. The Applicant must desist to dump solid waste at the Mchengautuba dumpsite within a period of 6 months from 1st May 2017.
- b. The Applicant must incinerate all refuse and level the area within a period of 12 months from the 1st of May 2017.
- c. The Applicant will vacate fully the Mchengautuba area within 18 months from 1st May 2017, after making sure that all refuse has been incinerated and the whole area has been levelled, the land once occupied by the dumpsite has been zoned or categorized or otherwise properly designated in accordance to the plans of the City of Mzuzu.
- d. During the outlined periods and time frame, the Respondents by themselves or their agents are restrained from blocking access to Mchengautuba dumpsite or in any way interfere in the proper process of closing down the dumpsite, or the process of dealing with encroachers in the exercise of zoning or otherwise re-classifying the land and area occupied by the dumpsite.

Costs

Normally cost follow the event. However, in this case each party will bear its own costs.

Made in Chambers at Mzuzu Registry this 19th day of February 2018


D.A. Decapriole

JUDGE