



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW CASE NUMBER 50 OF 2017

BETWEEN:

**THE STATE (On application of
PUMA ENERGY MALAWI LIMITED)
AND**

CLAIMANT

**THE COMMISSIONER FOR LANDS (IN HIS CAPACITY
AS AUTHORISED OFFICER UNDER THE LAND ACT
AS DEEDS REGISTRAR**

DEFENDANT

AND

MTUNTHAMA FARMING LIMITED

1st INTERESTED PARTY

BISHOP ABRAHAM SIMAMA

2nd INTERESTED PARTY

CORAM: JUSTICE M.A. TEMBO

Majamanda and Mlambe, Counsel for the Applicant
Katundu, Counsel for the Interested Parties
Mankhanamba, Official Court Interpreter

ORDER

This is the order of this Court on the interested parties' application that the leave that was granted to the claimant to apply for judicial review of the decision of the defendant herein be discharged.

Before this Court delves deeper into the matter at hand it wishes to indicate that, in view of the current rules of procedure, the names of the parties on papers to be filed in this matter from now onwards must appear as above, as indicated by the interested parties on their papers herein. This is in view of the divergent citation of parties by the claimant probably because there has been a transition from the old to the current rules of procedure in the course of these proceedings.

On 22nd January 2018, the claimant obtained leave to apply for judicial review of the defendant's decision made on 8th May 2017 cancelling the 99-year leasehold interest held by Mtunthama Farming Limited on plot no. KK 104 at Nkhotakota registered under Deed number 86782 in the Deeds Registry and on which the claimant had a 30-year sub lease registered as Deed number 86847 without according the applicant a hearing thereby violating the claimant's rights and constitutional right to property.

The claimant runs a filling station business on the subleased land.

The application for leave was filed on 24th August 2017 before the current rules of procedure came into force and was heard inter partes. The defendant despite being served with a notice of the inter partes hearing never appeared in the matter.

The 1st interested party, Mtunthama Farming Limited joined this matter, after leave was granted, as it is the one who surrendered its lease in favour of the 2nd interested party thereby implicating the claimant's sublease herein. The 2nd interested party similarly joined after leave was already granted.

The interested parties sought an order setting aside the leave on three grounds, namely, that the application for leave was made outside the three months' period prescribed under the rules for making such applications, that the claimant had an alternative remedy which he is pursuing but has not exhausted and that the matter herein is not suitable for judicial review.

The interested parties filed three sworn statements in support of the instant application to discharge leave and the claimant also filed a sworn statement in opposition.

On the first ground for seeking to set aside leave, namely, for the same having been sought outside the three months' period allowed by the rules, the parties submitted similarly as follows.

Leave to apply for judicial review has to be made promptly after the claimant becomes aware of the decision in issue and not beyond a three months period as prescribed by the rules.

The parties agree that Order 53 rule 4 Rules of Supreme Court, as the applicable rule at the time leave was obtained, clearly provides on the same as follows

An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when the grounds for the application arose unless the court considers that there is good reason for extending the period within which the application shall be made.

The interested parties correctly refer to several authorities on the matter of time for seeking leave. See *The State v Attorney General, ex parte Banda* and another Miscellaneous civil cause number 65 of 2005 (High Court) (unreported) and *The State v Attorney General, ex parte Chimbayo* Miscellaneous civil cause number 32 of 2005 (High Court) (unreported),

From there the parties diverge. The interested parties then submitted that the impugned decision herein was made on 8th May 2017 and the claimant had up to 8th August 2017 to file its application for leave to apply for judicial review. The interested parties correctly observe that the claimant filed its application for leave on 24th August 2017 which is outside the three months' period prescribed by the rules.

The interested parties note that the claimant in fact gave a notice of intended suit to the defendant herein alleging unlawful cancellation its sublease and that it would sue by action at the end of the notice period and that therefore the claimant deliberately delayed in commencing judicial review.

On its part, the claimant concedes that it indeed filed its application for leave outside the three months' period as submitted by the interested parties.

The claimant however submits that there was a good reason for that, namely, the closure of the courts due to the on-going industrial action by support staff in the courts. The claimant produced evidence showing that by 15th August 2017 the courts were still closed since 31st July 2017.

Additionally, in the circumstances, the claimant seeks this Court's permission that time for filing the leave application be extended if it is found that the claimant delayed in filing its application. The claimant noted that the rules permit this Court to extend time for applying for permission to apply for judicial review, formerly known as leave, and that there is no prejudice to the defendant and the interested parties. The claimant referred to Order 19 rule 20 (6) of the Courts (High Court)(Civil Procedure) Rules. This Court observes that under Order 53 rule 4 Rules of Supreme Court which was applicable then, this Court also has power to extend the time on good reason being proffered by the delayed applicant.

This Court notes that part of the three months' period that the claimant had within which to file its application for leave herein was taken up by the closure of the courts. This was a regrettable situation that rendered it impracticable for the claimant to file its application for leave by 8th August 2017. This is because the courts were closed from 31st July 2017 and were still closed by 8th August 2017.

In the circumstances, there was a good reason why the claimant filed its application outside the usual reckoning of the three months from the date of the impugned decision herein. In fact, time should not be reckoned during the closure of the courts in the circumstances.

This Court therefore finds that the claimant filed its application within the requisite period herein given that it lost part of the three months' period within which it was at liberty to file the leave application. There is therefore no need to extend the time.

The fact that the claimant gave notice of intended suit does not detract from the fact that part of the three months' period within which it was entitled to file its application for leave was taken away by the strike herein. It was open to the claimant to consider the best approach to the matter herein and determine which course to follow either a suit or a judicial review. In the end, the claimant opted for a judicial review and filed the same within the prescribed time in the circumstances.

The first ground for seeking to discharge leave herein therefore fails.

On the second ground for seeking a discharge of leave herein, namely, that the claimant had an alternative remedy which he is pursuing but has not exhausted, the interested parties submitted as follows.

The interested parties observed that there is another matter that was concluded before the High Court in Lilongwe in which Bishop Simama and Simsol Oil and Transport Limited as claimants sought and were subsequently granted a declaration that they own and must get possession of the same subject matter of the subleased land that is before this Court as against Puma Energy Malawi Limited who was the defendant.

The interested parties observed that in that Lilongwe matter, Puma Energy Limited applied to add as third parties, the Deeds Registrar who is the defendant herein as well as Mtunthama Farming Limited who is the 1st interested party herein, but the Court declined to add them following objections by Bishop Simama who is the 2nd interested party herein.

The interested parties observed that the claimant herein has appealed to the Malawi Supreme Court of appeal against the decision of the High Court at Lilongwe refusing to add the third parties in the matter before it.

The interested parties submitted that there is an alternative remedy that the claimant ought to pursue by seeking a stay of the Lilongwe High Court decision pending appeal instead of seeking a judicial review of the decision of the Deeds Registrar.

The interested parties correctly submitted that where a statutory alternative remedy is available by way of appeal then judicial review is not an appropriate remedy and leave should not be granted and must be discharged if it was already granted. See *The State v Controller of Customs and Excise, ex parte Mtelemuka* Judicial review number 41 of 2016 (High Court) (unreported) and *The State v Commissioner General of the Malawi Revenue Authority, ex parte Airtel Malawi Limited* Judicial review number 33 of 2015 (High Court) (unreported).

The interested parties added that the instant matter is on all fours with a recent matter in which the parties sought the same reliefs in two matters, namely *Gondwe and others v Honourable Dr Chakwera and the Malawi Congress Party* civil cause number 28 of 2018 (High Court)(unreported) and *Khamalatha v Secretary General of the Malawi Congress Party* civil cause number 1347 of 2016 (High Court) (unreported), that were before two Judges and in the *Khamalatha* matter a decision had been made and an appeal was filed.

The interested parties observed that in the *Gondwe* matter the court dismissed the application for injunction and the action itself because the matters in dispute were the same and because of the possibility that the decision that may be reached by the Malawi Supreme Court of Appeal in the *Khamalatha* matter appealed would be different from the High Court decision and that would bring the administration of justice into disrepute.

The interested parties then submitted that the claimant herein ought to pursue its appeal in Lilongwe and not seek a judicial review of the decision of the Deeds Registrar and that leave should be discharged.

On its part, the claimant submitted that there is no alternative remedy available to it in this matter.

It started by agreeing that indeed generally where an alternative remedy exists to the claimant by way of appeal leave to apply for judicial review will not be granted. See *The State v Malawi Communications Regulatory Authority, ex parte Galaxy Broadcasting Corporation Ltd t/a Galaxy Radio* Judicial review number 30 of 2014 (High Court) (unreported).

The claimant then submitted that the fact that there is an alternative remedy does not oust the jurisdiction of the court to grant leave to apply for judicial review. But rather that, it is a powerful factor for consideration by the court whether to grant leave to apply for judicial review or not. see *Calvin v Carr* [1980] AC 574, *Ridge v Baldwin* [1964] AC 40 at 126 and *Leech v Deputy Governor of Parkhurst Prison* [1988] ac 533 at 580-581.

The claimant then submitted that to start with, the interested parties do not identify which authority the claimant may go to appeal against the decision of the Deeds Registrar that is being complained about in this matter. And that the authority to offer the alternative remedy is therefore not being identified.

The claimant then conceded that there was indeed a matter before the Lilongwe High Court where the issue was about ownership and possession of the land in dispute and the Court in fact has decided in favour of the 2nd interested party as against the claimant herein who was the defendant. The claimant observed that the Lilongwe action was a private matter.

The claimant then observed that when the claimant as a defendant sought to add the Mtanthama Farming Limited and the Deeds Registrar as third parties, the Court in the Lilongwe matter refused. And that this meant the issues before this Court, between the claimant and the defendant, were never heard before the High Court in Lilongwe.

It then contended that what this means is that the judgment in Lilongwe and the appeal thereon would not lead to a determination of the issues before this Court as those issues were never raised. And that as such, there is nothing to stop this Court from reviewing the decision of the Deeds Registrar in these proceedings.

The claimant reiterated that the Lilongwe matter concerned who owns the land herein and who is entitled to possession. And that the current proceedings concern the manner in which the Deeds Registrar exercised his powers in implicating the rights of the claimant under the sublease.

The claimant also pointed out that, in its judgment, the Lilongwe Court noted that the Deeds Registrar must indeed explain how it implicated the rights of the claimant herein. And further that the 1st interested party was at the centre of causing confusion in the matter implicating the rights of the claimant herein.

This Court agrees that availability of an appeals procedure will generally indeed preclude resort to judicial review as submitted by both parties. See *The State v Controller of Customs and Excise, ex parte Mtelemuka* Judicial review number 41 of 2016 (High Court) (unreported), *The State v Commissioner General of the Malawi Revenue Authority, ex parte Airtel Malawi Limited* Judicial review number 33 of 2015 (High Court) (unreported) and *The State v Malawi Communications Regulatory Authority, ex parte Galaxy Broadcasting Corporation Ltd t/a Galaxy Radio* Judicial review number 30 of 2014 (High Court) (unreported).

This Court however agrees with the claimant that there is no alternative remedy under the statute, namely, the Deeds Registration Act, that has been identified by the interested parties as availing an alternative remedy to the claimant against the decision of the Deeds Registrar herein.

With regard to the private matter concluded before the Lilongwe High Court, this Court agrees with the claimant that contrary to the contention by the interested

parties herein, that matter did not deal with the question of how the Deeds Registrar exercised his powers herein to implicate the rights of the claimant under the sublease.

The 2nd interested party actually objected to the addition of the Deeds Registrar and the Court at Lilongwe agreed and thereby precluded the question in this matter from being considered by the Court at Lilongwe. The issue before this Court is therefore different from that before the Court at Lilongwe.

The appeal that has been lodged by the claimant against the refusal to add the Deeds Registrar in the now concluded matter before the Lilongwe Court cannot be said to directly address the issue of how the Deeds Registrar exercised his powers in this matter.

It will be a long and winding route if the appeal is successful to add the Deeds Registrar in the Lilongwe matter and later the Deeds Registrar will be added and later on the question may be raised as to how he exercised his powers that would involve a re-hearing of the Lilongwe matter that has already been concluded in favour of the 2nd interested party as against the claimant herein. This is all speculative at best and should not stop this Court from exercising its discretion to grant leave to apply for judicial review and hear the review to get an explanation on how the Deeds Registrar exercised his discretion herein and whether he did so to the standard required by the law.

For the foregoing reasons, this Court agrees with the claimant that the second ground advanced by the interested parties for seeking to set aside the leave on the ground that there is an alternative remedy available to the applicant herein must fail.

On the last ground for seeking to discharge leave, namely, that this matter is not amenable to judicial review, the interested parties submitted as follows.

They submitted that the Deeds Registrar never made any decision but rather simply accepted the surrender of the lease by the 1st interested party.

They added that in fact the search results shows that the claimant's sublease based on the surrendered lease of the 1st interested party was not registered in the Deeds Registry and hence the claimant's interest could not be taken into account by the Deeds Registrar.

The claimant on the other hand argued that it has property rights by its sublease which was cancelled by the Deeds Registrar in exercise of his public law functions under the Deeds Registration Act. It contended that the Deeds Registrar actually makes a decision to cancel a registered interest.

This Court does not wish to delve into the fine details of the argument concerning the exercise of power by the Deeds Registrar at this stage.

However, this Court is prepared to accept the claimant's argument that the Deeds Registrar has to make a decision before he accepts to cancel a deed on surrender of the same. If the surrender is erroneous, as argued by the claimant, surely the Deeds Registrar is not to act as a robot and simply accede to the wishes of the leaseholder surrendering a non-existent lease, for example.

As correctly pointed out by the claimant, as a matter of fact, the 2nd interested party advanced the arguments in the Lilongwe High Court matter to the effect that the decision by the Deeds Registrar to cancel the lease of the 1st interested party has not been challenged. Clearly, that entails that the Deeds Registrar made a decision herein regardless of the fact that the same was instigated by a request from the leaseholder the 1st interested party herein.

This Court therefore finds that the Deeds Registrar exercised a public law function by deciding to agree to cancel the head lease held by the 1st interested party and thereby implicated the rights of the claimant.

On the related question of registration of the deed of the claimant's sublease, the Deeds Registrar swore to evidence that the claimant's sublease was not registered. However, the claimant's sublease on the record shows that it has a deed number from the Deeds Registry. The argument that the claimant's interest was not registered cannot therefore be taken to be true on face value without a full hearing.

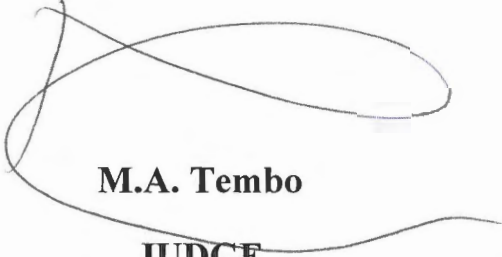
In the foregoing circumstances, this Court is not convinced by the interested parties' third ground for seeking to set aside the leave herein, namely, that there is no decision by the Deeds Registrar amenable to judicial review.

The three grounds for seeking to set aside leave herein have failed and the application to set aside leave fails.

The matter must be advanced to hearing in the usual fashion subject to the usual appeal in line with the Supreme Court of Appeal Rules.

Costs on the failed application are for the claimant.

Made in chambers at Blantyre this 21st March 2018.



M.A. Tembo
JUDGE