JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
JUDICIAL REVIEW CASE NO. 60 OF 2017

BETWEEN:

THE STATE

-AND-

MALAWI HOUSING CORPORATION ..... RESPONDENT

EX PARTE: MRS. SHEILA KENNETH DAVIS ..... APPLICANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Salimu, of Counsel, for the Applicant
Mrs. Mzanda, of Counsel, for the Respondent
Mrs. Jessie Chilimapunga, Court Clerk

ORDER

Kenyatta Nyirenda, J.

This is the Respondent's Summons for an order to (a) discharge Leave to move for Judicial Review and (b) vacate interlocutory injunction granted to the Applicant on 25th September 2017 [hereinafter referred to as the "Summons to Discharge Leave"].

It is desirable, before proceeding to consider the Summons to Discharge Leave, to narrate the chronology of the proceedings so as to make the Summons to Discharge Leave intelligible. On 25th September 2017, the Plaintiff filed with the Court a Notice of Application for Leave to Apply for Judicial Review, otherwise known as "Form 86A".

Form 86A is divided into three parts. The first part of Form 86A sets out the decision in respect of which relief is sought [Hereinafter referred to as the "challenged decision"]. The challenged decision reads:

"The decision by the Respondent to withdraw or cancel the Applicant's lease in respect of title number Ndirande 2/9/12 in Blantyre."

The second part of Form 86A is on reliefs. The Applicant seeks two reliefs, namely, "*A like order of certiorari quashing the decision of the Respondent*" and "*An Interlocutory Injunction restraining the Respondent from in any way whatsoever interfering with the Applicant's quite enjoyment of her leasehold interest in issue pending the determination of the substantive judicial review proceedings herein*".

The third part of Form 86A lists grounds on which relief is sought:

"1. The Respondent is as established by statute: The Malawi Housing Corporation Act (cap 32:02 of the laws of Malawi)

2. Section 3(2) (1) provides that:

"The Corporation shall have power to purchase, hold, manage, lease or otherwise dispose of any interest in or attending to land"

3. It in pursuance of such a power that the plot in issue being title number Ndirande 2/9/12 was created in 2015 and sold by Hyde Henry Khembo who later sold it to the Applicant to whom the respondent gave a leasehold interest of 99 years on 22nd June, 2016

4. The Respondent's performance or execution of the power referred to above is to the exclusion of any other authority.

5. The Applicant only started developing the plot after her development plans were duly approved by the Blantyre City Assembly Building Plans and town Planning Committee: the Responsible Authority envisaged by section 47 of the town and Country Planning Act (Cap 23:01 of the Laws of Malawi)

6. There being no factual or legal justification under the Lands acquisition act, the respondent action amounts to blatant violation of the Applicant's right not to deprived of her property arbitrarily as per section 28 (2) of the Constitution.

7. The Respondent's action is thus illegal, unreasonable, irrigational an abdication of his statutory authority and amenable to be reviewed by this court. The Applicant has already spent a lot of money developing the plot and thus her prayer for an interim injunctive relief is well grounded."

The application for leave to apply for judicial review came before me and I granted the Applicant permission to apply for judicial review. On the other hand, the ex-parte application for interlocutory injunction was granted subject to an inter partes hearing within 14 days from 25th September 2017.

On 12th October 2017, the Applicant filed with the Court a Notice of Originating Motion for Judicial Review. The Notice was accompanied by the following affidavit by the Applicant verifying grounds in support of application for judicial review:

> *"3 **THAT** the plot in issue was created and initially leased to a Mr. Hyde Khembo back in 2015. It is Mr. Khembo who sold the plot to me for a consideration of MK15, 000,000.00 in 2016. Now produced and shown to me marked "SKD 2" is a copy of the conveyance of title from the said Mr. Khembo to me.*
>
> *4. **THAT** on 8th December, 2016 I submitted my application to the City of Blantyre Building Plans and Town and Planning Committee. Now produced and shown to me marked "SKD 3" is a copy of the application.*
>
> *5. **THAT** all my Town Houses building plans were duly approved by the said committee on May 2017. Now produced and shown to me marked "SKD 4" 'a' 'b' 'c' 'd' 'c' 'd' 'e' 'f' 'g' 'h' 'h' 'I' 'm' and 'n' are the approved drawings duly stamped.*
>
> *6. **THAT** it is basis of the foregoing that I proceeded to start developing my plot.*
>
> *7. **THAT** by a letter dated 14th September, 2017 now produced and shown to me marked "SKD 5" the respondent purported to give me notice that my lease had been withdrawn because the developments "I was undertaking had be discovered to be a nuisance to the adjacent developments and under the direction of the Ministry of Lands pursuant to section 47 of the Town country and planning Act (cap 23:01).*
>
> *8. **THAT** as I have alluded to above I only started developing the plot after approved from "The Responsible Authority" Now produced and shown to me are some of the documents reflecting my expenses on the development so far done on the plot."*

On 18th October 2017, the Respondent filed with the Court a certificate of non-compliance to the effect that the Plaintiff had not complied with the Order of the Court requiring her to move the Court for further consideration of the matter within 14 days after issuance of the interlocutory injunction.

On the same day, that is 18th October 2017, the Respondent filed the Summons to Discharge Leave. The Summons to Discharge Leave is supported by an affidavit sworn by Okota Mzanda, the Respondent's legal counsel. The affidavit states as follows:

> *"3. **THAT** the Applicant herein upon acquiring a lease for plot No. Nyambadwe 255/2/2 (title number 219/2) recently commenced development on the said plot.*

4. ***THAT*** *however, the development on the said plot has proved to be a nuisance to the adjacent developments which is contrary to Section 47 of Town & Country Planning Act Cap 23:01 of the Laws of Malawi.*

5. ***THAT*** *in the premises, the Ministry of Lands directed that the development on the plot should be stopped and the Applicant be given an alternative plot; and two plots have been offered to her already.*

6. ***THAT*** *the Defendants then duly issued a stop notice pursuant to Section 49 of the Town Planning Act to the Applicant to cease the development.*

7. ***THAT*** *upon receiving the stop notice the Applicant commenced Court proceedings under Civil Cause number 265 of 2017 instead of appealing to the Town and Country Planning Board as prescribed under the said provision.*

8. ***THAT*** *upon filing the Writ of Summons, the Applicant obtained an interlocutory injunction and the Court ordered that the matter should be brought before it in 14 days for further consideration but the Applicant did not comply with the said order and the injunction was vacated.*

9. ***THAT*** *similarly in the matter herein, upon granting the interlocutory injunction the Court ordered that it should be moved within 14 days from the 27th September, 2017 but the Applicant has again failed to do so hence the injunction should be vacated for non-compliance.*

11. ***THAT*** *I repeat paragraph 4 and 5 herein and accordingly the Respondent has decided to withdraw the leasehold from the Applicant and if aggrieved by the decision she is supposed to appeal to the Town and Country Planning Board instead of commencing these proceedings hence the leave for judicial review should be discharged."*

On 20th December, 2017, the Applicant filed with the Court an affidavit in opposition to the Summons to Discharge Leave. This affidavit consists of the following four paragraphs:

"1. THAT contrary to what is stated in the sworn statement in support of the application no Town Planning Authority has issued any stop notice in the prescribed form in respect of the plot in issue herein.

2. THAT evidence of what is the status quo in civil case number 265 of 2017 that is before the Honourable Justice N'riva is not before this court. Paragraph 8 of the sworn statement of Okota Mzanda is unsubstantiated, suffice to say that the record in that case will show that the order vacating the injunction was reversed by the learned judge giving way to the claimant to file an inter-partes application for continuation.

3. *THAT it is trite to note that the proceedings before N'riva, J were commenced before the decision by Malawi Housing Corporation to cancel the lease: the judicial review proceedings were commenced only after that decision was made in the wake of the injunction.*

4. *THAT the issues raised by the Applicant raises issues that need further investigation at the substantive level and there is no basis to discharge the leave, more so because the Town Planning Authority being city of Blantyre has not rescinded its approval for the Applicant's Town Houses plans that are exhibited to the Originating Motion..."*

There are two issues for the determination of the Court, namely, whether or not (a) leave to move for judicial review should be discharged and (b) the interlocutory injunction should be vacated?

It is the case of the Respondent that the present proceedings have been pre-maturely brought in that the Applicant should first have lodged an appeal under the Town and Country Planning Act (Act). It may be useful to quote the relevant part of the Respondent's written submissions:

> *"... The Applicant upon being issued with a stop notice to discontinue developing the plot by the Respondent as a Responsible Authority, she ought to have appealed to the Town and Planning Board as prescribed under section 49 of the Town Planning Act. The law deems the Town and Planning Board as a more competent authority to review a decision of a Responsible Authority like the Respondent than a court of law. It is, therefore, submitted that leave for judicial review granted to the Applicant should be discharged as the Applicant has an alternative remedy and this is an abuse of court process."* – Emphasis by underlining supplied

The position of the Applicant is that the Town Planning Authority in respect of Title No. Ndirande 2/9/12 is Blantyre City Council and not the Respondent. It is said that the Respondent is just a lessor and not a Town Planning Authority. It was further contended that Blantyre City Council has made no decision against which the Applicant would wish to appeal. Counsel Salimu also invited the Court to note that the challenged decision pertains to cancellation of the Applicant's lease and not the alleged stop notice.

The third point by the Applicant has to do with the allegation by the Respondent of nuisance. The Applicant raises the following questions regarding this allegation:

> *"3.4 In the affidavit in support of the application to discharge leave and vacate the injunction the Respondent claims that the Applicant's developments have been a nuisance* ***without elaborating how****. And why should the Applicant be obliged to accept the alternative plots being offered to her when she has already started her plot.* ***Are these not the issues that must be investigated at a substantive hearing?****"*

Counsel Salimu concluded his submissions as follows:

> *"... the basis on which the current application is premised is misconceived. The Applicant (i.e. Mrs Davis) has laid basis on which this court has to hear the parties at the substantive level. There is no alternative remedy. The Town Planning Authority has not withdrawn its approval for the development of the plot so the mention of an appeal to the Town and City planning Board is utterly hilarious."*

A quick perusal of our Law Reports shows that discharge of permission to move for judicial review is permissible in appropriate cases: See **Jones & 14 Others v. Refugee Committee and Another [2005] MLR 134, The State v. Attorney General, ex-parte Chimbayo [2005]MLR 134, Hon. Rev Ndomondo v. The State and the Speaker of the National Assembly, Misc. Civil Cause No. 57 of 2009(unreported),** and **The State v. Secretary to Treasury and Others, Ex-parte Mponda and Others [2005] MLR 454.**

That this Court has powers to discharge permission was put beyond question in the case of **The State v. Secretary to Treasury and Others, Ex-parte Mponda and Others**, supra, where Mkandawire J, put the point thus:

> *"Both the Attorney General and Counsel Kaphale have formidably submitted that leave for judicial review granted herein should be set aside.. This Court has the inherent jurisdiction to set aside orders including orders granting permission to apply for judicial review, which have been made without notice being given to the defendant as was the case herein. The case authority in point is R v DPP ex parte Camelot PLC [1997] 10 Admin. L. Rep 93 – Order53.*
>
> *Practice note 53/1-14/34 is also very clear on this point that such an application has to be made promptly after the person had discovered the grant of leave. Thus the power of this court to set aside leave, already given for judicial review is covered in several case authorities from various jurisdictions."* – [Emphasis by underlining supplied]

The same point, albeit from a different perspective, is also forcefully made in yet another particularly instructive decision in **Inspector General of Police v. Mvula [2008] MLR 380** wherein Kamwambe J., observed thus:

> *"Order 32 rule 6 of the Rules of Supreme Court clearly states that where an order is made by a judge ex parte the same judge, or another judge of co-ordinate jurisdiction has power to set aside the order after an inter partes hearing (Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Ltd [1991] 4 ALL ER 65, PC). In view of this I am perfectly entitled to hear this matter which has come to me inter partes..."*

The rationale behind the Court's retention of the power to discharge permission may not be difficult to fathom. I think Lord Frazer of Tully Belton hit the nail on the head in **R. v. Inland Revenue Commissioners, ex p. National Federation of**

Self-Employed and Small Businesses Ltd [1982] A.C. 617 when he said at page 107:

> *"The Court which grants leave at this stage will do so on the footing that it makes a provisional finding of sufficient interest subject to reversal later on and is therefore not necessary to be criticized merely because the final decision is that the applicant did not have sufficient interest but where after seeing the evidence of both parties the conclusion is that the applicant did not have sufficient interest to make the application the decision ought to be made on that ground."*

Wise counsel holds that permission should be vacated sparingly. Of course, this is how it ought to be: see **R v. Customs and Excise Commissioners ex parte Eurotunnel PLC [1995] CLC 392** where the court said:

> *"It is obvious that the whole purpose of the leave stage would be violated if the grant of leave were to be regularly followed by an application to set aside"*

Be that as it may, the fact remains that the Court retains discretionary power to discharge permission in appropriate cases and the Court should not shirk from discharging this responsibility in deserving cases: see **SGS Malawi Case.**

Reverting to the case under consideration, it is clear that there is contestation on both factual matters and the legal questions arising therefrom. The main contestation relates to the stop notice. Section 49 of the Act makes provision in respect of stop notices and it is worded as follows:

> *"(1) Where a responsible authority is of the opinion that a person is carrying out unauthorized development the responsible authority may serve a stop notice requiring that person to cease the activity or such portion of it as may be specified in the stop notice.*
>
> *(2) If a person feels aggrieved by the stop notice issued pursuant to subsection (1), he may appeal to the Board within thirty days from the date of the service of the notice.*
>
> *(3) The Board may confirm, vary or rescind the stop notice appealed from and in doing so the Board may take into account any matters provided for in section 44 respecting enforcement notices."*

In terms of s. 2 of the Act, a "responsible authority" in relation to (a) a Planning Area, means the Planning Committee of that area, and (b) any other area, means the Commissioner.

Counsel Salimu submitted that the Defendant is not, for purposes of the Act, a responsible authority and it, consequently, had no power to issue the stop notice.

On the other hand, Counsel Mzanda argued that since (a) a lessor is required to endorse a development plan before the application goes to Blantyre City Assembly and (b) Blantyre City Assembly cannot approve a development plan without endorsement by the Respondent, the Respondent should be deemed as a responsible authority.

Having regard to the above-mentioned contestations, I really doubt, and I do not think that Counsel expects, that this case can be resolved at this stage before the factual and legal landscape of the case fully unfolds during the substantive hearing of the judicial review. It is trite that a court must at this stage avoid resolving complex legal questions appreciated through factual and legal issues only trial can avoid and unravel.

Having found that this is an appropriate case to proceed to a substantive hearing, the interlocutory injunction granted herein has to be maintained to preserve the status quo between the parties pending the determination of the substantive case or a further order of the Court.

All in all, the Summons to Discharge Leave is dismissed with costs.

Pronounced in Chambers this 7th day of March 2018 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE