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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICAL REVIEW CASE NUMBER 60 OF 2017

BETWEEN:

THE STATE (on the application of SHEILA KEITH DAVIES) CLAIMANT

AND

MALAWI HOUSING CORPORATION DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Msowoya, Counsel for the Claimant
Defendant, absent
Mankhambera, Court Clerk

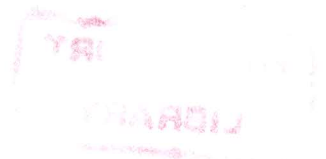
JUDGMENT

This is this court's order on the claimant's originating motion for judicial review of the defendant's decision withdrawing or cancelling the claimant's lease in respect of title number Ndirande 219/12 on account of the fact that the developments being undertaken on the leased land by the claimant are a nuisance to adjacent developments under the relevant city planning laws.

The defendant filed its defence but never appeared at the hearing of this matter despite knowledge that this matter was coming for hearing.

The facts of this matter are straightforward.

The applicant is a registered leasehold proprietor of title number Ndirande 219/12-Blantyre.



The defendant is a creature of statute the Malawi Housing Corporation Act with power purchase, hold, manage, lease or otherwise dispose of any interest in or attending to land. See section 3 (1) and 2 (f) of the Malawi Housing Corporation Act.

In pursuance of its powers, the defendant issued a plot of land title number Ndirande 219/12 which was created in 2015 and sold the lease to Hyde Khembo who later sold the same to the claimant. The claimant was given a 99 year lease on 22nd June 2016.

On 8th December 2016 the claimant submitted her building plan application to the City of Blantyre Building Plans and Town Planning Committee. Her building plan application was approved on 10th May 2017.

On the basis of the said approval she commenced development on her leased land herein.

By a letter dated 14th September 2017, the defendant gave notice to the claimant that her lease herein had been withdrawn because the developments she was undertaking herein were a nuisance to the adjacent developments and under the direction of the Ministry of Lands pursuant to section 47 of the Town and Country Planning Act.

The claimant seeks the quashing of the defendant's decision for being irrational, illegal, unreasonable and an abdication of the responsibility of the defendant's own authority under the statute which established it.

The defendant confirmed that the developments by the claimant herein were discovered to be a nuisance indeed.

It added that the Ministry of Lands directed that the developments be stopped and that the claimant be given an alternative plot and two have already been offered to her.

The defendant then issued a stop notice against the developments herein.

The defendant asserted that the claimant had an alternative remedy herein to judicial review in that she could have appealed to the Town and Country Planning Board as prescribed under section 67 (2) of the Town and Country Planning Act.

At the hearing, which was no attended by the defendant, the claimant argued as follows.

Firstly, that the defendant is not competent to exercise powers under the Town and Country Planning Act. And that the powers under the said Act are exercisable by the responsible authority being the Town and Country Planning Committee responsible for Blantyre City in terms of section 2 of the Town and Country Planning Act.

The claimant contended further that, by the same token, the Ministry of Lands is not a responsible authority under the Town and Country Planning Act.

The claimant contended further that the stop notice that the defendant issued at the directive of Ministry of Lands was incompetent. And that there is an error of law on the face of it.

The claimant also commented that the stop notice herein was unreasonable because it was preceded by approval of the claimant's building plans by the Blantyre City Building Planning Committee which has representation of the defendant and Ministry of Lands.

Further that the developments on the land herein are the same as those on adjacent pieces of land, namely, town houses.

The claimant also contended that nowhere do the powers of the responsible planning authority, in section 44 to 51 of the Town and Country Planning Act extend to withdrawal of title as is the case in this matter. And that the worst that can happen is that unauthorized development is stopped. And that in contrast, we have authorized development in the present matter.

In view of the foregoing, the claimant seeks an order quashing the decision of the defendant herein with costs.

This Court notes that its jurisdiction for judicial review can be invoked where a public authority charged with a public duty acts without jurisdiction or exceeds its jurisdiction. This is where a decision is founded, wholly or partly, on an error of the law. In such a case, the authority has acted outside its jurisdiction and its decision is, therefore, liable to be quashed by this Court. See *Anisninic Ltd v Foreign Compensation Commission* [1969] 2 A.C. 147.

The defendant is not spared from this jurisdiction. See *State and three others ex parte Right Honourable Dr Chilumpha SC* [2006] MLR 406.

This Court agrees with the claimant that, in the circumstances of this case, the decision of the defendant that is under review is irrational, illegal, unreasonable and an abdication of the responsibility of the defendant's own authority under the Malawi Housing Corporation Act.

As correctly submitted by the claimant, under section 2 the Town and Country Planning Act a responsible authority is defined as follows

> In relation to
>
> (a) A Planning Area, means the Planning Committee of that area; and
> (b) any other area, means the Commissioner for Town and Country Planning.

Section 2 the Town and Country Planning Act also defines a Planning Committee to mean a Planning Committee appointed or declared under Part III of the Act.

As correctly submitted by the claimant, in terms of section 47 of the Town and Country Planning Act only a responsible authority, being either the Planning Committee or the Commissioner, has authority to consider whether to serve an enforcement notice in relation to unauthorized development.

Further, it is only the responsible authority that can issue a stop notice in relation to unauthorized development terms of section 49 (1) of the Town and Country Planning Act.

It is clear, in the present matter, that neither the defendant nor the Ministry of Lands which directed the defendant to issue a stop notice herein is a responsible authority in relation to matters under section 47 of the Town and Country Planning Act.

In any event, enforcement notices and stop notices concern unauthorized development. As correctly argued by the claimant her development was authorized accordingly under the Town and Country Planning Act in line with section 44 (1) of the said Act.

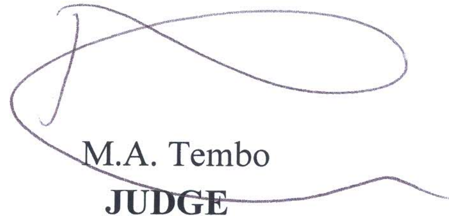
The consequences of an unauthorized development in section 44 to 51 of the Town and Country Planning Act do not include withdrawal of a lease from the holder therefore. All that must be dealt with is the unauthorized development.

The claimant having embarked on the commencement of authorized development it was really irrational, illegal, unreasonable and an abdication of the responsibility of the defendant's own authority under the statute which established it for the defendant to be directed by the Ministry of Lands to meddle in the authorized development by the claimant and withdraw her title herein without any colour of authority.

The argument by the defendant that the claimant should have appealed to the Town and Country Planning Board herein has no weight because the decision in question in this matter is illegal and was taken by the defendant without authority. If the decision in question was taken lawfully under the Town and Country Planning Act procedure then the claimant would have been compelled to appeal under section 67 (1) the Town and Country Planning Act procedure.

Consequently, the defendant's decision in question herein is quashed. The application for judicial review therefore succeeds with costs to the claimant.

Made in chambers at Blantyre this 17th May 2019.



M.A. Tembo
JUDGE