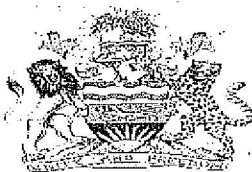


HIGH COURT
LIBRARY

Benard Ndaou & 2 Others v. Kasungu Municipal Council & 3 Others

Kenyatta Nyirenda, J.



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
JUDICIAL REVIEW CASE NO. 42 OF 2021**

BETWEEN

**THE STATE (ON APPLICATION OF BENARD NDAU,
DR AGNESS MWANGWERA AND BELEKE KAOMBA
REPRESENTING THEMSELVES AND MEMBERS OF
KASUNGU PEOPLES TRUST) CLAIMANT**

AND

KASUNGU MUNICIPAL COUNCIL 1ST DEFENDANT

**THE CHIEF EXECUTIVE OFFICE OF KASUNGU
MUNICIPAL COUNCIL 2ND DEFENDANT**

THE MAYOR (KASUNGU MUNICIPAL COUNCIL) 3RD DEFENDANT

JAMES MAFUTA INTERESTED PARTY

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

- Mrs. Mapemba, Counsel for the Claimant
- Mr. Mphote, Counsel for the Defendants
- Mr. Zimba, Counsel for the Interested Party
- Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is this Court's ruling on an application on the part of the Interested Party for declaratory orders. The application is said to be brought under Order 19, rule 27, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as the "CPR"].

The application is supported by a statement sworn by Counsel Innocent Zimba and the material part of the sworn statement reads:

"2. *Background of the Matter*

2.1 *By way of Judicial Review the claimants herein commenced the present action seeking the following declarations:-*

2.1.1 *A declaration that the decision of the Respondent to sell or subdivide or in any way dispose of the public property known as Kasungu Municipal and Restaurant and Resthouse, Plot No. KU 35 is arbitrary, Wednesbury Unreasonable and Procedurally Wrong, Illegal and unfair and made contrary to the provisions of the Public Procurement and Disposal of Assets Act.*

2.1.2 *An Order quashing the said decision of the Respondent on the purported sale or subdivision of the property known as Kasungu Municipal Restaurant and Rest House.*

2.1.3 *An Order that Council should meet within a given period of time to review the decision purportedly sale and/ or subdivide the property and take corrective measures.*

2.1.4 *And If permission/ leave is granted, a direction that there be a stay of the said decision of the respondents and that an injunction be issued against the Respondents restraining them from enforcing the said decisions till the matter is determined by the Honourable court.*

2.2 *Following the said application for the Judicial Review the parties to the Consent Order, minus the Interested Party, started engaging between themselves with the view of settling the matter out of court and on 9th December, 2021 the two parties in the absence of the Interested Party herein agreed on many terms, but those of specific application to the Interested Party herein are the following:-*

2.2.1 *That the Respondents herein and hereby permanently restrained from selling, pledging or in any way disposing the said property to the said Mr. James Mafuta or any other person acting on his behalf.*

2.2.2 *That the 1st, 2nd and 3rd Respondents admit and confirm that the purported lease issued to one James Mafuta, was done without the knowledge and approval of the 1st and 2nd Respondents and in this regard the 1st and 2nd Respondents HEREBY AGREE as follows:*

2.2.2.1 *The Respondents acting in good faith shall cooperate fully with the Claimants and the Registrar of Lands to have the lease granted herein over the property to Mr. James Mafuta rescinded and shall take all necessary steps to ensure that the ownership of the said Property reverts to Kasungu Municipal Council within thirty (30) days from the date hereof.*

3. *The Current Application*

- 3.1 *I refer to paragraph 2.2.1 above and state that a proper reading of the pleadings and the reliefs sought, there was no pleading nor relief that was sought to permanently restrain the respondents from offering the said piece of land to the interested party herein. It therefore means that the same has no legal basis and should not be entertained by this Honourable court.*
- 3.2 *The said term in the consent Order is discriminatory in nature as it curtails the interested party's right to ownership of this particular property in the event that the same has been corrected by the City Council and the same is being done without any legal basis as far as the Interested Party is concerned.*
- 3.3 *I refer to paragraph 2.2.2. above and state that the said term in the Consent Order is misleading and a misrepresentation of facts and almost implies that the Interested Party herein procured the lease through fraud or dubious means. The facts as from the face of the pleadings suggest rightly so that the Interested Party was offered and agreed to purchase the said piece of land from the Respondents and that there was agreement between the Respondents and the Interested Party thereof.*
- 3.4 *It is also apparent that after the said sale the Interested Party proceeded to obtain a lease from the Government, as is usually the case, without knowledge of the current proceedings. What the term of the Consent Order entails, therefore, is that the interested party procured the lease via fraud or 'dubious means', however, the same was never proved by neither the Claimant nor Respondent, and that the interested party herein was never invited to be part of such a discussion or settlement.*
- 3.5 *This term of the Consent Order therefore should be struck out on the basis that both the parties never established fraud against the Interested Party herein, especially when the interested party herein was neither consulted nor involved in the making of the Consent Order."*

The Consent Order being referred to is dated 9th December 2021 and the parties thereto are the Claimant and the Defendants. The body of the Consent Order will be quoted in full:

- "1. **THAT** the decision of the Respondents to sell or sub-divide or in any way dispose of the property known as Kasungu Municipal Council Restaurant and Rest House situated on Plot No. KU 35 (hereinafter referred to as the "Property") to a Mr. James Mafuta trading as Target General Dealers was arbitrary, unreasonable, procedurally wrong, illegal, unlawful and unfair and is hereby quashed and set aside.

2. *THAT the Respondents be and are hereby permanently restrained from selling, pledging or in any way disposing of the Property to the said Mr. James Mafuta, or any other person acting on his behalf.*
3. *THAT the Property herein shall henceforth not be dealt with by any of the Respondents except with the full approval of the 1st Respondent (the "Council") and, in the event of sub-division, sale or disposal of the Property, such approval shall be made at a meeting attended by not less than seventy five percent of the Council members and further, such sale shall be competitive and by public auction publicized in local newspapers within at least twenty one (21) days of a resolution being made.*
4. *THAT the 1st, 2nd and 3rd Respondents admit and confirm that the purported lease issued to one James Mafuta, was done without the knowledge and approval of the 1st and 2nd Respondents and in this regard the 1st and 2nd Respondents **HEREBY AGREE** as follows:*
 - 4.1 *The Respondents shall, acting in good faith, cooperate fully with the Claimants and the Registrar of Lands to have the lease granted herein over the Property to Mr. James Mafuta rescinded and shall take all necessary steps to ensure that the ownership of the said Property revert to Kasungu Municipal Council within thirty (30) days from the date hereof.*
 - 4.2 *The 1st Respondent shall, within forty eight hours, submit a letter to the Commissioner for Lands requesting the Registrar of Lands to cancel the sub-division and purported lease of the Property in favour of the said Mr. Mafuta.*
5. *THAT within twenty-one (21) days from the date hereof, the 1st Respondent shall submit to the Claimant's legal practitioners a written statement of account of the proceeds of the purported sale of the Property to Mr. James Mafuta, including the purchase price, mode of payment and date of receipt of the same.*
6. *THAT the contempt of court proceedings instituted by the Claimants against the Respondents are hereby withdrawn in their entirety.*
7. *THAT the 1st, 2nd and 3rd Respondents are ordered to pay costs of the action to be assessed if not agreed within 14 days."*

The Interested Party applies for declaratory orders that:

- "a) Order 2 under the Consent Order dated 9th December, 2021 purporting to permanently restrain the Respondents from selling, pledging or in any way disposing of the property to the Interested party herein or any other person acting on his behalf is arbitrary as it has no legal basis nor was the same included in the reliefs the Claimants sought and ought to be struck out of the Consent Order.

- b) *Order 4 of the Consent Order be struck out as it implies or asserts that the Interested Party herein procured the lease via fraud or 'dubious means' in that the Respondents had no knowledge of the lease, when in fact the Respondents had offered the Interested Party herein the said piece of land.*
- c) *Such Order(s) and Declaration(s) as the Court shall deem just and proper.*
- d) *An Order for Costs.* "

The Claimants are opposed to the application and they rely on the following sworn statement made by Counsel Grace Mapemba Chikopa:

"Background to Consent Order

4. *THAT the claimants were approached by the Respondents to consider settling out of court the contempt of court proceedings which had been commenced against them.*
5. *THAT the Contempt of court proceedings were due to be heard on 22nd December, 2021 and on the same day an application by the Claimants for default judgment against BOTH the Respondents and the Interested Party was also scheduled for hearing.*
6. *THAT on the day that the said contempt of court proceedings were due to be heard, I and counsel for the Respondents appeared before Justice Kenyatta Nyirenda where we informed him of the ongoing negotiations.*
7. *THAT on the same day, and immediately after we had appeared before Nyirenda, J. as aforesaid, I thereafter appeared before the judge again together with Counsel for the Interested Party for hearing of the application for default judgment. The Respondents conspicuously did not appear for the said hearing although they had appeared a few minutes earlier for the hearing of the contempt of court proceedings.*
8. *THAT the Court proceeded to enter default judgment against ALL parties in this matter including the Interested Party. See Exhibit marked "GM 1".*
9. *THAT on the next day, we were again approached by Counsel for the Respondents to conclude the negotiations relating to the contempt of court proceedings. The negotiations were duly concluded leading to the signing of the Consent Order attached hereto and marked "GM2" as a result of which the contempt of court proceedings were discontinued and withdrawn.*

Suppression of Material Facts

10. *THAT as it can be observed from the background above, it is not correct that the negotiations were for settlement out of court of the proceedings herein. They were restricted only to settling out of court of the proceedings herein and not the main*

judicial review proceedings as alleged in paragraph 2.2 of the Applicant's sworn statement.

11. *THAT the Interested Party herein was not a party to the consent order and therefore, being a stranger to the Consent Order, has no basis or interest to challenge or question any terms thereof duly entered into by the Claimants and the Respondents.*
12. *THAT the Respondents have never complained or challenged the Consent Order herein.*
13. *THAT the terms of the Consent Order were entered into by the Parties voluntarily and no one of them has complained about them.*

Setting Aside Consent Order

14. *THAT only a party to a consent order can set it aside and, even then, this can only be done by an action commenced for the said purpose and with specific reasons.*
15. *THAT the application by the Interested Party herein including the facts and matters raised in paragraph 3.2 and 3.3 of the Sworn Statement of the Interested Party, were already adjudicated upon by both the Default Judgment and/or were agreed upon by the Claimant and the Respondents in the Consent Order. Consequently, the said matters are res judicata.*
16. *THAT the application herein is incompetent, frivolous and vexatious as it is not founded on any law or any provision of our rules and thereof ought to be dismissed with costs."*

In his submissions, Counsel Zimba argued that the Consent Order entered into between the Claimant and the Defendant should be struck out because it lacks legal basis. It is expedient that the relevant part of the submissions by the Interested party be quoted in full:

- 3.1.1 *.... a proper reading of the pleadings and the reliefs sought, there was no pleading nor relief that was sought to permanently restrain the respondents from offering the said piece of land to the interested party herein. It therefore means that the same has no legal basis and should not be entertained by this Honourable court.*
- 3.1.2 *The said term in the consent Order is discriminatory in nature as it curtails the interested party's right to ownership of this particular property in the event that the same has been corrected by the City Council and the same is being done without any legal basis as far as the Interested Party is concerned.*
- 3.1.3 *I refer to paragraph 2.2.2. above and state that the said term in the Consent Order is misleading and a misrepresentation of facts and almost implies that the Interested Party herein procured the lease through fraud or dubious means. The*

facts as from the face of the pleadings suggest rightly so that the Interested Party was offered and agreed to purchase the said piece of land from the Respondents and that there was agreement between the Respondents and the Interested Party thereof.

3.1.4 *It is also apparent that after the said sale the Interested Party proceeded to obtain a lease from the Government, as is usually the case, without knowledge of the current proceedings. What the term of the Consent Order entails, therefore, is that the interested party procured the lease via fraud or 'dubious means', however, the same was never proved by neither the Claimant nor Respondent, and that the interested party herein was never invited to be part of such a discussion or settlement.*


3.1.5 *This term of the Consent Order therefore should be struck out on the basis that both the parties never established fraud against the Interested Party herein, especially when the interested party herein was neither consulted nor involved in the making of the Consent Order."*

Counsel Zimba also placed reliance on Order 23, rule 8, of the CPR which states that a person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied.

I have considered the submissions by both parties. To my mind, the first question to consider is whether or not this application has been competently brought. It is commonplace that the Interested Party was a party to this case by his own choice. The application by the Interested Party for permission to be added as a party was filed with the Court on 22nd September 2021 and the application was granted. Having been added as a party, Counsel Majekete appeared before the Court on behalf of the Interested party on 22nd November 2021 during the hearing of an application by the Claimant for the Court to enter a default judgement. Bearing this in mind, I have difficulties in appreciating how Order 23, rule 8, of the CPR supports the case of the Interested Party in this case. The language of rule 8 is clear: it is not meant to benefit persons who are parties to the case. If the Interested Party is aggrieved by the Consent Order, his answer lies in appealing against the said Consent Order.

In light of the foregoing and by reason thereof, the application is wholly misconceived. It is, accordingly, dismissed.

Pronounced in Court this 28th day of March 2022 at Lilongwe in the Republic of Malawi.


Kenyatta Nyirenda

JUDGE