REPUBLIC OF MALAWI
IN THE HIGH COURT IOF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 311 OF 2020
(Before Honourable Justice Nriva)

BETWEEN

MACDONALD MAKANJIRA & OTHERS…..……..……CLAIMANTS

-AND-

MOTA ENGIL ENGENHARIA E CONSTRUCAO AFRICA ……..……..…..1ST DEFENDANT
ATTORNEY GENERAL ……..……..2nd DEFENDANT

CORAM: His Honour, Elijah Blackboard Dazilikwiza Pachalo Daniels,
Kazembe, Counsel for the claimants,
Chagoma, Counsel for the 1st defendant
Kaunde, Counsel for the 2nd defendant,
Mr Mbekeyani, Court Official,

RULING

1. The matter cometh before this Court, for this Court to determine whether a summary judgement should be granted in favour of the claimants. This application was made under Order 12 Rule 23 as read together with Rule 28 of the Courts (High Court) (Civil Procedure) Rules of 2017 (Herein referred as CPR 17). As it were, Counsel for the claimants has passionately invited this Court to the understanding that the defence laid by the defendants is a sham and that they have no prospect of success at trial. This Court understands that the long and short of counsel's submission is that there is a clear contractual obligation, which the first defendant entered into with the 2nd defendant, whose material part, is that the 1st defendant would have to compensate the claimants for doing the developments on their land as their land was and is occupied by the 1st defendant through a lease granted in their favour by the 2nd defendant. Ironically, counsel submits that the 2nd defendant did its own part of the bargain, but that it is now

incumbent upon the 1st defendant to fulfil his obligation in the contract. Clearly, one wonders how then the 2nd defendant is a party to these proceedings. I must admit however that, it is not for this Court to note who should be party or not, because I should refrain from inviting myself to issues that are not contested, suffice to mention that, the argument of counsel for the claimants seems not to take issue with the 2nd defendant.

2. On the contrary, counsel for the 1st defendant ably in my view submitted intently as follows in sum: that the land in issue is not customary land per se and that the land is marked as industrial land. Again, counsel further argued that, counsel for the claimants must not be allowed to rely on documents which were not listed in his claim for that is guilty of breaching Order 5 of the CPR 17. Perhaps it must be announced that, counsel refused to stop cementing his arguments by yet advancing the argument that even if the documents were to be relied on, the contract that counsel for the claimants heavily relies on, is simply a draft contract and that, he says that there are provisions in the said contract which were to the effect that the obligation to pay, shall only suffice only at the signing of the contract.

   This did not happen as counsel submits, that his client, the 1st defendant did not sign the purported agreement. Moreover, counsel invites this Court to understand that their defence is sound in law and also in fact on the simple basis that the contract the claimants relied on is not a contract but rather simply an intention to enter into a contract which was not signed by the 1st and the 2nd defendant. I must say, that on this point counsel for the claimant, in rebuttal did not convince this Court with his response which was that in his exact coughing of words that this was a "*huge deal*" and that nothing would happen without putting pen to paper. Well this Court is no Court of speculation neither would this Court be moved with a good idea of an argument but rather an argument supported by substance. However, I must be quick to mention that several arguments were made by counsel for the claimants and also counsel for the defendants, suffice to says that I have only focused on those that will inform the decision of this Court.

   Be that as it may, the argument of counsel for the 1st defendant, that there is no contract seems to be convincing on the face of it until one cunningly undresses the submission of counsel for the claimants who submitted that if indeed the 1st defendant claims that the contract was not signed but still the parties conducted themselves in a manner that any reasonable mind would note that a binding contract was entered into by the manner through which the parties conducted themselves. To this point, counsel for

the claimants submits that the 2nd defendant, did its part in issuing the lease in favour of the 1st defendant who in his view has failed to compensate the claimants as it were. To this counsel says there cannot be anything to be proved to the contrary so he submits that this Court has to find in his favour and enter summary judgement against the defendants. I must say, that on this issue counsel indeed tempted this Court to side with the fragrance of his reasoning and indeed I agree that a contract can be entered into by conduct. However, this is the very reason the matter must proceed to trial perhaps because one says there is a contract and the other says there is not because for a fact the contract was not signed as it were and one says the parties conducted themselves as though they were in a contract. Thus, whether there was a contract or not seems to be a question of fact and whether if the first question be answered in the positive, there will be another question which is whether the contract was valid in law as it were. In essence, there could be two arguable questions, because counsel for the 1st defendant further argued that they did not do anything and they cannot be said to have done part of the contract on the premise that the 2nd defendant did their part to the supposed contract.

Let me pause a minute and ask myself should we not have this matter resolved for certainty and indeed on merit? I think it should, and I must be quick to warn myself not to not to jump the gun until I finish in summary analysing the issues before me.

3. Needless to say, counsel for the 1st defendant, further advised this Court and indeed invited the Court to understand that even if everything was to be seen as counsel for the claimants wants this Court to believe, counsel for the 1st defendant advised this Court that there is a clear statute which regulates expropriation of land with or without compensation. To this, counsel submitted in essence that, even if the contract was to hold valid, the parties would not agree outside the express provisions of statute law. As it were, counsel cited section 9 of the Land Acquisition and Compensation Act, Chap 58:04 and submitted that it is only the government through the responsible Minister which has the statutory mandate to acquire land with compensation and that such power cannot be delegated or passed on to a private body or indeed any other institution or company. I should admit that I had an encounter with the said section which in material provides as follows:

> "***Subject to the provisions of this Act,*** *where* ***any land is acquired by the Minister under this Act,*** *the Minister* ***shall*** *pay in respect thereof,*

appropriate compensation agreed or determined in accordance with the provisions of this Act." (Emphasis Added)

It is clear from the above provision that the use of the word "*shall*" connotes that it is mandatory and not a question of discretion. Again, it is the through the Minister responsible that land is acquired. I must say, that I need not to address the merits of the 1st defendants submission on this issue, that is whether the 1st defendant is supposed to pay compensation as per the purported contract or not. In fact this issue has to be seen from all angles , because the other question would be whether the defendant should he allowed to use a statute as an instrument of avoiding a contractual obligation or not. That indeed is a question beyond this court and I must refrain from answering it. Perhaps, the fate of this application seems to suffer and early death.

Admittedly, I must say that this argument heavily exercises my mind and that indeed there is in my view a serious question of law that the parties must be allowed to engage in at trial for the determination of the court to the fullest extent possible. Be that as it is, I must announce that I know no other consideration other than denying summary judgement where there is an arguable question of law. This argument I must say, deserves a day at trial because in my view this defence has merit and that the defence raises real and triable issues. On a similar finding, Justice Chinangwa in the case of *Zione Pitala vs Xiang Meng & Another Civil Cause No. 1059 of 2020 (Unreported)* had the following to say:

> "*…the question is does the defendant have a plausible defence? Is there an arguable question of law or a dispute on the facts?"*

As it were, I have already answered these questions in the affirmative and the logical conclusion follows. Suffice to say that, this Court had the opportunity to read the rules and in particular Order 12 Rule 26 of CPR 17 which provides as follows:

> "*The Court shall not enter summary Judgement against a defendant where it is satisfied that there is a relevant dispute between the parties about a fact or an arguable question of law*."

What then? Is this a proper matter for trial? I guess the answer is and should firmly be in the affirmative for the following simple reasons, counsel for the 1st defendant has raised serious issues which in my view do not allow this Court to consider the present application for doing so would be to kill the

possible jurisprudential benefit that those issues would bring if they are to be answered at full trial. Accordingly, I form the view that this matter must be decided on merit. This I say because there is an issue as to whether there is a valid contract either explicitly entered into or indeed entered into by the conduct of the 1st defendant and the 2nd defendant.

4. Again, as already alluded to, counsel for the 1st defendant raises a rather interesting issue which is that even if the contract was to hold, the contract would be *void ab initio* because the power to acquire land from the citizenry and to offer compensation afterwards should not and cannot be delegated. That in my view raises a very serious issue in law, and also in fact considering the fact that, counsel for the 2nd defendant seems to suggest that after doing their part of the bargain, it is the 1st defendant who should be responsible for compensating the claimants as it were.

5. In conclusion, I am satisfied under Order 12 Rule 26 of CPR 17 that there are triable issues and therefore the application to enter summary judgement be and is hereby dismissed.

6. The principle under Order 31 of the CPR 17 remains, costs are in the discretion of the Court and I make not an order on costs in the immediate circumstances. Thus, each party shall cover for their own costs as a consequence of my decision.

7. It is so ordered.

PRONOUNCED in chambers this the 18th day of July, 2022 at the High Court, Principal Registry, Blantyre.

Elijah Blackboard Dazilikwiza Pachalo Daniels

THE ASSISTANT REGISTRAR