



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

REVENUE DIVISION

JUDICIAL REVIEW CASE NUMBER 06 OF 202

BETWEEN:

THE STATE (ON THE APPLICATION OF FDH BANK
PLC)

CLAIMANT

AND

THE COMMISSIONER GENERAL OF MALAWI REVENUE
AUTHORITY

DEFENDANT

CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA

MR. KALEKENI KAPHALE, SC OF COUNSEL FOR THE CLAIMANTS

MR. ANTHONY CHUNGU AND MRS LONESS MICONGWE, OF COUNSEL
FOR THE DEFENDANTS

MR. FELIX KAMCHIPUTU, COURT CLERK

ORDER

1. The Claimant, FDH Bank PLC, brought an application for an interlocutory injunction and for extension of time within which to file an application for judicial review. The application was made without notice to the defendant. Upon perusal of the supporting documents, I ordered that the application be brought with notice to the defendant and I granted an interim injunction pending the hearing of the application. The *inter partes* hearing took place on 19th August 2022. Let me mention that during the hearing, the only application that was heard was the application to extend time within which to apply for judicial review. As a result, I will only refer to arguments in support of that application.

2. The claimant through counsel adopted the sworn statement in support of the application and skeleton arguments. In paragraph 27, the deponent avers that the delay to file an application for permission was occasioned by the desire to seek professional advice on the matter as both parties attempted to resolve the issues outside court.
3. During the hearing of the application, counsel for the claimant submitted that Order 19 rule 20(6) of the Courts (High Court) (Civil Procedure) Rules, 2017 (to be referred herein as Civil Procedure Rules) allows extension of time. Counsel submitted that the first principle to be considered in this application is whether or not the extension will cause prejudice to the defendant and the public. Counsel cited the case of **The State (on the application of Simeon Vitto Ross Lungu) V Senior Chief Malemia, Group Village Headman Mbeta, Paul Sumana and District Commissioner Nsanje**¹. The second principle advanced by counsel is whether or not the extension will be detrimental to good administration of justice. Counsel submitted that the claimant did not sleep on their rights as they engaged the defendant to find an amicable solution to the issues. Counsel submitted that in **The State (on the application of Simeon Vitto Ross Lungu) V Senior Chief Malemia, Group Village Headman Mbeta, Paul Sumana and District Commissioner Nsanje**², the court granted the extension after 5 months. On this same principle, counsel also cited the case of **The State and The Attorney General Exparte Charles Eliazel Banda and William Chamabalanga**³. Counsel submitted that the defendant has to demonstrate hardship or prejudice occasioned by the extension. On this point, counsel cited the case of **Nathaniel Mpinganjira V Malawi Development Corporation**⁴. Counsel submitted that the delay in collecting revenue is not hardship and that the court has in numerous occasions granted injunctions in proceedings of this nature. Counsel cited the case of **Blantyre Print and Packaging V Malawi Revenue Authority**⁵ where the court granted an injunction.
4. The defendant filed a sworn statement in opposition. The deponent Mbepula Likombola, Manager, Tax Disputes and Resolutions, avers in paragraph 3.42 that the discussions between the parties did not stop time from running as the defendant had

¹ Judicial Review Number 11 of 2008

² Supra

³ Miscellaneous Civil Cause Number 65 of 2005

⁴ Miscellaneous Civil Cause Number 63 of 2003

⁵ Revenue Cause Number 15 of 2017

already communicated a decision to the claimant. He avers that discussions do not unmake a decision already made especially where the decision is made under section 125 of the Taxation Act which is a sunset clause. The deponent avers that despite the fact that the decision was made in March 2022, the subject matter arose in 2014 with Malawi Savings Bank (MSB) and that all these processes should have been done within the prescribed period of 6 years.

5. During the hearing of the application, counsel for the defendant submitted that granting an order for extension of time herein will be prejudicial to the defendant as the issues arose in 2014 representing a period of 7 years. Counsel submitted that section 125 of the Taxation Act is an exception to section 98 of the Taxation Act that requires disputes to be filed and resolved before the Special Arbitrator. Counsel stated that section 125 is a sunset clause. Secondly, counsel submitted that section 125 is a provision that ensures that there is no delegation. Counsel cited the case of **Professor Peter Mutharika and Electoral Commission-V-Dr. Saulos Klaus Chilima and Dr. Lazarus Chakwera**⁶ where the court emphasized that where a public body is specifically mentioned as a duty bearer, no delegation will be required in those circumstances. Counsel submitted that there is need to look at substance over form in this matter. He stated that the cause of action relates to bad debts attributed to MSB that arose in 2014 and that section 125 application for reassessment was made in 2021. Counsel submitted that the claimant did not comply with the limitation period of 6 years provided in section 125 of the Taxation Act.
6. Counsel submitted that pursuant to section 54 of the Taxation Act, records are to be kept for a period of 7 years and that pursuant to section 91, the Commissioner General may adjust a tax liability within 6 years. Counsel therefore argues that extending time in these circumstances is prejudicial and that the effect of such an extension will result in opening of floodgates of applications since companies may choose to change ownership in the 6th year. Counsel submitted that pursuant to section 20 of the Constitution, taxpayers are to be treated equally. Counsel stated that extending time herein will create a bad precedent and such an extension will be prejudicial both to tax administration and the public.

⁶ Constitutional Case 1 of 2020

7. Counsel submitted that in tax matters there is strict interpretation of statutes. Counsel cited the cases of **BAT V Ministry of Finance, Malawi Revenue Authority and Attorney General**⁷. Counsel submitted that once we have the law, our duty is not to rewrite the law but to interpret it. He emphasized that section 125 of the Taxation Act is an exception to the general rule and that once the Commissioner General has decided, the matter shall stand closed.
8. Counsel submitted that the matter arose in 2014 and that the losses or bad debts are attributable to MSB. Counsel informed the court that an extract of returns by MSB does not show any losses or bad debts. Counsel submitted that with the limited period in section 91 of the Taxation Act, it will be difficult for the Commissioner General to verify the records. Counsel stated that any losses were to be assessed before 2020. Counsel reiterated that the claimant slept on their rights as they did not make the application within 6 years. On the cases cited by the claimant, counsel submitted that those cases are not related to the present issue as some of them relate to chieftaincy and not tax matters. Hence, he submitted that these cases are distinguishable. In the present case, he submitted that the issue is about reassessment of accounts.
9. On correspondences between the parties, counsel submitted that time was still running and he cited the case of **The State (on the application of Thirsty Juice Company Ltd) V Malawi Revenue Authority**⁸. Counsel submitted that the reassessment was supposed to be done within 6 years from 2014. He submitted that discussions cannot act as an estoppel replacing the dictates of the law. Counsel prayed for dismissal of the present application for lack of merits.
10. In reply, counsel for the defendant submitted that the decision which is the subject matter of the present application is the 22nd March 2022 decision. Secondly, counsel submitted that the issue of time bar was not indicated in the decision for rejection of the prayer. Counsel submitted that the issue of time bar only relates to tax losses which in his opinion is erroneous as will be argued once extension is granted. Counsel submitted that the defendants are not correct to push for a blanket bar as some issues did not arise in 2014 but 2018. On bad debts, the claimant submitted that it is the 2017 bad debts

⁷ Judicial Review Cause Number 11 of 2019

⁸ Judicial Review Cause Number 3 of 2022

that the claimant is seeking reassessment on and the March 2022 decision does not relate to bad debts/losses.

11. Pursuant to section 125(3) of the Taxation Act, counsel submitted that the Commissioner General could have been approached for reassessment in June 2021, 6 years backwards when the MSB was acquired and that the first returns that were filed in 2017 were within the prescribed time.
12. On section 125(3) of the Taxation Act, counsel submitted that these clauses that tend to oust the jurisdiction of the court are unconstitutional. Based on the foregoing, counsel prayed for an order of extension of time within which to file an application to apply for judicial review.

THE LAW AND DISPOSAL OF THE APPLICATION

13. Order 19 rule 20 (6) as read with Order 19 rule 20 (5) Of the Civil Procedure Rules gives power to the court to extend time within which a party is to file an application for judicial review. In **The State and The Attorney General Exparte Charles Eliazel Band and William Chamabalanga**⁹, the court stated as follows:

“...the court has power to extend time for applying for leave to move for judicial review, but only if it considers that there is good reason for doing so. Where an application to extend time is made under r4, notice thereof must be given to the person who will be the respondent to the motion, **CR v Ashford, Kent JJ, exp. Rickey {1955} 1 WLR 562**. The court will consider whether the grant of an extension of time to apply for judicial review will likely cause substantial hardship or prejudice, not only to the instant parties, but to a wider public or may be detrimental to good administration.”

⁹ Supra

14. In the case of **The State V Attorney General Ex Parte Joseph Chimbayo**¹⁰, the court had this to say on extension of time for judicial review:

“The rules of court must be obeyed, and, that in order to justify a court in extending time during which some step in procedure requires to be taken, there must be some material on which court can exercise its discretion. If the law were otherwise, the party in breach would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

15. From the above cited cases, it is clear to me that in considering an application of the present nature, the court has to consider whether or not the granting of the extension will cause any hardship to the other parties and the public and whether it will be detrimental to good administration. See also **The State v Malawi Revenue Authority Ex parte Merman and Others**¹¹, **R v University College of London, ex parte Ursula Riniker**¹², and **R v Dairy Produce Quota Tribunal, ex parte Carswell**¹³. Further, I am of the view that each case has to be decided on its own facts. It is also my view that extending time is in discretion of the court. Further, as was observed in **The State (on the application of Thirsty Juice Company Ltd) V Malawi Revenue Authority**¹⁴, discussions between parties after the impugned decision is made, do not extend time within which one has to file an application for permission to apply for judicial review.

16. Reverting to the present case, I am of the considered view that the extension of time within which to apply for permission for judicial review will not cause any hardship to the parties or the public. I am aware of the submissions raised by the defendant herein pertaining to applicability of section 125 of Taxation Act. I have deliberately avoided delving into such matters at this juncture. I am of the considered view that such matters can as well be raised at a certain point in these proceedings.

17. I am also of view that in these applications, the court has also to consider time taken to file the application for extension. Where time taken is inordinate and inexcusable, definitely, the court will decline the application. Where the application is made within

¹⁰ Miscellaneous Civil Cause Number 32 of 2005

¹¹ Judicial Review Number 44 of 2014 (High Court) (Unreported)

¹² [1995] ALL ER 213, 215

¹³ [1990] 2 AC 738

¹⁴ Supra

a reasonable time after the impugned decision, the court will allow the application. What is reasonable time in these circumstances depends on the facts of the case. Reverting to the present case, the application to extend time was made some days after the expiry of the prescribed time. I am of the considered view that the time taken to file the application is not inordinate or inexcusable.

18. Based on the foregoing, I exercise my discretion to grant the order extending time within which the claimant has to file an application to apply for judicial review. I order that such an application be filed within the next 7 days from today.

19. On costs, I am inclined to award costs to the defendant. I have arrived at this decision bearing in mind that the present application was at the instance of the claimant. Definitely, the costs incurred by the defendant ought to be paid by the claimant. I therefore condemn the defendants to pay costs of the present application.

20. **MADE IN OPEN COURT THIS 24TH DAY OF OCTOBER 2022 AT PRINCIPAL REGISTRY, REVENUE DIVISION, BLANTYRE.**


JOSEPH CHIGONA
JUDGE