REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

FINANCIAL CRIMES DIVISION

JUDICIAL REVIEW CAUSE NO. 01 OF 2023

(Before Hon Justice Kapindu)

BETWEEN

THE STATE (ON APPLICATION OF
XELITE STRIPS LIMITED.....1ST CLAIMANT
ORION INVESTMENTS LIMITED.....2ND CLAIMANT
OCEAN INDUSTRIES LIMITED.....3RD CLAIMANT

– AND –

THE DIRECTOR GENERAL OF
ANTI-CORRUPTION BUREAU.....DEFENDANT

CORAM: HON. JUSTICE R.E. KAPINDU

: Mr. C. Gondwe, of Counsel for the Claimants

: Mr. B. Mandala, of Counsel for the Defendant

: Saukila, Court Clerk/Official Interpreter

RULING

KAPINDU, J

1. This is the Court's decision following a *"with notice hearing"* of an application for permission to apply for judicial review brought by the Claimants herein. The application has been brought under Order 19 rule 20(3) of the Courts (High Court)(Civil Procedure) Rules, 2017 (hereinafter referred to as the CPR, 2017).

2. The brief background to the application is that on 29th November 2022, the Director of the Anti-Corruption Bureau (the Putative Defendant herein) issued the Claimants with Notices to Produce or Furnish Documents in connection with ongoing investigations under the Corrupt Practices Act (Cap. 7: of the Laws of Malawi). Specifically, the notices were issued under section 11(1)(c) of the Corrupt Practices Act. This provision states that:

> *"For the performance of the functions of the Bureau under this Act, the Director may require any person in charge of any office or establishment of the Government, or the head, chairman, manager or chief executive officer of any public body or private body [to] produce or furnish within such time as may be specified by the Bureau, any document or a certified true copy of any document which is in his possession or under his control and which the Bureau considers necessary for the conduct of investigation into any alleged or suspected offence under this Act."*

3. The Notices required the Claimants to provide or furnish the said documents within three working days from the date of service of the respective Notices.

4. The Claimants are aggrieved that the Putative Defendant decided to exercise these statutory powers at that point in time. They have their reasons for feeling so aggrieved and have particularized such reasons as grounds for judicial review under Form 86A of the erstwhile Rules of the Supreme Court, 1965 (RSC), the same still being the applicable prescribed Form for the filing of an application for permission to apply for judicial review in the High Court. See *The State v. Malawi Communications Regulatory Authority, Ex-parte Bisika, (Ex-Parte Bisika)* Judicial Review Case No. 71 of 2017, per Tembo, J.

5. In the application for permission to apply for judicial review herein, the Claimants state, first, that the Putative Defendant's decision requiring them to produce or furnish documents after Putative Defendant already executed a warrant of search and seizure on them more than a year ago, in October 2021, is procedurally unfair.

6. Secondly they argue that the Putative Defendant's decision requiring them to produce documents, some of which were already seized by the Putative Defendant after having executed the abovesaid warrant of search and seizure, is procedurally unfair and unreasonable in the *Wednesbury's* sense.

7. Thirdly, they argue that the Notice to produce documents by the Putative Defendant, after more than a year since the investigations commenced, has been made in bad faith considering that during that period, the Putative Defendant has failed to charge Mr. Zunneth Sattar with any criminal offence.

8. The Claimants also pray, in the event that the Court decides to grant them permission to apply for judicial review, for several interlocutory orders or

directions which I do not find it necessary to particularise at this stage of the decision.

9. The Court wishes to immediately mention, at this juncture, that even though the parties neither raised nor argued the issue of the Court's jurisdiction, after carefully considering the issues, it is the Courts view that for the proper and effectual disposal of this matter, this issue must be addressed. The Court considers that this is even more so considering that this is the first reasoned decision that this Division of the High Court is pronouncing since its establishment and that such being the case, it is essential that certain important matters pertaining to the jurisdiction of the Court be addressed.

10. In this respect, the Court has also considered that the Supreme Court of Appeal has held that the question of jurisdiction can be dealt with by the Court at any stage of the proceedings and that, in any event, time never runs out for a Court, seized of a matter, to pronounce itself on the issue of jurisdiction. See the case of *Hetherwick Mbale v. Hissan Maganga,* MSCA Civil Cause No. 21 of 2013.

11. This Court recalls its remarks in *Re Shepherd Bushiri & Mary Bushiri*, Criminal Review Case No. 11 of 2021, at paragraphs 87-88, where the Court stated that where the issue of jurisdiction relates to the matter of forum:

> *"the scheme of the Courts Act now is that proceedings that are commenced in the wrong Division must be transferred to the appropriate Division. It seems to me that the position therefore is no longer that a proceeding commenced in a wrong Division, say a proceeding commenced in the Civil Division which should appropriately have been commenced in the Commercial*

*Division, should ipso facto be void ab initio. This is so in view of the fact that the decision in the **Mbale case** on this point, and in as far as proceedings in the High Court are concerned, was overtaken by…legislative changes in 2016. The new scheme of the law is that proceedings commenced in the wrong Division ought to be transferred to the right Division either on the Registrar's own motion or upon an application being made to the Court by any of the parties. The issue of transfer of the proceedings would not arise if the proceedings were to be declared void by reason of having been commenced in the wrong forum as was the case pre-2016. This is a point that should therefore be borne in mind when the issue of a matter being litigated in a wrong division of the High Court arises."*

12. The scheme of section 6A(2) of the Courts Act shows that the Court is entitled to decide to transfer a matter to the appropriate Division on its own volition.

13. In the case of *Manyozo v. Mchawa* [1993] 16(1) MLR 288 (HC), addressing the question of the Registrar's jurisdiction, and making affirmative reference to the cases of *Baker v. Oakes (1877) 2 QBD 171 and Re Davidson (1899) 2 QB 103),* it was held that the term *"Court"* refers to the Judge and that, unless the context shows otherwise the words *"the Court"* or *"the High Court"* in an Act of Parliament mean the court sitting in banc, that is a judge or judges in open court.

14. Further, under the CPR, 2017, it is provided that the Registrar exercises the powers of the Court subject to the directions of the Judge. See Order 25 Rule 1. A reading of the entirety of Order 25 of the CPR, 2017 shows that the Judge may, in appropriate cases, exercise all the judicial powers of a Registrar.

15. It follows, therefore, upon considering all these authorities, that this Court is well within its powers to decide, of its own volition, on the issue of jurisdiction. In determining this issue, the starting point is section 6A(1)(f) of the Courts Act (Cap. 3:02 of the Laws of Malawi). Section 6A(1) of the Act provides as follows:

> *"(1) The High Court shall have the following divisions— (a) the Civil Division which shall hear civil matters not provided for under another division of the High Court; (b) the Commercial Division which shall hear any commercial matter (c) the Criminal Division which shall hear criminal matters not provided for under another division of the High Court; (d) the Family and Probate Division which shall hear any family and probate matter; (e) the Revenue Division which shall hear any revenue matter; and* ***(f) the Financial Crimes Division which shall hear any financial crime matter****."*

16. Section 2 of the Courts Act then proceeds to define the term *"financial crime matter."* It states as follows:

> *" "financial crime matter" means a matter requiring a person to answer a criminal matter arising out of a financial crime and includes a matter under— (a) the Financial Crimes Act, including any civil proceeding arising under Part VI thereof; (b) the Corrupt Practices Act; (c) Chapters X, XXXI, XXXII, XXXIII and XLI of the Penal Code; (d) any financial service law as defined under the Financial Service[s] Act; (e) the Public Finance Management Act; (f) the Public Procurement and Disposal of Public Assets Act; (g) the Companies Act; and (h)*

any other written law akin to offences under paragraphs (a) to (g)."

17. This Court has carefully examined the definition of a *"financial crime matter"* under section 2 of the Courts Act as amended in 2022. The Court notes that although this Division is explicitly called the *"Financial Crimes Division"*, thus giving the impression that its primary focus is on criminal matters, Parliament has also conferred the Court with civil jurisdiction. The Court further notes that there was abundant wisdom in the approach taken by the Legislature in this regard, as the Legislature sought to avoid forum confusion among different divisions of the High Court.

18. Confusion would easily result in instances where civil issues arising from, or relating to, or directly connected to financial crime matters which have to be dealt with or are being dealt with by the Financial Crimes Division, were to go to another Division, such as the Civil Division first for determination of certain issues. Examples would include civil matters related to the recovery of tainted property in connection with financial crimes or suspected financial crimes; or where there are financial crimes criminal proceedings and prosecutorial decisions in respect of the same are challenged by way of judicial review. If such civil proceedings, which are intractably connected with matters of financial crimes, were to be dealt with by another Division other than the Financial Crimes Division itself, chaotic case management on the part of the Courts would almost inevitably, result at some point. Parliament had the foresight to seek to avert such scenarios.

19. However, in trying to achieve that objective, the Court reckons that it was not easy for Parliament to couch a provision that would properly define the contours of the jurisdiction of this Court, particularly in civil matters, which would be clearly appreciated by all at first sight. The result

is that Parliament came up with a provision that calls upon the courts to provide more clarity as regards its scope.

20. The question of the jurisdiction of the Financial Crimes Division, in civil matters other than those arising under Part VI of the Financial Crimes Act (Cap. 7:07 of the Laws of Malawi), was recently comprehensively dealt with by my brother Judge, Kenyatta Nyirenda, J in the case of *George Kainja v. Director of Anti-Corruption Bureau and 2 Others*, Judicial Review Cause No. 48 of 2022, (HC, Civil Division, LL). The learned Judge stated, at paragraphs 23-26, that:

> *"The definition of the "financial crime matter" can conveniently be divided into two parts, namely, the chapeau (opening words) and the paragraphs. The chapeau (opening words) also comprise two distinct parts, namely, the "means" part and the "includes" part. According to the "means" part, a "financial crime matter" is one which requires a person to answer a criminal matter arising out of a financial crime. Going by this part only, judicial review would not fall within the mandate of the Financial Crimes Division in that judicial review is not concerned with "requiring a person to answer a criminal matter arising out of a financial crime." Time to turn to the "includes" part of the definition of the "financial crime matter". As already discussed, this part extends the definition of "financial crime matter" to "a matter" under any of the written laws referred to in paragraphs (a) to (h) inclusive. The catchword is "a matter". That Parliament chose to use the indefinite article, that is, "a", in the phrase "and includes a matter" and not the definite article "the" is instructive. I believe the respective meanings of the terms "definite article" and "indefinite article" are as I learnt them during my grammar*

school days in the late 1970s. A definite article (that is, "the") refers to a particular noun that is understood. The audience is aware of the object of reference and no further identification is needed. In contrast, an indefinite article (that is, "a" and "an") refer to a non-specific noun. The object of reference is not clear and further identification would be needed to know the exact object."

21. The learned Judge proceeded to state, at paragraphs 27-29 that:

"In view of the foregoing and by reason thereof, I fully agree with the submissions by the 1st Defendant that the wording of the definition of "financial crime matter", particularly the "includes" part, is meant to leave no doubt that Parliament intends that the Financial Crimes Division should, to the exclusion of the other Divisions, entertain all matters relating to financial crimes be they criminal or civil, including such things as non-conviction based asset recovery forfeiture and judicial review of a decision, action, etc., stemming from a financial crime matter. With regard to judicial review, the Financial Crimes Division will simply be exercising powers or discharging duties that correspond to the supervisory jurisdiction of the High Court over tribunals or those exercising quasi-judicial functions. For the sake of completeness, a word about the paragraphs in the definition of "financial crime matter" might not be out of order. Paragraphs (a) to (h) inclusive fall within the phrase, which is in the latter part of the chapeau (opening words) of the definition, that is, "and includes a matter under ". Any matter under any of the written laws referred to in paragraphs (a) to (h) inclusive qualifies as a financial crime matter. Having regard to the preceding

analysis of the law, and taking into consideration the fact that the substantive case of judicial review has yet to take place, I am compelled to come to the conclusion that the judicial review matter for determination in this case fall[s] squarely within the purview of the Financial Crimes Division, and not the Civil Division or the other Divisions. In the premises, this matter is transferred to the Financial Crimes Division. It is so ordered."

22. This Court fully agrees with the interpretation of my brother Judge in terms of the import of the term *"financial crime matter"* as expressed in paragraphs 23-26 of his decision (above) but has some differences on certain aspects of the latter part of his interpretation, in paragraphs 27-29 thereof.

23. I must, however, pause here to quickly express my deep gratitude to my brother Judge Kenyatta Nyirenda J, for pioneering the interpretive journey in this regard, and in the process providing us with such a lucid and cogently expressed decision on the matter. My disagreement with him on some aspect(s) of his interpretation does not take away the great admiration that I have for his cogency of reasoning and his clarity of expression.

24. The primary rule of statutory interpretation is the literal or plain meaning rule. The import of the rule is that where the words used in a statute are precise and unambiguous, presenting no interpretive problems, the words used in the statutory provision(s) are simply assigned their ordinary and usual (natural) or plain meaning. In the case of *Malawi Revenue Authority v. Azam Transways*, MSCA Civil Appeal No 48 of 2007, the Supreme Court of Appeal stated that:

"The fundamental rule of statutory interpretation is that courts

must endeavor to give effect to the express intention of them that made the statute under consideration. If the words of the statute are in themselves precise and unambiguous no more is necessary than to expand those words in their natural and ordinary sense, the words in themselves in such case declaring the intention of the legislature."

25. However, not so infrequently, statutory interpretive life does not come so easy as to simply call for the literal or plain meaning approach. Circumstances frequently invite the Court to advert to a deeper and more engaging analysis and construction of the words used.

26. In the case of *Gonthi v. Attorney–General* [1995] 2 MLR 592 (HC), Kumange J, at page 597, made a humbling admission, which all of us who engage in the art of statutory interpretation must necessarily make, that *"statutory interpretation is not an easy judicial task."* Indeed, it has been suggested that *"even the clearest piece of writing can give rise to ambiguity or differing feasible interpretations."* (See Lillian Corbin, *"The role of statutory interpretation in law-making through the courts"*, *Legal date Journal*, Volume 19(2), May 2007).

27. It is my considered view that this is a proper case where the Court must adopt a purposive and contextual approach to statutory interpretation, or, to use the rather old school term, *"the mischief rule"* approach. In *Gonthi v. Attorney–General* (above), Kumange J described the broad import of the mischief rule (the purposive approach), stating that *"This rule applies by looking at the type of mischief for which the legislature passed that particular law."*

28. The purposive approach (mischief rule) has been more elaborately explained elsewhere. In the judgment of Lord Tindal in the *Sussex Peerage*

case, (1844) 8 E.R. 1034, the learned Judge stated, at page 1057, that:

> *"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble … and "the mischiefs which [the makers of the Act] intended to redress."*

29. In *Re Canada 3000 Inc.*, *Re Canada 3000 Inc.*, [2006] 1 S.C.R. 865 Binnie, J stated, at paras. 36-37, that:

> *"[T]he issues of interpretation are, as always, closely tied to context. The notion that a statute is to be interpreted in light of the problem it was intended to address is as old at least as the 16th century…"*
> Also See the *Heydon's Case* (1584), 3 Co. Rep. 7a, 76 E.R. 637.

30. Thus, in general, the position is that when we adopt the purposive approach (or the mischief rule), as this Court does in the present matter, the Court takes into account such considerations as the purpose of the statute or provision being interpreted, its context, the consequence of its application, as well as any available extrinsic aids to interpretation. Thus the rule is not merely originalist, but also takes into account the context of the application of the words of the statute.

31. Taking this broad, purposive, contextual and consequentialist approach to statutory interpretation, this Court is of the firm view that the Legislature, in addressing the mischief of lack of a specialized Court to deal with financial crime matters in the country, must have appreciated that whilst it listed a wide spectrum of legislative pieces to which the scope of jurisdiction of the Financial Crimes Division would extend, there were other civil matters arising under those same pieces of legislation which clearly would have to be dealt with by other Divisions of the High Court, such as the Civil Division or the Commercial Division.

32. Thus, for instance, in stating that the jurisdiction of the Financial Crimes Division would include *"a matter under any financial services law as defined under the Financial Services Act",* it does not mean that any matter whatsoever arising under any financial services law as defined under the Financial Services Act (Cap. 44:05 of the Laws of Malawi) would have to come to the Financial Crimes Division for adjudication. I should state here that this is the only aspect to my brother Judge Kenyatta Nyirenda's decision in *George Kainja v. Director of Anti-Corruption Bureau and 2 Others* which I depart from, and this difference is premised on the assumption that this is indeed what my brother Judge really meant. As shown above, my brother Judge took the view that, in terms of the jurisdiction of the Financial Crimes Division:

> *"Any matter under any of the written laws referred to in paragraphs (a) to (h) inclusive qualifies as a financial crime matter."*

33. This Court takes the view that on its face, this passage sounds very broad as it seems to capture any matter falling under the wide array of legislative pieces listed under paragraphs (a) to (h) under the definition of

a financial crime matter in section 2 of the Courts Act. This Court's interpretation is that, apart from the Penal Code in respect of which section 2 of the Courts Act specifies the exact Chapters where the Financial Crimes Division has jurisdiction, the Division may deal with (1) any criminal matter arising out of offences in the laws listed under paragraphs (a) to (h), and (2) any civil matter which civil matter however *arises out of offences* in the laws listed under the abovesaid paragraphs, as provided for under the definition of a *"financial crime matter"* in section 2 of the Courts Act. In other words, the interpretation should not simply be that the Financial Crimes Division may deal with *"any matter, whether civil or criminal"*, arising out of those written laws as that would be overly broad. Considering the context, such an understanding would not represent the meaning that the Legislature intended. Indeed, an examination of the provisions of the generic paragraph (h) shows that the focus of the provision is on matters arising out of *"offences under"* the listed paragraphs.

34. The position of this Court therefore is that whilst indeed the Financial Crimes Division is to deal with both criminal and civil matters arising out of the cluster of laws listed in the definition under section 2 of the Courts Act, the expression *"civil matter"* in this context should be understood rather narrowly as referring to *"any civil matter arising out of offences under paragraphs (a) to (h)"* (above). This interpretation, in this Court's view, purposely avoids an alternative wider interpretation that would entail that the Financial Crimes Division would, for example, deal with civil matters relating to preferences, rights and limitations in respect of shares or dividends and distributions under the Companies Act (Cap. 46:03 of the Laws of Malawi), under the pretext that definitionally, such matters are financial crime matters. The result of such an interpretation or construction would be typically absurd.

35. Thus, using the above example of the Companies Act, which Act is listed under paragraph (g) on the list of statutes referred to earlier, what section 2 of the Courts Act entails is that where offences arise under the Companies Act, any such offences are financial crime matters to be dealt with by the Financial Crimes Division, and if any civil matter arises in connection with such offences, then such a civil matter, including judicial review matters, would qualify as *"a matter"* to be dealt with by the Financial Crimes Division.

36. In the present matter, the issues arising in these civil proceedings clearly arise out of financial crime matters being dealt with by the putative Defendant herein under the Corrupt Practices Act. It follows therefore in the instant case, that this Court, just like it was held by the Court in the *George Kainja v. Director of Anti-Corruption Bureau and 2 Others* case (above), has the requisite jurisdiction to deal with the present matter.

37. Accordingly, the Court proceeds to deal with the application for permission to apply for judicial review herein.

38. The jurisprudence on the judicial review process in Malawi is well settled. The purpose of the requirement that a Claimant must first seek permission to apply for judicial review before lodging the actual judicial review application is basically twofold. First, it aims at eliminating frivolous, vexatious or hopeless applications for judicial review without the need for a substantive judicial review hearing. Secondly, it is meant to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigation at a full judicial review hearing. See *State, Ex Parte Pindani Kamwaza; Traditional Authority Dambe and others* [2007] MLR 378 (HC).

39. The test for granting an order of permission to apply for judicial

review is that the Court must be satisfied that the Claimant has disclosed a case fit for further investigation at a full judicial review hearing. See the cases of *The State and others; Ex Parte Ziliro Qabaniso Chibambo* [2007] MLR 372 (HC), per Chipeta J (as he then was); and *Ansah, Kamanga, Kanyuka, Nyamilandu, P. Kayira, Nkhowani State and another*; *Ex Parte: Clc Forex Bureaux and nine others* [2009] MLR 449 (HC), per Chipeta J (as he then was).

40. For the Court to make an informed decision in this respect, it goes without saying that it is imperative that the Claimants must furnish the Court with sufficient information in respect of the adverse decision(s) against which the judicial review proceedings are sought to be commenced.

41. In the present matter, the Court noticed, with concern, that whilst the Claimants went to lengths seeking to challenge the putative Defendant's decisions in the form of Notices requiring them to produce documents, they did not exhibit copies of such Notices. Not only that, but the Claimants also failed to narrate the content of the purported decisions as expressed in the impugned Notices. In other words, they simply stated that they seek to challenge the decisions in the form of those Notices without showing any proof of the existence of the written decisions that they were referring to, as expressed in the form of the impugned Notices herein.

42. Even when the Court decided that the application for permission to apply for judicial review herein, which is ordinarily dealt with on the papers without notice (ex-parte), was to be heard with notice (inter-partes), this glaring defect in the application was still not cured by the Claimants.

43. During the hearing, I asked Counsel Gondwe whether the Claimants had exhibited any copy of the impugned Notices. At first, he confidently answered in the affirmative but, after going through the documents that the Claimants had filed, he conceded that no such Notice was exhibited to any of the Claimants' filed documents. He, however, invited the Court to note that the Defendant had since exhibited the impugned Notices.

44. The result is that if the Claimants' application were to be taken strictly on its own merits, it would be so defective that this Court would be unable to determine whether indeed there is a case fit for full investigation at a full hearing of judicial review, as the Court would not have been shown, both in form and content, the very written Notices containing the decisions that were the subject of the Claimants' challenge.

45. I however remind myself of the overriding objective of the applicable civil procedure rules, the CPR, 2017, which Under Order 1 rule 5 thereof, is to deal with proceedings justly.

46. Having in mind this overriding objective, I find it appropriate in the circumstances of the present case to pause and consider the fact that notwithstanding the Claimants' evident failure to exhibit copies of the very decisions and Notices which they sought to challenge, the Putative Defendant ended up exhibiting them to their own sworn statement in opposition. It would therefore be unjust for me to ignore documents that the Court has now seen, formally filed before it, and which, on their face, appear to cure the otherwise fatal defect in the Claimants' application.

47. In other words, but for the Putative Defendant's litigation approach of placing all their cards on the table by exhibiting the impugned Notices which the Claimants failed to exhibit in the first place, the Claimants' application for permission to apply for Judicial Review would have been

summarily dismissed on the basis of that they had failed to provide the Court with sufficient information for the Court to make an informed decision. I must add, however, that the Court commends the putative Defendant's *"all cards on the table approach"* which approach seeks to have the matter determined on the true established facts.

48. In the circumstances, it behooves the Court to proceed and consider further the issues raised by the parties in support of and in opposition to the Claimants' application for permission to apply for Judicial Review.

49. The summary of the Claimants' case is that the Putative Defendant's decision to require the Claimants to produce or furnish her office with documents is unreasonable in the *Wednesbury's* sense, and also in bad faith for two reasons.

50. The first reason is that the Putative Defendant has taken too long to investigate the Claimants. A period of over one year has elapsed since the investigations commenced and this period, in the Claimants' view, is too long. According to the Claimants, the whole idea behind the investigations was to prosecute one Mr. Zunneth Sattar, and that a period of over one year is too long for such investigation to continue without having Mr. Sattar charged.

51. Counsel Gondwe for the Claimants argued that this was more so in view of the fact that in March 2022, when applying to renew the Restriction Notice against the Claimants' properties, the Putative Defendant indicated that they had made significant headway with the investigations.

52. The Claimants therefore argue that the Putative Defendant is merely seeking further documents from them because they still want to be seen to be pursuing the investigations into the alleged crimes by Mr. Sattar

when in fact the Putative Defendant really has nothing with which to charge him.

53. In this regard, the Claimants take the view that the demand by the Putative Defendant for them to produce documents has been made in bad baith and is unreasonable in the *Wednesbury's* sense.

54. The second reason, according to the Claimants, is that the Putative Defendant is unjustified in making such a demand having already carried out a search and seizure operation on the Claimants on 5th October, 2021 under a Warrant of the Court. It is the Claimants' contention that some of the documents sought by the Putative Defendant were already seized during that operation, and that it is unreasonable for the Putative Defendant to just make a blanket request for documents without stating what specific documents they are looking for.

55. Thirdly, Counsel Gondwe contended that the Putative Defendant, in the Notices to produce, simply required the Claimants to furnish all documents that they have in their possession or control which are connected to the properties under investigation by the Putative Defendant. Counsel stated, during the hearing, that:

> *"The Defendant, as we have already alluded to, did not specify as to which documents they want produced for the purposes of the investigations, considering that during their search they already seized most of the documents that are alleged to be under investigation.* ***It is like a fishing exercise on the part of the Defendant to just make a blanket request without specifying the description of those documents... If this was in good faith, they should have***

specified the documents that they are looking for and the list of the properties that are still under further investigations. [Court's emphasis]

56. It was therefore Counsel Gondwe's argument that for this reason, the Putative Defendant's decision to issue the Claimants with Notices to Produce or Furnish Documents has been made in bad faith and is unreasonable in the *Wednesbury's* sense.

57. In opposition, Counsel Mandala on behalf of the Putative Defendant, explained that the investigations into the matter are complex as they concern over 84 public officials and also considering the international angle as some of the suspects are outside the country. He stated therefore that considering the scale of the investigation, it was not unreasonable to expect that the investigations would last as long as they have done.

58. On the ground that some of the documents which the Putative Defendant was asking for had already been seized during the 5th October 2021 operation, Counsel Mandala denied the assertion that the documents that they are requesting were already seized by the putative Defendant on that day. He stated that these are documents which were not in possession of the Putative Defendant. These, he stated, were documents seeking to address areas where the Putative Defendant had noted that there was a gap in information in establishing the process that was followed by the Claimants in acquiring the various properties, and hence the Notice to produce or furnish herein.

59. Counsel Mandala refuted the claim that the Notices herein were not specific on what documents or information were to be furnished. Counsel referred the Court to the text of the exhibited Notices and invited the Court to observe that contrary to Counsel Gondwe's assertions, the Notices were

in fact very specific both on the documents or information which the Putative Defendant is seeking, as well as the specific properties to which the notices relate.

60. Counsel concluded by saying that if the Claimants' position is that they do not have the documents that are required in the Notices, they should simply say so.

61. I have considered the facts and issues in the present case. I wish to first deal with the last issue, namely that the Notices lacked specificity, as the issue is very straightforward given the facts on the record.

62. An examination of the impugned Notices to Produce herein clearly shows that contrary to what Counsel Gondwe asserted in his submissions, the Notices were very clear and specific on the documents and information sought, as well as in respect of the specific properties to which they relate.

63. In the Notice to Produce or Furnish Documents directed to the Managing Director of the 1st Claimant, Xelite Strips Ltd, dated 29th November 2022 and Exhibited as SM2(a), the *"Schedule of Documents Required to be Produced"* specifically identifies the Plot numbers of the two properties to which the Notice relates, and clearly indicates that the documents required are *"Application Letter/Form, Offer Letter and Certificate of Lease."* This is the very information which the Claimants' Counsel stated was not provided in the Notices, and hence forming the foundation for the intended judicial review claim herein.

64. Again, in relation to the Notice to Produce or Furnish Documents directed to the Managing Director of the 2nd Claimant, Ocean Investments Limited, dated 29th November, 2022 and Exhibited as SM2(b), the

"Schedule of Documents Required to be Produced" specifically lists the Plot numbers of each of the eighteen (18) properties to which the Notice relates, and states that the documents sought to be produced are (1) a published intention to sell by the previous title holder, transfer of lease documents and certificate of lease for the first ten properties; (2) Application letter/forms, other letters and Certificate of Lease for each of the following four properties; and lastly (3) contact details, including physical address for the Legal Practitioners who prepared the transfer of lease documents for the last four identified properties. Once again, this is exactly the information which the Claimants' Counsel stated was not provided in the impugned Notices, and hence forming the foundation for the intended judicial review claim herein.

65. Finally, in relation to the 3rd Claimant, the Notice to Produce or Furnish Documents to the Managing Director of the 3rd Claimant, Ocean Industries Limited, dated 29th November, 2022 and Exhibited as SM2(c), the *"Schedule of Documents Required to be Produced"* specifically lists the Plot numbers of each of the seven (7) properties to which it relates, and states that the documents sought to be produced are the Transfer of lease, Certificate of lease and published intention to sell. This, again, is precisely the information which the Claimants' Counsel stated was not provided in the impugned Notices, and hence forming the foundation for the intended judicial review claim herein.

66. It clearly follows, therefore, that the contention that that the Notices herein simply imposed a sweeping requirement for the Claimants to furnish all information that they have concerning all the properties connected to the investigation, without specifying the properties in issue and the specific documents sought, is inconsistent with the actual facts and hence untenable. That contention by the Claimants in this regard therefore has no merit, is patently unworthy of any further investigation

at a full judicial review hearing and must be dismissed.

67. The Court proceeded to pause and wonder why the Claimants would have decided to pursue such an unmeritorious and legally unworthy line of argument. The Court, in this respect, is inclined to believe that there was a strategic nexus between this line of argument and the Claimant's failure to exhibit copies of the impugned Notices herein. The Court forms the firm view that the failure by the Claimants to exhibit the Notices or copies thereof was not the result of an inadvertent omission on their part. It appears to have been a calculated attempt to suppress the material fact that the Notices, if exhibited, would clearly show that the Defendant was very clear and specific about the properties concerned and the specific documents or information that was being sought from the Claimants. The Claimants were, as it were, taking their chances with the Court.

68. In the case of *Mundango Nyirenda & CDEDI v. Ministry of Health & 3 Others*, Judicial Review Cause No. 66 of 2021 (HC, LL), the decision of Kenyatta Nyirenda, J, it was held that suppression of material facts deals a fatal blow to an application for permission to apply for judicial review. Thus, on the ground that the Application for Permission to Apply for Judicial Review herein sought to suppress material facts, the application again falls to be dismissed. It does not matter that the putative Defendant proceeded to furnish to the Court the documents which the Claimants purposely failed to furnish.

69. With regard to the argument that some of the documents sought by the Putative Defendant were already seized during the search and seizure operation of 5th October, 2021, the Claimant has made no attempt whatsoever to even give a single example of a document that the Putative Defendant is asking for in the impugned Notices which was already seized

during that operation. The Claimants made the allegation. It is a well settled principle of the law that *"ei qui affirmat, non ei qui negat, incumbit probatio"*, meaning that that the burden of proving a fact lies on the party alleging such fact. In other words, a person who asserts a matter of fact must prove it but the one who denies the allegation need not prove it. In the instant matter, the Claimants asserted the affirmative. They therefore had the burden to prove that allegation. It was not up to the putative Defendant to prove their denial.

70. Further, the Putative Defendant, whilst admitting that they did seize documents during the abovesaid search and seizure operation, and also that they obtained some information from the Ministry responsible for land matters, states that all those documents were duly analyzed and that they still noted that there was an information gap relating to the process of acquisition of the specified properties herein and hence the Notice to Produce or Furnish Information being issued to the Claimants. It is the Putative Defendant's case that all the documents that they are seeking are currently not in their possession.

71. This Court has already found that the Notices issued by the Putative Defendant are very specific on the documents and information sought, as well as on the specific properties concerned. It should therefore have been easy for the Claimants to provide examples of any documents that they claim were already seized from them by the Putative Defendant and show that the Putative Defendant is being abusive of the legal process by asking for the same documents again. They have however failed to provide even a single example of such. They simply state that some of the documents were already seized without giving the Court any clue on what those documents (i.e. some of the documents) are.

72. The information provided is thus wholly insufficient for the Court to

determine that there is a plausible argument here which is worthy of further investigation at a full judicial review hearing.

73. As stated earlier, another ground that the Claimants have raised in challenging the putative Defendant's decisions is that the investigation, having taken more than one year, has taken too long and should not be allowed to continue. The Claimants state that Mr. Zunneth Sattar, who was the main basis for the issuance of the Restriction Notice by the Putative Defendant on the Claimants' properties, should already have been charged by now, and that the fact that he has not yet been charged is a sign that the putative Defendant really has nothing with which to charge Mr. Sattar.

74. I wish to begin by observing that it is rather surprising and indeed curious that the Claimants herein, who are separate legal personalities in their own right, seek to speak on behalf of, and to assert and vindicate the rights of Mr. Zunneth Sattar, who is not before this Court. This Court opines that if Mr. Sattar is of the view that he has good grounds upon which to complain to and argue before the Court that he should no longer be investigated by the putative Defendant, for instance based on the ground that the State has taken too long to charge him with any crime, he surely will be able to speak for himself in that regard.

75. What the Court would have expected the Claimants to focus on was for them to comprehensively outline their own circumstances and state why, in their view, their rights are being prejudiced by reason of the investigations herein continuing after more than one year has elapsed since their commencement. It does not lie in their mouths to be arguing about when, or why, or whether Mr. Zunneth Sattar will be criminally charged by the putative Defendant, or indeed to assert that the putative Defendant has nothing on Mr. Sattar. Otherwise, the Claimants' conduct

might create the impression that perhaps this is a situation of Mr. Sattar himself speaking indirectly from behind the veil of the Claimants' corporate personality.

76. Having said that, I must pause to agree, at this juncture, with the persuasive remarks of Mativo, J in the Kenyan Judicial Review matter of *Republic v. Director of Criminal Investigations & 2 others; Resilient Investments Limited & 3 others (Interested parties)* (Judicial Review Application E037 of 2021) [2022] KEHC 43 (KLR) (4 February 2022), where, at paragraph 25, the learned Judge said:

> *"Investigation of the crime is a solemn duty imposed by law on the police officers. The duty of the investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the courts to record convictions, but to bring out the real unvarnished truth."*

77. The Court has considered that the Claimants' intended judicial review claim, is basically to state that the putative Defendant's investigation should be stopped by this Court at this point on the basis that, according to them, the investigations have lasted too long. As the Court considers that contention, it is also mindful that the Anti-Corruption Bureau's duty, as is the duty of other lawfully constituted investigative agencies, is a solemn to investigate suspected cases within their respective mandates is not only to seek to do whatever they can to secure convictions before the courts, but more importantly to come up with such evidence as would bring out the real unvarnished truth in any given matter. When presenting their cases before the Courts, it is their duty to invite the Court, and indeed the Court's duty, to determine such matters impartially, with regard only to legally relevant facts and the prescriptions of law, in terms of section 9 of the Constitution of the

Republic of Malawi (the Constitution).

78. The Court further adopts, with approval, the reasoning in the above-stated Kenyan case of *Republic v. Director of Criminal Investigations & 2 others; Resilient Investments Limited & 3 others (Interested parties)*, where the Court, at paragraph 30, stated that:

> *"The power to stop or quash police investigations on a suspected offender must be exercised sparingly and with circumspection and in the rarest of rare cases, and the court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the court do not confer an arbitrary jurisdiction on the court to act according to its whims or caprice. The power to quash investigations is immense since it amounts to exonerating a suspect before trial. Such power must be exercised with extreme care and caution. It is a power, which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution."*

79. Thus, in order for this Court to be satisfied that there is an argument and indeed a case fit for further investigation at a full judicial review hearing, the Statement of Grounds for Judicial Review, any verifying sworn statement and accompanying Skeleton Arguments must show that what the putative Defendant has done in the present case by taking just over one year whilst still investigating the matter before charging a suspect is seriously objectionable conduct that falls in the category of the rarest of

rare investigative conduct. The Claimants would have to show that such conduct is so patently absurd that no reasonable person or body would be expected to engage in the same. They would have to show that the putative Defendant's conduct is highly exceptional and that it is demonstrative of abuse of power or abuse of discretion or bad faith.

80. Pausing there, the Court observes that with regard to the temporal argument advanced by the Claimants, namely that the whole investigative process into the conduct of Mr. Sattar, and in turn into the affairs of the Claimants herein, should be curtailed for taking a period of over one year, the Claimants have cited no law that places such a narrow limitation on the temporal horizon of an investigation, especially an investigation of the character described by the Putative Defendant's Counsel.

81. In stating this, the Court is not unmindful, and is indeed keenly aware of the dangers of overly lengthy investigations and how they might occasion a miscarriage or failure of justice in various ways. This certainly includes instances where restraints are placed on the exercise of property rights or on participation in economic activity. Such restraints might, in the current state of the law, include the imposition of Restriction Notices under Section 23 of the Corrupt Practices Act, or Preservation Orders under Section 65 of the Financial Crimes Act, among others. Where investigations take inordinately long, the Court has discretion to grant a number of remedies including discharging such restraints or, as described above, in the rarest of rare cases where there are exceptional circumstances warranting such drastic and extraordinary measure, ordering the curtailment of an investigation.

82. In the instant matter, the proposed blanket limitation cap on the period of investigations, placed at as short a duration as one year for the conclusion of complex investigations on financial (including economic)

crimes by the Claimants herein, has been made without showing the existence of any rare or exceptional circumstances. There is no suggestion, evidenced by clear instances, that the conduct of the putative Defendant herein falls in the category of the rarest of the rare adverse investigative conduct. Placing such an arbitrary cap on the length of investigations would seriously imperil the capacity of the State to investigate complex financial crimes cases ably and competently. What the state investigative agencies should be mindful about however, is that their investigations are carried out in a context where those being investigated also have their own rights in an open and democratic society.

83. The Court holds that instead of placing a non-contextualised blanket cap on the period of investigations, the better view is that, unless there be a specific statutory provision that imposes a specific time cap, all cases must be dealt with on a case-by-case basis in the light of their specific circumstances. In the case of *Viezzer v. Italy* [1991] ECHR 21, 12598/86, The European Court of Human Rights dealt with the question of delay in investigations and stated, at paragraph 17, as follows:

> *"The Court points out that, under its case-law on the subject, the reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case. In this instance the circumstances call for an overall assessment."*

84. In the instant case, the Claimants have not come out to specifically argue why an overall assessment of the circumstances of the matter should lead to the conclusion that a period of just over one year is exceptionally long, and that the length of such investigation falls in the category of the rarest of rare cases of investigative delay.

85. In the Court's analysis of the arguments advanced by the Claimants, there are only two issues that the Claimants have raised in support of the claim of investigative delay. The Court now traverses them herebelow.

86. First, both through Counsel during the with notice hearing and at paragraph 2.5 of the Statement of Grounds for Judicial Review, the Claimants state that considering what Isaac Nkhoma deposed in his affidavit (attached to exhibit CG5 herein), that the investigations herein had by March 2022 made headway, the putative Defendant should by now have charged Mr. Sattar *"who is the main basis for issuing the restriction notices".*

87. Quickly, the Court opines that the reason stated in paragraph 86 above, on its own, can hardly suffice as a ground warranting further investigation of the matter at a full hearing of judicial review. It can hardly be said that simply because the putative Defendant stated that they had made some progress in the investigation as at March, 2022, then by November 2022, the continuation of the investigation has become an exceptionally rare occurrence of investigative delay which should leave the Court with no option but to curtail the same. If there were other issues that the Claimants would have wished for the Court to consider in connection with this argument, then those issues should have been briefly particularized in the grounds.

88. Secondly, in their Skeleton Arguments in support of the application for permission to apply for judicial review, the Claimants have stated, at paragraph 3.3.6.3, that:

> *"The ACB has hampered the Claimants' businesses for close to a year with the restriction notice and documents that they seized but have not come up with any charge against Sattar*

who is the subject of their investigations."

89. However, the Court wishes to point out that both parties did not address the issue of the Restriction Notices at all in their oral representations. The Court is of course mindful that such failure or omission does not mean, per se, that they thereby decided to drop the issue. The Court has also considered that the parties herein adopted all the documents that they filed for use by the Court in arriving at its determination. However, the Court still reckoned that in all likelihood, the failure or glaring omission to address the issue orally was a clear indication that this was not an issue whose further pursuit the parties were passionate about. This is more so considering that in oral argument, the parties indicated that they would adopt the documents and only highlight the most important issues. The Court is further buttressed in this view in the light of the facts as they emerge from the papers filed.

90. In the Statement of Grounds for Judicial Review, the Claimants, at paragraphs 1.7 and 1.8, state that:

> *"1.7…the Defendant on 23rd December 2021 issued a Restriction Notice to the Principal Secretary of Ministry of Lands against any form of dealing with the listed properties registered in the name of companies in which investigations are showing that Sattar has beneficial interest with the aim of preserving evidence on the matter until investigations are completed. 1.8 The Restriction Notice was for three months and will [sic.] therefore expire on 23 March 2022."*

91. The Statement of Grounds for Judicial Review proceed to state, at paragraphs 2.1 -2.2, that: *"2.1 In less than 21 days, the Restriction Notice issued by the Defendant will last 12 months. 2.2. The Restriction Notice has*

now been renewed 3 times."

92. The Court takes judicial notice that section 23(3) of the Corrupt Practices Act provides that:

> *"A notice issued under subsection (1) shall have effect from the time of service and shall continue in force for a period of three months or until cancelled by the Director, whichever is earlier, but may upon expiry be renewed for further periods of three months on application to a magistrate showing cause why the notice should be renewed."*

93. The Court has considered the fact that the Grounds State that the Notice was first issued on 23rd December, 2021, and that it was therefore due for renewal by 23rd March 2022. Further, the Claimants state that the said Restriction Notice has been renewed three (3) times. Effectively, that means that the Restriction Notice was renewed until on or about 23rd December, 2022 as the last date for its validity unless further renewed by order of the Court.

94. No suggestion has been made in the present proceedings, at this stage, that the Restriction Notice has been renewed again since 23rd December 2022. As I said, no party addressed the issue of the continued effect of the Restriction Notice on the Claimants during the with notice hearing herein. The only logical conclusion is that as the Court writes and delivers the present decision, there is no issue regarding the continued effect of a Restriction Notice as argued under paragraph 3.3.6.3 of the Claimants' Skeleton Arguments.

95. In order for a claim of exceptional inordinate delay in the conduct of investigations to be competently made, particularly in Financial Crimes

matters, considering that such a decision is to be made on a case-by-case basis, the party making the claim must bring out important issues that would satisfy the Court that a compelling, exceptional case that fits the description of the rarest of the rare has been made out.

96. Factors to be considered would include the complexity of the matter under investigation or lack thereof, the size (magnitude) of the investigation, any specific issues relating to the conduct of the parties or other authorities involved in the investigative process, the importance of the case both in regard to its public interest character (if any) and to the parties, and whether there were excessively lengthy periods of inactivity attributable to the State, among other plausible considerations. The categories of such considerations cannot be closed.

97. With regard to the issue of complexity, at paragraph 24 of the Sworn Statement in Opposition of Shadreck Mpaso of 25th January, 2023, the deponent, on behalf of the putative Defendant, stated that the matter herein has taken so long due to *"the complex nature of the dealings of the suspects, involving 86 plots of land, over 10 bank accounts, 84 public officers"* and that as such *"the investigations has [sic] taken slightly over 14 months now."*

98. Counsel for the Claimants did not comment at all on the issue of the complexity of the matter in his arguments, both written and oral. Simply making a blanket claim that a period of over one year is too long and therefore prejudicial, without stating the exact circumstantial particulars that render the period inordinately long, does not suffice to provide any prospect that if the matter goes to a full judicial review hearing, a compelling and exceptional case that shows that the existence of very rare adverse decision(s) and conduct by the putative Defendant would probably be established. In other words this points to failure by the Claimants to

establish an arguable case fit for further consideration at a full judicial review hearing.

99. As the Court draws this decision to the end, the Court wishes to make some general comments relating to the nature of the putative Defendant's investigative mandate vis-à-vis the intended judicial review action herein.

100. This Court adopts with approval, the highly persuasive remarks expressed by the Court of Appeal of Kenya in the case of *Commissioner of Police & the Director of Criminal Investigation Department & another v. Kenya commercial Bank Limited and 4 others* [2013] eKLR where the Court of Appeal stated that:

> *"Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged. By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and*

avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri v. Republic [1985] LLR 3090. It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua v. R. [2002] 1EA 205. See also Kuria & 3 Others v. Attorney General [2002] 2KLR 69."

101. The clear import of this passage is that these Courts do have the inherent power to stop clearly abusive investigations by law enforcement agencies, such as the putative Defendant herein, where such investigations are being conducted in a grossly unreasonable fashion, or being conducted in bad faith, with bad motives such as personal score-settling, pure personal vilification or being pursued in a clearly discriminatory manner with no rational justification, among other compelling circumstances. This, however, is the exception. The general rule, as the authorities above amply demonstrate, is that Courts must refrain from stopping investigative processes and must wait for the investigations to be completed and for the suspect to be charged before they may come in with such drastic measures as stopping the legal process

from continuing.

102. In the Namibian Supreme Court decision of *Hailulu v. Director, Anti-corruption Commission and Others* (SA 57 of 2013) [2016] NASC 3 (06 October 2016), the Court stated that:

> *"Although [the] appellant's dismay at the Commission's decision to investigate him is understandable, a court should be slow to interpret s 18 to insert unnecessary hurdles in the path of the Commission when it seeks to commence an investigation into corrupt practices. While an investigation into corrupt practices will often cause inconvenience to the person who is the subject of the investigation, as do criminal investigations, that inconvenience is outweighed by the heightened public interest that requires that investigations into corrupt practices be swiftly and effectively instituted."*

103. In the Kenyan High Court decision of *Thuita Mwangi & 2 others v. Ethics & Anti-Corruption Commission & 3 others* [2013] eKLR, Majanja, J stated, at paragraphs 92-96, that:

> *"92. The petitioners allege that there was inordinate delay in investigating and bringing the charges in the criminal case. The 2nd and 3rd petitioners aver that investigations were completed about May, 2011 when statements from potential witnesses were received and that it was not until 28th February 2013 that the DPP in conjunction with EACC laid charges against them. They contend that by failing to promptly decide to recommend or to decline to recommend their prosecution, the DPP violated the specific requirement that they were entitled to administrative action that was*

expeditious, efficient, lawful, reasonable and procedurally fair.

93. The DPP and EACC on the other hand contend that the matter at hand was one that involved cross-border investigations and complex issues including mutual legal assistance with Japanese authorities and translations.

94. The right to trial without unreasonable delay is one of the components of a fair trial under ***Article 50****. After considering the international jurisprudence on the right to a trial within a reasonable time, the Court of Appeal in* ***Julius Kamau Mbugua v Republic, Criminal Appeal 50 of 2008 [2010] eKLR*** *summarized the principles on the right to a trial within a reasonable time inter alia as follows;*

i. The trial within a reasonable time guarantee is part of international human rights law and although the right may not be textually in identical terms in some countries the right is qualitatively identical.

ii. The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.

iii. The general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obliged to consider all the relevant factors within the context of the whole proceedings.

iv. There is no international norm of "reasonableness". The concept of reasonableness is a value judgment to be considered in particular circumstances of each case

and in the context of domestic legal system and the economic, social and cultural conditions prevailing.

v. The standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable.

vi. The right is to trial without undue delay. It is not a right not to be tried after undue delay except in Scotland and it is not designed to avoid trials on the merits.

95. What is clear from the decision is that what constitutes 'unreasonable delay' is not a matter capable of mathematical definition but one dependent on the facts and circumstances of the particular case. In the present matter, it is common ground that the transaction subject of the criminal matter took place in the year 2009. It is also common ground that the charges were taken to court on the 28th February 2013. The question is, can this be termed as unreasonable delay and hence a violation to the right to fair trial under ***Article 50****.*

96. What is not in dispute is that the matter at hand is complex and involved investigations within and outside jurisdiction. The petitioner's bear the burden of proving that there has been unreasonable delay in charging them to the extent that a fair trial is impaired. I find and hold that they have not satisfied the, "relatively high threshold [that] has to be crossed before the delay can be categorized as unreasonable" [as] propounded in the ***Julius Kamau Mbugua Case (Supra)****."*

104. It will be appreciated that these illuminating passages from Kenyan decisions mirror the reasoning that has been pursued by this Court in the

present matter. It thus fortifies the Court in its conclusions.

105. One other point to highlight is that, just like the Kenyan Court of Appeal held in the ***Julius Kamau Mbugua Case (above)*** in respect of the Republic of Kenya, the right that the Malawian Constitution guarantees is likewise the right to trial within a reasonable time, which clearly entails trial without undue delay. Section 42(2)(f)(i) of the Constitution provides that:

> *"Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right as an accused person, to a fair trial, which shall include the right to public trial before an independent and impartial court of law within a reasonable time after having been charged."*

106. The Malawian Constitution, just like the Kenyan one, does not expressly guarantee *"a right not to be tried after undue investigative delay"*. Of course, as is apparent in the above discussion, even though such a right is not expressly guaranteed by the Constitution, the Court has inherent powers to stop an investigation where the delay, considering all the circumstances of the particular matter, is so excessive and unusual as to amount to an abuse of the legal process. Again, as the authorities demonstrate, the threshold for triggering such judicial intervention is very high. In other words, an investigative delay that would warrant the Court to stop an investigation should be very rare and exceptional.

107. Finally, I must also mention that in arriving at this decision, the Court has also considered the overriding objective of the CPR, 2017 which is to deal with proceedings justly, and which overriding objective under Order 1 Rule 4 of the Rules includes active case management. In this

regard, the decision herein has been made after a with notice hearing involving both parties and bearing in mind the provisions of Order 1 Rule 5(5)(c) of the CPR, 2017 which states that *"Active case management includes deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others."*

108. All in all therefore, having considered the totality of the facts, issues, the law and the circumstances of this matter, I find the application for permission to apply for judicial review herein unsatisfactory. No issues fit for further investigation at a full hearing of judicial review have been raised.

109. The application for permission to apply for judicial review therefore fails and it is dismissed with costs.

Made in Chambers at Lilongwe this 14th Day of February, 2023.

R.E. Kapindu

JUDGE