



REPUBLIC OF MALAWI

JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

JUDICIAL REVIEW CAUSE NO. 28 OF 2019

(Before Honourable Justice J.M. Chirwa)

BETWEEN

THE STATE (on application of Registered Trustees

of) AFRICAN EVANGELICAL CHURCH.....CLAIMANT

-and-

BLANTYRE CITY ASSEMBLY.....1ST DEFENDANT

UNKNOWN DEVELOPER.....2ND DEFENDANT

Coram: Honourable Mr. Justice J. M. Chirwa

Mr. Sitolo, Counsel for the Claimant

Mr. Micheus, Counsel for the 2nd Defendant

Mr. Khan, Counsel for the 2nd Defendant

Doreen Mithi, Official Court Interpreter

RULING

A. Introduction:

This is an application by **Ibrahim Aziz Vindan**, the 2nd Defendant, the Unknown Developer, who incidentally chose to be known, to discharge an order restraining the 2nd Defendant from accessing and developing his piece of land and for an order removing the 2nd Defendant as a party to these proceedings. The application is supported by a sworn statement of the said Defendant and Skeleton Arguments.

The application is opposed by the Claimant and a sworn statement in opposition sworn by **Pastor Allan Alfazema**, the Secretary General of the Claimant and Skeleton Arguments have been filed for the purpose.

B. Background:

By a Notice of Application for leave to apply for Judicial Review taken out on the 17th of June, 2020, the Claimant sought the permission of this Court to apply for Judicial Review of the following decisions: -

- “ (i) *The decision of the Defendant, its employees or agents in re-allocating part of the Applicants piece of land to unknown persons to develop without consulting or seeking prior permission or approval of the Claimant or to give reasons or plausible reasons for the said re-allocation of the Church's piece of land or part thereof is unfair.*
- (ii) *The Defendant's decision to re-allocate substantial part of the Claimant's piece of land to unknown people without giving reasons to the Claimant for seizure of its land which was legally allocated and the Church has already started developing the plot/land based on the approved Development Plan is unlawful.*
- (iii) *That the decision by the Defendant, its employees or agents in re-allocating part of the Claimant's piece of land fully knowing that the whole piece of land belongs to the Claimant is wrongful, illegal and unlawful.*
- (iv) *The Defendant's decision to go ahead to re-allocate part of the Claimant's piece of land to unknown individuals following an informal request the Chief Executive Office of the Defendant had made to the Claimant on 20th February, 2019 to surrender part of the land to the Defendant and subsequent response by the Church to consult its congregants as part of consultation before providing feedback to the*

Defendant on the feasibility of the request, the Defendant has gone ahead to unilaterally re-allocating the Claimant's land offends the principles of natural justice, namely the right to be informed of the reasons for the action being taken.

- (v) That the decision by the Defendant through its Chief Executive Officer in or around April, 2019 refusing to meet with the Claimant to provide feedback on the request made to surrender part of the Plot and the decision by the Defendant to go ahead to start re-allocating the same piece of land to unknown people is not only unfair but shows lack of good faith."*

The reliefs sought by the Claimant are as follows:

- " (a) A declaration that the Defendant's decision to re-allocate the Claimant's piece of land to unknown people when fully aware that the piece of land in question belongs to the Claimant is wrongful, unlawful and illegal.*
- (b) A declaration that the decision by the Defendant, its employees or agents to sub-divide the Claimant's land and re-allocate the same to unknown people without waiting to get feedback from the Claimant is unreasonable and it shows lack of good faith.*
- (c) An order directing the Defendant, its employees or agents to surrender to the Claimant building equipment, materials and tools which it confiscated on 17th May, 2019.*
- (d) An order directing the Defendant, its employees or agents to stop harassing Claimant's employees or agents on the said Plot or piece of land.*
- (e) If leave to apply for judicial review is granted, a direction that such grant should operate as an injunction restraining the Defendant, its employees or agents from sub-dividing the Claimant's piece of land, harassing the Claimant's employees or agents and from trespassing unto the Claimant's land and, the developer who has been granted part of the Claimant's land should stop developing the land.*

(f) An order directing the Defendant to pay costs of these proceedings.”

When the application came before this Court, this Court, on the 24th June, 2019 granted the leave sought and also ordered a stay of the decisions complained of pending the determination of these proceedings or further order of this Court.

Aggrieved by the said Order, the 2nd Defendant has decided to make himself known, as aforesaid, has made this application.

C. The position of the parties to this application: -

First, the position of the 2nd Defendant.

It is the case of the 2nd Defendant that he is a leaseholder of the piece of land in dispute under a lease dated the 16th of May, 2019 made between Blantyre City Council (the 1st Defendant) and himself registered on the 28th of May, 2019 as Application No. 893/2019 (Exhibit “1B2 (a). “A certificate of Lease dated the 28th of May, 2019 certifying that the 2nd Defendant is the registered owner of **Tittle Number Blantyre City Mzedi 23/135** has also been exhibited as “1B2(b).”

It is in the premises, the contention of the 2nd Defendant that as a leaseholder of the said piece of land, the Claimant has no right or interest over the said piece of land. It is the further contention of the 2nd Defendant that the order restraining him from accessing and developing the said piece of land was wrongly granted.

It is further the case of the 2nd Defendant that the Claimant did not disclose very crucial material facts to this Court when making the application. The material facts alleged to have been suppressed are as follows:

- (a) that the 2nd Defendant is the bona fide purchaser of the said piece of land having procured the same from the 1st Defendant without notice that the same was encumbered. Further, that there was no way of him knowing that the said piece of land purportedly belonged to the Claimant as the same was offered to him by the 1st Defendant, the owner of the said piece of land.*
- (b) that the title to the said piece of land had already been transferred to him by the 1st Defendant and that he is a leaseholder of the same.*
- (c) that as a leaseholder of the said piece of land he is therefore, not a trespasser thereon.*

It is still further the case of the 2nd Defendant that he has been wrongly cited as a party to these proceedings on the following grounds:

- (a) *Judicial Review proceedings are only concerned with reviewing decisions made by a public authority. And that being a private citizen and further since he has not made any decision that has affected the Claimant's rights over the said piece of land, which belongs to him, his decision cannot be reviewed.*
- (b) *that he is a leaseholder of the said piece of land, and can thus not be restrained from developing his own piece of land.*
- (c) *that he has no powers to sub-divide or to relocate the Claimant's piece of land.*

It is, in the premises, the prayer of the 2nd Defendant that an order restraining him from accessing and developing the said piece of land be discharged and further that he should be removed as a party to these proceedings.

The 2nd Defendant has also prayed for the costs of this application.

And secondly, the position of the Claimant.

It is the case of the Claimant that it was allocated the said piece of land on the 14th of May, 2002 by the 1st Defendant and that following the said allocation it paid the relevant fees. The Claimant has exhibited the following documents (i) the offer letter from the 1st Defendant to the Claimant (Exhibit "AA1"), the receipts for the fees paid (Exhibits "AA2", "AA3" and "AA4"). The Claimant has further exhibited a sketch map for **Plot No. MZ 16/62/3, Mpingwe, Blantyre** as Exhibit "AA5" which, it contends, is the subject matter of these proceedings.

It is the further case of the Claimant that since it was allocated the said piece of land it has been responsible for the payment of the ground rentals therefor. The Claimant has exhibited Exhibit "AA6" a copy of the receipt for the ground rentals.

It is thus the contention of the Claimant that the 1st Defendant dubiously allocated part of its land to the 2nd Defendant in or around February, 2019 when the Claimant was approached by the 1st Defendant to surrender part of its land for what the 1st Defendant called "pressure from some quarters," a request which was not accepted by the Claimant. It is still further the contention of the Claimant that the allocation of the said piece of land by the 1st Defendant to the 2nd Defendant was illegal and borders on corruption, hence the 2nd Defendant can not claim to have been duly allocated the said piece of land.

It is, still further the contention of the Claimant that an illegal and corrupt transaction can not entitled the 2nd Defendant legal status and peaceful enjoyment of the said piece of land at the expense of the Claimant as the rightful owner of the said piece of land.

It is still further the contention of the Claimant that a beneficiary of an illegal allocation of the said piece of land by the 1st Defendant, the 2nd Defendant was thus not wrongly cited as a party to these proceedings. It is still further the contention of the Claimant that if the 2nd Defendant is discharged or removed as a party to these proceedings then the 2nd Defendant will proceed to develop the said piece of land which is the subject of these proceedings and that these proceedings would, consequently, be rendered nugatory and purely an academic exercise.

It is, in the premises, the prayer of the Claimant that the application by the 2nd Defendant should be dismissed with costs for being misconceived.

D. Issues for Determination:

- (1) Whether or not there is an order on the Court Record restraining the 2nd Defendant from accessing and developing his piece of land which can be discharged as per the application before this Court.
- (2) Whether or not the 2nd Defendant should be discharged from being a party to these proceedings.

E. Determination

- (1) **Whether or not there is an order on the Court Record restraining the 2nd Defendant from accessing and developing his land which can be discharged.**

An examination of the Court record in these proceedings will show that the orders granted by this Court on the 24th of June, 2019 were (a) for leave (or permission) to apply for judicial review and (b) for the stay of the decisions, allegedly, made by the 1st Defendant. There was no order made by this Court restraining the 2nd Defendant from accessing and developing any piece of land.

In the premise, this Court is constrained to grant the 2nd Defendant's prayer since there was no order restraining the 2nd Defendant from accessing and developing his piece of land, made by this Court which can be discharged. As a court of law, this Court cannot discharge what it has not granted. It is the view of this Court that since

the order of stay made herein is against the 1st Defendant as the alleged maker of the decisions complained of, it is thus only the 1st Defendant which can make an application to have the same discharged.

In the premises, this Court finds no merit in the 2nd Defendant's prayer. It is misconceived.

(2) **Whether or not the 2nd Defendant should be discharged from being a party to these proceedings.**

This Court is mindful that the present proceedings are judicial review proceedings. Order 19 Rule 20 (1) of the Courts (High Court) (Civil Procedure) Rules 2017 ("the CPR") which deals with judicial review provides as follows:

- " (1) *Judicial review shall cover the review of—*
- (a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or*
 - (b) a decision, action or failure to act in relation to the exercise of a public function in order to determine;*
 - (i) its lawfulness;*
 - (ii) its procedural fairness;*
 - (iii) its justification of the reasons provided, if any; or*
 - (iv) bad faith, if any,*
- where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened."*

It should be evident from the wording of Rule 19(1) of Order 20 of the CPR, above-quoted, that the judicial review is concerned with the reviewing of the decisions of the Government or a public officer. The case authorities also abound on the subject matter. For instance, **In the matter of Ministry of Finance ex-parte SGS Malawi Limited**, Miscellaneous Civil Application No.40 of 2003 (unreported), cited by the 2nd Defendant, the court had this to say;

"Judicial review reviews decisions of persons exercising power in the public arena. Judicial review only operates in the context of the rights in public law remedy. It never protects private rights using this public remedy. Mechanisms to enforce private rights abundantly abound in our legal system. Judicial review, however, avails to enforce private rights involving decisions with a

public element or statutory underpinning. To avoid inundation and ensure confirmation of good public administration, commencing judicial review proceedings is only with the leave of the court. This screening mechanism screens deserving cases. Consequently, a party seeking leave must make a frank and full disclosure of material matters on the facts and law and must have an arguable case. Leave will be refused or, if granted, set aside if the Applicant does not, at the leave stage, make a full and frank disclosure of matters material on the law and facts justifying the application.

In the present proceedings, while the 1st Defendant is a public body, the 2nd Defendant is not a public body, neither does he, perform public functions. In the premises, judicial review proceedings cannot be maintained against him.

Order 6 Rule 8 of the CPR, correctly, in this Court's view, cited by the 2nd Defendant provides as follows:

" 8. The court may, on an application by a party, order that a party in a proceeding is no longer a party where-

- (a) the person's presence is not necessary to enable the court to make a decision fairly and effectively in the proceedings; or*
- (b) there is no good and sufficient reason for the person to continue being a party."*

Now, given that judicial review proceedings are concerned with the reviewing of the actions or decisions of a public body or public officer, and the 2nd Defendant not being such a body or officer, is there any good or sufficient reason or cause for him to continue being a party to these proceedings? Further, would the determination of the decisions complained of require the presence of the 2nd Defendant as a party to these proceedings? This Court prefers to answer the foregoing questions in the negative.

F. Conclusion

From the findings made above, this Court now proceeds to make the following orders:

- (a) that the 2nd Defendant's application to discharge an order restraining him from accessing and developing his piece of land be and is hereby dismissed on grounds that it is misconceived.
- (b) that the 2nd Defendant do cease from being a party to these proceedings on the grounds that he has been wrongly added as a party hereto.

The present proceedings shall thus proceed only against the 1st Defendant as a public body. It is so ordered.

G. Costs:

The costs of any proceedings are in the discretion of the Court (see Order 21 Rule (3) of the CPR. This Court having dismissed part of the 2nd Defendant's application now proceeds to exercise its discretion on costs by ordering that each party should bear its own costs.

Dated this^{18th}.....day of.....^{September}.....2020.


CHIRWA J
JUDGE