IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

MISCELLANEOUS CIVIL APPEAL NO. 14 OF 2022

BETWEEN

ZUNETH ABDUL RASHID SATTAR..... APPELLANT

AND

THE REPUBLIC (STATE)..... RESPONDENT

CORAM: JUSTICE WILLIAM YAKUWAWA MSISKA

: Mr. M.G. Chipeta, of Counsel, for the Appellant

: Mr. I. Saidi and Mr. B. Mandala, of Counsel for the Respondent

: Ms. Deborah Mtaya, Court Reporter

: Mr. F. Dzikanyanga, Official Interpreter

JUDGMENT

Introduction

[1] The Appellant brought this matter to this Court as an appeal against the decision of the Senior Resident Magistrate court to renew a restriction notice. Following the hearing of the appeal, this is the reasoned judgment of the Court.

Background

[2] The facts as gathered from the court record are that the Anti-Corruption Bureau (the Respondent/State) is an institution established under the Corrupt Practices Act, Cap. 7:04 of the Laws of Malawi with the mandate to investigate, prosecute and prevent corruption. The Respondent received information to the effect that the Appellant and his agent were bribing public officials to enable the Appellant secure contracts with government agencies for the supply of goods.

[3] Following the receipt of that information, the Director of the Respondent acting pursuant to section 11 of the Corrupt Practices Act, authorized that investigations into the matter be undertaken. As an aid to the investigations, the Respondent obtained a warrant of search and seizure which was executed on 5th October, 2021 and a lot of documentation relating to the businesses operations and properties of the Appellant were seized.

[4] Due to the nature and extent of the investigations, the Director of the Respondent acting in accordance with the provisions of section 23 (1) of the Corrupt Practices Act, issued a restriction notice addressed to the Principal Secretary for Lands against any form of dealing with the listed properties registered in the names of companies in which investigations have revealed that the Appellant has beneficial interest. The aim was to preserve evidence on the matter until investigations were completed. The restriction notice was issued on 23rd December, 2021 and to be valid for three months. It was to expire on 23rd March, 2022.

[5] On 8th March, 2022, the Respondent filed an application with lower court for the renewal of the restriction notice. The renewal of the restriction notice was sought on the basis of the expansive nature of the investigation which so far revealed, among other things, that the Appellant had beneficial interests in a number of companies that included Malachite FZE, Xavier Limited, Ocean Industries Limited, Xelite Strips Limited, ARS Holdings, AR Sattar, Orion Investments Limited, Imperial Car Sales Limited and Crystal Beverages Limited. Some of these companies are believed to have been involved in alleged corrupt procurement agreements.

[6] The investigations also showed that there are some properties that the Appellant had registered in the names of his wife and those of his relatives and close associates.

[7] The Respondent made an application for renewal of the restriction notice in compliance with the provisions of section 23 (3) of the Corrupt Practices Act. Section 23(3) reads as follows—

"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"

[8] In the lower court, the Appellant opposed the application for the renewal of the restriction notice through the affidavit (sworn statement) made by counsel for the Appellant. The matter was heard on 21st March, 2022. During the hearing, the deponent to the sworn statement in support of the application for renewal was also cross-examined by the Appellant.

[9] Following the conclusion of the hearing, the lower court decided to renew the restriction notice for a further period of three months.

[10] Dissatisfied with the decision of the lower court to renew the restriction notice for a further period of three months, the Appellant lodged an appeal with this Court against the whole decision based on three grounds as contained in the Memorandum of Appeal. These grounds are reproduced verbatim and are as follows—

a) *The lower court erred in law and fact by ordering renewal of Restriction Notice when there was no evidence or sufficient evidence to show cause why the Notice be renewed.*
b) *The lower court erred in law by finding that it would have posed a risk to investigations and risk of hearing evidence if the State showed relevant documents to support the application for renewal of Notice, when such risk not pleaded or raised by the State or any party to the proceedings.*
c) *The totality of the lower Court's Ruling is a wrong decision in law and has occasioned miscarriage of justice.*

[11] Both parties filed with the Court their respective skeleton arguments which were on the date set down for hearing of the appeal augmented by oral submissions.

Notice of Preliminary Issue

[12] It is imperative at this point to state that a day before the date of hearing of the appeal, the Respondent filed in Court a notice of preliminary issue which was to the effect that the appeal be discontinued/ dismissed for being academic or moot for the reason that the restriction notice that was renewed on 23rd March, 2022, the subject of the appeal was no longer in force as it had expired on 23rd June, 2022.

[13] The notice of preliminary issue was served on the Appellant on the date of hearing of the appeal. Ordinarily, and as a matter of procedure, the hearing of the appeal would have been adjourned to allow the Appellant enough time to prepare and adequately respond to the preliminary issue as raised by the Respondent. However, it was not to be, as the Appellant was ready and willing to proceed with hearing of both the notice of preliminary issue and the appeal.

[14] The Court, then, directed that it should first be addressed on the preliminary issue and then on the appeal as a substantive matter. In his submission on the preliminary issue, counsel for the Respondent argued that the appeal should be dismissed because the subject matter or the basis of the appeal no longer exists. The restriction notice as renewed on 23rd March, 2022 had a lifespan of three months which expired on 23rd June, 2022.

[15] It was the further argument of counsel that whichever way the decision goes, the pronouncement of this Court will have no effect owing to the lapse of the restriction notice. For that reason, the decision of this Court will be a mere legal opinion and the whole appeal process will be moot or academic. In support of this proposition, Counsel cited the case of ***Maziko Sauti Phiri v Privatisation Commission & Another Constitutional Cause 13 of 2005*** in which the court said—

> *"...secondly it is not in the courts to give gratuitous legal opinions. This, we think is for practitioners to do. Practitioners must not and should not therefore be encouraged to come to court to seek opinions which they will then pass on to their clients. Thirdly, and following on the foregoing we think we must also emphasise the point that the courts should be allowed to decide real disputes/issues."*

The views in the above quotation were also expressed in the case of ***James Phiri v Bakili Muluzi &Another Constitutional Cause No.1 of 2008.*** In conclusion, it was therefore submitted that the appeal should be dismissed with costs.

[16] In response, counsel for the Appellant submitted that the preliminary issue is misconceived in that the appeal is against the whole decision of the lower court that culminated in the renewal of the restriction notice and not the restriction notice. According to counsel, the ruling or judgment of the lower court does not have an expiry date. There are still outstanding issues requiring the resolution of this Court. For that reason, it was the further submission of counsel that to argue that the appeal is academic is not correct.

[17] It was also the submission by counsel that it is not entirely correct to push the blame on the Appellant with regard to the delay occasioned in hearing the appeal. In any event the date for hearing of the appeal was set by the Court. That date fell outside the lifespan of the restriction notice. It is therefore no fault of the Appellant. The Court was urged to dismiss the preliminary objection and proceed with the hearing of the appeal.

[18] This Court has considered the gist of both arguments in support as well as against the preliminary issue. This Court agrees with the Appellant. What is in issue is the decision of the lower court: whether or not the lower court was correct to renew the restriction notice. The appeal is questioning the propriety of the renewal of the restriction notice. It is about the interpretation of the provisions of the law in light of the relevant facts. That is a live issue requiring resolution by this Court. This appeal is also about rights. It would, therefore, not qualify to be moot or academic.

[19] There is also a further incidental reason why the appeal herein does not qualify being described as moot or academic. Being an area of law in this jurisdiction in which jurisprudence is still developing, it is imperative, save in the clearest type of case where it may be ideal to terminate an appeal for being moot or academic, a court seized of the matter such as the present appeal should always express itself through a reasoned judgment after a hearing of the substantive appeal. Such an approach is an avenue for clarifying the law

[20] A careful and circumspect reading of the case of ***James Phiri v Bakili Muluzi and Another (supra)*** leaves this Court with no doubt that it is distinguishable from the present case. In this appeal, there is a legal and legitimate dispute stemming from the interpretation of section 23(3) of the Corrupt Practices Act by the lower court which this Court is required to determine.

[21] What follows is that the preliminary issue to have the appeal dismissed for being an academic and moot exercise fails.

Submissions on the Substantive Issues on Appeal

[22] Coming back to the appeal, it should be acknowledged that on the hearing of civil appeals, this Court has, under section 22 of the Courts Act, the following powers—

"In a civil appeal, the High Court shall have power—

a) to dismiss the appeal;

b) *to reverse a judgment upon a preliminary point and, on such reversal, to remit the case to the subordinate court against whose judgment the appeal is made, with directions to proceed to determine the case on merits;*

c) *to resettle issues and finally to determine a case, notwithstanding that the judgment of the subordinate court against which the appeal is made has proceeded wholly on some ground other than that on which the High Court proceeds;*

d) *to call additional evidence or to direct the subordinate court against whose judgment the appeal is made, or any other subordinate court, to take additional evidence;*

e) *to make any proper amendment or any consequential or incidental order that may be just and proper;*

f) *to confirm, reverse or vary the judgment against which the appeal is made;*

g) *to order that a judgment shall be set aside and a new trial be had; and to make any such order as to costs in the High Court and in the subordinate court as may be just."*

[23] Appeals to this Court are by way of rehearing. That means this Court will subject the evidence before the lower court to a fresh scrutiny. Put in another way, this Court will evaluate the whole evidence anew. Of course, this Court is always mindful that when sitting as an appellate Court it should never lose sight of the fact that the lower court had the advantage of determining the credibility and demeanour of the witness first hand. One among the many authorities on this point is ***Peter Lengani v Franscico Yonasi, Civil Appeal No. 5 of 2021 (HC) (PR) (Unreported).***

[24] With regard to the first ground of appeal, which is that the lower court erred both in law and fact to order a renewal of the restriction notice when there was no evidence or insufficient evidence to show cause why the restriction notice be renewed, the Appellant observed and argued that in its application for renewal the Respondent only made wholesale or blanket assertions in support of the application. The assertions were not supported by requisite documents to show or prove the essence of their content.

[25] It was also the argument by the Appellant that the deponent to the sworn statement of the Respondent, in cross-examination, conceded failure to show among other things: (a) documentation of the oral information alleging corruption against the Appellant; (b) documentation relating to the business operations of the Appellant and relating to properties believed to be connected to him; (c) to the court registration certificates or documents for the companies or entities mentioned in the affidavit; (d) any documents to prove that the Appellant has beneficial interest in the companies or entities; (e) any document to prove that the properties alleged therein were registered in the name of the Appellant; (f) any document concerning alleged procurement contracts; (g) any document to prove that a lot of properties in Malawi were registered in the names of the companies in issue; (h) any document how the properties in issue were acquired, when they were acquired and who are the beneficiaries; and (i) any registration documents of the property.

[26] The deponent also conceded that, to date, the Anti-Corruption Bureau has not submitted to the office of the Director of Public Prosecutions the documents that were requested by that office.

[27] It was the submission of the Appellant that in order to show cause, the law requires good reasons or evidence establishing a *prima facie* case and that a mere conjectural or fishing case is insufficient. It was the further argument of the Appellant that it is trite law that the phrase "showing cause" or "cause shewn" when used in statute requires evidence that establishes a *prima facie* case. The case of ***Re Mercantile Finance &Agency Co. Limited (1895) 13 NZLR, 472*** was cited as authority.

[28] In response, counsel for the Respondent supported the decision of the lower court by submitting that it was not wrong in renewing the restriction notice. He contended that the requirement for renewal of a restriction notice under section 23 (3) of the Corrupt Practices Act is for the Respondent to "show cause". According to counsel, "showing cause" entails providing a reasonable explanation or justification. "Showing cause" does not only mean production of documents.

[29] It was further argued that the lower court was satisfied with the reason for seeking a renewal of the restriction notice which was that the ongoing investigations have taken an international dimension because most of companies being investigated were registered outside the jurisdiction. Similarly, payments for the contracts

awarded to these companies were also being paid through banks outside the jurisdiction. Therefore, investigations of this nature will invariable require time, hence the renewal of the restriction notice.

[30] Based on the submissions from both parties, this Court has observed that the main issue in the resolution of the first ground of appeal is the meaning of the phrase "show cause". From the understanding of this Court, "to show cause" is to present to the court such reasons and considerations as one has to offer why a particular course of action should or should not be taken. To "show cause", is in the view of this Court, an instance where the law allocates to a party the onus to move the court but no proof is required. Neither guilt nor innocence is in question and the law allows the court to reach a decision based on information that is credible and trustworthy but, otherwise, not strictly admissible. ***See The Queen v Peter Anoussis 2008 QCCQ 8100, available on Canadian Legal Information Institute***

[31] Where a party is required to "show cause" at a hearing for renewal of the restriction notice, this Court finds that it is not a burden of proof in the ordinary sense that requires the party to establish the existence of a fact to a *prima facie* case, balance of probabilities or beyond reasonable doubt. It is not an obligation to prove a fact. It is enough that the party who bears the onus has an obligation to justify a proposed disposition having regard to the objectives of the law and the relevant facts of the case. The party must be able to give a cogent reason why renewal of the restriction notice is required.

[32] This Court is, therefore, of the view that at a hearing for renewal of a restriction notice, it is appropriate to speak of a standard of sufficient information to justify a reasonable belief that the renewal is required to secure the aims of the law.

[33] The Court having found that to "show cause" does not require a party or indeed the Respondent to establish the existence of a *prima facie* case, failure on the part of the Respondent to show to the court: (a) documentation of the oral information alleging corruption against the Appellant; (b) documentation relating to the business operations of the Appellant and relating to properties believed to be connected to him; (c) to the court registration certificates or documents for the companies or entities mentioned in the sworn statement; (d) any documents to prove that the Appellant has beneficial interest in the companies or entities; (e) any document to prove that the properties alleged therein were registered in the name of the Appellant;

(f) any document concerning alleged procurement contracts; (g) any document to prove that a lot of properties in Malawi were registered in the names of the companies in issue; (h) any document how the properties in issue were acquired, when they were acquired and who are the beneficiaries; and (i) any registration documents of the property, would not, as the law stands and in the circumstances of this case be a ground for a court to decline renewal of the restriction notice.

[34] From the foregoing, this Court is unable to agree with the submission of the Appellant that the Respondent did not establish a *prima facie* case to warrant a renewal of the restriction notice by the lower court. The case of ***Re Mercantile Finance &Agency Co. Limited (1895) 13 NZLR, 472*** relied upon by the Appellant is distinguishable from the present one. In that case, under consideration by the court was an application for the removal of a liquidator based on certain charges with regard to performance of his duties. It was the requirement under the relevant law that ***"due cause"*** be shown to have a liquidator removed. It is the understanding of this Court that the phrase "due cause" connotes failure to do something or the commission of a transgression which requires a concerned individual to exculpate himself from the consequences. The reason must be justifiable to avoid sanctions. That would invariably call for the establishment of a *prima facie* case. That is not the case in the present matter.

[35] The first ground of appeal therefore fails. The Respondent is only required to give cogent reasons why the restriction notice should be renewed. This Court agrees with the submission of the Respondent that the expansive nature and the international dimension the investigation had taken was cogent reason that necessitated the grant of the renewal.

[36] On the second ground of appeal, that the lower court erred in law by finding that it would have posed a risk to investigations and risk of hearing evidence if the State showed relevant documents to support the application for renewal of notice, when such risk was not pleaded or raised by the State or any party to the proceedings, counsel for the Appellant submitted that it is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon specific matters which the parties have raised by their pleadings. In other words, a court cannot introduce a new matter and base its judgment on it. The court is bound by the pleadings. In support of this proposition of law, the Appellant cited the cases of ***Fred Nseula v Attorney General MSCA Civil Appeal No. 18 of 1996 (unreported);***

Gunde v Msiska 2 ALR Mal. 465; and General Simwaka v Attorney General MSCA Civil Appeal No. 6 of 2001(unreported)

[37] It was further submitted that the lower court gravely erred in justifying the failure by the Respondent to show relevant documentation in support of the application by raising risk as a ground to placate such failure when the Respondent never pleaded such risk.

[38] Lastly, on this ground, it was the submission of counsel that a reasonable and fair-minded person would strongly be tempted to believe and conclude in such circumstances that the lower court was plainly biased in favour of the Respondent and not impartial.

[39] For the record, this Court has observed that neither the skeleton arguments nor the oral submissions of the Respondent addressed the second ground of appeal. The Court has refrained from going into speculations. Suffice to state that the basis for the second ground of appeal is paragraph 16 of the transcript of the Ruling of the lower court which is quoted in full below and reads as follows—

> *"The state could have done better by attaching documents. But then, it would also pose a risk to the foregoing investigations, and a risk of hearing the evidence when that stage has not been reached yet. Be that as it may, as already stated, the court is satisfied with the witness and believes his testimony and there was nothing that pointed to him being an unreliable witness. In view of this, the court is satisfied that the state has shown cause why the restriction notice should be extended. Having arrived at this decision based on the facts before me and the law at hand, I do not think I am in contravention of section 9 of the Constitution. The restriction notice is therefore extended for three months."* ***(Emphasis by underlining supplied)***

[40] The paragraph quoted above is very clear in its import. It is the view of this Court that the sentence complained of by the Appellant is not a finding by the lower court. If anything, those words were expressed *obiter* (in passing) and were not at all the basis for the decision to renew the restriction notice. A careful consideration of the court record shows that at that point, the lower court had, under paragraph 15 of the transcript of the Ruling, already made a finding that ***"it was justifiable for the state to be given more time to investigate."***

[41] It is, therefore, the finding of this Court that the second ground of appeal is devoid of merit and it is dismissed.

[42] This Court opines that it will be pointless and not necessary to proceed to consider the third ground of appeal after it has found that the decision of the lower court to renew the restriction notice cannot be faulted on both law and fact. The third ground of appeal naturally falls away.

[43] Before concluding, this Court has observed that counsel for the Appellant, an officer of the court, in his skeleton arguments at page 9, paragraph 3.19 made allegations of bias and impartiality on the part of the lower court. The allegation is framed as follows—

> *"A reasonable and fair-minded person, it is humbly submitted, would strongly be tempted to believe and perhaps conclude in such circumstances, that the lower court was plainly biased in favour of the Respondent and impartial."*

[44] This Court notes with grave concern and regret that despite the Supreme Court of Appeal having deprecated the tendency of counsel accusing courts of bias and impartiality without any evidence, it seems this practice is refusing to die. In the case of ***Arthur Peter Mutharika and Another v Saulosi Klaus Chilima and Another MSCA Constitutional Appeal No. 1 of 2020***, when referring to some of the grounds of appeal of the 2nd Respondent, the Supreme Court of Appeal expressed itself that the 2nd Respondent made-

> *"unwarranted and baseless allegations, including allegations of bias, against the Court below. Allegations of bias, especially against a court, should not be lightly made, but must be based on concrete and provable evidence... We have to say some of the grounds were not just fictitious, but clearly unprofessional and distasteful."*

[45] In ***Chris Chaima Banda v Republic (Anti-Corruption Bureau) Miscellaneous Criminal Application No. 10 of 2022 (HC) (Lilongwe District Registry) (Unreported)*** Kapindu, J, also recently expressed similar concerns.

[46] This Court has considered the whole court record and is unable to find any evidence of bias or impartiality on the part of the lower court. Even counsel in his skeleton arguments has failed to show with concrete evidence that the lower court was biased and impartial. In the view of this Court, this is a wild assertion attacking

the court for executing it constitutional mandate in accordance with dictates of section 9 of the Constitution.

[47] It should be made abundantly clear that any accusation of bias against a court, however, frivolous if not dispelled, may tarnish the judicial officer concerned and corrode the public confidence in the judiciary as a whole. The belief of this Court is that such scurrilous charges have a distinct tendency to bring into disrepute not only the judicial officer concerned, but also all of the judiciary.

[48] This Court fully associates itself with the views of both the Supreme Court of Appeal and this Court that such accusations are not only unprofessional but also distasteful. Labeling a court as biased and impartial without evidence is a serious thing that should, at a minimum, be avoided. It is a serious matter which may call for an inquiry with a view to discipline or indeed citing for contempt the author of such accusations.

Disposal

[49] In light of the foregoing reasons, the decision of the lower court to renew the restriction notice cannot be faulted. The net effect is that the appeal is dismissed in its entirety. Costs are for the Respondent to be assessed by the Registrar if not agreed by the parties.

PRONOUNCED in open Court this 16th day of August 2022 at Lilongwe.

W.Y. Msiska

JUDGE