



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL DIVISION
JUDICIAL REVIEW CAUSE NO. 45 OF 2022

BETWEEN

THE STATE (on application of MARTIN LIGOMIEKA)

CLAIMANT

-AND-

THE OFFICER IN-CHARGE OF LILONGWE
POLICE STATION

RESPONDENT

CORAM: HON. JUSTICE VIOLET PALIKENA-CHIPAO

Dr. Mkwani, Counsel for the Claimant

Ms. R. Kumwenda, Court Clerk and Official Interpreter

Chipao, J

RULING ON APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL
REVIEW

1. This is an application for permission to apply for judicial review against the Respondent's decision in refusing to release to the Applicant's consignment of timber. The application was made without notice but the court directed that it be heard with notice to the Respondent. The Respondent was therefore served with the application but did not attend the hearing of the application and so the application was heard unopposed.
2. The decision giving rise to the application for judicial review is the Respondent's decision refusing to release the Claimants consignment of timber when there is no one charged with any offence before any court of law.

3. On application for judicial review, the court is guided by Order 19 rule 20 of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter the CPR). Order 19 rule 20(1) & (2) of the CPR 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.*

(2) *A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.*

4. Under Order 19 rule 20, a law, an action or decision of the Government or public officer, will be reviewed to determine its conformity with the Constitution. The court can also review a decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness, its procedural fairness, its justification of the reasons; or bad faith.

5. The court is mindful that judicial review is concerned with the decision-making process and not the merits of a decision of a public body. As in the words of Lord Hailsham L.C. in *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141 at 143,

"The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected to and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

This principle has been applied in local cases including the case of *State, Ex parte Pindani Kamwaza; Traditional Authority Dambe and others* [2007] MLR 378 (HC).

6. An applicant seeking to commence judicial review proceedings is firstly required to obtain leave to commence judicial review proceedings. The purpose for requiring leave is twofold;

- a) *to eliminate frivolous vexatious or hopeless applications for judicial review without the need for an inter partes judicial review hearing; and*
- b) *to ensure that an Applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further investigation at a full inter partes hearing. (See State, Ex parte Pindani Kamwaza; Traditional Authority Dambe and others [2007] MLR 378 (HC))*

7. The Applicant's initial application for leave to apply for judicial review was without notice but the court directed that it be heard with notice to the Respondent. The direction of the court was not brought to the notice of the Applicant or his lawyer until after set dates passed. Instead of simply filing notice of adjournment for the hearing of the application, the Applicant through Counsel filed another application for permission to commence judicial review.
8. The factual background as presented by Counsel for the Applicant in his sworn statement in support of the application is that the Applicant is a bona fide owner of timber which he sold to another person. The Applicant obtained a cheque payment from the buyer but before he could cash the cheque, the police arrested a Chinese citizen in connection with the purchase of the timber alleging the person who bought from the Applicant is not a genuine buyer. It was further stated that the police confiscated the timber and are detaining the same at Area 3 police to the prejudice of the Applicant yet no one had been charged with any offence or been brought before a court of law in connection with the timber.
9. It is therefore the Applicant's argument that the decision to hold the timber without charging anyone is irrational and unreasonable in the Wednesbury sense. It is therefore submitted that this is a proper case for the court to grant permission to commence judicial review and that the permission should act as a stay of the Respondent's decision. It is further prayed that the Respondents be compelled to release the timber to the Applicant and keep a few pieces as potential exhibits.
10. At the time of hearing of the application, the court noting that there was an initial application filed on 25th August 2022 and the present application filed on 5th October 2022, asked Counsel as to which documents the application was relying on. Counsel indicated that he was relying on documents filed on both dates. It is indeed noted from the sworn statement of Dr. Zolomphi Nkowanji that the applicant is relying on both documents in his application.
11. In the arguments, in support of the granting of permission to commence judicial review, Counsel cited Order 19 rule 20 (3) of the CPR and section 42(2)(b) of the Constitution as

well as case of *State (on the Application of Zuneth Sattar v. The Director of Public Prosecutions and the Director of Anti-Corruption Bureau and the Attorney General* Judicial Review Cause No 68 of 2021.

12. Order 19 rule 20 (3) of the CPR which the Applicant cited, is a provision which empowers a party seeking to commence judicial review to apply for the court's permission to commence judicial review proceedings.

13. Section 42 (2)(b) of the Constitution provides for rights of persons detained or arrested for alleged commission of an offence. The section provides as follows;

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—

(a)

(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released;

14. The Applicant before the court is not in detention neither was, he arrested or accused of alleged commission of any offence. From the facts as presented by Counsel in the sworn statements in support of the application, it is a Chinese national who was arrested in connection with timber which the Applicant claims to have bought and sold to another person. It is the Respondent's decision to withhold the timber which the Applicant seeks to challenge by way of judicial review as he argues that the decision is unreasonable as no one was charged or taken before a court of law within 48 hours of arrest. In as far as the Applicant is not in detention or was not arrested in connection with any offence, section 42 (2)(b) of the Constitution is inapplicable.

15. Be that as it may, even if the issue of the arrest of Mr. Wang Teng was before the court, what section 42(2)(b) of the Constitution provides is that an arrested person must be brought to court within 48 hours of arrest to be charged or informed of reasons for his or her further detention failing which he is to be released. It is on the Claimants own statement in his skeleton arguments that the said Mr. Wang Teng was released on police bail. The release on bail of the Mr. Wang could actually be a compliance with section 42(2)(b) of the Constitution. The citing of section 42(2)(b) of the Constitution therefore as a legal basis for the application for judicial review is misplaced.

16. The Applicant also cited the case of *State (on the Application of Zuneth Sattar v. The Director of Public Prosecutions and the Director of Anti-Corruption Bureau and the Attorney General* Judicial Review Cause No 68 of 2021 as authority for the proposition that permission to commence judicial review will be granted if the court is satisfied that there is an arguable case for the relief claimed by the Applicant. The question at this stage therefore is whether or not the Applicant has raised an arguable case for the granting of permission to commence judicial review.
17. The application filed by Messers Zolomphi & Co contains very little information as to the Applicant's ownership of the timber. It simply states that the Applicant is a *bona fide* owner of the timber and he sold the same. There are no details as to when and how he acquired the same and to whom he sold the same. There are no details as to when the Chinese was arrested and whether or not he is still in custody. There is no suggestion that the Applicant tried to approach the Police to ask for release of the timber as he claims it is his. There is no documentation attached to his application as filed by Messers Zolomphi & Co. to support his claim that he bought the timber and no information as to where he bought the timber from. This is not the kind of evidence on which it can be said that the Applicant has raised an arguable case worthy pursuing at a substantive hearing for judicial review.
18. For more information regarding the timber and the Applicant, one may have to look to the documents filed by Messers Whyte & Cross which were adopted in the sworn statement filed by Messers Zolomphi & Co. These documents were also adopted at the time of hearing of the application.
19. It must be noted that the initial application for permission to commence judicial review was filed by Messers Whyte & Cross and the court directed that the application be heard with notice to the Respondent. Messers White & Cross filed an application with notice in compliance with the court's direction but the hearing of the application was rescheduled due to absence of the court and on subsequent dates hearing failed to take place due to failure of the registry to notify parties of the dates set by the court.
20. Messers Zolomphi & Co filed a notice of appointment of legal practitioner to act alongside Messers Whyte & Cross. At the hearing of the application, Messers Whyte & Cross did not appear and there is no indication that they were served with the application. Although Counsel Dr. Nkowane indicated at the time of hearing the application that he would rely on documents filed by him and those filed by Messers Whyte & Cross, there was no suggestion that he was acting on behalf of Messers Whyte & Cross. The court has serious problems in

relying on documents that were not presented by Counsel who filed the same more so in view of the observations that I will shortly refer to with regard to the documents.

21. In support of the application for permission to commence judicial review, the Applicant through Messers Whyte & Cross filed a statement of facts and sworn statement. According to the statement of facts, presented by the Applicant, one Mr. Limbani Halala bought one M'bawa tree from the Department of Forestry after trees fell due to cyclone Ana in January 2022. Exhibit ML1 is an approved application form for purchase of one M'bawa tree dated 26th January, 2022. It is in the name of Limbani Halala. Exhibit ML2 is general receipt being payment of K30, 000 for one M'bawa tree by Limbani Halala.
22. The Applicant further stated that Mr. Limbani Halala obtained a conveyance certificate giving him authority to move timber cut from the said tree within the borders of Malawi. The conveyance/transfer certificate was exhibited as ML3.
23. Exhibit ML3, the conveyance/transfer certificate is dated 25th July 2022. It is issued in respect of 180 pieces of timber (M'bawa). The court observes that Exhibit ML1 is a receipt for purchase of one M'bawa tree purchased on 26th January 2022 and Exhibit ML3 is a conveyance certificate for 180 pieces of timber dated 25th July 2022. In the absence of evidence linking the two documents, one wonders whether timber in ML3 is the product of the one tree in ML1 especially considering the gap of seven months from the time the tree is said to have been bought and the time the timber is said to have been cut from the tree.
24. Again, it is considered that in support of the application, the Applicant also attached Exhibit ML4 which is a letter written by the Malawi Police Service addressed to 'whom it may concern' in which the police indicated that they recovered 204 pieces of timber valued at K2, 400, 000. It is noted that the Applicant is praying for the release of 200 pieces of timber and less the few that may be kept as potential exhibit. The quantity of timber in ML3 does not tally with the quantity that is being referred to in ML4 by the Police. The reference by the applicant to the release of 200 pieces of timber suggests to the court that the quantity of timber impounded by the police is around 200. This being the case, one wonders whether ML3 whose quantity is 180 can be used as evidence of the authority to convey over 200 pieces of timber. The figures do not add up and these raises doubt as to whether the documents attached to the application can support the applicant's contention as owner of the timber.
25. In addition, Exhibit ML4 suggests that the timber was impounded as part of investigations following a report of an offence of obtaining by false pretences by the Applicant. Of course, the Applicant stated that it is not true that he lodged a complaint to the Respondent but that

the respondent simply issued the letter in Exhibit ML4. It is interesting that from the Applicant's version he did not approach the Police in which case the police would not have information as to when the timber was obtained from Thyolo and transported to Lilongwe. In the letter however, the Police states that the offence of obtaining by false pretences occurred on 26th July 2022 between Thyolo and Lilongwe. Although the dates differ by one day, one cannot expect the police to have that information unless they were informed. If the Applicant is not the one who sold the Chinese national the timber, how would the police connect the Applicant to the timber?

26. It appears in my view that Claimant did not fully disclose the facts of his possession of the timber as well as the facts of how the police came to know about the timber and impounded the same.
27. It will be noted that in the application filed by Messer Whyte & Cross, the Applicant stated in the statement of facts that after he bought the said timber from Mr. Limbani Halala and obtained all the named three documents, he then decided to sell the timber in Lilongwe to "a Mr. who gave him a cheque in the sum of" The applicant left this statement incomplete yet the wording suggests that he intended to mention the name of the buyer and the selling price. No explanation was given at the time of hearing of the application whether the absence of the details was deliberate or he forgot to complete the statement.
28. The Applicant went further to say that he deposited the cheque in a friend's account. As proof of the deposit of the cheque, the Applicant referred to Exhibit ML3 as deposit slip evidencing depositing of the cheque. ML3 however is a conveyance certificate for the transfer of the timber within Malawi and not a cheque deposit slip. The absence of the deposit slip has not been explained in the statement. At the time of hearing of the application, the absence was not explained and yet the documents were adopted as they are.
29. The Applicant went further to say that before the cheque cleared, a police officer by the name Detective Sulani from Area 3 Police Station called the Applicant and told him that that he had been duped of his timber by the person who issued the cheque and that the timber was found with a Chinese national Wang Teng who bought the timber from the unscrupulous person. This version regarding the cheque is different from what is stated in the sworn statement of Dr. Nkowane which is to the effect that before the Applicant cashed the cheque, the Police intercepted the timber. That is why Counsel argued that the Applicant could not cash the cheque and could not he take back the timber as it was in the hands of the police.

30. If we take the Applicant's version in the initial documents filed to be correct, at the time the police intervened, he had already sold the timber to another person and had already obtained a cheque payment which he deposited into the account of his friend. This means the money was not with the seller but it was with him through a third party by his consent. In terms of sell of goods, the risk had passed to the buyer at the time he released the timber and received the purchase price. If at that stage the police impounded the timber, it was no longer him who had interest in the timber but the undisclosed buyer. It is that person who should have been seeking to move the court for the release of the timber and not the applicant. As it is the facts presented by the Applicant and his counsel in the two sets of documents, leave a lot of questions. The Court is not satisfied that on the facts on record, there is a case worthy pursuing at a substantive judicial review hearing. The application for leave is denied.

31. The Claimant also asked the court to grant him an interim relief in the form of stay of the Respondent's decision withholding timber when the suspect has not been brought before the court to be charged. In support of the interim relief, the Claimant cited cases of **The State v. The President of Malawi and Macra exparte Joy Radio Ltd. Misc Civil Cause No. 198 of 2006** quoting the following;

"The executive should not be allowed to pick and choose which laws they will observe. We must always remember that the Constitution enjoins every person not to be above the law. This country must be ruled by law by those in position of power otherwise there will be no democracy and, in its place, we might have dictatorship."

32. I am at a loss as to the relevance of this cited quotation as it has nothing to do with interim reliefs being sought.

33. The case of **Mpinganjira v. Speaker of National Assembly and Another [2001-2002] MLR 318** was also cited as authority on the issue of grant of interim reliefs. The Claimant quoted the following from the judgment suggesting that that is what the High Court said regarding interim reliefs;

"the Constitution of the Republic of Malawi, in particular the provisions in sections 41(3), 46(2) and 46(3) cited above, should not and/or cannot stop this Court from giving an effective, and appropriate, remedy if that effective remedy would mean making an injunctive order for the purpose of securing the Applicant's rights and freedoms which they claim have been infringed."

34. It is important to observe that the above quote is a continuation of observations that the court was making in that case regarding section 10 of the Civil Procedure (suits by or against government or public officers) Act. This is what the Court had to say;

For now, let me go back to section 10 of Cap. 6:01 and make my observations regarding this section and the question that it raises.

It is the judgment of this Court that this provision raises the issue regarding the power, or the duty, of the court to grant an effective remedy against the state for violations or the purported violations of the rights or freedoms, or both, of an individual which are protected by the Constitution, where such rights or freedoms are infringed or threatened. In this regard, it is pertinent to visit some constitutional provisions so as to understand why I make this observation.

.....

It will be seen that the above-mentioned sections demonstrate that if section 10 of the Civil Procedure (suits by or against government or public officers) Act is taken literally, then the courts would be rendered impotent in so far as what the Constitution of the Republic of Malawi enjoins them to do where there is a complaint that rights or freedoms of an individual have been infringed or threatened. Indeed, Cap. 6:01 of the Laws of Malawi which was promulgated before the current Constitution of the Republic of Malawi, in particular the provisions in sections 41(3), 46(2) and 46(3) cited above, should not and/or cannot stop this Court from giving an effective, and appropriate, remedy if that effective remedy would mean making an injunctive order for the purpose of securing the Applicant's rights and freedoms which they claim have been infringed. If the effective remedy which is found necessary and appropriate is an injunction order, then surely this Court will so order, notwithstanding the provisions of section 10 of the Civil Procedure (suits by or against government or public officers) Act. That would be the case if it is assumed that this Act is intended to cover judicial review proceedings as well. But as will be recalled, this Court has formed the opinion, and has found as a fact, that judicial review proceedings are not legal suits or claims, and are therefore not caught by the provisions of Cap. 6:01 of the Laws of Malawi [Emphasis added].

35. The emphasis shows the part which the Applicant quoted. Whilst the judgment makes reference to the granting of reliefs like injunctive reliefs, the paragraph referred to is quoted out of context and the ratio it advances does not apply to the present case. Be that as it may, it is noted that the interim reliefs were sought as ancillary to the granting of permission for judicial review, the permission having not been granted, the prayer for interim reliefs has no legs to stand on.

Made in Chambers on 18th day of January, 2023 at Lilongwe.



V. Palikena-Chipao

JUDGE