



**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**REVENUE DIVISION**  
**JUDICIAL REVIEW CAUSE NUMBER 4 OF 2022**

**BETWEEN:**

THE STATE (on the application of MAPETO  
DWSM LIMITED)

CLAIMANT

-AND-

COMMISSIONER GENERAL OF  
MALAWI REVENUE AUTHORITY

DEFENDANT

**CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA**

MR. PEARSON WAME, OF COUNSEL FOR THE CLAIMANT

MR. ANTHONY CHUNGU, OF COUNSEL FOR THE DEFENDANT

MRS. LYDIA SAUTI PHIRI, OF COUNSEL FOR THE DEFENDANT

MR. FELIX KAMCHIPUTU, COURT CLERK

**CHIGONA, J.**

**JUDGMENT**

[1] By a Notice of Motion dated 6<sup>th</sup> April 2022, the claimant, Mapeto DWSM Limited, one of the textiles manufacturing companies in Malawi applied for judicial review seeking the following orders:

affording the claimant the right to be heard is illegal and unlawful for being inconsistent with section 43 of the Constitution of Malawi;

2. A declaration that the defendant decision of canceling the claimant's registration of Industrial Rebate in the Textile Manufacturing Industry without affording the claimant the right to be heard and without valid grounds is unreasonable in Wednesbury's sense and is devoid of the claimant's legitimate expectation to be accorded fair administrative treatment under section 43 of the Constitution;
3. A declaration that on the true construction of Regulation 116 and Paragraph 13 of the Eighth Schedule to the Customs and Excise Regulations, and section 43 of the Constitution of Malawi, the defendant owes a duty to the claimant to accord fair administrative procedures;
4. A like order to certiorari quashing the defendant's decision in the circumstances; and
5. An order for the costs of this application to be awarded to the applicant.

#### **CLAIMANT'S CASE (FACTS OF THE CASE)**

[2] The facts of the case as extracted from the sworn statement in support of the application for permission to apply for judicial review are that the claimant was at all material times registered under the Industrial Rebate Registration in the Textile Manufacturing Industry-Fabric Manufacturing as exhibit **FGL1**, a bundle of Licenses, is showing. That in January 2021, the claimant placed an order for raw materials from its importers Hongkong Polychem Company for fabric manufacturing as evidenced by exhibit **FGL2**. When the goods arrived in Malawi, they were duly assessed and duty paid and with authority from the defendant, container number CMAU-0713109 was released as evidenced by copies of importation documents, defendant's receipts and release order exhibited and marked as **FGL3**, **FGL4** and **FGL5** respectively.

[3] The deponent avers that following the importation of CMAU-0713109, the claimant has imported more than 200 containers of similar raw materials without breaching the terms of the Industrial Rebate Registration as evidenced by exhibit **FGL6**, a bundle of Customs Clearance documents. The deponent avers that through a letter dated 25<sup>th</sup> March 2022, the defendant without according the claimant the right to be heard, and through suppression of material facts, decided to cancel the Industrial Rebate Registration as evidenced by the letter of cancellation exhibited and marked as **FGL7**. The deponent avers that the defendant's decision-making process is unfair, illegal and unreasonable, and amenable to review by this court.

[4] During the hearing of the application, counsel for the claimant reiterated what is contained in the sworn statement in support of the application as outlined above. Counsel submitted that the defendant was supposed to accord the claimant a right to be heard before cancellation of the

Industrial Rebate. Counsel further submitted that before the cancellation, there was supposed to be a period to allow the claimant put its house in order.

[5] The claimant cited Order 19 rule 20 (1) (b) of the Courts (High Court) (Civil Procedure) Rules (to be referred herein as Civil Procedure Rules) which states that the following are the grounds for judicial review:

- a) The lawfulness of the decision
- b) Its procedural fairness
- c) Its justification for the reasons
- d) Bad faith
- e) Legitimate expectation

[6] The claimant argues that in the case at hand, it is beyond dispute that the defendant's decision should be quashed because the defendant's decision was made without complying with section 43 of the Constitution. Further, the exercise of the discretionary powers under rule 13 of the Eighth Schedule to the Customs and Excise Regulations is subject to constitutional compliance. Lastly, the claimant argues that section 43 of the Constitution per se creates a legitimate expectation on the part of the claimant to be heard in matters involving a decision made by a public authority.

#### **DEFENDANT'S CASE**

[7] The defendant filed a sworn statement in opposition to the application to apply permission for judicial review by Chimwemwe Kawalewale, Customs and Excise Deputy Commissioner responsible for Facilitation. The deponent agrees with the claimant that Industrial Rebate Registration was granted to the claimant as evidenced by the Application Form and Bond exhibited and marked as **CK1A** and **CK1B** respectively. The deponent avers that upon registration, the claimant was to import raw materials for its fabric business free of duty except for the payment of Value Added Tax. The deponent avers that through a tip-off anonymous, it was alleged that the claimant imported, under the said Industrial Rebate Scheme (IRS), ready-made fabrics and twine and falsely declared them to customs authorities as raw materials, namely, unbleached grey fabrics and yarn respectively.

[8] The deponent avers that container number CMAU0713109 with a declaration number **BLA C3607** of 18<sup>th</sup> March 2012 was to be offloaded in the presence of the officers of the defendant for them to check if the goods were indeed raw materials for making fabrics under the IRS. The understanding was that the offloading was to happen on 20<sup>th</sup> March 2021 in the morning. That to their surprise, the container was already offloaded when they visited on 20<sup>th</sup> March 2021. The pictures of the offloaded goods are exhibited and marked as **CK3A** and **CK3B** respectively. That upon inspection of the goods, the deponent avers that they discovered inconsistencies with the documentation in terms of number of packages and supplementary units in metres. That further inspection of the premises by the officers discovered finished fabrics of rolls not produced by the claimant. The officers placed an embargo on the container and trailer and also on 80 bales pending investigations under section 149 of the Customs and Excise Act. The deponent avers that inspection of the warehouses discovered concealment of goods and that legal processes were put in place. The concealment pictures are exhibited and marked as **CK7**.

[9] The deponent avers that their investigations clearly shows that the claimant breached the IRS by importing finished products disguised as raw materials so as to evade payment of excise and duty. That the examination of the claimant's factory and machinery revealed incapacity for the high-quality production, branding and packaging of the finished fabrics and twine, contrary to what was actually found in the various warehouses. The deponent avers that these four warehouses were also storage places not approved under the IRS. The deponent submitted that even assuming that these warehouses were approved storage facilities, they breached customs laws as they had concealed entrances and therefore not easily accessible by customs officials, as a matter of fact, which is contrary to the dictates of the IRS.

[10] The deponent avers that the actions of the claimant resulted in loss of duty amounting to MK1, 980, 685, 404.87. The deponent avers that considering these grave violations of the customs laws and the IRS, the Commissioner General cancelled the claimant's privilege under the IRS on 25<sup>th</sup> March 2022.

[11] During the hearing of the application, Counsel Sauti Phiri emphasized to this court that the Commissioner General took time to investigate the matter and made a finding that the claimant was not complying with the terms and conditions of the IRS. Counsel submitted that the Commissioner General therefore invoked Paragraph 13 of the Eighth Schedule to the Customs and Excise Regulations which gives him power to cancel the Industrial Rebate upon being satisfied that the conditions of the Industrial Rebate were not complied with.

[12] It is imperative to mention that during the application for permission to apply for judicial review the defendant was of the view that that pursuant to Eighth Schedule to the Customs and Excise Regulations, the cancellation does not depend on hearing of the beneficiary as it is a privilege and not a right to a taxpayer. Counsel submitted that under customs laws, there are specific areas that require hearings such as agents' cancellation but not Industrial Rebate cancellations. Counsel submitted that the claimant should not imply issues into a tax law as the general principle of interpretation in tax statutes is strict interpretation.

[13] After the application for permission to apply for judicial review, the defendant changed its position and now argues that it accorded the claimant a fair hearing. The defendant argues that the claimant was given an opportunity to make representations in this matter as follows:

- a) The claimant's officials were requested to demonstrate the production of Java wax, satin or twine but failed to do so.
- b) On being asked the claimant's officials also failed to produce or show any of proof of capacity and raw materials.
- c) When the claimant's officials were asked to produce any relevant production documents or customs clearance documents for the finished products, they failed to do so.

[14] The defendant argues that the finding that the claimant was fraudulently importing finished products ready for use under the industrial rebate scheme was basis of the cancelation of the registration, as such, the claimant cannot claim that he was not accorded an opportunity to be heard.

Counsel submitted that there was no unreasonableness as all facts were taken into consideration after thorough investigations. Counsel submitted that the fact that the claimant was able to import other containers while investigations were on-going does not impute any unreasonableness on the decision to cancel the IRS.

[15] Counsel Chungu further submitted that the decision of the defendant does not mean that the claimant was taken out of business. What it simply means is that the claimant was put in the same position as all taxpayers not under IRS. He submitted that the cancellation of the Industrial Rebate will not affect goods imported or those in the warehouse.

[16] The defendant further argues that neither the Constitution nor Customs and Excise Act creates a legitimate expectation that the claimant would be subjected to a formal hearing before the registration was cancelled. The Constitution demands that there shall be lawful and procedurally fair administrative action, which is what happened in this case. The Customs and Excise Act allows the defendant to see the manufacturing operation in which materials entered under the rebate are used.

[17] The defendant further argues that the process that led to the cancellation of the registration was lawful in that it complied with the stipulations under the Customs and Excise Act; and was procedurally fair, in that the claimant was asked to demonstrate the manufacturing process but failed to do so. Furthermore, the claimant was further allowed to make representations but failed to do so.

[18] The defendant thus argues that no other basis for legitimate expectation recognized at law has been demonstrated by the claimant. There is no particular procedure required by law, that the defendant ought to have followed, that has been raised and relied upon by the claimant in this matter. There is no evidence of any conduct on which the claimant could have relied on to hold the defendant liable for breaching a procedural legitimate expectation that the defendant would hold some formal hearing for the claimant.

[19] As already alluded to, the claimant filed a sworn statement in reply to sworn statement in opposition by one Yaseen Muhammad. The deponent avers that at the time of offloading the said container CMAU0713109, the defendant had issued a release order without a condition to have the container inspected and that **CK2** is not an undertaking for physical examination as alleged and that at the time when the said container was sealed by the defendant, the said container was already offloaded on 19<sup>th</sup> March 2021. The deponent avers that a copy of the release order was confiscated by the defendant during the search process and it is still in the custody of the defendant.

[20] The deponent avers that those allegations relating to alleged discovery of other goods was not the basis of the cancellation of the Rebate and the same is the basis of criminal proceedings. He further submitted that the claimant has not been found guilty by any competent tribunal, nor did the defendant summon the claimant for hearing relating to the said allegations other than the commencement of the criminal proceedings which are still pending.

## THE LAW AND DISPOSAL OF THE APPLICATION

[21] I have considered the issues raised in this application by way of sworn statements, grounds and submissions by the respective parties. Indeed, Order 19 rule 20(1) of the Civil procedure Rules provides as follows:

“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.”

[22] It is worth noting that the right to fair administrative action as enshrined under section 43 of the Constitution has been the subject of substantial litigation both in Malawi and within the region, presumably in an effort to set parameters for what amounts to reasonableness in the actions taken by public bodies. Section 43 states as follows:

“Every person shall have the right to—

(a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and

(b) be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected.”

[23] The law on legitimate expectation was ably explained by Lord Diplock in **Council of Civil Service Unions v. Minister for the Civil Service**:<sup>1</sup>

“To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations

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<sup>1</sup> [1975] AC 374

of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."(My Emphasis supplied)

[24] Closer to our jurisdiction in Kenya I find another relevant explanation of law pertaining to legitimate expectation in the case of **Keroche Industries Limited v Kenya Revenue Authority & 5 Others Nairobi:**<sup>2</sup>

"...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised." (My Emphasis supplied)

[25] Similar reliance can be placed on **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others:**<sup>3</sup>

"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and

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<sup>2</sup> [2007] eKLR

<sup>3</sup> [2005] 1KLR 280

certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine." (My Emphasis supplied)

[26] Three basic questions were identified in **R (Bibi) v Newham London Borough Council**<sup>4</sup> as follows:

"In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

[27] In De Smith, Woolf & Jowell, "**Judicial Review of Administrative Action**"<sup>5</sup>, it is stated that:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

[28] Reverting to the present case, as pointed out above, the defendant initially argued that the cancellation of the IRS does not depend on hearing of the beneficiary as it is a privilege and not a right to a taxpayer. The defendant then argued that in any case, the right to be heard was afforded to the claimant during its investigation. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate "in the sense of an expectation which will be protected by law". See **R v Department for Education and Employment, ex p Begbie**<sup>6</sup>. In other words, since the doctrine of legitimate expectation is based on considerations of fairness, even where the benefit claimed is not procedural, it should not be

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<sup>4</sup> [2002] 1WLR 237

<sup>5</sup> 6<sup>th</sup> Ed, Sweet & Maxwell, 609

<sup>6</sup> [2000] 1 WLR 1115, 1125C-D.



invoked to confer an unmerited or improper benefit. See **R vs. Gaming Board of Great Britain, ex p Kingsley**<sup>7</sup>.

[29] The most important case authority of all which I find so persuasive for me to adopt is the English case of **R v Devon County Council ex parte P Baker**<sup>8</sup> where the rationale for this doctrine was restated as follows:

“...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.” (My Emphasis supplied)

[30] Clearly, from the above proposition, legitimate expectation is all about protecting one's interests. The defendant tried to advance an argument that pursuant to Eighth Schedule to the Customs and Excise Regulations, the cancellation does not depend on hearing of the beneficiary as it is a privilege and not a right to a taxpayer. I find this argument to be misconstrued. As held in the above cited case, expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law hold protected by the requirements of procedural fairness. Unless, the defendant is of the view that section 43 of the Constitution of fair administrative action does not apply to it, then such an argument is untenable. In any case, Order 19 rule 20 of the Civil procedure Rules is clear that judicial review shall cover the review where a right, freedom, interests or legitimate expectation of the claimant is affected or threatened.

[31] In this matter, the defendant agrees with the claimant that IRS Registration was granted to the claimant and that the same was renewable annually. The expectation therefore from the claimant was that they would enjoy the benefits under IRS unless the defendant has declined to renew the licence due to valid reasons. Again, the law on legitimate expectation was ably defined by Lord Diplock in **Council of Civil Service Unions v. Minister for the Civil Service**<sup>9</sup> as follows:

“To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker that it will not be withdrawn without giving him first

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<sup>7</sup> [1996] COD 178 at 241

<sup>8</sup> [1995] 1 ALL ER 73

<sup>9</sup> supra

an opportunity of advancing reasons for contending that they should not be withdrawn.”(My Emphasis supplied)

[32] The defendant by cancelling the IRS registration deprived the claimant some benefit arising from the scheme. As was well explained by the defendant, the scheme allowed the claimant to import certain raw materials duty free. This was a benefit the claimant was permitted by the defendant to enjoy and which the claimant legitimately expected to continue. However, when it comes to cancellation of the same, the law on legitimate expectation under section 43 as well as the case law is clear that such decision must be communicated to the claimant with valid reasons for the cancellation and the claimant must be accorded an opportunity to comment on it.

[33] The defendant claims that the claimant was given an opportunity to make representations during the conduct of the investigations. From the facts of the case, it is clear that the claimant was asked questions during the investigations. There was nothing of cancelling the IRS that the claimant was given an opportunity to comment on. Arguably, the investigations were being conducted for the defendant to commence criminal proceedings against some alleged criminal conduct. I am fortified in my reasoning since the cancellation was done after commencement of the criminal proceedings and after the claimant imported a good number of containers under the IRS. I am of the considered view that the defendant was compelled to accord the claimant an opportunity to be heard on the cancellation of the IRS following the commencement of the criminal proceedings. The commencement of criminal proceedings and the cancellation of the scheme are totally different issues. In my considered view, fair administrative action under section 43, is not conducting investigations and asking the claimant to comment or answer some questions during its investigations as the defendant would like this Court to believe. That, in my view, is not a hearing. Investigations are understood and treated as such.

[34] On fair administrative action, the Supreme Court of Appeal in **Chawani v The Attorney-General**<sup>10</sup> had this to say:

“Section 43 of the Constitution requires, in our view, that an administrative action affecting another person must be lawful and fair; it must also be supported by reasons which must be given to the affected person. This requirement exists where the administrative action would adversely affect the rights, freedoms, interests and legitimate expectations of a person. There is an additional requirement to give written reasons for an administrative action where the rights, freedoms, interests and legitimate expectations are known to the decision-maker. The purpose of section 43 is clearly to ensure transparency in decision-making where the decision is likely to infringe the rights, freedoms, interests or legitimate expectations of others. The section was also intended to enable persons affected by administrative actions to have adequate opportunity to defend themselves effectively. A person would be able to present a good and effective defence to an

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<sup>10</sup> [2000-2001] MLR 77 (SCA)

administrative action when he knows the reasons supporting the action.”

[35] In my considered view, from the above cited case, fair administrative action requires a person against whom an administrative action has been taken to be given an opportunity to be heard and to make representations in that regard where an administrative action is likely to affect the fundamental rights and freedoms and legitimate expectations and interests of that person. Nothing of that nature happened in this case. The defendant just conducted its investigations then later on decided to cancel the industrial rebate scheme. Whether the reasons for the cancellation are meritorious or not, I find the action of the defendant to be devoid of procedural fairness as enshrined in the Constitution. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Thus, a claimant whose interests are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under section 43 of the Constitution. Generally, one expects that all the precepts of natural justice are to be observed before a decision affecting substantive rights or interest is reached.

[36] More importantly, section 43 is to the effect that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The right to fair hearing is evidently closely intertwined with fair administrative action.

[37] In conclusion, my considered view is that under section 43 of the Constitution, it appears that the court, effectively has a duty to look into, not only the merits and legality of the decision made due to the requirement of “reasonable” action, but also the process and procedure adopted due to the requirement of following all precepts of natural justice. The court proceeding under section 43 of the Constitution is expected not only to look into the process but also ensure that in substance, there is justice to the claimant. The traditional common law principles of judicial review are, in other words, not the only decisive factor.

[38] In the premises and based on the foregoing, and I hereby find that the defendant’s decision of cancelling the Industrial Rebate Registration in the Textile Manufacturing Industry – Fabric Manufacturing without affording the claimant the right to be heard was inconsistent with section 43 of the Republican Constitution. Accordingly, based on the said grounds, the Notice of Motion dated 6<sup>th</sup> April 2022, is merited.

## **RELIEFS**

[39] Consequently, I issue the following reliefs:

- An order that the defendant’s decision of cancelling the Industrial Rebate Registration in the Textile Manufacturing Industry – Fabric Manufacturing without affording the claimant the right to be heard is illegal and unlawful for being inconsistent with section 43 of the Constitution of Malawi.

- An order that the defendant decision of canceling the claimant's registration of Industrial Rebate in the Textile Manufacturing Industry without affording the claimant the right to be heard and without valid grounds is unreasonable in Wednesbury's sense and is devoid of the claimant's legitimate expectation to be accorded fair administrative treatment under section 43 of the Constitution.

- An order that on the true construction of Regulation 116 and Paragraph 13 of the Eighth Schedule to the Customs and Excise Regulations, and section 43 of the Constitution of Malawi, the defendant owes a duty to the claimant to accord fair administrative procedures.

- An order to certiorari quashing the defendant's decision in the circumstances; and

[40] On costs, I exercise my discretion and order that each party should bear its own costs.

**MADE IN OPEN COURT THIS 28<sup>th</sup> DAY OF JULY 2022 AT PRINCIPAL REGISTRY,  
REVENUE DIVISION, BLANTYRE.**

  
JOSEPH CHIGONA

**JUDGE.**