

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1839 (A) OF 1997

**THE ADMINISTRATOR OF THE ESTATE**

**OF DR. H. KAMUZU BANDA .....PLAINTIFF**

-AND-

**THE ATTORNEY GENERAL .....DEFENDANT**

**CORAM: CHIMASULA PHIRI, J.**

<b>T. C. Nyirenda</b>	-	<b>of counsel for the plaintiff</b>
J. M. Chirwa	-	of counsel for the Attorney General
Mr Kaundama	-	Official Interpreter
Mrs Chingota	-	Court Reporter

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**JUDGMENT**

In this judgment I will set out the pleadings in full then consider the facts, evidence, issues and law.

**1. PLEADINGS**

**1.1 Statement of Claim**

The plaintiff's claim is for an injunction restraining the Malawi Government by its servants or agents from removing the perimeter fence on the plaintiff's cattle ranch, from trespassing on the said ranch and from in any way interfering with the plaintiff's property rights on the said ranch and from evicting the plaintiff and his servants or agents from the said ranch and for declarations that such eviction, removal of the perimeter fence and interference with the plaintiff's property rights would be in violation of the plaintiff's constitutional rights to own property, to engage in economic activity and not to have his property expropriated in peace time and further that even in a state of emergency it would

be unlawful to expropriate such property without compensation.

## **2. AMENDED STATEMENT OF CLAIM**

a. The plaintiff is the administrator of the estate of Dr H. Kamuzu Banda who died on 25<sup>th</sup> November 1997 hereinafter called the deceased.

b. The deceased was at all material times the owner of 4636 hectares of customary land known as Shire Valley Cattle Ranch situated in the Chikwawa District near Paiva Village.

c. On the said Ranch the deceased raises cattle for beef which is sold to members of the public directly and through Cold Storage Company Limited.

d. The ranch is well developed employing about 75 people and over K3,000,000.00 has been invested on it.

e. The ranch originally covered 6,426 hectares and was divided into sections A, B, and C.

f. In or about 1995, the deceased was requested by the then Minister of Lands and Valuation to surrender Section C of the farm for the distribution to people in the area.

g. After consulting the local people and upon being satisfied that the local people only required Section C, the deceased agreed to surrender the said section and did so surrender after having Section C resurveyed at his own cost.

h. The then Minister of Lands and Valuation advised the deceased to apply for a lease for sections A & B which the deceased did.

i. In or about January 1997, the Ministry of Lands and Valuation informed the deceased that his application had been rejected and demanded that he vacates the land.

j. The said Ministry of Lands did not state the law under which the demand was being made and offered no compensation.

k. By letter dated 7th August 1997 the Ministry threatened to remove the perimeter

fence surrounding the ranch which threat was repeated in a letter dated 11th September 1997 and to distribute the land to the deceased's neighbours thereby evicting the deceased, his servants and agents from the said land and forcing the deceased to remove the cattle from the land.

i. The plaintiff contends that the action contemplated by Government will violate deceased estate's constitutional rights to own property, to engage in economic activity and not to have the property expropriated except when a state of emergency has been declared and even when a state of emergency has been declared, it would be unlawful to expropriate such property without compensation.

ii. The plaintiff further contends that no state of emergency has been declared and any entry on the land without his authority will constitute a trespass to his land.

iii. Wherefore the plaintiff prays for:-

i) A declaration that the removal of the perimeter fence and eviction of the plaintiff and his employees would be an interference with the plaintiff's constitutional right to own property, to engage in economic activity and not to have his property expropriated except when a state of emergency has been declared and even then not without compensation.

ii) An injunction restraining the Malawi Government by its servants or agents from removing the perimeter fence on the plaintiff's cattle ranch, from evicting the plaintiff and his servants or agents from the said Ranch or from in any way trespassing on to the ranch and from interfering with the plaintiff's property rights.

iii) In the alternative, an order that the Malawi Government comply with the provisions of the Constitution relating to expropriation of property.

i. Costs of the action.

### 3. **AMENDED DEFENCE**

a The defendant denies that the plaintiff did at any time have title to the 4636 hectares of customary land known as the Shire Valley Cattle ranch situate in the Chikwawa District near Paiva Village as alleged in paragraph 2 of the Amended Statement of Claim.

b. Further, and in the alternative, the Defendant contends that in accordance with Section 25 of the Land Act (Cap. 57:01 of the Laws of Malawi) the said land is and was at all material times the lawful and undoubted property of the people of Malawi and is and was vested in perpetuity in the President of the Republic of Malawi.

c. The Defendant has no knowledge of the matters averred in paragraphs 3,4 and 5 of the Amended Statement of Claim but will at the trial contend that any dealing with the land by the Plaintiff is and was in the premises unlawful and tantamount to a trespass.

d. The Defendant denies the matters averred in paragraph 6 of the Amended Statement of Claim and will at the trial contend that the then Minister of Lands and Valuation (hereinafter referred to as “the Minister”) only made a suggestion to the plaintiff that if the plaintiff wanted to acquire any title to the land the plaintiff had to apply for a lease in the prescribed manner after the land had been re-surveyed in accordance with Section 26 of the said Land Act.

e. The Defendant repeats paragraph 4 hereof and contends that the said suggestion did not in any way constitute a commitment on the part of the Minister to grant a lease of the land to the Plaintiff as would estop him from re-possessing the land from the plaintiff.

f. Further or in the alternative, the Defendant contends that the suggestion made to the Plaintiff as aforesaid was and is not a grant of the lease of the land or any part thereof to the plaintiff by the Malawi Government.

g. The Defendant has no knowledge of the consultations alleged to have been made by the plaintiff in paragraph 7 of the Amended Statement of Claim but will at the trial contend that if any consultations were made by the plaintiff as alleged, the plaintiff did not thereby acquire a lease of the land or any part thereof.

h. The defendant admits paragraph 9 of the Amended Statement of Claim and contends that the Minister was in the premises not obliged to state the law under which it required the plaintiff to vacate the said land nor offer any compensation for its requirement.

The defendant will at the trial refer to the provisions of Sections 27 and 28 of the said Land Act for the true intention of the legislature.

i. The defendant contends that having unlawfully occupied or forcibly acquired the land, the plaintiff is not entitled to any compensation or notice to quit as averred or implied in paragraph 10 of the Amended Statement of Claim.

j. The defendant admits that the Minister indicated his intention to distribute the land to the landless people living around the Ranch as alleged in paragraph 11 of the Amended Statement of Claim and will at the trial contend that the Minister intended to act as aforesaid in accordance with Section 26 of the said Land Act.

k. The defendant denies that by requiring the plaintiff to vacate and surrender the land the plaintiff's constitutional rights as alleged in paragraph 12 of the Amended Statement of Claim would in any way be violated and puts the plaintiff to strict proof thereof.

l. The defendant refers to paragraph 13 of the Amended Statement of Claim and will at the trial contend that the defendant is entitled to enter upon the land and evict the plaintiff therefrom without offering him any compensation therefor.

m. SAVE as hereinbefore expressly admitted the defendant denies each and every allegation in the Amended Statement of Claim contained as if the same were herein set out and traversed seriatim.

n. **IN** the premises the defendant denies that the plaintiff is entitled to the grant of the declaration, injunction and alternative relief sought by him in paragraphs 13(a), 13(b) and 13(c) respectively, of the **Amended Statement of Claim** and prays that the action be dismissed with costs to the defendant.

#### **4. FACTS**

The subject of the claim is 4636 hectares of land known as the Shire Valley Cattle Ranch situated at Paiva Village in Chikwawa District. The land was given to the Late President Dr. H. Kamuzu Banda by the traditional Chiefs in the area.

In 1974 President Banda held a public meeting in Chikwawa district which was attended by Chiefs from Nsanje as well as that district. The people of the area gave him a number of gifts including heads of cattle. At the end of the meeting he informed the Chiefs that in order to assist them improve their cattle he had decided not to move the cattle out of the area. Instead he would import a better breed of cattle which could cross breed with the local cattle. He therefore asked them to find land where the cattle could be accommodated. After an extensive search for suitable land in both districts the Chiefs

identified the customary land at Paiva Village and gave it to him. The land was not suitable for cultivation because it was stony and was not fertile. It had not been used for cultivation since time immemorial. The cattle were moved into the area and President Banda honoured his promise by introducing Brahman cattle into the ranch. The people in the surrounding villages were and are allowed to have their cattle cross breed with the Brahman. President Banda was in cattle ranching business until he died. This means he was in business for about twenty-five years. His personal representative still runs the farm.

In or about 1996, President Banda applied for a lease of the subject land; and in or about January 1997, the Department of Lands and Valuation rejected the application. In August 1997, President Banda was asked to vacate the land and relocate the herds of cattle from the ranch, as the Government was desirous of allocating the land to landless people living near or around the ranch.

## **5. EVIDENCE**

### **PW 1: Harry Mailos Kadango Saka**

This witness testified that he was the Ranch Manager at the plaintiff's ranch. He was initially employed as veterinary assistant and was posted to Nchalo in 1984. Both Lisandwa and Shire Valley Cattle Ranch belonged to President Banda.

He described the cattle ranch as comprising three sections: namely A, B, and C. Section A is a 2020 hectare piece of land on which there are houses, a garage, shed, a block of three offices, water reservoirs, and a pump house. Water is pumped from Shire River. The vegetation consists of natural and artificial trees such as blue gums. The soils are poor, waterlogged, salty and generally dambo sand and therefore not suitable for cultivation. Food grown on this type of soil would not taste good. The section is fenced with barbed wire. Animals are not allowed to roam. The grass is cut and carried for them to feed. Apart from the cattle there are also wild animals such as buffaloes, bushbucks, warthogs, reedbucks and kudus. These mingle with cattle freely. There are also guinea fowls.

Section B is divided into two. There is thus Section B1 and B2. The vegetation on B1 consists of natural trees. Just like on Section A are houses and water reservoirs. Water is pumped from boreholes. It is fenced with barbed wire. The soils are rocky or gravel like and not suitable for farming.

Section B2 is also endowed with natural trees and has similar facilities as those on B1. Nearest to Section B1 is Paiva Village which is under the control of village headman Paiva who is answerable to Group Village Headman Mphedza. Section B2 is bounded by Chamanga Village. Section B1 covers 1,340 hectares whilst B2 is a 1,152-hectare piece of land.

Section C is near Chief Jasi and is west of Section B. It is comprised of 18,000 hectares. The witness showed the court sketch maps for the three sections.

He further testified that in 1996, the then Minister of Lands and Valuation, Hon. Shaibu Itimu visited the farm. This was after he had been to the headquarters of the ranch where he learnt that the farm had no title deed. He requested through management that Section C be surrendered so that it could be given to the landless people. He further advised that a lease be applied for. President Banda agreed and surrendered Section C. Surveyors from the Ministry carried out a survey of Sections A, B1 and B2. The cost was met by President Banda.

The witness then took the court on a tour of all the sections including Sections C where the court was able to see for itself the vegetation and some of the cattle and facilities. At Section C, the witness informed the court that although the land was taken in the name of the people it had not been distributed to them. Instead the trees had been wantonly cut down with the result that there are fewer trees than in the other sections. He was of the view that the people did not need the land because they were in fact unable to fully utilize the land in their respective villages. He showed the court some of the idle land in Paiva, Chamanga and Jasi villages. The case was adjourned before the witness could complete his testimony. He has since died.

## **PW 2: Traditional Authority: Ngabu**

He testified that he is the traditional authority of the area in which the ranch is located. He further testified that in 1974/75 the Chief's of Chikwawa and Nsanje donated gifts (including cattle) to the late President D. H. K. Banda.

President Banda felt that the people of the area could benefit if he left the cattle either in

Chikwawa or Nsanje and brought in better breeds from abroad so that the new breed could cross breed with the local cattle. He therefore asked the chiefs of the two districts to find him a piece of land where the donated cattle could be kept. The Chiefs searched for land in the two districts and eventually settled for the land at Paiva Village. In opting for this land they considered the fact that the land is generally not arable and that it was not being used by the villagers. They further considered the fact that the people of the area have adequate land.

In 1994 the late Minister Itimu visited Chikwawa. He met the witness as well as PW 1 and the Group Village Headman. The Minister said the land was too big and proposed that Section C be excised and given to the people to cultivate. He further proposed that President Banda apply for a lease of Sections A, B1 and B2. Since the procedure for leasing land was that the village headman and traditional authority should consent to the lease of customary land, he did so in writing by signing the forms which were then forwarded to the District Commissioner. Village headman Paiva also consented and signed accordingly. Section C was not included in the application for lease. Surveyors, one of whom was Jofilisi, went to the area and carried out an aerial survey using a helicopter.

As Chief, he has not taken away the land from President Banda. In fact, according to the custom of the area land once given to a person cannot be taken away. It is for the use of that person and his family and can be inherited.

Section C is not being cultivated. In spite of Minister Itimu's statement that it would be given to the people to cultivate, that has not happened. Instead there has been serious deforestation. The trees have been cut down uncontrollably.

As traditional authority, he does not wish to see what happened to Section C happen to Section A and B. The forest is useful to the people of the area in that they are allowed to collect firewood and they are also able to obtain poles for building houses. The cutting of trees is controlled by the manager of the farm. Further, rain is not a problem in the area. This is because of the trees. Those who own cattle are also benefiting in that their cattle cross breed with the cattle on the ranch.

### **PW 3: Group Village Headman Mphedza**

As Group Village Headman, several villages fall under his jurisdiction and these are Paiva, Gonyo, Chamanga, Therere and Utumbe. His testimony confirmed that of T/A Ngabu especially with regard to the meeting President Banda held in the area in 1974/75 and his request for land to accommodate the cattle given to him by the chiefs of Chikwawa and Nsanje. He further stated that the chiefs went to Makhuwira on the East Bank but



failed to find a suitable place. They then approached him with regard to the land at Paiva village and he agreed because the soil was rocky and unsuitable for farming. It was not used by anyone. He further confirmed that the people of the area benefit a lot from the ranch and do not wish to lose it. The people of the surrounding villages do not need extra land as they are failing to utilize what they have to the fullest extent. He said Government encourages people to reforest the land. It does not therefore make sense for Government to take away the land from President Banda's estate when it is clear that the result will be deforestation as is the case with Section C.

#### **PW 4: Wiseman Paiva**

He is village headman Paiva. His evidence collaborated that of the other witness on how President Banda set up the ranch in his village. He confirmed that he consented to a lease being issued to President Banda. He had discussed the issue with T/A Ngabu and he knows that the traditional authority also consented to the lease being issued. He was not consulted on the taking of Sections A, B1 and B2. He would not in any event have agreed because the land had already been given to President Banda. He has no objection to the lease being granted to President Banda. He is aware that Section C is not being cultivated and that the trees have been cut wantonly.

He further confirmed that people in his village are happy with the forest and the cattle. His subjects benefit from the ranch. He outlined the benefits. He further testified that Government encourages them to plant more trees. His village is lucky in that it has natural trees. He described the assertion that his subjects need land as incorrect. There is plenty of land in his area.

#### **PW 5: Albert Joloson Kapindula Chamanga**

He is a brother to village headman Chamanga. He is also a pastor in the African Kingdom of God and Peoples Church of God. His village bounds the ranch. He is fully aware of the benefits that the people in the surrounding areas derive from the ranch. When he heard that Government intended to take over the ranch, he wrote to President Muluzi, the Ranch Manager and MCP President calling on them not to close the ranch because people benefit from it. He produced one of the letters he wrote.

## **PW 6: Village headman Jauma**

She has been village headman for 10 years. She knows the ranch. It is near her village also. Her children eat from it. With the permission of the Ranch Manager, they cut grass, collect and sell firewood. Her subjects' cattle cross breed with the ranch's cattle. Consequently, they have better cattle. She said she had been sent by her people to tell the court that the forest and the ranch should stay. She confirmed the state of Section C which was surrendered by President Banda and said she is not happy with the way the trees have been cut.

According to the Mang'anja, custom land once given cannot be taken away. It should therefore not be taken away from President Banda.

## **6. ISSUES**

Three issues stand to be resolved in this case and these are:

- a. Whether the late President Banda had any constitutionally recognized right in the land called the Shire Valley Cattle Ranch.
- b. Whether Government, by demanding that late President Banda vacate the land was and would be infringing any of the President Banda' rights guaranteed by the constitution.
- c. Whether late President Banda had or his personal representative has a constitutional right or locus standi to challenge Government action on matter relating to the environment and also whether his personal representative can challenge Government's intended action under the Environment Management Act.

### **. Issue Number 1**

Whether President Banda had constitutionally recognized right in the land called the Shire Valley Cattle Ranch.

That the land is customary land is not in dispute; neither is that fact that it was given to President Banda. Being customary land, no registration of title or grant of any interest in

land is required. (Ibik, Restatement of African Law, Vol 4, p. 83).

It was the testimony of the village headmen and the traditional authority of the area that land once given is never taken back. Their evidence is consistent with research and findings of one Ibik as recorded in his book Restatement of African Law, Vol 4, p 82. He observed that under Sena and Mang'anja customary land law, the power to allocate lands rests and is exercisable by the chief. The village headman also has the power of allocation unless expressly withheld from him by the Chief and it is lawful to allocate to any person of whom the chief approved (Ibik p.82).

The nature and extent of the interest conferred under an allocation depends on the express or implied intention of the chief or village headman allocating the land in question and for purposes of ascertaining the nature, duration and limitation of the interest conferred, regard is had inter alia to:-

- i The evidence of the witness present,
- ii The original request by the applicant,
- iii Other relevant facts and surrounding circumstances. (see Ibik, p 83).

The largest possible right which a guarantee may possess and enjoy over the land is the right of indefinite occupation and utilization. It is capable of assignment and it is also heritable (Ibik, p 77). In the absence of evidence to the contrary it will be assumed that this was the type of interest granted to Dr H. Kamuzu Banda.

Anyone who occupies or uses any piece of land is liable to forfeit his or her own interest in the land if he or she is guilty of the following:-

- i. Witchcraft,
- ii. Purported sale of land,
- iii. Habitual theft, murder or quarrelsomeness,
- iv. Willful waste and inexcusable neglect of the land for an unreasonable period,

v. Occupying and utilizing allocated land without prior consent of permission the owner thereof,

vi Occupying and utilizing unallocated land without prior approval of the Chief or Village Headman.

vii Alienating the land to a non-assimilated stranger without the knowledge or approval of the Chief (Ibik, pp 87-88).

President did not do anything that as would have made him liable to forfeit his land. As his interest in the said land is heritable, it can be passed on to heirs. Under Sena customary land law, no land previously allocated, or in actual use or occupation, is capable of re-allocation, unless such land has been either forfeited or surrendered to the Chief (Ibik, p 79). As the land is in actual use and occupation, and it has not been surrendered (except Section C); it cannot be taken away from the plaintiff.

On May 18, 1994 the current constitution came into force. As of that, President Banda was the lawful owner of the ranch. His right to the property was saved by Section 209 of the Constitution which provides as follows;

**"All persons who have rights in property at the date of the commencement of this Constitution shall continue to have such rights under this Constitution and any other law".**

The constitutional provision applies to all rights in property including rights of property in customary land.

. Issue Number 2

**Whether Government, by demanding that President Banda vacate the land was and would be infringing any of President Banda's rights guaranteed by the Constitution.**

#### Expropriation of Property and Customary Land

The reason given for rejecting the application for lease is that the traditional leaders who live in the surrounding villages had informed Government that they required for their

own use. As pointed out the evidence does not support this assertion. Even if that were the case, it should have been the traditional leaders themselves making the demand from the late President Banda. Again the evidence given is that land once given cannot be taken back.

Assuming that Government being aware of the fact that the traditional leaders could not take back the land had decided to assist them, the Government should have complied with the supreme law of the land.

Section 44(4) of the constitution provides that expropriation of property shall be permissible only when done for **public utility** and only when there has been adequate notification and **appropriate compensation**, provided that there shall always be a right to appeal to a court of law.

In law, property is that which is peculiar or proper to any person; that which belongs exclusively to one. The word denotes everything which is the subject of ownership. Property is classified into either real or immovable; or personal or movable (see Black's Law Dictionary 5th edition). This means that even those holding beneficial or equitable rights or property in customary land are, under the constitution, equally entitled to adequate notice and **appropriate compensation** in terms of Section 44 of the Constitution.

The expulsion of the plaintiff from the land without due compensation would be tantamount to a breach of Section 44(4) of the Constitution and a violation of his right not to arbitrarily deprived of property as enshrined in Section 28(2) of the Constitution.

The Land Act also provides for situations when the Government may expropriate property. Section 27(1) of the Land Act provides as follows:-

i. "Wherever it appears to the Minister that any customary land is needed for a public purpose, that is to say a purpose which is for the benefit direct or indirect, of the community as a whole, or part of the community, he may declare **by notice published in the Gazette**, that such land is public land, and thereupon such land become public land".

In this case, the Minister neither made a declaration nor did he publish a notice in the Gazette even though the land is said to be required for a purpose beneficial to part of the community. One can only surmise that the reason for not wanting to comply with the legal requirements was to evade payment of compensation for **Section 28(b) of the Land Act** it is provided that:-

ii "any persons who by reason of.....any declaration made under Section 27(1) that and such land is public land .....suffers any disturbance of or loss of damage to any interest which he may have or, immediately prior to the [declaration] may have had in such land, shall be paid such compensation for such disturbance, loss or damage as shall be reasonable".

Similarly, under the **Land Acquisition Act (Cap 58:04)** of the Laws of Malawi, the Minister is empowered to acquire any land whenever he is of the opinion that it is desirable **in the interests of Malawi so to do**, paying such compensation therefore **as may be or determined under the Act** (Section 3 of the Act).

The Land Acquisition Act applies to "any land" including customary land. This means that it is desirable or expedient compulsorily to acquire any land under the Act, he shall serve notice upon the persons who are possessed of an interest in the land or upon such of those persons as are after reasonable inquiry known to him.

It is clear that the Minister did not comply with any of the three statutes. If President Banda's land is to be taken away he is entitled to adequate notice and appropriate compensation, he is entitled to no less. This is his constitutionally and statutorily guaranteed right. To proceed in a manner other than the law demands and insists would be tantamount to an infringement of his rights which are expressly guaranteed under the constitution.

#### The Constitution and Customary Land

**Section 28 of the Constitution** provides that every person shall be able to acquire property alone or in association with others and further that no person shall be arbitrarily deprived of property.

It is clear that the provision does not aim to protect only those who hold legal and equitable titles to property. It is therefore equally protective of any kind of title to property be it legal or equitable. Consequently, any person holding any of the incidents of property discussed above is equally protected by the constitution. It should be noted further that the provision does not dictate where the property should be acquired and so a holder of customary land is within the ambit of its application and protection.

In the case at hand, the plaintiff's rights over the piece of land called Shire Valley Ranch are protected by the constitution and he cannot be arbitrarily deprived of them by the Minister's exercise of his duty **under Section 26 of the Land Act**.

Further, under **Section 29 of the Constitution** every person is guaranteed the right to freely engage in economic activity, to work and pursue a livelihood **anywhere** in Malawi. It goes without saying that anywhere means any place within the boundaries of Malawi including customary land and more specifically at Paiva village. The right of Dr Banda guaranteed and protected by the constitution, should not be limited by the Minister's exercise of his powers of control and administration under Section 26 of the Land Act.

## 7. CONCLUSION

The defendant's defence erroneously assumes that Dr H. Kamuzu Banda is not Malawian by pleading that he did not any time have title to the subject land but that property was at all material times the lawful and undoubted property of the people of Malawi. **See paragraphs 1 and 2 of the Amended Defence**). It does not take much wit to see that the argument is fallacious. Dr H. Kamuzu Banda was Malawian and is the lawful and undoubted owner of the Shire Valley Ranch and therefore cannot trespass on his own land as paragraph of the Amended Defence suggests. **Section 25 of the Land Act** clearly provides that customary land is vested in the President for the purposes of that Act alone. The land does not belong to the President. It is assumed to be vested in him for the purposes of the Land Act only.

Dr H. Kamuzu Banda definitely has rights in the subject land that are constitutionally guaranteed and protected. It would therefore, be an infringement of those rights if Government was to evict Dr H. Kamuzu Banda from the land without giving him due compensation on the pretext that the Minister merely was doing his duty under the Land Act. As the Constitution is supreme law, all other laws are subject to it. Therefore, the provisions relating to expropriation of property as detailed under the Constitution should be strictly adhered to.

As Dr H. Kamuzu's rights and title to the land have been established, the kind of relief prayed for in paragraph 14 of the Amended Statement of Claim is only right and proper. To proceed in any other manner other than that prayed for would constitute derogation from rights guaranteed by our constitution; **Section 45** of the constitution clearly provided that there will be no derogation from these rights unless there has been a declaration of a state of emergency. No such declaration has been made and therefore, it is hereby declared that provisions relating to expropriation of land as detailed in the constitution should be followed.

In these premises, Government should cease and desist from interfering with Dr H. Kamuzu Banda's constitutionally protected rights.

. Issue Number 3

Whether late President Banda had or his personal representative has locus standi to challenge Government's action of the Constitution as well as under the Environment Management Act.

i. Background

The ranch is a haven for natural trees and grasses and is also a habitat for several species of wild animals. Its uniqueness lies in the fact that it has maintained its natural beauty when all land surrounding it has become bare due to deforestation.

A visit to the ranch revealed that there was another aspect of the case, which had not been explored: the issue of environmental degradation. This facet of the case became apparent due to the obvious destruction of trees and natural grasses in Section C of the ranch which had been given away by the plaintiff in 1996 and which Government had not bothered to distribute despite its insistence that there were landless people around the ranch.

It is a the well-founded fear amongst the people of the area and the plaintiff that the whole ranch is going to go the same way that Section C has gone. A fear that its striking natural beauty would be lost if the action of executive arm of Government went unchecked.

ii The Law

Research by scientists reveals the potential for changes so dramatic in the next century that life, as we know it may no longer exist. Fortunately, as a result of growing awareness and on going scientific research, public policy makers and legislators are enacting laws and working cooperatively to alter human behaviour in ways that could stem the tide of environmental degradation and consequently achieve a sustainable society. Malawi has not lagged behind in this regard.

One of the primary goals of environment laws is to preserve some of our nation's remaining wilderness and waters in their natural state. To this end our constitution recognizes the protection of the environment as a significant issue and hence includes environmental protection and the promotion of sustainable use of natural resources as



some of the principles of national policy (see **Section 13(d) of the Constitution**). The constitution also empowers courts to have regard to such principles of national policy in determining the validity of decisions of the executive (**Section 14 of the Constitution**).

The Environment Management Act has taken a step further from the directory provisions of the constitution by offering substantive Environment Law. It makes it a the duty of **every person** to take all necessary and appropriate measures to protect and manage the environment and to conserve natural resources to promote sustainable utilization of natural resources in accordance with the Act and any other written law {**Section 3(1)** of the Environmental Management Act}. It also gives every person the right to a clean and healthy environment {Section 5(1)}. For purposes of enforcing that right it gives the right to any person to bring an action in the High Court to prevent or stop any act or omission which is deleterious or injurious to any segment of the environment or likely to accelerate unsustainable depletion of resources or to require that an ongoing project or other activity be subject to an environmental audit in accordance with the Act {**Section 5(2)**}.

In recognition of the pressing need to preserve the environment, the Environmental Management Act has given **locus standi** to 'any person' to bring suits to enforce the right to a clean and healthy environment, which right is, of course, also not localized. In a nutshell, the Environmental Management Act departs from orthodox requirements for locus standi and gives any person the right to involve himself or herself in environmental litigation. Needless to say, then, that President Banda or his personal representative has a right to bring an action in the High Court, as he has done, to enforce the right to a clean healthy environment.

It cannot be disputed that the intended Government action is deleterious and injurious to the environment and that it is likely to accelerate unsustainable depletion of natural resources. The wanton destruction of trees and other vegetation in Section C of the ranch bears this truth. When the late President was in occupation of Section C, the trees and wildlife there were used at sustainable level and in an environmentally friendly manner. The moment he moved out, people started cutting down the trees and grass wantonly. It is obvious that if the plaintiff is evicted from the rest of the ranch, a similar scenario will happen in the other sections of the ranch.

The Act makes clear that it is the duty of **every person** (including Government) and their servants and agents to make all necessary and appropriate measures to protect and manage the environment {**Section 3(1)**}. In the words of judge Skelly Wright in **Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission 449 F. 2d 1109 (1971)**

"Several recently enacted Statutes attest to the commitment of Government to control, at

long last, the destructive engine of material "progress". But it remains to be seen whether its promise of this legislation will become a reality. Therein lies the judicial role..... Our duty, in short, is to see that important legislative purpose heralded in the hallways of the federal bureaucracy".

I hold the view that the action contemplated by Government to evict Dr H. Kamuzu Banda from the ranch will open up the ranch to environmental degradation and unsustainable utilization of the resources therein. Such action will constitute an undisguised dereliction from the important duty imposed by the Constitution and underlined by the Environment Management Act.

It is the duty of the court to see to it that important legislative purposes heralded in Parliament are not lost or misdirected by executive action.

## **8. CONCLUSION**

The Government and its agents are constitutionally bound to protect environment from deleterious action. This obligation is given substantive weight by the Environmental Management Act. By allowing the Shire Valley Cattle Ranch to fall prey to deforesters, Government would be unashamedly derogating from its duty under both the Constitution and the Environmental Management Act. The plaintiff is therefore entitled to an injunction as pleaded in the Amended Statement of Claim in paragraphs 14(a) and (b).

## **OBITER**

The refusal by the Minister to process the lease application of Dr Banda is denying the people of Malawi the much needed revenue which would have been generated from annual ground rent. It is an axiomatic fact that if a lease were granted to Dr Banda the status of the land could have changed from customary land tenure to private land, hence attract ground rentals.

The defendant is also condemned to pay costs of and incidental to these proceedings.

**PRONOUNCED** in open court at Blantyre this 11th day of January 2004.

Chimasula Phiri

**JUDGE**