



IN THE MALAWI SUPREME COURT OF APPEAL

MISCELLANEOUS CIVIL APPLICATION NO 50 OF 2023

(Being Judicial Review Case Number 06 of 2023 at the High Court of Malawi, Principal Registry, Revenue Division)

BETWEEN:

THE STATE

On the Application of

MAHMED SHAFEE AHMED CHUNARA-----1ST APPLICANT

AHMED MUHAMMED CHUNARA-----2ND APPLICANT

-AND-

DIRECTOR OF PUBLIC PROSECUTIONS-----DEFENDANT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE JA

G. Chipeta/Khonyongwa, Counsel for the Applicants

Defendant, absent

Mrs Chimtande, Recording Officer

RULING

1. On 21st September 2023, the Applicants brought an ex-parte application for permission to apply for Judicial Review, extension of time within which to apply for

Judicial review and interlocutory order of stay of criminal proceedings. The Court below dismissed the application in its entirety.

2. On 27th of September 2023, the Applicants filed an ex-parte application for permission to apply for Judicial Review, extension of time within which to apply for Judicial Review and interlocutory order of stay of criminal proceedings under Order 1, rule 18 of the Supreme Court Rules and Common law.

3. On 3rd October 2023, I ordered that the matter should come inter-parte on the 25th of August 2023. On the 25th of August 2023, the Defendant was not present. As no reasons were given for their failure, I proceeded to hear the Applicants. I also noted that despite the fact that the Defendant was served with the notice of hearing, the Defendant did not even file a response opposing this application.

4. The Applicants have filed two Affidavits in support of their application. They have also filed skeleton arguments in support of their application.

5. After going through the documents filed, I find that there are three issues before me. First, permission to apply for Judicial Review of the decision of the Defendant to prosecute the Applicants in the High Court, Revenue Division. Second, extension of time within which to apply for Judicial Review. Third, an interlocutory order staying criminal case number 2 and 2A of 2022 pending final determination of Judicial Review.

6. The Applicants say that the decision by the Defendant to prosecute the Applicants in the High Court, Revenue Division, criminal case number 2 and 2A of 2022, **Republic vs Mahmed Shafee Ahmed Chunara, Norman Paulosi Chisale, Peter Mukhito, Roza Madalo Mbilizi and Ahmed Mohammed Chunara:**

1.1 Has been made outside the defendant's constitutional mandate in that, in making the decision, the Defendant failed or neglected to act in strict accordance with the law, contrary to section 10(2) of the constitution.

1.2 Has been made in bad faith and dishonesty in that, in making the decision, the defendant failed or neglected to adhere to:

a. The fundamental constitutional principle requiring all institutions and persons to observe and uphold the constitution and rule of law under section 12(i)(f) of the constitution and

- b. Constitutional Principles of National Policy on administration of justice, under section 13(m) of the constitution, requiring honesty practices in government and humane application and enforcement of laws.
 - c. Has been made in variation of the Applicants' entitlement to equal protection of the constitution as directed by section 4 of the constitution.
 - d. To the extent that it is inconsistent with the provisions of the constitution is invalid pursuant to section 5 of the constitution.
7. On the issue of extension of time, the Applicants have said that in June, 2022 some 16 months ago, the Applicants instructed Counsel Manuel Theu to commence Judicial Review proceedings against the Defendant's decision. However, due to no fault on the Applicants' part and circumstances beyond reasonable control of the Applicants, their lawyer failed or neglected to carry out their instructions, currently being nowhere to be seen and not answering the Applicants' calls. The Applicants therefore seek an extension of the time within which to commence Judicial review.
8. Because of the facts and the grounds upon which Judicial review is being sought herein, the Applicants say that the Defendant's impugned decision is unconstitutional and invalid. The Applicants therefore pray for a stay of the proceedings at the High Court, Revenue Division.
9. The starting point here is whether the Applicants deserve an extension of time to apply for Judicial Review. As has been correctly stated by the Applicants in their affidavits, an application for Judicial review is supposed to be made within 3 months from the date of the impugned decision. In this matter, the Applicants had taken 16 months to file the application. From the facts put forward by the Applicants, their lawyer failed or neglected to carry out their instructions and Counsel is nowhere to be seen and Counsel can not even answer their calls.
10. Much as the Applicants lament on the conduct of their Counsel one Manuel Theu, it is however my considered view that the Applicants themselves are also to blame. They deliberately decided to sit on their rights and they should be ready for the consequences. They have not even made any effort to show this court what they had done on their part to mitigate the damage of procedural delay. Just to say that Counsel Theu is not answering his phone is not enough. They do not even show any evidence attached to their affidavits as to when they last communicated with

Theu. If Theu was not answering their phone calls, they do not even explain why they did not even bother to physically visit him at his chambers in order to make a follow up on this very important case for them. One even wonders why they could not even communicate through letters if it is true that the phone was not being answered.

11. I therefore do not find anything to persuade me to extend the time as prayed for. Even if I had granted the Applicants' prayer for extension of time, my thorough consideration of the facts and law shows that this matter does not meet the test for granting Judicial Review. All the issues that the Applicants are raising can better be dealt with by the trial court. The Applicants should not use the avenue of Judicial Review in order to suffocate the free flow of the criminal justice system. Let the Applicants ventilate their issues at the High Court, Revenue Division where they will have their day in court.

12. I therefore dismiss this application in its entirety. Since the Defendant did not do anything to oppose the Application, I make no order with regards to costs.

MADE this *10th* day of November 2023 at Blantyre



M.C.C. MKANDAWIRE

JUSTICE OF APPEAL