IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL CAUSE NO. 42 OF 2008

BETWEEN

THE STATE

AND

THE REGIONAL LANDS COMMISSIONER (CENTRE)

EX-PARTE: WESLEY TSOKA (INTERESTED PARTY)

CORAM : HON. JUSTICE MZIKAMANDA

: Likongwe, Counsel for the Applicant

: Jangale, Counsel for the Respondent

: Mrs Kabaghe, Court Reporter

: Mr. Kaferaanthu – Court Interpreter

JUDGMENT

MZIKAMANDA, J.

This is a judicial review of the decision of the Regional Commissioner for Lands (Centre) made on or about 14th July, 2008 withdrawing Plot No. 12/568 in the City of Lilongwe from the interested party. The application for judicial review is

opposed. The affidavit in support of the application shows that by a letter dated 3rd September, 2001 the Ministry of Lands and Housing offered him Plot Number 12/568 in the City of Lilongwe which he duly accepted and paid K242,762.50, being all amounts required. He got a certificate of completion of Payment of Development Charges and Auxiliary Fees and Charges Exhibit WT 2. In December, 2002 he submitted drawing plans for the development of the plot to the Lilongwe Town Planning Committee who refused to approve the drawing plans and refused to grant permission for the interested party to start developing the plot because the land was unserviced. In 2003 the Ministry of Lands threatened to revoke the allocation of the plot because the interested party had not obtained approval for the development of the plot. (Exhibits WT 4 and WT 5 refer). The Lilongwe Town Planning Committee only approved his building plans in July 2005 as per Exhibit WT 6. He then applied for lease and has been continuously requesting the Respondent for the lease, but the Respondent has failed to give the lease or title deeds for the plot. He has thus been constrained to complete developments on the plot. The Respondent's failure to give him a lease for the plot also prevents him from getting finance for construction through mortgage.

In December, 2007 an encroacher entered then Plot No. 12/568 with the corrupt connivance of some of the Respondent's employees. The encroacher was removed with the assistance of the Respondent. He decided to construct a fence on the property in order to deter other would be encroachers. Between January and March 2008 he constructed a brick fence on Plot Number 12/568 as a development on the plot and also to ward off would be encroachers.

On or about 18th July, 2008 he received a letter from the Respondent dated 14th July 2008 delivered to a guard deployed on Plot Number 12/568 informing him that the Plot had been allocated to another party and it threatened him with prosecution. In that letter was made reference to a letter of 24th June, 2008 which he had not seen. On 21st July, 2008 he went to the Respondent's office to get a copy of the letter of 24th June, 2008 but Respondent's employees refused to give him a copy. He thus engaged the services of his legal practitioner to take up the matter with the Respondents. It is not true that he started constructing the brick fence after 8th July, 2008 but that he constructed it between January and March, 2008. The Respondent's action will unjustly enrich the Respondent or any third party who may be allocated the Plot because the money values and land values have changed since the time he was allocated the Plot and have developed the plot. He is ready, able and willing to construct a dwelling house on the plot as per the plans already approved by the Lilongwe Town Assembly Committee.

He prays that this court grants an order of certiorari quashing the decision of the Regional Commissioner for Lands (Centre) to withdraw Plot Number 12/568 in the City of Lilongwe from him an order of mandamus compelling the Regional Commissioner for Lands (Centre) to cancel any decision of withdrawing Plot No. 12/568 in the City of Lilongwe from him. He also prays for an order of prohibition against the Regional Commissioner for Lands (Centre) from allocating Plot Number 12/568 in the City of Lilongwe to other parties and an order of mandamus compelling the Regional Commissioner for Lands (Centre) to issue a lease of Plot Number 12/568 to him.

It would appear that the Respondent has relied on the affidavit in opposition for leave to apply for judicial review in the hearing of the originating summons. That affidavit shows that the Respondent denies that the interested party was refused to access a letter withdrawing the plot from him. It shows that when the interested party, being the applicant, was offered the Plot No. 12/568 in question on 3rd September, 2001, he duly accepted and paid K66,295.00 leaving a balance of K176,402.50. It is true that in 2003 the area was not serviced and the applicant was informed about it. On 29th July 2004 the applicant was written FM 1 informing him that the area had roads and water, hence his access to build a fence. The applicant failed to build after he got the communication. The applicant has not proved that Lilongwe City Assembly failed to approve or refused to grant him planning permission in or around 2004. He was informed that the issuance of lease was contingent upon full payment of development charges and land rent which he failed to pay. The Respondent rejects the contention that the interested party paid in full development charges in that he failed to attach the completion certificate and general receipt as proof of payment. On 23rd May, 2006 the applicant paid K166,407.50 on GR No. 849619 (FM 2) leaving a balance of K10,000.00 only which is long overdue and with compound interest it stands at K20,112.00 (FM 3). It is also averred that the applicant was in fundamental breach of the condition of offer which stipulated that he had to pay land rent in the sum of K100.00 per annum and he failed to pay this for seven years, now amounts to K54,771.00 despite a reminder which was a demand dated 21st February, 2008 (FM 4).

A fence has been constructed on one side of the plot without submitting plan for approval of the Lilongwe Town Planning Committee. On 24th June, 2008 by WT 11 the applicant was properly furnished with reasons in writing on the withdrawal of plot No. 12/568 from him among which reasons was that he failed to develop the land since 13th August, 2002. Thus it was argued that the decision of the Regional Commissioner for Lands (Centre) was reasonable, fair, just considerable and consistent with the law and government policy on land development and citizen welfare.

Counsel addressed me. There were skeletal arguments filed by both sides. According to counsel for the applicant the decision of the Respondent to withdraw Plot No. 12/568 from the applicant was based on wrong premise. The applicant was not accorded the right to be heard and there was no reasonableness in the Wednesbury sense in the decision of the Respondent. The Applicant also alludes to Section 44 (4) of the Constitution on expropriation of property and argue that it can only be done for public utility and where there is adequate notification and appropriate compensation, none of which exist in the present case.

The Respondent argues that by letter of 24th June, 2008 the applicant was given the reason why the plot was to be withdrawn from him if he did not rectify the failure to develop the plot by 8th July, 2008. On 14th July, 2008 the Respondent then informed the Applicant that the plot had been re-allocated to another developer. According to the Respondent this meets the requirements of Section 43 of the Constitution on the right to be heard. The Respondent concede that the crucial issue was whether there was development on Plot No. 12/568 as at 24th

June, 2008. The Respondent then said that the fence that was standing on one side of the plot did not amount to development on the plot alleging that it was illegally constructed as it was done without permission.

On the question of expropriation under Section 44 (4) of the Constitution, it was argued for the Respondent that the Section is not applicable because in the case at hand the applicant was in a fundamental breach of a contract or covenant leading to the acquisition of the piece of land. The Respondent calls on this court to uphold the decision of the Regional Commissioner for Lands withdrawing Plot No. 12/568 and lift the stay order granted earlier. The Respondent also prays for costs.

This is a judicial review. The concern of the court is the decision-making process. It is not the duty of this court to substitute its own decision in place of an administrative decision. Where the Court finds that the decision-making process was flowed it had the power to quash the decision which is the result of flawed procedure. This Court looks for procedural fairness and whether an individual has been given fair treatment by the decision-making authority. (See The *State v The Chief Immigration Officer, Exparte Molvin Ibrahim Mussa Bharuchi Misc Civil Cause No. 1 of 2001 (Mzuzu, Unreported). Civil Liberties Committee v The Minister of Justice and The Registrar General MSCA Civil Appeal No. 12 of 1999).*

In the case at hand the decision to be judicially reviewed is that made by the Regional Commissioner for Lands (Central) withdrawing Plot No. 12/568. It is a common case that on 3rd September, 2001 the Applicant was offered Plot No.

12/568 in the City of Lilongwe by the Controller of Land Services. Regarding the withdrawal of the plot from the Applicant, two letters are particularly relevant. Both letters were written by the Respondent, dated 24th June, 2008 and 14th July, 2008 respectively. The first one states as follows:

"Ref Alimaunde – 12/568 24th June, 2008

Mr. W.F. Tsoka
P.O. Box 30133
LILONGWE 3.

Dear Mr. Tsoka

RE: WITHDRAWAL OF PLOT NO. 12/568 IN THE CITY OF LILONGWE

I note that since the plot was allocated to you on 13th August, 2002 it has remained undeveloped and I am giving you up to 8th July, to remedy the breach and after that date the plot will be allocated to another developer. Your deposit money will be refunded upon production of original receipt.

Yours faithfully

F.S.C. Mtonga
REGIONAL COMMISSIONER FOR LANDS (C)"

The letter is exhibit WT 11. The second letter states as follows in part:

"Ref Alimaunde – 12/568 14th July, 2008

Mr. W.F. Tsoka

P.O. Box 30133

LILONGWE 3.

Dear Sir,

RE: WITHDRAWAL OF PLOT NO. 12/568 IN THE CITY OF LILONGWE

I visited the plot on 10th July and found that you have started building a fence.
Please NOTE that the plot has already been allocated to another developer which fact was made known to you in my letter of 24th June.

I wish to remind you that you are now a trespasser and liable to prosecution for the illegal possession of government land after due notice to vacate was given to you. If you resist I will instruct our lawyers to institute legal proceedings against you.

Yours faithfully

F.S.C. Mtonga

REGIONAL COMMISSIONER FOR LANDS (C)"

This letter is exhibit WT 8. These are the two material letters in this matter. As will be observed the letter exhibit WT 11 takes the form of a warning. A close reading of it shows that the Respondent had made an observation that the plot was undeveloped and he gave the applicant until 8th July, 2008 to develop the

plot, a period of 14 days. Perhaps the wording of Exhibit WT 1 is problematic in that it gave the Applicant *"up to 8th July to remedy the breach and after that date the plot will be allocated to another developer."* This seems to suggest that whether the Applicant remedied the breach by 8th July or not, the plot would still be allocated to another developer. Ordinarily though one would have expected that if the breach was remedied by 8th July, thus if the plot did not remain undeveloped as of 8th July, then the plot would not be allocated to another developer. Remedying the breach therefore would ordinarily mean that the plot remained in the name of the Applicant. Be that as it may, certain matters come out clearly from exhibit WT 11. The first is that there was an intention to withdraw the plot on the sole reason that the plot had remained undeveloped since 13th August, 2002. The second thing is that the Respondent was minded of giving grace period, and did in fact give grace period of 14 days within which the Applicant should remedy the breach. Exhibit WT 11 is clear that any future act of withdrawal would be contingent upon the Applicant not remedying the breach within the period allowed. Between 24th June, 2008 and 14th July, 2008 there was no communication from the Respondent and the Applicant stating that the Applicant had failed to meet the date of 8th July and that the plot was in fact being withdrawn.

In the letter of 14th July, 2008 the Respondent said among other things that:

> *"Please Note that the plot has already been allocated to another developer which fact was already made known to you in my letter of 24th June."*

The letter of 24th June is Exhibit WT 11. With respect to the Respondent the letter of 24th June, 2008 was not a withdraw letter. Neither was it advice that the plot had already been allocated to another developer. Again the letter of 24th June, 2008, being Exhibit WT 11, cannot be regarded as due notice to vacate the plot to the Applicant. My reading of Exhibit WT 8 and Exhibit WT 11 show that neither of the two letters amount to communication of a decision to withdraw Plot No. 12/568. However Exhibit WT 8 shows that the decision had been made and implemented without the applicant being informed and further that within that short space of time the plot had been allocated to another developer. Again from a reading of both Exhibit WT 8 and Exhibit 11 it is clear that the reason for which the withdrawal of the plot would have been done was that it remained undeveloped even when a grace period of 14 days was given. I can only gather this reason from the two letters. Section 43 (b) of the Republic of Malawi Constitution on administrative justice provides that every person has the right to be furnished with reasons in writing for administrative action where his or her rights freedom, legitimate expectations or interests if those interests are known. In the present case no such reason can be said to have been furnished. The case of *Chipula v Attorney General [1995] 1 MLR 76* is illuminating. In that case the Zomba Town and Country Planning Committee revoked its approval for the plaintiff to develop a piece of land and reallocated the land to other parties. The High Court of Malawi quashed the decision of the Committee because the Committee had not given the plaintiff the opportunity to be heard before revoking the approval. In the case at hand the Respondent never gave the Applicant the opportunity to be heard before withdrawing the plot. Surely having given the

Applicant some grace period to do development on the plot the Respondent should have given the Applicant the opportunity to be heard before the decision to withdraw the plot was finally made. (See also *Kondowe and Others v Malawi National Council of Sports [1993] 16 (1) MLR 213).*

If for one moment we accept that the Respondent withdrew the Plot No. 12/568 by the letter of 24th June, 2008 then the only reason given for such withdrawal is that the Applicant had failed to develop the plot since 13th August, 2002 when the plot was allocated to him. I must observe that any attempt afterwards to give other reasons for withdrawal as the Respondent tried to do in subsequent correspondence is unacceptable and cannot be recognized within the requirements of the law. Now when Section 43 (b) of the Constitution provides the right to be furnished with reasons in writing for administrative action, such reasons must be good, sound and credible reasons. Not every reason will meet the requirements of Section 43 (b) of the Constitution. In the case at hand there is clear evidence that any delay in developing the plot in question could not be attributed to the applicant alone. It is clear that the Respondent too contributed to the delay in the development of the plot. For example the plot allocated to the applicant was not serviced at the time. Although the applicant submitted his development plans in December, 2002 to the Lilongwe City Town Planning Committee, the same could not be processed by the said Committee on the ground that the plot was unserviced. Exhibit WT 5 being a letter from the Lilongwe City Assembly to the Applicant with a copy to the Respondent and dated June 13, 2003 confirms this position. It reads in part.

"Dear Sir,

Plot No. 568 Area 12

The captioned topic refers.

Please be advised that the Commissioner of Lands is aware of the stand of the Lilongwe Town Planning Committee with regard to development plans on unserviced land. We take it that the Commissioner's Office might have sent you the withdraw letter by mistake.

However, the Commissioner may be in a better position to enlighten you why they sent you the letter that you refer to.

Yours faithfully,

D.L. Mpoola
DIRECTOR FOR PLANNING AND DEVELOPMENT
FOR CHIEF EXECUTIVE"

As a matter of fact, the Applicant only got permission from Lilongwe City Assembly to develop the plot in July, 2005 as per Exhibit WT 6. Thus, the Applicant could not have been expected to develop the plot before July, 2005. Exhibit WT 1 which is the letter of offer of plot dated 3rd September 2001 written by the Controller of Land Services reads in part:

> *"You will be required to submit a planning application within six months of the date hereof. When this department receives*

notification of approval, Ministerial consent with them be sought. You will then be required to complete the standard form of lease agreement before you will be permitted development."

It is clear from the above that even when his development plans approval were received from Lilongwe City Assembly Town Planning Committee, the Applicant was further constrained by the Respondent's own requirement as contained in the above paragraph. It is not clear from the Respondent's affidavit when they finally permitted the Applicant to commence development. By Exhibit WT 2 which is a Certificate of Completion of Payment of Development Charges and Anxiliary Fees and Duties issued by the Respondents to the Applicant and dated 23rd May, 2006 the Respondent indicates that 23rd May, 2006 was the date the Applicant completed payment of Development Charges and other anxiliary fees and duties. If the Respondent's permission to the Applicant to commence development was contingent on his payment of the development charges and anxiliary fees and charges, it may very well be argued that 23rd May, 2006 is the date when the Applicant was permitted by the Respondent to commence development. Of course I am aware that the letter of offer did say that as a special incentive to developers in the Capital City, the balance of development charges would be payable when the lease document was sent for the Applicant's completion. It is not clear on the affidavits that the said lease document was ever sent to the applicant. On the other hand the applicant suggests that the lease documents have not been sent to him yet.

Further the Applicant has produced in this court, through supplementary affidavit, a newspaper cutting of a Public Notice issued by the Respondents and published in the Nation of 15th December, 2008 which is as follows:

> *"The Ministry of Lands and Natural Resources wishes to notify the general public and especially the residents and developers of Area 12 in the City of Lilongwe that the Ministry has embarked on construction of Access Roads and drainage system in Area 12 Extensions and has engaged Deans Engineering Company to do the work.*
>
> *This work will take six months commencing 1st November, 2008 to 30th April, 2009. Therefore, it is expected that other access roads in this particular Area may be inaccessible while under construction.*
>
> *Any inconvenience that this work may bring is greatly regretted.*
>
> *F.E.Y. Zenengeya*
>
> ***SECRETARY FOR LANDS AND NATURAL RESOURCES."***

The Applicant produces this public notice as evidence that he was not entirely to blame for any perceived delay in developing Plot No. 12/568. The Public Notice seems to contradict Exhibit FM 1, a letter of 29th July, 2004, from the Respondent to the Applicant saying in part: *"Would you please go to City Assembly and confirm your plans if they are approved because roads are constructed in Area 12 for you to proceed with your development."*

There is another aspect to the reason given by the Respondent in their letter of 24th June, 2008 as being the basis for purported withdrawal of the Plot No. 12/568. The Applicant stated that he in fact began developing the plot much earlier than the 24th of June, 2008. He brought a water tap on the plot and paid water bills for the water used on the plot. He produced Exhibit WT 13 being his application to Lilongwe Water Board for new water connection on Plot No. 12/568 and it is dated 03 April, 2007. He also produced Exhibit WT 14 as payments he made on 4th October, 2007. Exhibit 15 consists of seven Water bills for the plot issued to him by Lilongwe Water Board prior to the letter of 24th June, 2008. Again the Applicant stated that he built a perimeter fence for the plot between January and March 2008 such that by 24th June, 2008 there was development taking place on the plot. He produced in evidence numerous receipts relating to materials purchased and labour charge payments made for the construction of the fence. I have examined the receipts, thirty five of them, and they all cover the period between end January, 2008 and end March, 2008. I am satisfied that when the Respondent stated on 14th July, 2008 in Exhibit WT 8 that:

> *"I visited the plot on 10th July and found that you have started building a fence."*

He must have found the fence that was built between January, 2008 and March, 2008. I am not persuaded in the least that the Applicant could have built the fence within the 14 days between 24th June, 2008 and 8th July, 2008. In fact, the Applicant may only have heard of the letter of 24th June, 2008 but never saw it. He never received it until his lawyers, by their letter of 21st July, 2008, Exhibit WT 9

demanded the letter as it was referred to in the letter of 14th July, 2008. The Applicant only got to see the letter of 24th June, 2008 when it was sent to his lawyers by the Respondent under cover of their letter Exhibit WT 10 dated 22nd July, 2008, well after the event.

Counsel for the Respondent argued that it was neither here nor there because of the postal rule that a letter once posted is deemed to have been received. However, in the present case there was no proof that the letter was posted at all. For the letter of 14th July, 2008 the Respondent delivered it to a guard of the Applicant at the plot. It is unclear why the Respondent did not do the same for the earlier letter of 24th June, 2008. One thing is clear, that the Applicant did not develop the plot on account of the letter of 24th June, 2008, which remained a mystery until 22nd July, 2008, well after the purported withdrawal of the plot. The conclusion to be drawn from all the above is that the reason given for the purported withdrawal is a mere shame and does not meet the requirement of Section 43 (a) of the Constitution.

The affidavit in opposition raises other reasons on the basis of which the plot might have been withdrawn. Those reasons were never brought to the attention of the applicant at the time of the purported withdrawal. The Respondent cannot withdraw the plot. Moreover many of those reasons are contradicted by evidence emanating from the Respondent's own Office. The averment that the Appellant had not exhibited anything to prove that the Lilongwe City Assembly failed to approve the granting of planning permission in or around 2004 is contradicted by the Lilongwe City Assembly's grant of permission dated 11th July, 2005. The

averment that issuing of lease was contingent upon full payment of development charges is contradicted by the Respondent's own letter of offer of 3rd September, 2001 indicating flexible condition as incentives for Capital City Developers. The averment that the Applicant had not completed development charges is contradicted by the Certificate of Completion of Development Charges and Anxiliary Fees and Duties issued by the Respondents to the Applicant on 23rd May, 2006 (Exhibit WT 2). Now, even if the Applicant had only paid K166,407.50 as alleged and leaving a balance of K10,000.00 equity would have recognized substantial performance and would have come to the aid of the Applicant. The Respondent purports to argue that the applicant constructed the fence on one side of the plot without submitting his fence plan for the approval of the Lilongwe Town Planning Committee as required by law. However, it is clear that the purported withdrawal was based on the alleged undeveloped plot, not on a plot improperly developed. To have a land developed on the basis of plans not approved cannot be the same thing as to have the plot not developed. There was development on the plot, except that the Respondent alleged that the development was based on plans not approved by Lilongwe City Assembly.

I must next consider whether the decision of the Respondent to withdraw the Plot No. 12/568 from the Applicant was reasonable in the Wednesbury sense. It is the case for the Applicant that the decision of the Respondent was unfair and unreasonable. The Respondent on the other hand argues that the decisions was fair and reasonable. It is true that a decision of a tribunal or other body exercising a statutory or administrative duty of a public nature can be quashed for unfairness, unreasonableness or irrationality (See *Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] 1 KB 223*; *Council of Civil Service*

Unions v Minister for the Civil Service [1985] AC 374; Felix Mtwana Mchawi v The Minister of Education Science and Technology Miscellaneous Civil Cause No. 82 of 1997 (Unreported); Kalumo v Attorney General [1995] 2 MLR 669; Du Chisiza v Minister of Education and Culture [1993] 16 (1) MLR 81). I also agree that it is not for the Court to quash a decision merely because it does not agree with it or consider it to have been founded on a grave error or judgment. Since the court merely exercises supervisory jurisdiction, and not appellate jurisdiction, in a judicial review, it will not substitute its view for that of the public body charged with the exercise of a discretion under a law. In the case at hand it was unfair for the Respondent to write a letter to the Applicant on 24th June, 2008 giving him 14 days within which to develop the plot but not to being that letter to his attention until the letter of 14th July, 2008 where the earlier letter was merely referred to. When the Applicant demanded to see the letter of 24th June, 2008 he was not allowed such access until 22nd July, 2008, following the help of his legal practitioner. It seems to me that the letter of 24th June, 2008 was merely for the Respondent's record to justify withdrawal of the Plot No. 12/568, whether the Applicant did some development on it or not. That was most unfair on the part of the Respondent. It was also most unreasonable for the Respondent to give a grace period of as short as 14 days within which the Applicant should have constructed a house on Plot No. 12/568. It is unheard of that a house in an exclusive area as Area 12 in the City of Lilongwe could be built within 14 days. The Respondent who deals in land matters should certainly know that it is impossible, if not next to impossible, for a house to be built in Area 12 in 14 days. It is surprising the speed at which the Respondent acted in withdrawing the plot and re-allocating it to another developer without even giving the Applicant an

opportunity to be heard. I am satisfied and I find that the Respondent acted unfairly and unreasonably in the Wednesbury sense in withdrawing Plot No. 12/568 from the Applicant. The decision ought to be quashed.

In this matter the Applicant called in aid Section 44 (4) of the Constitution on expropriation of property. I must say that I am unable to see elements of expropriation in the present case. As was stressed by Chimasula Phiri, J., as he then was in *The Administrator of the Estate of Dr. H. Kamuzu Banda v The Attorney General Civil Cause No. 1839 (A) of 1997 (Unreported)* expropriation will only be established if it is for public utility besides there being adequate notification and appropriate compensation. Re-allocation of a plot to another developer as in the present case takes the case out of the realm of expropriation, as this cannot be said to be for public utility. In my view this is a case of the Respondent exercising the right of re-entry on the land as in *Mangulama v Gazamiala [1991] 14 MLR 230*. Under the Land Act the Respondent is entitled to exercise the right of re-entry on Land leased to a person if that person is in fundamental breach of the lease agreement.

If I had found in the present case that the Applicant had been in fundamental breach of a lease agreement with the Respondent I would have gone on to hold that the Respondent properly exercised the right of re-entry and that would have had nothing to do with expropriation of the land.

In the present case I find that the Respondent did not comply with Section 43 of the Constitution and their decision and action withdrawing Plot No. 12/568, Area

12 in the City of Lilongwe was unfair, unreasonable and irrational. I accordingly quash that decision and action. The Respondents are directed to process the Plot No. 12/568 Area 12 in favour of the Applicant in the normal way and that the Applicant must hence forth oblige with all the requirements in accordance with the law.

The Applicant gets costs for this application.

MADE this 7th day of July, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E