IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW CASE NUMBER 56 OF 2016

BETWEEN:

THE STATE

AND

THE MINISTER OF LANDS, HOUSING AND URBAN DEVELOPMENT **1st RESPONDENT**

LIWONDE SAFARI CAMP LIMITED **2nd RESPONDENT**

EX PARTE :

DARREN BRUESSOW t/a BUSHMAN BAOBAB LODGE APPLICANT

CORAM: JUSTICE M.A. TEMBO,

B. Theu, Counsel for Applicant
F. Maele , Counsel for 2nd Respondent
Mankhambera, Official Court Interpreter

ORDER

1. This is this Court's order on the applicant's application, with notice, for an order restoring the leave to apply for judicial review in this matter following the discharge of the said leave by my brother Judge on account of the

applicant's failure to attend the hearing of the application for judicial review. The application is contested.

2. Due to some intervening factors, this matter was recently assigned to my Court by the previous Judge since my Court is handling another private law matter involving the same land the subject matter of the judicial review, namely, private land.
3. The facts on this application, as gathered from the affidavit in support of the application, are straightforward. The 2nd respondent obtained a lease from the 1st respondent over part of land which the applicant claims was not supposed to be covered by the lease and which land he claims he occupied and uses for accessing his business that lies on the land adjoining that of the 2nd respondent. The applicant's claim is that the lease encroaches on his land and also blocks a public road to his premises. The applicant therefore obtained leave to apply for judicial review of the decision of the 1st respondent granting a lease to the 2nd respondent over that disputed land. The leave was obtained on 8th July, 2016 and it was accompanied with directions including the hearing date of 3rd August, 2016. At that stage, the 2nd respondent was not a party to the judicial review proceedings.
4. On 3rd August, 2016, the 2nd respondent applied to be added as a party. That application was not heard on that date and was actually heard and granted on 13th September, 2016.
5. By the order adding the 2nd respondent, the Court also ordered that the judicial review application be heard on 26th October, 2016. That order adding the 2nd respondent and setting the hearing date was served on the applicant on 10th October, 2016. However, when the matter was called for hearing on 26th October, 2016, the applicant was absent. Consequently, the Court discharged the leave to apply for judicial review as well as the ancillary orders attached to the leave. The order discharging leave was served on the applicant on 27th October, 2016. That is what led to the instant application.
6. On 4th November, 2016, the applicant filed an application to set aside the order discharging the leave. The reason advanced by counsel for the applicant, who previously acted in this matter, is essentially that he failed to attend the hearing of the application for judicial review because, although his firm was duly served with the notice of hearing, he was not made aware of the date of the hearing. He elaborated that a secretary in his firm acknowledged service of

the notice of hearing of the application for judicial review but inadvertently did not diarize the same for counsel's attention.

7. He excused his secretary for not noticing that the Order adding a party also set the hearing date. He however indicated that he was aware of the application to add the 2nd respondent as a party which had been set for and adjourned on the initial hearing date of the application for judicial review because the 1st respondent was present. Counsel also explained that he did not attend the application to add the 2nd respondent as a party since he had no objection and communicated the same to previous counsel for the 2nd respondent. He indicated that on 21st October, 2016, he was served with the papers for the 2nd respondent and placed them on his file awaiting further directions of the Court.
8. The applicant asserted that the leave should be restored and that the matter be reheard since he was not heard on the merits and the 1st respondent was not put to answer on the issues on the application for judicial review. He added that the effect of the dismissal of the judicial review proceedings has grave consequences for him in that he may have to close down his business as, among things, the road to his business premises is under the lease the subject of the judicial review. He elaborated that closure of his business will lead to loss of employment and forex from foreign visitors.
9. The 2nd respondent did not file an affidavit but contested the application by way of submissions after the applicant filed his own submissions on his application.
10. Both parties' submissions correctly indicate that in terms of Order 35 rule 1 (2) of the Rules of Supreme Court, which were the applicable rules then, if when the trial of an action is called and one of the parties does not appear, the Judge may proceed with the trial of the action in the absence of that party.
11. They further indicated that Order 35 rule 2 (1) Rules of Supreme Court provides that any judgment, order or verdict obtained where one party does not appear at the trial may be set aside, on the application of the party, on such terms as it thinks just. And that, Order 35 rule 2 (2) provides that any application under this rule must be made within seven days after the trial.
12. The applicant then referred to the case of *Grimshaw v Dunbar* [1953] 1 ALL ER 350 in which it was held that a party to an action is entitled to have it heard in his presence. And that if by some mischief or accident a party is shut out

from such a hearing and an order is made in his absence then common justice demands, so far as it can be given effect without injustice to other parties, that the litigant who is accidentally absent should be allowed to come to court and present his case, on suitable terms as to costs.

13. Both parties referred to the case of *Chocked and another v Goldschmidt and others* [1998] 1 ALL ER 372, in which it was held that on application to set aside a judgment given after trial, in the absence of the applicant, different considerations apply than on an application to set aside a default judgment. In particular, the predominant consideration for the court was not whether there was a defence on the merits but the reason why the applicant had absented himself and if the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. It was further held that other relevant considerations included the prospect of success of the applicant on retrial, the delay in applying to set aside, the conduct of the applicant, whether a successful party would be prejudiced by the judgment being set aside, and the public interest.

14. The applicant then argued that the main consideration on this application should be the reason behind his failure to attend the hearing of the application for judicial review. He admitted failure to attend due to in-house problems in his lawyer's firm. He observed that the effect of discharging the leave is that he will lose his customers whereas the interim reliefs he got did not affect the 2nd respondent's business. He argued that the only way justice would be served is that the matter be decided on the merits as the leave was only dismissed on account of his nonattendance.

15. The 2nd respondent took a contrary view, after noting that the failure to appear by the applicant at the hearing of his application for judicial review was due to his lawyer's firm secretary's failure to diarize the date of hearing upon service of the notice of hearing. The view of the 2nd respondent is that the failure to attend the hearing is inexcusable and that the applicant's counsel cannot shift the blame to his secretary who is part and parcel of his practice. It noted that there is no explanation why the secretary did not diarize the hearing date.

16. The 2nd respondent then argued that one of the considerations on this application, per *Chocked and another v Goldschmidt and others* [1998] 1 ALL ER 372, is whether the applicant's case has prospects of success once leave is

restored. It took the view that the case at hand has no prospect of success given that the affidavit of the 1st respondent shows that the applicant is in occupation of public land without any authorization from the responsible Minister as per the relevant statute. And that public policy would not favour restoration of a matter for the benefit of a person in illegal possession of public land to be challenging a lease granted by the Minister responsible for Lands. The applicant echoed the views of this Court in *Ex Parte Chikwiri and others* Miscellaneous civil cause number 27 of 2015 (High Court) (unreported) where it was held that public policy does not allow a person to benefit from illegalities, in that particular case being carrying on commercial activities in a residential area without the requisite permission from the respondent authority. It further noted that occupation of public land without permission from the Minister was an offence under section 10 of the Land Act.

17. The 2nd respondent also argued that restoring the leave in this matter would be prejudicial to it when the application has no prospect of success given that the applicant has no authority to be on the adjoining public land which he is occupying.
18. This Court agrees with the parties' submission that a party is entitled to be heard before being condemned. That is a fundamental of justice. This is reflected in the provisions of Order 35 of the Rules of Supreme Court cited by both parties.
19. The main issue for consideration on this application is indeed the reason why the applicant had absented himself, and if the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. See *Chocked and another v Goldschmidt and others* [1998] 1 ALL ER 372.
20. This Court has looked at the facts in this matter, in particular, that the order adding the 2nd respondent as a party and also setting the matter down for hearing was duly served on the applicant through his lawyers on 10th October, 2016 indicating that the hearing was set for 26th October, 2016. The applicant's lawyer got the notice and for the entire period between 10th and 26th October, 2016 did not check to see what the Order said. There appears to have been a deliberate laissez-faire approach to this case by the applicant's lawyer.
21. Having not attended the application to add the 2nd respondent as a party in this matter, one would have expected that counsel for the applicant would have

been interested to have a look at the terms of the order adding the 2nd respondent as a party soon after the same was made without his objections. That was an opportunity at which counsel would have perused the order adding the 2nd respondent and noted the date of hearing.

22. Again, after counsel for the claimant was served with the papers on the application for judicial review by the 2nd respondent he would have had a chance to look at his file since he said the said papers were placed on the file at his firm. This time counsel also did not bother to check his file.

23. In such circumstances, this Court agrees with the 2nd respondent that it cannot be said that the failure to attend the hearing of the application for judicial review herein was by accident or mistake. It is the view of this Court that the applicant's counsel acted with a deliberate laisse-faire attitude and as a result failed to attend a hearing of his own application. This Court therefore agrees with the 2nd respondent that there is therefore no plausible excuse for the applicant's failure to attend the hearing of the application or judicial review at which the said leave was discharged due to the claimant's non-attendance. The foregoing notwithstanding, this Court would have been amenable to exercising leniency to previous counsel's slip and to consider the restoration of leave on terms as to costs as submitted by the applicant on the strength of the authority of *Stripes Industries v A-G (Ministry of Lands)* Land cause number 46 of 2017 (High Court) (unreported) (13th June, 2018) but for the next matter for consideration.

24. The next consideration here is whether the restoration of the leave would really make a difference considering the argument by the 2nd respondent that the case of the applicant is not worthwhile given that he is in occupation of the land he claims to be his without any authority from the Minister Responsible for Lands.

25. An examination of the application for judicial review as presented at the leave stage as per the rules, shows that the applicant asserts that on the application for lease by the 2nd respondent, the 1st respondent treated the land in issue both as customary land and as public land. He however does not come out clearly as to the nature of the land in question herein. What is telling from the papers on the application for the lease by the 2nd respondent that, as pointed out by the applicant himself that the District Commissioner for Machinga did not sign off on a Form that would signify that the land was customary, the process

of dealing with the land as customary land was abandoned midway. It appears to have been a mistake. In the circumstances, what the applicant says is essentially that both himself and the 2nd respondent were granted rights to use their respective pieces of land by a local chief on the pretext that this was customary land. The local chief appears not to have had no authority in the matter. The applicant has not provided any evidence in support of the leave to move for judicial review that the land herein is customary land. However, the 2nd respondent obtained a lease from the Minister responsible for Land.

26. In the premises, this Court agrees that the applicant is on this public land illegally and without authority from the Minister responsible for Land. The Minister exercised powers under the law to grant a lease as he is entitled to and it would be against public interest to allow the applicant to be challenging the Minister in such circumstances where he is proceeding from a position of illegal occupation of public land.

27. This Court agrees further with the 2nd respondent that if the leave were restored in the foregoing circumstances the prospects of success are tenuous such that it is not prudent to restore the leave.

28. The preceding view of this Court is not swayed notwithstanding the applicant's further submission that when looking at prospects of success this Court does not need to go into much detail. The applicant observed that although the land in issue is said to be public land by the 1st respondent, still that does not account for existing interests which various parties, villagers, have acquired by virtue of occupation of the land from time immemorial which the 1st respondent acknowledged. The applicant contended that it is this intricate and curious phenomenon of what he termed 'de jure public land which is under de fact customary management' that is the source of the applicant's occupation of the land at the instance of the local chief, a confusion under which the 2nd respondent also operated for a number of years. The applicant indicated that these are matters for consideration at the judicial review hearing. And that there is no demonstrable prejudice to the 2nd respondent.

29. This Court in answer to the further submission observes that the Land Act as it stands makes it an offence to use or occupy public land without authorization from the Minister. That is according to section 20 of the Land Act. It is simply not allowed under any guise. Under the old Land Act, the

same was provided for in section 10. Section 134 (1) of the Registered Land Act which provides for ownership of private land by peaceable, open and uninterrupted possession without permission of any person lawfully entitled to such possession for a period of twelve years has a proviso that no person shall so acquire the ownership of customary and public land. These provisions make clear that Parliament intended that no one must acquire rights in public land by occupation or otherwise but except with authority from the Minister responsible for Land.

30. On another note, the papers of the applicant on obtaining leave also do not show any proof that the road in issue, allegedly blocked by the lease, is indeed a public road.
31. The foregoing premises make the case of the applicant on the further submission untenable. This buttresses the 2nd respondents case that the applicant's case has no prospect of success and that there is really no point in restoring the leave.
32. Further, restoring the leave in such circumstances will prejudice the 2nd respondent who has a lease from the lawfully constituted authority.
33. Given all the foregoing circumstances as discussed above, this Court declines to set aside the order discharging leave in this matter.
34. Costs follow the event and are for the 2nd respondent.

Made in chambers at Blantyre this 28th October, 2021.

M.A. Tembo
JUDGE