Banda and another v Attorney–General
[1995] 2 MLR 797 (HC)

Division: High Court of Malawi
Principal Registry
Date: 12 May 1995
Miscellaneous Application Number: 89/1994
Before: Mtambo J

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[1] Human rights – Right to privacy not violated by land acquisition for public good
[2] Judicial review – Not concerned with merits but decision-making process
[3] Judicial review – Representative action only when person with interest unable to take action personally
[4] Land – Land acquisition under Lands Acquisition Act – Whether constitutional vide section 5 of Constitution
Editor's Summary
The applicants sought to stop the Government from acquiring two properties owned by the first applicant. The acquisition was purportedly made under the Lands Acquisition Act which entitles the Government to acquire any piece of land in the public interest. The second applicant meant to assist the first applicant to take up the action on the ground that the first applicant was not able to do so himself on account of old age and ill health.
Held - Dismissing the action:
(1) Legal standing rests in persons with sufficient interest. Since the first applicant was personally able to be a part of the proceedings, the second applicant had no interest in the matter.
(2) The Lands Acquisition Act was not inconsistent with the provisions of the Constitution.
(3) Judicial review is not concerned with the merits but the decision-making process.
Case referred to in the ruling
Chief Constable of North Wales Police v Evans [1982] 3 All ER 141 – applied
Ruling
Mtambo J: These proceedings originate under order 53 of the Rules of the Supreme Court 1965 for judicial review of the decision of the minister of the Malawi Government responsible for land matters (hereinafter referred to as the Minister) whereby the first applicant's properties known as Mudi House of Title Number Blantyre East 7 in the city of Blantyre and Mtunthama House of Title Numbers Njewa 78, 79, 80 and 81 in the city of Lilongwe have been compulsorily acquired by the Government under the provisions of the Lands Acquisition Act (Cap 58:04) of the laws of Malawi (hereinafter referred to as the Act).
I intend to narrate the circumstances of the case as briefly as I can, but some detail will be inevitable. Before I do so, however, let me first
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dispose of the question now exercising my mind, namely, the standing of the second applicant (hereinafter called "the Organisation") in the proceedings. The generally accepted position is that the overriding rule governing the standing of a person to apply for judicial review is that he "has a sufficient interest in the matter to which the application relates" (see order 53/1-14/11). The facts before me indicate that the Organisation decided to take action: "because of human rights and because the man is voiceless, defenceless and weak," according to Reverend Longwe who testified before me; and the term "the man" refers to the first applicant. I do not think that the witness can be taken seriously because "the man" is in fact himself a party to the application, a fact indicative enough that he is not voiceless, defenceless and weak as the Organisation would like the court to believe. In fact, I do recall that Counsel did indicate at one

stage that his client was well and in good health. Even if it might have been the position that the first applicant could not personally lodge the application, I would myself have been reluctant to find that the Organisation has "a sufficient interest" in the matter to which the application relates. I have gone further and considered whether it can be said that the Organisation's interest is of such a general and public nature as to entitle it to apply for judicial relief. I must say that I would have found some force in this but only if it were true that the first applicant was indeed voiceless, defenceless and weak, lest we, to borrow the expression:

"Create a class of person, popularly referred to as a 'private Attorney–General', who seeks to champion public interest in which he is not himself directly or personally concerned, under the guise of judicial review" (see order 53/1-14/11)."

The first applicant is himself up and fighting for his rights, as I have already said, and, in any case, there is nothing the Organisation's application is advancing that has not been advanced by the first applicant himself. The application is to all intents and purposes a mere duplication of the application by the first applicant himself.

In the circumstances, I feel unable to entertain the Organisation's application and it is dismissed with costs. I will, therefore, proceed to consider the matter as if the first applicant was the sole applicant.

Now the facts. It is commonplace that this country became a Republic on 6 July 1966 and that the applicant became its first head of state and Government, a position he held until 21 May 1994. And the facts, as can be gathered from the oral evidence and the affidavits before me, show this. On 1 August 1968, by an Indenture of Conveyance made between the Minister of the one part and the applicant of the other part, the Minister sold and conveyed to the applicant in his private capacity, at the price of £16 295, all that plot of land in the then township (now the city) of Lilongwe comprising 18.981 acres, more or less, more

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particularly delineated on Deed Plan Number 264/68 and called Plot Numbers 3080 and 3081 which included a dwelling-house and outbuildings already erected thereon to hold the same in fee simple. Desirous of expansion, the applicant, in December 1968, purchased Plot Numbers 3078, 3079, 3082 and 3280, adjoining the above mentioned property, more particularly described on Deed Plan Number 50/69 for a total consideration of £22 700.

The applicant then entered into lease agreements with the Minister whereby he demised unto the tenant (the Minister) a number of plots together with the buildings thereon for use by the head of state (the applicant himself) at rentals which appear to have been faithfully paid and happily received. It is observed here, although without real validity, that it would seem from the totality of the facts that the Minister was the tenant of practically the entire premises known as Mtunthama House, and this was chiefly so for security reasons, I think. So much for Mtunthama House.

The circumstances relating to the acquisition of Mudi House by the applicant are similar to those relating to the purchase of Mtunthama House. There are two pieces of land one consisting of 7.76 acres and another consisting of 1.894 acres situate at Mandala in the city of Blantyre and are known as Plot Numbers 863A and 868A of Title Number Blantyre East 7, more particularly delineated on Survey Department Deed Plans Numbers 342/60 and 343/60, respectively. This property was conveyed to the applicant by the Minister by an Indenture of Conveyance dated 29 February 1984 for a sum of K246 839. There is no evidence whether this property too was leased to the Minister, but suffice to say that the government had bought it together with the buildings thereon from African Lakes Corporation Limited in 1966 at a total price of £14350.

I have said that the applicant ceased to be head of state and Government on 21 May 1994, when another Government assumed power. On 12 July 1994, the Minister of the new Government, so to speak, wrote to the applicant as follows:

"NOTICE TO NEGOTIATE PURCHASE OF MTUNTHAMA AND MUDI HOUSE'S

This is to give notice that it is the intention of the Government to acquire by purchase the two stately residences the ownership of which is in your name, that is, the Mtunthama House in Lilongwe and the Mudi House in Blantyre.
Accordingly, the Government seeks to enter into negotiations with you for the purchase and sale of the two houses. You are advised that in negotiating the purchase price for each house, the Government will take into account the expenditure, if any, it has incurred on the houses.
You are requested to indicate your acceptance to enter into negotiations with the Government as proposed within 14 days from the date of this letter.
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If you do not accept the Government proposal within the period stipulated, Government shall proceed to acquire the two houses compulsorily in accordance with the Land (sic) Acquisition Act."
The purpose of the letter appears to be two-fold. Firstly, to invite the applicant to negotiations with the Government with a view to purchasing his properties. Secondly, to give notice to the applicant of the Government's intention or desire to acquire the properties compulsorily under the Lands Acquisition Act, if he (the applicant) did not accept the government's proposal within a specified period. And when the letter is read carefully, the picture that emerges appears to be that its primary purpose was to give notice to the applicant of the government's intention to proceed under the Act, and this view appears to be supported by the events that followed, as will appear shortly. It seems unlikely, in any case, that the government could seriously have expected the applicant to willingly agree to sell the properties, just like no one would do so, and I say this only by the way.
Anyway, by their letter dated 21 July 1994, the applicant's lawyers, Messrs. Sacranie, Gow and Company, responded to the Minister's letter. The material part of the response read as follows:
"It would be appreciated if you would clarify the following:

1. What is the reason for the Government wishing to acquire the two stately residences?
2. Is the approach to purchase made on the basis of a willing seller, willing buyer? If not on what basis is the approach made?
3. As you have threatened the invocation of the Lands Acquisition Act in certain circumstances on what grounds would you propose implementing the same?

Once we hear from you in response to the above we shall be able to take further instructions and hopefully the matter may be resolved amicably."
The lawyers wrote again on 2 September 1994 and said: "If we do not hear from you within two weeks, we would assume the Government's intention has been abandoned."
The Minister then responded, in the material part, as follows:
"You will appreciate that both properties were erected as state residence at enormous expenditure to the Government, and Government had made its wish to negotiate acquisition or otherwise acquire the two stately residences in the public interest and it does not see it proper to start erecting new state residences now."
It is observed here that the Government had by that time already gazetted notices in accordance with the Act, a move fortifying me in my earlier observation that the government intended all along to acquire the properties under the Act and not otherwise. The notices appeared in the
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Government Gazette of 26 August 1994 and were numbered 414 and 415. They were similarly drafted and so it is not necessary to reproduce both of them. They each read:
"Notice is hereby given that the Minister of the Malawi Government Responsible for Land Matters has resolved that the above land be compulsorily acquired under the above Act.
Any person claiming to be entitled to any interest in the said land is invited to submit particulars of his/her claim to the undersigned within two weeks of the date of publication of this notice.

The person or persons entitled to transfer the land to His Excellency the President are required to do so within the period mentioned in the immediately preceding paragraph hereof.
Dated this 22nd day of August 1994."
The land was then subsequently transferred from the applicant to the Minister on 11 October 1994.
I think now is an appropriate stage at which to refer to the crucial sections of the Act. Section 5 provides:

"5 (1) If the Minister resolves that it is desirable or expedient compulsorily to acquire any land under this 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 enquiry known to him.

(2) Every notice under this section shall with all reasonable dispatch be published in the Gazette."

Subsection (3) then goes on to provide for persons with claims in the land to communicate them (the claims) within a specified period, which can be abridged in certain circumstances. Then there is section 7 which is about the service of the notice on the persons with interest in the lands to be acquired so that, and quite naturally too, they are not taken by surprise. And subsection (3) reads:

"(3) Where any such notice has been published the acquisition of the property to which it related shall not be invalid by reason only of any irregularity in the service or publication of the notice."

Such really are the circumstances in which I am being asked to review the decision of the Minister acquiring the two properties. But before I come to that I think I should first resolve the issues that have been raised concerning the law. I think I should start with the contention whether the Lands Acquisition Act is, or some provisions thereof are, still valid law because if I find in the negative there will be little point in considering the matter any further.
Section 5 of the Constitution of the Republic of Malawi provides that any law that is inconsistent with its (the Constitution's) provisions is, to the extent of the inconsistency, invalid. It has been argued before me
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that the Act is, or some provisions thereof are, inconsistent with the provisions of sections 21(1)(b), 28, 43 and 44(4) of the Constitution.
Section 21(1)(b) reads as follows:

"21 (1) Every person shall have the right to personal privacy, which shall include the right not to be subject to–

(b) The seizure of private possession."

I think it should be quite apparent to anyone that that subsection, once read carefully, would not apply in the instant case, and especially so because what the Act provides for is in certain circumstances permissible under section 44(4) of the Constitution which reads:

"(4) 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."

Besides, the Act concerns itself with acquisition of lands and, therefore, not with personal privacy which is the concern of section 21. As for section 44(4) itself I am unable, with the greatest respect, to see how the provisions of the Act can be said to be inconsistent with it. Everything that can be done under the Act appears to me to be consistent with that section of the Constitution.
Regarding sections 28 and 43, they read as follows:
"Section 28
Every person shall be able to acquire property alone or on association with others.
Section 43
Every person shall have the right to —

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

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

Here too, I find nothing in the Act that can be read as being contrary to any of these provisions. The conclusion I reach, in the circumstances, is that the Lands Acquisition Act is still valid legislation in its entirety.

Having said all that, I think I should now turn to say something regarding the function of the court and the purpose of the remedies in matters where judicial review is sought. I have had occasion in some of my earlier decisions to refer to what Lord Hallsham said on this topic in the case of Chief Constable of North Wales Police v Evans [1982] 3 All ER 141 and think that I should do so again. He said:

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"The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law . . . The purpose of judicial review is to ensure fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

I think there is wisdom in this passage, my understanding of which is that the concern of the court in a judicial review proceeding of this kind is whether the correct procedure and process were followed by the authority concerned. It is not the concern of the court as to the reasons for such decisions nor anything else outside the decision making process.

So, what answers does this offer to the various arguments before me? They are these: I am not concerned with the merits of the reasons, whether of policy or not, for resolving to acquire the applicant's two properties; I am not concerned with the merits of the acquisition of the properties by the applicant himself; I am not concerned whether the applicant paid for the properties; I am not concerned with the type or extent of developments that might have been carried out on the premises after the applicant had acquired them, and I am not concerned with who might have paid for such development or how much. What I am saying here is that these are not matters for this kind of application in which I am only to consider whether the requirements of the law have been satisfied, as the Minister is subject to the rule of law and, therefore, must comply with it, just like everyone else.

Parliament passed the law that a citizen whose property the Minister desires, in the interest of Malawi, compulsorily to acquire shall be notified of such desire. And it seems to me from reading the Act that the purpose of the notice is not to afford the person so notified an opportunity to object to the desire of the Minister, but rather to afford him time to make alternative arrangements, where that may be necessary, and of course that he should not be taken by surprise. This means that the decision of the Minister would be good whether or not objected to by the person(s) concerned and I suppose the law permits this because such decision would be, or is to be, in the public interest, a thing not unique to this country. The question, therefore, should now be whether the applicant was notified of the Minister's desire. I am satisfied that he was, and as a matter of fact even responded to the notification.

The law further requires the Minister, with reasonable dispatch, to publish the notice in the Gazette. I am satisfied that this requirement too was fulfilled.

Furthermore, and I suppose this is in recognition of the supremacy of the reason for such acquisition, the law goes further and provides that if there are to be any irregularities in the service or publication of the notice, such irregularities would not make the acquisition invalid, and I

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thought I should add this, not because I think there were irregularities, but just to

complete it all. Let me just add this: It does not appear to me that judicial review is the remedy in the facts which obtain here and I say this because the decision would still later be made by the Minister, if it is desirable, by simply complying with the requirements of the law.
In conclusion, the application must fail and it is dismissed with costs.
For the applicants:
Munlo
For the respondent:
Maluwa