



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
JUDICIAL REVIEW NUMBER 26 OF 2017**

BETWEEN:

THE STATE

AND

THE ASSISTANT REGISTRAR OF THE HIGH COURT RESPONDENT

EX PARTE:

MUHAMMAD JAWAD

APPLICANT

Coram: JUSTICE M.A. TEMBO,

Hara, Counsel for the Applicant

Mwafulirwa, Counsel for the Respondent

Mtegha, Official Court Interpreter

ORDER

This is the order of this Court on the applicant's application for leave to apply for judicial review of the respondent's decision to continue sitting as a Senior Resident Magistrate, in a matter in which the applicant is an accused person, after the respondent was posted away to sit as an Assistant Registrar of the High Court.

The application was made ex parte in the usual fashion under Order 53 rule 3 Rules of Supreme Court.

An application for leave to apply for judicial review is usually made ex parte but the Court may order such an application to come inter partes for both parties to be heard

so that the Court can form a better view on the application for leave where a consideration of the papers only at the ex parte stage leaves the Court in doubt as to whether leave should be granted or not. See Note 53/14/62 to Order 53 rule 14 Rules of Supreme Court. That is exactly what happened in this matter.

After considering the papers on the ex parte application, this Court was not sure whether to grant leave or not. One of the reasons being that a similar question has previously been resolved in favour of a former Chief Resident Magistrate proceeded to continue finalizing trial of criminal cases that were at an advanced stage upon taking up the position of Deputy Registrar. See *Ex parte Chibambo* Miscellaneous civil cause number 166 of 2009 (High Court) (unreported).

This Court therefore ordered that the application for leave be made on notice to the putative respondent.

As rightly pointed out by both the applicant and the respondent, the purpose of a leave application like the instant one is firstly to eliminate at an early stage, applications which are either frivolous, vexatious or hopeless and secondly to ensure that an application is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. See *State and Governor of the Reserve Bank of Malawi ex parte Finance Bank of Malawi* Miscellaneous Civil cause number 127 of 2005 (High Court) (unreported), *Ombudsman v Malawi Broadcasting Corporation* [1999] MLR 329 and *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Limited* [1981] 2 All ER 93.

As rightly observed by the parties, leave to apply for judicial review will be granted if the Court is satisfied that there is an arguable case for granting the relief claimed by the applicant.

At this stage, there is no need for this Court to go into the matter in depth. Once the Court is satisfied that there is an arguable case then leave should be granted. The discretion that the court exercises at this stage is not the same as that which the court is called on to exercise when all the evidence in the matter has been fully argued at the hearing of the application for judicial review. See *Ombudsman v Malawi Broadcasting Corporation*.

The applicant's contention in the main is that leave must be granted because the decision in *Ex parte Chibambo* was per incuriam the Courts Act which provides that only High Court judges shall have all the powers that magistrate courts have. In *Ex parte Chibambo* the court decided that the Deputy Registrar being part of the High Court equally has the same powers of the High Court vis a vis the powers of magistrate courts.

On the contrary, the respondent supports the decision in *Ex parte Chibambo*.

However, before this Court can consider whether there is a case fit for further investigation at a hearing and justifying leave in this matter, this Court must consider another issue raised by the respondent. That issue is that the applicant has an alternative remedy to judicial review and that therefore the applicant must utilize that alternative procedure.

The alternative procedure that the respondent refers to is the power of the High Court to review criminal proceedings in the magistrate courts once the same are brought to its attention.

That procedure for criminal review is provided in section 360 of the Criminal Procedure and Evidence Code as follows

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of reviewing the proceedings and satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

This Court notes that this review power is quite wide to encompass a review of issues of jurisdiction of the respondent sitting as a magistrate court and to continue sitting and make certain orders in the matter herein.

The issue at hand concerns jurisdiction. And so, the respondent is correct in submitting that the applicant has an alternative remedy to bring the matter up before the High Court, in particular at the moment the Criminal Division, to review the regularity of the impugned proceedings herein including the decision of the respondent to continue presiding over the matter and whether the respondent continues to have the requisite jurisdiction.

The applicant could not clearly explain why he chose to seek a judicial review other than a review under the statute that regulates criminal proceedings the subject matter of the proposed judicial review in this matter. He only insisted that that he had no alternative remedy and that section 26 of the Courts Act which provides for the High Court's power to supervise subordinate court proceedings supports the review powers of this Court.

This Court is convinced that section 360 of the Criminal Procedure and Evidence Code provides an alternative remedy allowing for a review of the regularity of the impugned decision of the respondent.

The point here is that in England decisions of the inferior courts are subject to judicial review if they are made *ultra vires*. See Note 53/14/47 to Order 53 rule Rules of Supreme Court which states that

Where, however, an inferior court or tribunal has acted outside its jurisdiction or there has been a denial of natural justice, judicial review may be the appropriate remedy. Judicial review cannot be used to appeal against the decisions of the General or Special Commissioners of Income Tax on the merits of tax cases. Appeal lies from those bodies to the High Court by way of case stated, but on points of law only: s.46 (2) of the Taxes Management Act 1970 precludes any other method of appealing against tax assessments. Aliter if the General or Special Commissioners exceed their jurisdiction, or fail to observe the rules of natural justice (in a way which cannot be dealt with on an appeal by way of case stated: cf. *R. v. Special Commissioner, ex p. Napier* [1988] 3 All E.R. 156, CA), or refuse to state a case where they are obliged to do so; then judicial review would normally be the appropriate remedy.

In contrast, here in Malawi in criminal matters any alleged acting outside jurisdiction by magistrate courts or *ultra vires* decisions of magistrate courts will be dealt with as well under section 360 of the Criminal Procedure and Evidence Code such that judicial review is not an appropriate procedure in view of the alternative review procedure under the Criminal Procedure and evidence Code. This a point that must be driven home.

In that regard, this Court agrees with the decision of this Court cited by the respondent to the same effect, namely, *Ex parte Zhang* Miscellaneous civil cause number 248 of 2007 (High Court) (unreported).

The applicant shall therefore proceed by seeking a review of the respondent's decision before the Criminal Division of the High Court under section 360 of the Criminal Procedure and Evidence Code.

Consequently, this Court will not deal with the issue whether there is a case fit for judicial review in this matter.

Leave is accordingly declined with costs to the putative respondent.

Made in chambers at Blantyre this 16th March 2018



M.A. Tembo

JUDGE