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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVL CAUSE NUMBER 355 OF 2020

BETWEEN:

EDGAR NAMAKHWA **CLAIMANT**

AND

MOTA ENGIL **DEFENDANT**

CORAM: JUSTICE M.A. TEMBO

Dzonzi, Counsel for the Claimant
Mtonga, Counsel for the Defendant
Mankhambera, Official Court Interpreter

ORDER

1. This is this court's order on the defendant's application to dismiss the claimant's claim herein for injunction and damages on a point of law or for being frivolous, vexatious and abuse of the court process. The application is taken out under Order 10 Rule 1 and Order 1 Rule 5 of the Courts (High Court) (Civil Procedure) Rules and pursuant to the inherent jurisdiction of this Court.
2. The defendant relies on Order 1 Rule 5 (1) (b) and (d) of the Courts (High Court) (Civil Procedure) Rules which provides that the overriding objective of the Civil Procedure Rules is to deal with proceedings justly, which includes saving expenses and ensuring that a proceeding is dealt with expeditiously and fairly. It also relies on Order 10 Rule 1 of the Courts (High Court) (Civil

Procedure) Rules which provides that a party may apply during a proceeding for an interlocutory order or direction of the Court by filing an application.

3. The claimant contests the application.
4. The facts of the matter are straightforward. The claimant owns a piece of farm land in Thyolo District. The defendant is a contractor engaged by the Roads Authority to construct the Thyolo-Thekerani Road. The claimant filed a summons claiming that he had entered an agreement with the defendant so that the defendant could enter upon his land and deposit some top soil. He alleges that it was further agreed that the defendant would level the place so that the claimant would then go on and grow crops on his land during the next growing season. He added that contrary to the alleged agreement, the defendant went on to use his land as a plant and equipment storage place for more than one crop growing season. He asserted that the land is outside the road reserve at 33 metres from the middle of the road. He therefore seeks an injunction to prohibit the defendant from using his land, a mandatory injunction to compel the defendant to rehabilitate the land and punitive damages for the unconscionable conduct of the defendant.
5. The defendant indicated that this matter was initially commenced before the Magistrate Court which dismissed the matter for want of jurisdiction, which is not the reason that the defendant advanced on a similar application the defendant made before the lower court. The defendant lamented that the same action has been commenced before this Court despite the claimant being aware of the arguments on this application and as the same arguments were made before the lower court.
6. The gist of the defendant's application is that the action herein ought not to have been commenced on account of the fact that there is a statutory procedure provided for cases like the instant one under the Public Roads Act.
7. The defendant asserted that the legal action is misplaced because the Public Roads Act clearly provides for the party that handles compensation issues and it further provides the procedure that is supposed to be taken when a party would like to claim for compensation.
8. The defendant indicated that at the time of the events herein it was simply an agent of a known principal which was the Roads Authority referred to as the Highway Authority in the Public Roads Act.

9. It then asserted that not only is the claimant prohibited from directly bringing an action as has been done in this case but the Public Roads Act also specifically provides that all issues to do with compensation are supposed to be handled by the Highway Authority and not a mere contractor like the defendant.
10. The defendant lamented that it would be unfair for it to go through another lengthy legal proceeding when the law clearly provides a remedy for the claimant.
11. The issue for determination is whether this Court should dismiss the present action for the reasons advanced.
12. Both the defendant and the claimant made arguments on the matter. There were preliminary issues raised by the claimant on the propriety of the instant application which this Court considers prudent to deal with and determine whether that disposes of the matter or not before the substance of the application is dealt with.

1.1 The claimant indicated two preliminary issues asserting that the instant application was not properly taken out and prayed to this Court to dismiss the application and sought an order entering summary judgment on the grounds that the defendant has no defence on merit against the claim.

13. The claimant observed that Order 1, Rule 3 of the Courts (High Court) Civil Procedure Rules governs the application of these Rules to all civil proceedings before the High Court in Malawi. And that Rule 3(1) expressly states that subject to sub rule 2, these Rules shall apply to all civil proceedings in the High Court. He noted that sub rule 2 provides for instances where other rules may apply, and states that other rules of practice and procedure shall so apply as long as it is so provided by an Act or any other written law.
14. He then asserted that it follows from the provisions of Order 1, Rule 3 (2) of the Courts (High Court) Civil Procedure Rules that except in cases where an Act or other written law provides for a different practice or procedure, all civil proceedings in the High Court are governed by the Courts (High Court) Civil Procedure Rules. And that a party may not therefore take out any proceeding which is neither provided for by the Rules nor an Act of Parliament or any written law.
15. The claimant next observed that Order 1, Rule 5 of the Courts (High Court) Civil Procedure Rules sets out the overriding objectives of the Rules. and that,

it states that the overriding objective of these Rules is to deal with proceedings justly and this includes (a) ensuring that the parties are on an equal footing; (b) saving expenses; (c) dealing with a proceeding in ways which are proportionate to the (i) amount of money involved; (ii) importance of the proceeding; and (iii) complexity of the issues; (d) ensuring that a proceeding is dealt with expeditiously and fairly; and (e) allocating to a proceeding an appropriate share of the Court's resources, while taking into account the need to allocate resources to other proceedings.

16. He then noted that Order 2 of the Courts (High Court) Civil Procedure Rules provides for the effect on proceedings of non-compliance with the Rules. He noted that Order 2 Rule 1 states that the failure to comply with these Rules or a direction of the Court shall be an irregularity. And that Order 2 Rule 2 goes on to state that, notwithstanding rule 1, an irregularity in a proceeding, or a document, or a step taken, or order made in a proceeding, shall not render a proceeding, document, step taken or order a nullity.

17. He also noted that Order 2 Rule 3 goes on to enumerate what the Court can do where there has been failure to comply with the rules. It provides that where there has been a failure to comply with these Rules or a direction of the Court, the Court may:

> (a) set aside all or part of the proceeding;
> (b) set aside a step taken in the proceeding;
> (c) declare a document or a step taken to be ineffectual;
> (d) declare a document or a step taken to be effectual;
> (e) make an order as to costs; or
> (f) make any order that the Court may deem fit. 4.

18. The claimant the observed that Order 12 of the Courts (High Court) Civil Procedure Rules provides for various legal mechanisms for an ending a proceeding without the need for a full trial. And that such instances include ending a proceeding by way of default judgment, summary proceedings, judgment on admission, withdrawal and discontinuance of actions, dismissal or striking out actions.

19. The claimant then noted that an action is said to be frivolous or vexatious where the pleadings are obviously frivolous or vexatious, or obviously

unsustainable. See the case of *A.A. Mirza General Traders v AMI (Malawi) Ltd.* Civil Cause No.59 of 1999 (High Court) (unreported). He noted that Lindley L.J. in *Attorney General of Duchy of Lancaster v London & North Western Railway* [1892] 3 Ch 274 at 277 said that the pleading must be so clearly frivolous that to put it forward would be an abuse of the process of the court. He noted further that in the case of *Dyson v Attorney General* [1911] 1 K.B. 410, 411, Fletcher Moulton L.J. defined a frivolous action in the following terms:

> Now it is unquestionable that, both under the inherent power of the court and also under a specific rule to that effect made under the Judicature Act, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiffs claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in court, and not to be refused a hearing in court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

20. The claimant then observed that in *The State v Malawi Revenue Authority and Mapeto DWS Ltd* Judicial Review Case Number 84 of 2015, Justice Potani (as he then was) defined abuse of Court process in the following terms:

> The position of the law seems to be that generally; it would amount to an abuse of the process of the court for a plaintiff or an applicant to maintain two causes of action on the same issues.

21. But that, however, making his determination of the matter, the Learned Judge held as follows:

> It must hastily be said that the court should not be misunderstood to be saying that the present proceedings cannot be an abuse of court process merely because they are a judicial review while those pending in the Supreme Court of Appeal arise from a miscellaneous application. That is not the point. The point is that although they relate to the same subject matter, the reliefs sought are different. And to further demonstrate that the reliefs sought are different it appears to this court, on the facts, that whichever way the decision of the Supreme Court of Appeal will go, that is, whether stay will be granted or not, would not necessarily affect the fate of these proceedings. The decision will not resolve the dispute over the tax assessment which by these proceedings the applicant would wish to compel the respondent to refer to the special arbitrator.

22. The claimant observed that, similarly, in the case of *National Bank of Malawi v Gondwe* [1993] 16(1) MLR 376 the High Court had occasion to consider whether the plaintiff's action was an abuse to the court process. Delivering his judgment, Tambala J (as he then was) said as follows:

> I shall now consider submissions made by both counsels. Mr Chizumila submitted, inter alia, that in commencing this action while a counterclaim grounded basically on the same facts is still pending in court, the plaintiffs are guilty of abuse of the court's process. In the counter-claim the plaintiffs are proceeding against the company whose liability is primary. In the present action they are claiming the same amount from the defendant whose liability as a surety is secondary. Originating summons provides a simpler and more expeditious mode of prosecuting an action. I do not think that the plaintiffs committed abuse of the court's process when they started the present action. If they succeed in the present claim, they will obviously discontinue the counterclaim.

23. He then submitted that, as can be seen from the above dictum, it is not in every case where a claimant maintains two actions that would amount to abuse of court process. And that each case must be decided on its facts and in its context.

24. The claimant then observed that the House of Lords, in the case of *Grobbelaar v. News Group News Papers Ltd* [2002] WLR 3024 defined inherent jurisdiction as follows:

> The inherent jurisdiction of the court may be defined as being the reserve or fund of power, residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

25. He observed further that Justice Kenyatta Nyirenda in the *State (On Application of Esther Cecilia Kathumba and Others v the President of Malawi and Others* Judicial Review Case number 22 of 2020 defined the term this way:

> Another way of putting it is that inherent jurisdiction remains the means by which Courts deal with circumstances not prescribed or specifically addressed by rule or statute, but which must be addressed to promote the just, speedy, and inexpensive determination of an action.

26. And that the Learned Judge went on to point out that inherent jurisdiction should be exercised in conformity with statutes and well established rules of practice. Further, that the Judge cited the Canadian case of *College Housing Cooperative Ltd. v. Baxter Student Housing Ltd.* [1976] 2 S.C.R. 475 where the Supreme Court of Canada observed thus:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

27. And that adhering to this caution, the Judge concluded as follows:

> Three principles emerge from the foregoing, namely, the so called inherent jurisdiction (a) is equitable in nature, (b) is solely intended to ensure justice, and (c) has to be exercised with restraint and discretion. This means that a prayer based on the Court's inherent jurisdiction cannot be granted as a matter of right. The Court has to take into account all the circumstances of the case, including submissions by all concerned parties. As such, it is not enough for a party seeking to invoke the court's inherent jurisdiction to simply file a notice to that effect without having to

come to court during the hearing of the matter so that he or she can address the submissions by the other parties and in appropriate cases, questions by the Court.

28. The Claimant then noted that the defendant has purportedly made the present application under Order 10, Rule 1 as read together with Order 1 Rule 5 of the Courts (High Court) Civil Procedure Rules. and that the defendant also purports to invoke this Court's Inherent Jurisdiction as a basis on which this application has been commenced. He then drew this Court's attention to Order 1 Rule 3 of the Courts (High Court) Civil Procedure Rules, which expressly provides for the applicable practice and procedure in the High Court of Malawi. And he pointed out that it will be noted that the Rules do not provide for the application of the nature as taken out by the defendant.
29. The claimant asserted that a careful examination of the application before this Court clearly shows that the defendant is trying to bring an application which under the old practice provided for by the Rules of the Supreme Court of England, was governed by Order 14A and Order 18 rule 19. He observed that Order 14A provided for determination of the matter on a point of law whereas Order 18 rule 19 governed an application for determining a matter on the basis that the same is frivolous, vexatious or abuse of court process. He referred this Court to the case of *Mviza v Press Corporation Ltd and Prentice*, Civil Cause number 705 of 2000 (High Court) (unreported).
30. The claimant asserted that it will be noted that under the Courts (High Court) Civil Procedure Rules, the practice which obtained under Order 14A and 18 of the Rules of the Supreme Court has not been imported. And that it follows therefore that our Civil Procedure Rules have expressly excluded that practice. Further, that it is therefore his contention that the defendant cannot resurrect that practice under the guise of inherent jurisdiction.
31. The claimant submitted that, as is clear from Order 1 rule 3(2) of the Courts (High Court) (Civil Procedure) Rules, no other practice or procedure is a permissible except where, provided for by the Rules or an Act or some written law in Malawi. He insisted that the present application, therefore, has been made without any legal authority. And that the present application has been incompletely brought before this court. He pointed out that, as is clear from the *College Housing Cooperative* case cited above, inherent jurisdiction

cannot be exercised so as to conflict with an express statute or rule of procedure.

32. The claimant indicated that if anything, the application ought to have been taken out under Order 6 of the Courts (High Court) (Civil Procedure) Rules which deals with parties to a case.

33. On its part, the defendant contended that the application is taken out under Order 10 of the Courts (High Court) (Civil Procedure) Rules that provides for applications because the Rules do not provide for disposal of matters on a point of law or for being frivolous, vexatious and an abuse of the court process and that the application is properly taken for this Court to end this matter now.

34. This Court observes that indeed as argued by the claimants Order 10 of the Courts (High Court) (Civil Procedure) Rules simply provides for making of applications in proceedings. It is however important that a specific Rule dealing with the substance of the application in question is alluded and indicated on the face of the application to draw attention to the opposite parties and the Court as to which Rule is in issue on an application made.

35. This Court observes that the defendant asserts that the rules do not provide for the remedy that it seeks. However, this Court agrees with the claimant that the defendant should have read the Rules patiently instead of hastily claiming that the Rules are not comprehensive. The defendant in essence seeks to be removed as a party. Such a remedy is worth exploring on an application to be made under Order 6 Rule 8 (a) of the Courts (High Court) (Civil Procedure) Rules which provides that the Court may, on an application by a party, order that a party in a proceeding is no longer a party where the person's presence is not necessary to enable the Court to make a decision fairly and effectively in the proceeding.

36. This Court also agrees with the claimant that the Courts (High Court) (Civil Procedure) Rules do not provide for disposal of a case on a point of law as was the case under the old Rules but rather for summary judgment applications. The defendant could therefore not properly make the present application to have the matter herein determined on a point of law. It is important that the bar and the bench must appreciate that such procedures as were provided under the old Rules of procedure and which are not included in the current Rules of procedure must not be resuscitated through the back door as is sought herein. There is clearly no provision for making an

application for disposal of a case on a point of law under the Courts (High Court) (Civil Procedure) Rules. However, this does not preclude the Court, at a Scheduling Conference, from ordering trial to be had with the effect that the matter is solely determined on a point of law given that at a Scheduling Conference a Judge shall make directions on the conduct of a trial. See Order 14 Rule 2 (4) Courts (High Court) (Civil Procedure) Rules.

37. However, contrary to the assertion of the claimant, it is open to the defendant to apply under the inherent jurisdiction of this Court to strike out the action herein for being frivolous, vexatious and an abuse of the Court process. This Court has inherent jurisdiction to prevent abuse of its process. This accords with the views expressed in *The State (On Application of Esther Cecilia Kathumba and Others v the President of Malawi and Others* Judicial Review Case number 22 of 2020 where it was stated that:

> Another way of putting it is that inherent jurisdiction remains the means by which Courts deal with circumstances not prescribed or specifically addressed by rule or statute, but which must be addressed to promote the just, speedy, and inexpensive determination of an action.

38. In *Dyson v Attorney General* [1911] 1 K.B. 410, 411, it was clearly stated that there is an inherent jurisdiction to strike out actions that are vexatious.

39. If the defendant intends to prove that the claimant is vexing it and is abusing the court process and that the matter must be ended now, then this matter qualifies for being dealt with under the inherent jurisdiction of this Court. And so on that account, this Court finds that the present application is well taken considering that the defendant intends to show that the claimant is vexing it and is abusing the court process and that the matter must be dealt with speedily, and in an inexpensive way in line with the overriding objectives of the Courts (High Court) (Civil Procedure) Rules as cited by the defendant. Frivolous actions must suffer the same process.

40. The claimant's objection to the application on procedural grounds therefore fails.

41. This Court therefore considers the application on substance, that is, whether the claim herein is frivolous, vexatious and an abuse of the court process as asserted by the defendant.

42. The defendant referred to section 29 (1) of the Public Roads Act which provides as follows:

> A highway authority, or any person duly authorized by it, shall at all times have the power to enter upon any land (except within the boundaries of the area of a City, Municipality or Township or of the area of land comprised in any Mineral Right, non-exclusive prospecting license, claim, permit, or other authority, subsisting under the Mines and Minerals Act) and to take therefrom any material (including water, other than water from an artificial dam, well or borehole save with the consent of the owner) necessary for the construction, maintenance or repair of roads or proposed roads for which the highway authority is responsible and for providing in connection therewith labor camps, access roads and space for stock-piling, and no compensation shall be payable except as provided in this section.

43. It also referred to section 29(5) of the Public Roads Act which provides that:

> Whenever land is entered for any purpose in accordance with the powers conferred by this section, compensation shall be paid by the highway authority to the owner and occupier of the land in respect of surface rights in accordance with Part II; the valuation date in such a case shall be the date when the owner or occupier of the land suffered the loss or damage which gave rise to the claim. The time for making a claim for such compensation shall be within six months after any loss or damage is suffered.

44. It then alluded to section 30 of the Public Roads Act which provides as follows:

> A highway authority and persons employed by it in the construction or repair of any road or proposed road shall have the right, provided that before exercising such right under this section it or they shall have given reasonable notice to and have consulted with the owner or occupier of any land which will be affected....

.....(b) to place and store plant and equipment on land outside the road reserve where there is insufficient room on the road reserve;

45. It next referred to section 31 of the Public Roads Act which provides that:

> The rights granted to and the obligations of a highway authority under sections 18, 23, 29 and 30 may be exercised by a contractor under the supervision or direction of the highway authority engaged in the construction or repair of public roads or proposed roads and on behalf of any highway authority-
>
> ....Provided that in the case of any damages done by a contractor any compensation payable under this Act shall be paid by the highway authority concerned.

46. It also alluded to section 21 (1) of the Public Roads Act which provides as follows:

> No matter or thing done or omitted to be done and no contract entered into by a highway authority and no matter or thing done or omitted to be done by any officer or servant or other person acting under the direction of such authority shall, if the matter or thing was done or omitted to be done or the contract was entered into bona fide in pursuance of the duties of the authority in respect of any road, subject any servant or agent of the highway authority to any action, liability, claim or demand whatsoever and any expense incurred by any such servant or agent shall, in connection with any such action, claim or demand, be paid by the authority out of its funds.

47. The defendant then referred to section 47 of the Public Roads Act which provides that:

> (1) Any person desiring to claim compensation shall make a claim in writing to the highway authority liable to pay such compensation within the time prescribed for making claims and shall give particulars of the amount claimed and the basis of the claim:

Provided that-

(a) in the case of customary estate, the claim may be made orally to a customary land committee which shall be required to record the claim in writing through the assistance of the land clerk who shall forward the claim to the officer responsible for land matters within the local government area and such officer shall in turn forward the claim to the relevant highway authority;

(b) a Land Tribunal may in any proper case extend the time for making a Claim even though no claim is made before the prescribed time for making it has expired.

(2) On receipt of a claim the highway authority responsible shall agree to pay the claim or forthwith make a written offer to the claimant in settlement thereof.

(3) In every case, if compensation is not agreed within two months after the date of the claim the assessment of compensation may be referred by the highway authority or the claimant to a Land Tribunal

(4) A Land Tribunal shall consist of a Resident Magistrate and two assessors appointed by the Judicial Service Commission, on the recommendation of the Ministry responsible for land matters, and the Tribunal shall determine the amount of compensation by a majority decision.

(5) The Land Tribunal under subsection (4) shall have jurisdiction in respect of all claims for compensation under this Act, irrespective of the amount thereof, and shall, in case the compensation relates to disturbance of the occupier of any customary land, consult the customary land committee of such area and the board shall proceed to assess the amount of compensation after giving the claimant and the highway authority an opportunity of being heard, and the Land Tribunal may award a reasonable amount of compensation and costs as may be necessary in the circumstances of the claim.

48. It further alluded to section 49 of the Public Roads Act which provides as follows:

Where the Claimant or the highway authority is not satisfied with the amount of compensation awarded, he may apply to the High Court for judicial review within one month from the date of the

award by the Land Tribunal in accordance with the rules made by the Chief Justice under the Courts Act.

49. The defendant then noted that the claimant states that it entered land belonging to him and started stockpiling its construction materials. It submitted that section 29(1) of the Public Roads Act gives the highway authority the powers to enter land and stockpile construction materials. And observed that the highway authority in the Thyolo/Thekelani project was the Roads Authority. It asserted that it was a contractor of the Roads Authority.
50. The defendant asserted that section 30 of the Public Roads Act provides that a contractor, such as itself, can exercise the powers of the highway authority under, among others, section 29 of the Public Roads Act. And that this basically means that the Public Roads Act empowers the defendant to enter land and stockpile materials. It asserted that this, even based on the claimant's statement of case, was exactly what was done in the present case.
51. The defendant then pointed out that section 29(1) of the Public Roads Act goes further to state that if someone's land is entered as done by it, compensation is only supposed to be paid as provided under that section. In other words, that section 29(1) of the Public Roads Act prohibits the payment of compensation in any other method except as provided in that section.
52. It observed that section 29(5) of the Public Roads Act deals with the issue of compensation. And that the section states that compensation, when land is entered for stockpiling, is supposed to be paid in accordance with part II of the Public Roads Act. Further, that the said part II of the Public Roads Act does not provide for the taking up of Summons as done by the claimant herein. it pointed out further that, Part II of the Public Roads Act, specifically section 47, provides for a well laid down procedure that is supposed to be followed if someone, whose land was entered, is trying to claim compensation. And that the following is clear from the reading of section 47 of the Public Roads Act: (1) compensation issues are handled by the highway authority and not a contractor like it; (2) the procedure to be followed does not start by Summons as done by the claimant; (3) a complaint is supposed to be lodged to the highway authority and if not settled, it is referred to a Land Tribunal. The defendant noted that the claimant neither complained to the Roads Authority nor did the matter go through a Land Tribunal.

53. The defendant asserted that, according to section 49 of the Public Roads Act, a matter only comes to the High Court if a complainant is not satisfied with the compensation assessment done by the Land Tribunal. And that, in fact, the matter comes to the High Court by way of Judicial Review and not Summons as brought by the claimant. The defendant pointed out that the claimant's action is clearly misplaced, vexatious and an abuse of the court's process and a deliberate waste of the court's time.
54. The defendant indicated further that, section 21 of the Public Roads Act specifically provides that an agent of a highway authority, such as itself, should not be subjected to any action, claim or demand for something done or omitted to be done pursuant to the exercise of the powers of the highway authority. It asserted that that what it did in this matter was directly connected to the road construction. And that it was an exercise of the powers under sections 29 and 30 of the Public Roads Act.
55. The defendant then observed that, whilst providing that a contractor, such as itself, can exercise the rights and obligations conferred on the highway authority under sections 29 and 30 of the Public Roads Act, section 31 goes further to specifically provide that in the process of exercising those powers, if a contractor has caused any damages, the same is supposed to be paid by the highway authority. It observed that it is therefore surprising that the claimant has dragged it instead of the Roads Authority to court.
56. Considering the above arguments, it is the defendant's submission to this Court that this matter is ill conceived, vexatious and an abuse of the court process. That the claimant has deliberately decided to ignore what the law provides and approached this Court. And that it would be unjust for the matter to go all the way to trial and expose the defendant to unnecessary costs, which it cannot even recover from the claimant, when there are no serious issues of facts that would have to be dealt with.
57. The defendant then sought that the claimant's action be dismissed with costs for being vexatious and an abuse of the Court process.
58. On his part, the claimant observed that section 21 of the Public Roads Act indeed provides for the liability of highway authorities and their members of staff in connection with the constructions of public roads as indicated by the defendant. He however added that, in section 21 (2) of the Public Roads Act it is provided that nothing in subsection (1) shall be deemed to debar a suit

where any act or omission has been occasioned by such negligence on the part of the authority, its officers or servants as would create liability under any other law.

59. He then pointed out that section 30 of the Public Roads Act permits highway authorities, their employees or agents to park any vehicle or erect such huts or temporary shelters on private land as follows:

> A highway authority and persons employed by it in the construction or repair of any road or proposed road shall have the right, provided that before exercising such right under this section it or they shall have given reasonable notice to and have consulted with the owner or occupier of any land which will be affected to park vehicles and to erect tents, huts or other temporary buildings on any site convenient to it- or them". (Emphasis supplied by claimant).

60. He added that this right is subject to the following conditions:

> (i) no tents, huts or other temporary buildings shall be erected within 180 metres of any dwelling house without the consent of the occupier of the dwelling house; and
>
> (ii) if the owner or occupier of such land objects to any site chosen for the erection of tents, huts or other temporary buildings, the matter shall be referred to the Minister who may make such order thereon as he may deem just and reasonable.

61. He added further that this right includes the right to place and store plant and equipment on land outside the road reserve where there is insufficient room on the road reserve; to take and otherwise make provision for water necessary for the proper execution of the work and for animals and labourers.

62. He also alluded to section 31 of the Public Roads Act.

63. The claimant then noted that failure by a party to a contract to perform his part of the contract amounts to breach of the contract. And that, in particular, where a vendor fails to complete a sale agreement by transferring title and possession even after the purchaser has made payment, he is to be held to be in breach of contract. He noted that in *Chikonde v Kassam* 10 MLR 234, a vendor was held to have wrongfully terminated a sale of land contract when he resold the land to another thereby failing to deliver possession even after the plaintiff had already paid the deposit.

64. The claimant then observed that it was stated in the case of *Kajombo v Malawi Housing Corporation,* Civil Cause No. 224 of 1996 (unreported) that the issue of consideration relates to whether the parties have discharged their duties under the contract (see page 3). And that in the case of *Skipco Malawi Limited v ADMARC* Civil Cause No. 2213 of 1995 (unreported) it was made clear that the duties are that upon the purchaser paying full payment of the purchase price the vendor shall transfer the property and deliver vacant possession (page 12, 14). And that where the vendor fails to deliver vacant possession there is failure of consideration.
65. The claimant then pointed out that specific performance as a remedy entails that the Court will issue an order directing the party in breach to carry out his or her obligations. However, that this in an equitable remedy and as such it is discretionary. He noted that in exercising its discretion, the Court will look into whether or not damages would be adequate. And that if it will be difficult to establish pecuniary loss because it would be impossible to quantify then specific performance will be ordered. He observed that in the case of *Harnet v Yielding* (1805) 2 Sch & 549 Lord Redesdale had this to say "unquestionably, the original foundation of these decrees was simply this, that damages would not put him in a situation as beneficial to him as if the agreement was specifically performed."
66. He also noted that in the case of *Facke v Gray* (1859) 4 Drew 651, Kindersley VC explained further that:

> The courts of equity would not allow an injustice to stand but intervened to order performance of the obligations."
> An innocent party to a contract which has been breached can seek its enforcement via a suit for damages in lieu of specific performance. This rule of law was stated in Lock vs. Furze (1866) 15 L.T 161 where Blackburn J on page 162 said:
>
> "Where a contract is broken, the injured person is, so far as money can do it, to be placed in the same position with respect to damages as if the contract had been performed."

67. The claimant then observed that the measure of the injured party's loss is the value of the land not at the time of breach but at the time of assessment of damages. He referred to the case of *E Fernandes and Another v, Karfreight*

Deliveries Ltd, Civil Appeal No. 48 0f 1995 (unreported) in which the Supreme Court of Appeal of Malawi on page 8 stated thus:

> It must be emphasized that the time of making payment is of particular importance in cases of this nature. If the respondents.....had established the market value of the motor vehicle immediately after the accident and paid it to the appellant or into court, they would have been liable to pay the appellant the market value of the motor vehicle as at May, 1994 (date of the accident). By delaying to make such payment until the appellant had to resort to court proceedings, they must be liable to pay the appellant market value of the car as at the time of making the assessment.

68. He then asserted that although that case authority specifically made reference to damages for a motor vehicle, the principle herein was referring to damages generally. And that where the vendor fails to complete the sale, the purchaser is also entitled to damages for such consequences as follow in the usual course from the breach or might reasonably be supposed to have been in the contemplation of both parties at the time the agreement was made. he noted that in *Chikonde v Kassam* (supra) the claimant purchaser was also held entitled to loss of money expended on repairs, and expenses incurred in respect of the mortgage as these followed from the breach.
69. He then argued that, at a substantive level, the defendant has taken up this application on the incorrect understanding that the action has been commenced under the Public Roads Act. further, that based on the erroneous understanding, the defendant contends that the claimant should have sued the Highway Authority under the Public Roads Act. He then asserted that this position is misconceived on the following grounds.
70. He drew this Court's attention to the Summons and Statement of Case by which he commenced this action. He pointed out that it will be seen from paragraph 3 that this action arose from a contractual relationship between the parties. Further, that it will be seen that it is the breach of that contract which gave rise to the present proceedings. And that it follows therefore that although the subject matter of the contract were soils which the defendant was generating in the course of the defendant's construction of a public road, it was not perpetrated or required by the actual construction. And that at the time of the contract the defendant had not approached the claimant nor required the use of the Claimant's land.

71. The claimant submitted therefore that this claim is founded on the law of contract as opposed to breach of statutory duty by Public Authority. He added that the position provided for under the Public Roads Act is confined to situations where the land of innocent party has been adversely affected by the construction of a public road. He asserted that in the present case, his land was not affected by the construction of the road. And that the situation giving rise to this action has arisen from the defendant's breach of its contractual obligations to him. It is therefore his view that the Public Roads Act is not applicable in this case. He asserted that the defendant cannot seek to displace liability by pleading the defence under the Public Roads Act.
72. The claimant submitted further that, even if this Court were to hold that this action is within the ambit of the Public Roads Act, the he contends that the defendant cannot derive any benefit from the said law by reason that it had failed to comply with the strict legal requirement of that Act. He drew this Court's attention to section 30 of the Act which the defendant has quoted in its submissions and states that the right to park, store or keep anything on private land in connection with the construction of the public road requires that the owner of the land should be notified and consulted on such use of the land.
73. He noted that in the current proceedings neither the defendant nor the Roads Authority notified him of a contrary use to his land than the one under contract. He observed that it follows therefore that the defendant had acted outside its legal mandate under the Public Roads Act. he asserted that it is an established principle that a party cannot benefit from its own wrongdoing. And that if this court allows the defendant to shirk responsibility under the guise of the Public Roads Act, it will be perpetuating an illegality.
74. The claimant then noted that the defendant also argues that this action amounts to an abuse of court process and that it is frivolous. He drew this court's attention to the Sworn Statement filed in opposition to these proceedings him and stated that it will be seen from exhibit EN1 to EN5 that he has a legitimate and sound claim against the defendant. he pointed out that there is ample evidence that the defendant did store quarry stone and other construction materials on his piece of land. See Exhibit EN1. Further, that the defendant fully acknowledged putting his land to its own use contrary to the agreement. See Exhibits EN2A andEN2B. and that there is also proof that contrary to the

agreement, the defendant destroyed the field as can be seen from Exhibit EN5. He added that it is also abundantly clear that as of this date the defendant is still keeping various materials on his piece of land.

75. The claimant indicated that all these acts have prevented him from using his land for the intended agricultural purposes. And that it also follows therefore that he has suffered loss for which he is entitled to compensation. He asserted that this Court will see therefore that his claims are neither frivolous nor vexatious. In fact, that they amply demonstrate a meritorious action which deserves the due determination of this Court. He submitted therefore that it is the defendant's application which is frivolous and vexatious. He therefore prayed that even on this ground, the application is grossly misconceived.

76. In view of the foregoing, the claimant submitted that the application by the defendant should be dismissed in its entirety with costs. He further submitted that since the only defence put forth by the defendant hinges on the Public Roads Act, then this Court should determine the fate of this action once the application of the Public Roads Act has been excluded. He believes that there are no factual disputes between the parties. And that the only issue is whether or not the defendant can escape liability on the basis of the Public Roads Act.

77. The claimant submitted that, in making that determination, this Court must pay attention to the provisions of section 21(1) of the Public Roads Act. He pointed out that it will be seen that the scheme under that Public Roads Act only entitles a party to indemnification by the Roads Authority but does not grant any party immunity against liability. And that even if the defendant were entitled to such indemnification, it would still remain liable for its actions. He submitted therefore that this Court should proceed to determine liability on the facts and the law as they stand without the need for a full trial.

78. With regard to the prayer in the immediately preceding paragraph which suggests that summary judgment be made in favour of the claimant, this Court's view is that the same may amount to an ambush of the defendant. If the claimant is minded to pursue summary judgment, then he must make an application according to the Rules and the defendant shall be afforded an opportunity to defend itself accordingly before a determination is made.

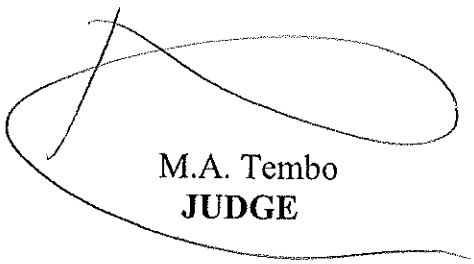
79. With regard to the defendant's application, the question that this Court has to answer is whether the defendant has shown that the claimant's claim herein is "wantonly brought without the shadow of an excuse, so that to permit the

action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless". See *Dyson v Attorney General* [1911] 1 K.B. 410, 411, Fletcher Moulton L.J.

80. The claimant has indicated that in the present matter, the defendant came onto his land initially after a contract was entered into, or as the defendant would have it, after the claimant asked for a favour that soil be deposited on the land in issue. The claimant indicates that his claim is for breach of contract in that he invited the defendant for one thing and it ended up doing something else.
81. The claimant asserts that if that is found not to hold then alternatively his argument is that, beyond what was agreed, there was no consultation or notice from either the defendant or its principal the Highway Authority being the Roads Authority to use the land for further purpose of keeping plant and equipment and other things on the said land.
82. The claimant asserts that given that there was no such consultation or notice, which are required by the Public Roads Act, then the defendant cannot avail itself of the defence under the Public Roads Act.
83. This Court is not here to comment on the merits of the claimant's case but notes that it is not a hopeless case or vexing to the defendant.
84. It must be pointed out that the circumstances of the entry of the defendant herein may have been without the agreement with the claimant after the point at which the soils had been deposited on the land as requested by the claimant. Beyond that point, as submitted by the claimant, for the defendant to be within the Public Roads Act, the defendant ought to have given reasonable notice to the claimant and consulted with him for the defendant to benefit from section 30 of the Public Roads Act. Further, it is not clear whether the claimants land suffered use at the hands of the defendant in circumstances where there was insufficient room within the road reserve as required under section 30 (b) of the Public Roads Act. These are matters that are not demonstrated by the defendant as the matter stands now and are matters that are fit for trial on the claimant's claim. Entry onto land is on certain conditions as set in the Public Roads Act itself and not willy-nilly at the whims of agents of the Highway Authority. That safeguards the right against arbitrary deprivation of property as provided in section 28 of the Constitution.

85. This Court observes that, contrary to the claimant's submission, section 21 (1) of the Public Roads Act provides immunity to servants of the Highway Authority for acts done in connection with road construction. As correctly submitted by the claimant the section also provides indemnity for expenses incurred by the servants of the Highway authority in connection with any legal action in that regard. This Court observes that the claimant indicates that whatever the defendant did herein was not in connection with road construction but finds that very doubtful. However, what is important at this stage is that section 21 (2) of the Public Roads Act, which the defendant conveniently omitted to cite, clearly allows court actions or legal suits outside the compensation framework under the Public Roads Act where any act or omission has been occasioned by such negligence on the part of the Highway Authority, its officers or servants as would create liability under any other law. This aspect entails that the immunity of entities such as the defendant under section 21 (1) of the Public Roads Act is not absolute and is subject to section 21 (2) of the Public Roads Act as submitted by the claimant. It is open to the claimant to show at trial that the defendant acted negligently and in the process breached a contract or agreement it had with the claimant as alleged.
86. This Court observes that section 29 of the Public Roads Act alluded to by the defendant does not apply to the facts of this matter as disclosed by the statements of case given that this case is not about the defendant entering the claimant's land for the purpose of taking materials from there.
87. The short of it is that the claimant's case does not appear to be hopeless or vexing to the defendant.
88. In the foregoing premises, this Court is unable to agree with the defendant that the claimant's claim is frivolous, vexatious or an abuse of the court process.
89. The defendant's application is accordingly dismissed with costs.

Made in chambers at Blantyre this 24th May, 2021.



M.A. Tembo
JUDGE