



IN THE HIGH COURT OF MALAWI  
ZOMBA DISTRICT REGISTRY  
JUDICIAL REVIEW NO. 16 OF 2021

BETWEEN

THE STATE (ON THE APPLICATION OF  
KEZZIE MSUKWA)

CLAIMANT

-and-

THE DIRECTOR OF ANTI CORRUPTION  
BUREAU

DEFENDANT

CORAM: HON. JUSTICE ZIONE NTABA

RULING

1.0 APPLICATION

- 1.1 On 31<sup>st</sup> December, 2021 the Claimant filed and made an *ex parte* application for leave to apply for judicial review under the inherent jurisdiction of the Court, Part 54 of the Civil Procedure Rules as read with Order 19 rule 20(3) of the Courts (High Court)(Civil Procedure) Rules. The said application was supported with a sworn statement as well as the relevant format for judicial review including skeleton arguments.
- 1.2 The Claimant argued that he is bringing a judicial review because the Defendant has failed to correctly appreciate and discharge her constitutional, statutory and administrative law duties to relation to the decision herein. The said decision being challenged is one where the Defendant, or her agents or those working under her charge made on or around Wednesday 29<sup>th</sup> December, 2021 by having a warrant of arrest issued against him in relation to Plot Number 46/2057 in Area 46 in Lilongwe sold to Zuneth Abdul Rahid Sattar by the Ministry of Lands, Housing and Urban Development before he was a Minister was wrong. Furthermore, that the Defendant could have taken a less dramatic approach by instituting proceedings against him under section 84 of the Criminal Procedure and Evidence Code (hereinafter the CP & EC). Secondly, the Claimant alleges that the same is an abuse of prosecutorial discretion by the Defendant as well as tainted in bad faith, unconscionable as well as Wednesbury unreasonable meant only to

embarrass the Claimant in his Ministerial office. Lastly, he further argued that the decision was irrational, an abuse of power, Wednesbury unreasonable and unconstitutional. He stated that the present proceedings questioned the propriety of the Defendant's decision in terms of section 84 of the CP & EC as viewed through the prism of section 39 of the Constitution which protects him from arbitrary deprivation and/or curtailment of the right to liberty and/or movement when he is not a flight risk, available or reachable by many means and willing to appear before both the Chief Resident Magistrate Court sitting at Lilongwe and the Defendant for any prosecutorial processes. He concluded that he had no alternative remedy as such the judicial review application.

1.3 The Claimant prayed that the Court grant him the following –

- 1.3.1 an order permanently staying the execution of the warrant of arrest of the Claimant in the interim until the hearing of the judicial review herein;
- 1.3.2 a quashing order or alike order to certiorari quashing the decision entirely;
- 1.3.3 if permission to apply is granted, an order of injunction restraining the Defendant from executing the warrant of arrest issued on 29<sup>th</sup> December, 2021 against the Claimant and a further order staying both the decision and execution of the warrant of arrest for the Claimant;
- 1.3.4 if permission to apply is granted, a direction that the hearing of the application for judicial review be expedited;
- 1.3.5 further or other relief;
- 1.3.6 an order for costs; and
- 1.3.7 that all necessary and consequential directions to be given.

## 2.0 LAW AND FINDINGS

2.1 The legal principles regarding an application for leave for judicial review are well settled in law including that no application for judicial review shall be made unless leave of the Court has been obtained. Furthermore, Order 19 rule 20 also sets down the form in which an application for judicial review should be brought. Upon examination of the documents in support of the application, this Court is satisfied that the Claimant has satisfied the dictates of the CPR in seeking leave for judicial review in terms of the form of the application.

- (1) Judicial review shall cover the review of\_\_
  - (a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or
  - (b) a decision, action or failure to act in relation to the exercise of a public function in order to determine\_\_
    - (i) its lawfulness;
    - (ii) its procedural fairness;
    - (iii) its justification of the reasons provided, if any; or
    - (iv) bad faith, if any,

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

(2) A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.

(3) Subject to sub-rule (3), an application for judicial review shall be commenced *ex-parte* with the permission of the Court.

- 2.3 Secondly, the Court has to then be satisfied that the requirements that the decision which Mr. Msukwa is complaining about was made on 29<sup>th</sup> December, 2021 and therefore adhering to the prescribed time limits of three (3) months to make their application. In the case herein, Mr. Msukwa has made this application within 48 hours thus being within the prescribed time limit.
- 2.4 After dealing with the procedural issues, this Court has then to examine whether the decision being questioned is amenable to judicial review. According to Order 19 rule 20, judicial review is a remedy that lies against a public body or office, and it can be granted on a number of reasons for instance want or excess of jurisdiction, failure to comply with rules of natural justice to mention a few. The Claimant cited the following cases to justify that this application is amenable to judicial review. In *Mzuzu City Assembly vs. Jenala Peter Wandaza Chitete*, MSCA Civil Appeal No. 26 of 2007 Nyirenda, SC JA writing on behalf of their Lordships Mtambo SC JA and Singini SC JA said -

*“Judicial Review is a public law remedy. Where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he must, as a general rule, proceed by way of judicial review, O Reilly vs. Mackman [1983] AC 237”*

- 2.5 Secondly, insight is also provided in the case of *The State and Director of Public Prosecutions et al ex parte Chilumpha*, Constitutional Cause No. 5 of 2006 where Justices Chipeta, Potani and Kamwambe held as follows -

*“Judicial review, as currently understood and accepted, is a procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, or other persons or bodies which perform public duties or functions. (See Practice note 53/1-14/1 under order 53 rules 1 to 14 of the Rules of Supreme Court). As aptly put by Lord Hailsham L.C. in Chief Constable of North Wales Police vs Evans (1982) 1 W.L.R 1155 at 1160, judicial review is concerned with reviewing, not the merits of the decision the application relates to, but rather the decision – making process. (See: note 53/1 – 14/6). In the application before us, to avoid reviewing what the law forbids us to so review, we should really be looking for proceedings and/or decisions, conducted or made by inferior courts or tribunals or by persons or bodies performing public duties or functions, and only when we*

*find such should we check whether the decision-making process in them calls for the proposed review.*

- 2.6 Consequently section 4 of the Corrupt Practices Act stipulates that there will be established a body to be known as the Anti-Corruption Bureau which shall consist of the Director, the Deputy Director and such other officers of the Bureau, as may be appointed under section 9 and that the Bureau shall be a Government Department and the finances of the Bureau shall be charged to the Consolidated Fund. This court is therefore satisfied that the Defendant being the Director of the Anti-Corruption Bureau exercising public function duties is amenable to judicial review. It should be stressed that this court is not looking at the merits of the decision to summon and investigate the Claimant because that is not what judicial review is about. What this court is concerned about is the circumstances surrounding the said decision and such is supported by Lord Templeman's views in *Re Preston* [1985] AC 835 at 862 –

*"Judicial review is available where a decision making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers."*

- 2.7 Furthermore the sentiments of Justice Tembo (as he was then) in *Kalumo v Attorney General* [1995] 2 MLR 669 at 671-672 offer valuable wisdom –

*"Let me pause for a moment to consider to consider the law on the question of judicial review. Where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or injunction or otherwise. See *O'Reilly v Mackan* [1983] 2 AC 237. If a public authority charged with a public duty acts without jurisdiction or exceeds his jurisdiction judicial review will lie. Thus, where a decision of an administrative authority is founded, wholly or partly on an error of law, the authority has acted outside its jurisdiction and accordingly its decision is liable to be quashed. See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. Where the rules of natural justice apply and the decision has been reached in breach of those rules judicial review will lie. See *Ridge v Baldwin* [1964] AC 40. Broadly, the rules of natural justice embody a duty to act fairly. Whether those rules apply and the extent of the duty depends upon a particular type of case concerned. The rules of natural justice or fairness are not cut and dried. They vary infinitely. They will normally apply where the decision concerned affects a person's rights, for example, where the property is taken by compulsory purchase or he is dismissed from a public office. See *R v Home Secretary, ex parte Santillo* [1981] QB 778; *Ridge v Baldwin* (cited above).*

*Besides the foregoing, let me also note that judicial review is concerned with reviewing not the merits of the decision in respect in which the application is made, but the decision-making process itself. Indeed the purpose of the remedy of judicial review is to ensure that the plaintiff is given fair treatment by the Army Commander. I have no right to substitute my opinion on the matter for that of the Army Commander, otherwise the court would, under the guise of preventing the abuse of power, be itself guilty of usurping the power of the Army Commander. Thus, the court in judicial review will only interfere with the decision of a public authority, such as the Army Commander, where the authority; has acted without jurisdiction or failed to comply with rules of natural justice."*

- 2.8 This Court has had to address itself as to whether judicial review can lie in criminal matters. Ordinarily, judicial review does lie in criminal matters. Nevertheless, courts have used it sparingly especially in terms of prosecutorial discretion. It is trite law though that courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment or stop a prosecution if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court. In the United Kingdom, abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects an abuse and the case of *Hui Chi-Ming v R* [1992] 1 A.C. 34, PC supports this position.
- 2.9 Notably, the inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process as indicated is to be exercised only in exceptional circumstances. *The Attorney General's Reference (No 1 of 1990)* [1992] Q.B. 630, CA and *Attorney General's Reference (No 2 of 2001)* [2004] 2 A.C. 72, HL are cases on point. The essential focus of the doctrine is on preventing unfairness at trial through which the defendant will be prejudiced in the presentation of his or her case. Accordingly, courts exercising their inherent power to stay should first consider whether other procedural measures such as the exclusion of specific evidence or directions to the jury might prevent 'trial unfairness' and allow the prosecution to continue. In terms of abuse of process, *Bennett v Horseferry Magistrates' Court* [1993] 3 All E.R. 138 (HL) confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances where it would be impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case. Remarkably, the issue herein is not in the strictest sense prosecutorial decision to prosecute. However, the ACB is an interesting body as it has both investigative and prosecutorial powers. Therefore, it is this former aspect which is currently being referred for judicial review and subject to an injunction or stay herein. The Claimant alleges that the decision by the Defendant in obtaining a warrant of arrest versus summoning is based on unconscionable behavior as well as an abuse of power. Consequently, this doctrine of abuse is more

exceptional than those described above and according to *Bennett case*, it is the court's duty to oversee executive action so as to prevent the State taking advantage of acts that threaten either basic human rights or the rule of law. Whilst in *R v Looseley; Attorney General's Reference (No 3 of 2000)* [2002] 1 Cr. App. R. 29, the House of Lords held that -

"i. it is not acceptable for the state to lure its citizens into committing illegal acts and then to seek to prosecute them for doing so;  
ii. the courts can use their inherent power to stay proceedings in order to ensure that executive agents of the state do not misuse the coercive law enforcement functions of the court;  
iii. a useful guide to identifying the limits of acceptable police conduct is to consider whether, in the particular circumstances, the police did no more than present the defendant with an unexceptional opportunity to commit a crime (although each case will depend on its own facts);  
and  
iv. the courts will need to carefully consider whether to exclude the evidence under section 78 PACE 1984, or to stay proceedings."

- 2.10 Remarkably, courts in Malawi including this Court are very cognizant that orders for judicial review, injunction or stay into the Bureau's and investigative agencies mandate and power to effect arrests are perceived as interference. Further that the same should be reluctantly ordered however where the circumstances clearly show infringement of constitutional rights but also behaviour that is *prima facie* questionable in terms of propriety, it is the duty of courts to ensure the same are dealt with including pointing out to the said public office or public officer.
- 2.11 It should be highlighted herein that the Claimant argued that the warrant of arrest was obtained to basically cause him political embarrassment as opposed to him being summoned and questioned accordingly. The Claimant further averred that this is more so since he is highly known being a Minister. Furthermore, he is not a flight risk and is available and willing to appear before the Chief Resident Magistrate or the Defendant. The Court is very conscious that where the court is faced with illegal conduct by police or prosecutors, so grave as to threaten to undermine the rule of law, the court is likely to regard itself as bound to stop the case as held in *R v Grant* [2005] 2 Cr. App. R. 28
- 2.12 The last test which must be satisfied is whether the Claimant has sufficient interest in the matter in which the application relates to. This sufficient interest relates both to judicial review as well as the injunction or stay of execution. The Claimant is directly affected by the decision as he is the subject of the said warrant of arrest as such, he does have sufficient interest in the matter herein and the warrant directly relates to him and all subsequent aspects of it and as such he has *locus standi*.

2.12 In terms of the application being made *ex parte*, courts allow such to be

made if the judge is satisfied that the matter is suitable for more detailed investigations and hearing for the substantive claim and this is supported by the case of *Ombudsman v Malawi Broadcasting Corporation*, [1999] MLR 329 held that –

*“applications to move for judicial review are made ex parte to a single judge. The application may be determine without a hearing unless a hearing is requested. This procedure enables the court to deal with such matters more conveniently, expeditiously and cheaply. Leave will be granted if the court, on the materials available before it, is satisfied that there is an arguable case for granting the relief claimed by the Claimant. At this stage there is no need for the court to go into the matter in depth.”*

- 2.13 It is critical the Court also addresses the question of the propriety of the arrest being considered *ex parte*, as ordinarily the Bureau would need to be heard on this very aspect especially if the Court is considering a stay. In this case, looking at the circumstances, that is, urgency but also the numerous improper issues in the matter herein, such necessitated the application to be entertained *ex parte*.
- 2.14 A supplementary sworn statement was filed by Counsel Lughano Mwabutwa which further highlighted the need for a stay and why it urgently needed to be handled. The said statement is reproduced herein

3. THAT all facts deposed in this sworn statement are as supplied to me by the Claimant and I evenly believe the same.
4. THAT I am reliably informed that the information for the basis of the arrest is based on purported cooperation arrangements between Anti Corruption Bureau (ACB) and National Crime Agency (NCA) of the United Kingdom of which no mutual legal assistance request has been obtained either from Malawi or to Malawi in accordance with the law.
5. THAT further, at the time of filing the present application the defendant had called the Claimant to report at its offices pursuant to the Warrant of Arrest but unfortunately the Claimant had been taken ill of hypertension and admitted at Partners in Hope Private Hospital in Lilongwe, the fact of which he duly communicated to the Defendant.
6. Notwithstanding the communication on the illness and subsequent admission the Defendant purportedly proceeded to effect the arrest of the Claimant at the aforesaid medical facility without reading his rights as he is bed ridden and worse still the Defendant arranged a medical doctor at Partners in Hope to witness the illegal arrangement. The Defendant went as far as having the Claimant handcuffed and subsequently chained to a hospital bed when no circumstances necessitated such drastic actions.
7. The purported arrest clearly amounts to subjection of the Claimant to cruel, inhuman and degrading treatment contrary to section 19(2) of the Constitution.
8. In the premises, I respectfully ask for permission to apply for Judicial Review and for the interim relief of an Order for Stay of the Decision of the Defendant as set out in Form 86A and that in view of the subsequent purported arrest that the Defendant be ordered to forthwith not detain or not further detain the Claimant pending determination of the Judicial:

2.15 Finally, turning to the Claimant's prayers which are seeking an injunction as well as stay of execution of the warrant of arrest. This Court noted that whilst it was writing this determination, the Defendant purportedly executed the warrant of arrest on the Claimant on his hospital bed and proceeded to issue a public notice of the same. The Court reminded itself that rights of an accused person during arrest and detention are provided for in section 42(1) of the Constitution. This Court is aware that the power to arrest rests with authorities under written law to do so, however, the Court questions the manner of such execution considering the Claimant. In jurisdictions like the United States of America, hospital arrests are kept for dangerous offenders or if the person is a flight risk. Taking into consideration the facts herein and the way the arrest was executed, brings into fruition the Claimant's assertion. The facts show that the Defendant or her agents as per paragraphs 5, 6 and 7 of Mr. Mwabutwa's sworn statement to flouted constitutional safeguards to a right to fair trial. Courts should be reluctant to allow fragrant disregard of constitutional safeguards in the pursuit of justice.

- 2.16 There is an interesting aspect which has been raised by the Claimant again in the case herein which is the evidence on which the arrests are made. There is a claim that they are based on information gathered from a cooperation arrangement between ACB and National Crime Agency (NCA) of which no mutual legal assistance request has been obtained either from Malawi or to Malawi in accordance with the law. This Court wants to highlight the words of my brother Judge, Justice Mike Tembo in *The State (On the Application of Zuneth Sattar) v The Director of Anti-Corruption Bureau et al*, Judicial Review Case No. 68 of 2021(HC)(PR)(Unrep) -

*"24. This Court is mindful of the provisions of section 5 (1) of the Mutual Assistance in Criminal Matters Act which provides that nothing in the said Act shall derogate from existing forms or prevent development of other forms of cooperation (whether formal or informal) in respect of criminal matters between Malawi and any Commonwealth country, or between Malawi, or any enforcement agencies or prosecuting authorities in Malawi, and the International Criminal Police Organization or any other such agencies or authorities outside Malawi.*

*25. It could well be that the United Kingdom Government officers were on the ground on the search and seizure operation carried out by the 1st defendant herein due to some other form of cooperation and not necessarily with a view to be shared evidence or information at some future date, as alleged by the claimant, without recourse to the Mutual Assistance in Criminal Matters Act or the Financial Crimes Act."*

- 2.17 The Defendant is reminded that that adherence to the rule of law is critical especially in criminal matters but more so in corruption cases due to their very public nature This Court therefore reminds the Director of the Anti-Corruption Bureau of the above sage advise by my brother judge as it continues to deal with these cases.

### 3.0 CONCLUSION

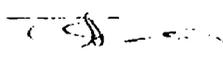
- 3.1 Firstly, the Court has carefully reviewed the application but has decided not to determine the application for leave of judicial review. This is despite the Court being fully satisfied that the Claimant on a balance of probabilities could have been granted such leave under Malawian law. The reasons for this Court not determining the same have been stated in paragraph 3.4 hereafter.
- 3.2 The Court turns to an issue which despite its decision in paragraph 3.4 was of the considered opinion that it needed to be addressed with expediency. The Court noted with concern the way the warrant of arrest was executed on the Claimant. This Court's conclusion from the facts is that the said arrest on the face of it is unlawful as it falls short having offended section 42 (1) of the Constitution as well as section 20A (1) & (3) of the Criminal Procedure and Evidence Code. Secondly, it is the

Court's considered opinion that the Claimant's assertions regarding the Defendant's conduct and motive were correct. The Defendant and her agent's conduct are to a degree unconscionable and unreasonable but more so meant to just cause embarrassment to the Claimant especially in the execution of the warrant of arrest. The Defendant and her agents have known since the issuance of the warrant of arrest as to where the Claimant was in Malawi. The Defendant in executing the warrant on 31<sup>st</sup> December, 2021 decided to do so whilst he was on a hospital bed and in the process violating his right to privacy, jeopardized his health to mention a few. These are issues which courts should frown upon. This is more so especially where the public office or officer doing so is one constitutionally mandated to uphold the rule of law.

- 3.3 The Court orders that the purported arrest including further detention in the hospital is stayed until the determination of the leave application and *inter partes* application for stay. The Defendant or her agents are advised that when it does execute any warrant of arrest against the Claimant to do so as per the Constitution including informing him of the reason of his arrest as well as his rights thereunder including being produced before the Chief Resident Magistrate on the same day of arrest to answer the said charges or informed time and date when he should appear before the said magistrate.
- 3.4 This Court indicated in paragraph 3.1 that there were reasons on why it did not proceed to determine the leave application and it hereby gives its reason for the same. The Court noted from the details of the case that the Claimant is based in Lilongwe, but his Counsel is Blantyre based. Additionally, the Defendant is based in Lilongwe and the warrant of arrest was issued in Lilongwe. Notably, despite this Court noting it has jurisdiction to determine and conclude the matter however for good case management, this matter is best suited to be handled at the Lilongwe District Registry. Accordingly, the rest of the application for judicial review is hereby being transferred to Lilongwe to be handled as an *inter partes* application for all pending issues.
- 3.5 This Court on transferring the file to Lilongwe District Registry prays that it will be urgently dealt within seven (7) days of the order herein which is an interim one.

I order accordingly.

**Made in Chambers on 1<sup>st</sup> day of January, 2022 at Zomba.**

  
**Z.J.V Ntaba**  
**JUDGE**