THE JUDICIARY

IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 846 OF 2010

BETWEEN;

RAJESH HATHIRAMANI.....1ST CLAIMANT

DEEPAK HATHIRAMANI.....2ND CLAIMANT

(Both as Administrators of the Estate of KAMLA GOBINDRAM HATHIRAMANI, Deceased)

GOOLSHAN NAVAL JAL.....3RD CLAIMANT

-AND-

THE ATTORNEY GENERAL.....DEFENDANT

CORAM: H/H Ibrahim Hussein, Assistant Registrar

Mr. S. Tembenu, Sc, of Counsel for the Claimants

Mr. T. Chakaka-Nyirenda, AG, of Counsel for the Defendant

Ms. N. Munthali, Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

CamScanner

1. The claimants commenced this matter on 19th April 2010 claiming fair compensation from the Malawi Government for deprivation of property without payment of compensation. On 20th March, 2019, the court entered judgment against the defendant and awarded damages to be assessed accordingly.

Brief Background:

2. In 1981, the Malawi Government compulsorily acquired land then known as Plot Number MC 20 (now known and described as Title Numbers Michiru 578 and 579) situated within the boundaries of Blantyre City. The Malawi Government acted pursuant to the powers under the now repealed Land Acquisition Act 1967. In accordance to that law, the Government made an offer of compensation to the original owners of the land which, as the evidence will show, was not accepted. This resulted in countless negotiations over the years with an aim to reach an agreed amount. However, the concerned parties could not reach a consensus.

3. The land in question comprises 14.38 acres which was being held on freehold basis at the material time. The Government having assessed the land in terms of usage, location and structures on the land, assessed compensation at MK2,550.00. As stated earlier, the owners of the land disputed the assessment. It is that dispute that culminated into the present proceedings.

The evidence:

4. The assessment hearing commenced on 22nd February 2023 and ended on 24th April 2024. The first witness to testify for the claimants was one Mr. Galeta of Terrestrial Property Consulting. His testimony was that he was engaged by the claimants to carry out valuation of property known as Plot Number

CamScanner

MC 29 (renamed MC 282) at Chirimba Industrial area in Blantyre. He went further to state that he inspected the land and did research concerning the land. On the basis of the inspection and considering all relevant factors, it was his opinion that the market value of the land as at 26th March 2019 was at MK867, 000, 000.00. This sum is to be escalated by 5% per annum until the final conclusion of the matter. Finally, he indicated that in coming up with the value, he used the comparison valuation approaches which considered market transactions of commercial land in the same and similar areas. The witness also adopted his supplementary witness statement which put the value of the land as at 29th August 2023 at MK18, 677, 949, 821.94.

5. The 1st and 2nd claimants also testified on the history of the matter. In summary, their testimony was to the effect that the land in question was granted a freehold title on 20th September 1955. The land was conveyed to the claimant predecessors for agricultural and residential purposes. The witness also indicated that at the time the land was compulsorily acquired, the family was offered the sum of MK2, 000.00 for the land itself and K550 for the crops that were on the land. The evidence shows that there were several communications between the Ministry responsible for Land and the representatives of the family regarding a fair compensation to be paid as the initial amount was not accepted by the family. As such, it is clear that the amount of MK2550.00 was never accepted at any moment in time.

6. On the other hand, the defendant called three witnesses in defense of the matter. The 1st defense witness, Joseph Kambwiri, a Lands Registrar for the Southern Region explained the historical context of the matter which was not really different from what the claimants put to the court. However, he added that even though the valuation of MK2550.00 was contested as

CamScanner

be ng extremely low and inconsistent with the actual value of the land, the original owners of the land did not provide a contrary valuation.

7. The second witness was one Mr. M. Phula, a Lecturer in Property valuation at Malawi University of Business and Applied Sciences. He informed the court that he presented himself to the court on behalf of the Surveyors Institute of Malawi following the office of the Attorney General's request to the Surveyors Institute for an opinion on the matter. As part of the evaluation, he visited the land in question and inspected documents at the lands registry. This led him to a conclusion that the land is worth MK4, 400, 000.00. When he was questioned on how he arrived at that sum by the claimant's Counsel, he stated that in terms of value, freehold and leasehold land differ in value. So, in valuing land, there are three methods that are used. These are; the compassion method, investment method and cost or depreciated replacement value. As regards valuation of the present land, he told the court that he used a combination of the methods and part of investment method.

The witness acknowledged that at present the land was turned to an industrial area and it cannot be acquired at MK4,000,000.00. Lastly, he stated that the purpose of his valuation was not to value the land again as it has changed status. But it was to bring to the present value the 1981 valuation by use of CPI.

8. Lastly, the defendant called Mrs Cynthia Chisanu, a Deputy Director for Lands. The relevant part of her testimony was that the office of the Attorney general requested the Reserve bank of Malawi to furnish it with the exchange rates of the Malawi Kwacha against the British Pound applicable since 1981. The exchange rates were used to calculate the current value of the assessed sum. She further stated that the assessment of the land at

CamScanner

the time of acquisition considered the amount paid in acquiring the land which was 500 pounds, the value of improvements to the lands and any other appreciation in the value of the land since the time of acquisition. The witness also disputed the testimony given by the claimant's witness, Mr. Galeta, and contended that Mr Galeta erred in his calculation by using 8 100 as the base rate and 1970 as the year of acquisition when the land was acquired in 1981. Finally, the claimant stated that the total compensation ought to be MK10, 075, 646.85 as shown in the report marked CCC8.

9. In brief, this is the evidence that was presented before the court. Before diving into the issues, it must be pointed out that the parties agree that the government compulsorily acquired the land in 1981. It also agreed that upon assessment, the government arrived at a compensation sum of MK2,550 per the applicable law at the material time. During the trial, there appeared to be a dispute as to whether the assessed amount was agreed upon by the parties even though payment was not made. The court has considered a number of correspondences that was sent between the parties. It is clear that the parties never reached an agreement as regards the compensation amount. As such, the only issue for determination is the quantum of compensation payable.

The Law :

10. The general rule is that compensation is meant to restore the claimant to the position he would have been, if the act or omission did not take place. The purpose of an award of damages is to, as much as money can do it, place the plaintiff at a position he would have been had he not suffered the damage. See: ***Cassell and Company v. Broome [1972] 1 All ER***

CamScanner

801. In **George Kankhuni v. Shire Bus Lines Ltd Civil Cause No. 19 15 of 2002,** Katsala, J (as he then was) stated as follows;

> *The law demands that the plaintiff, as far as money can do it, is put in the same position as if the has not suffered the loss. This is what is referred to as restitution in intergrum. See:* ***Cassell and Company -vs- Broome [1972] 1 All ER 801, Halsbury's Laws of England (3rd edition) p.233,***

It is also trite that when awarding damages, the court has to take into ac count the depreciation of the currency by taking into account the time th. comparable awards were made. *See:* ***Malamulo Hospital (The Registered Trustees) -vs- Mangani [1996] MLR 486 (SC A).***

11. Regarding assessment of fair compensation Section 9(1) of the Land Acquisition Act (Chapter 58:04, Laws of Malawi) states that where the Government of Malawi compulsorily acquires land, the government shall pay fair compensation. The section reads as follows:

> *Subject to the provisions of this Act, where any land is acquired by the Minister under this Act the Minister shall on behalf of the Government pay in respect thereof fair compensation agreed or determined in accordance with the provisions of this Act.*

12. Section 10 of the Land Acquisition Act provides for the formula for assessing the compensation. It reads as follows;

> *(1) Unless otherwise agreed between the parties, fair compensation shall be assessed by the Minister.*
>
> *(2) An assessment of compensation made by the Minister under this section shall be calculated by adding together;*
>
> *(a) the consideration which the person entitled to the land paid in acquiring it;*

CamScanner

(b) the value of any exhausted improvements to the land made at the expense of the person entitled thereto since the date of his acquisition thereto; and

(c) Any other appreciation in value since the date of that acquisition

Analysis of the law and Evidence;

13. Th ɜ facts and the evidence have revealed the cause of action in this matter arose in 1981. The law applicable at the time was the repealed Land Acquisition Act 1967 as amended in 1971. Pursuant to section 14 of the General Interpretation Act, the present assessment has to be subjected to the dictates of the said repealed Land Acquisition Act.

14. As mentioned earlier, the question that has to exercise the court's mind, in the course of this assessment, is what would be a reasonable compensatory su n. In a bid to aid the court to reach at a reasonable amount, there are three evaluation reports from both sides herein. The two reports were submitted by the defendants' witnesses. When quizzed on why they arrive at a different amount, the same was attributed to the use of different formulae.

The defendant is adamant that it is ready to settle the matter and pay the claimant the sum of MK2,550 as can be escalated to its present equivalence. At the same time, the claimants propose the sum of MK18, 67 ', 949, 821.94. The court, therefore, ought to assess whether the stated proposals are fair and reasonable.

15. The claimants in their submissions argue that even though the evidence from the defendant states that the compensation was fair and reasonable, the Minister should have also considered subsection 2(c) and subsection (7)

CamScanner

in order to arrive at an amount that represents fair compensation. He was mandated and duty bound to do so. Sub section 2 (c) of section 10 is to the effect that in calculating the compensation, the minister ought to have considered any other appreciation in the value of the land since the date of acquisition of the land.

16. It is further argued that pursuant to Section 10 (6) no compensation shall exceed the current market value of the land. It is submitted that, subsection 2 (c) obligated the Minister to consider any other appreciation in the value of the land. It is the claimant's contention that no evidence was led by the defendant to prove that the assessed sum of MK2,550.00 was done after consideration of factors affecting the market value or any other appreciation in value prevailing at the time of the compulsory acquisition. In that regard, the MK2,550.00 cannot be described as having been fair compensation when the assessment by the Minister completely disregarded other relevant factors which ought to have been taken into in making the assessment.

17. On the other hand, the defence argued that the Minister responsible for lands duly assessed the compensation at the time of acquisition and He arrived at the sum of MK2,550.00. The sum was specifically said to include the value of the land, crops and improvements made on the land. This was in compliance with section 10 of the Land Acquisition Act of 1967. The court was also called upon to consider the fact that the offered amount for the land was more that the amount that the original owners paid for its purchase. As such the assessed amount followed the market value of the land and all relevant factors that could affect the value of the land.

CamScanner

18. The defendant also reminded the court that the government acquired freehold land and created leases for Industrial development out of that land. Thus, the land then was not leasehold as it is now. As such, the court ought to disregard any appreciation in the value of the land which came about as a consequence of the re-designation of the land.

19. It is not in dispute that at the time the land was being acquired by the government, the said land was freehold land whose lease was for agricultural and residential purposes and no other. After the acquisition, the land was designated as leasehold for commercial purposes. This is the basis upon which the claimants' assessment report tendered by their expert witness, Mr Galeta, relied on. In short, he made an assessment based on the fact that the land is commercial property. This is clearly misleading. The court would not be making a reasonable and fair award if it is to follow the approach taken by the claimants as we have already indicated that the government did not acquire commercial property. The value of the land as it stands presently therefore has no bearing in these proceedings. Whilst this court agrees that the present assessment ought to consider what would be the present value of the land, it would be a grave error for this court to consider the fact that the land is now leasehold and commercial property. The government did not acquire commercial property or leasehold land. As stated earlier, the land was acquired when it was freehold and agricultural/ residential land.

20. For the reasons stated, it was an error for the claimant to make calculations based on the fact that the land is commercial and leasehold land. As such, this court will disregard the said calculations as contained in Exhibit BG2 and page 9. In any event, it is clear that the final figure was arrived at as a

CamScanner

result of considering factors like loss of opportunity which we do not find to be justifiable or applicable in the present assessment.

21. Reverting to the defendant's submission, the sums proposed by the defendant are based on the offered compensation sum MK2,550.00 as of 1981. So, the sums presented by the Defendant's witnesses represent the rejected amount of MK2, 550.00 as on the assessment date. This sum, in the eyes of the claimants was unfair and unreasonable. In the absence of the claimant's counter proposal to the 1981 offer. It is this court's view that, if the government then had reconsidered the offer and for instance doubled it, the 'new' offer would have been generous, reasonable and fair in the circumstances. In that regard, this court is of the view that to double the award made at the time of acquisition would result in fair and reasonable compensation. Therefore, that amount ought to be escalated to its present value.

22. As indicated earlier, the figures presented by DW2 and DW3 differ in the sense that the calculations by DW3 reflect not only the present value of the 1981 offer but it also took into account an element of growth. Thus, it considered the gains that could have been realised had been that the sum of MK2,550.00 was invested on the money market. The court finds that formula reasonable and fair. In that regard, doubling the 1981 offer will translate to a current sum of MK20, 000, 000.00.

23. The claimants also submitted that the conduct of the defendant from acquisition of the land to date has been unconstitutional, unreasonable and oppressive. This therefore ought to attract a substantial award of aggravated damages to compensate the Claimants. In response, the defendant cited **section 10 (2) of the Statute (Miscellaneous Provisions) Act**

CamScanner

and argued that the matter at hand survived for the benefit of the estate of claimants and therefore cannot include exemplary damages. Whilst this court agrees with the interpretation advanced by the defendants, it is worth mentioning that the law governing exemplary and or aggravated damages is to the effect that such awards are made on where any of the following three circumstances are met. Thus; where there is an express authorisation for such an award by a statute, where there is oppressive, arbitrary or unconstitutional action by servants of the government and where the conduct to result in profits. see, ***McGregor on Damages (15th Ed) (Footnote Para 280).***

The compulsory acquisition of the land herein was legal in all respects as the government followed the law applicable at the material time. If it is about the delay, the same cannot be solely attributed to the government. Equally, the claimants contributed to the delay as they repeatedly disputed to the offer made by the government without providing an alternative assessment that contained a proposed sum. Hence the government had to stick to its own assessment. With this in mind, the court is of the view that this claim for aggravated damages cannot be sustained as none of the factors mentioned above exist in the present case.

24. Finally, there is claim for loss of opportunity. The court does not wish to take too much time on this item. This is so regarding the fact that the claim does not appear anywhere in the pleadings and indeed on the order made by the court. Having in mind that this court takes its mandate from the pleadings and what has been ordered by the court, we find no basis to proceed to make an assessment under this head. For these reasons, the court will not make no assessment under this item.

CamScanner

25. Conclusively, the claimants are awarded the sum of MK20, 000, 000.00 being compensation for the freehold land that was acquired by the government in 1981.

DELIVERED IN CHAMBERS THIS 05TH DAY OF NOVEMBER, 2024

Ibrahim Hussein

ASSISTANT REGISTRAR

CamScanner