



IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MISC CIVIL APPLICATION NO. 43 OF 2023

(Being Judicial Review Case No. 1 of 2023 at the High Court of Malawi

Commercial Division, Lilongwe)

BETWEEN:

FINSBURY INVESTMENT LIMITED.....APPLICANT

AND

THE REGIS TRAR OF FINANCIAL INSTITUTIONS.....RESPONDENT

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA JA

Mr Chipeta, of Counsel for the Applicant

Mr Wapona Kita, of Counsel for the Applicant

Mr Chapo, of Counsel for the Respondent

Mr Kumwenda, of Counsel for the Respondent

Mr Mataka, of Counsel for the Respondent

Mr Chinkono, Recording Officer

RULING

Kalembera JA

This is the Applicant's Application for Leave/Permission to Apply for Judicial Review of the Respondent's decision mainly approving the acquisition of MyBucks Banking Corporation by Centenary Group of Uganda and the Catholic Church Archdiocese of Lilongwe without considering certain material facts before it that were presented by the Applicant (Form 86A). The Application is brought under Order 1, r.18 of the Supreme Court of Appeal Rules and the Inherent Jurisdiction of the Court. Both parties have filed affidavits and skeletal arguments in support of their respective positions. The Respondent opposes this Application.

As can be observed this is essentially a re-Application for Leave/Permission to Apply for Judicial Review, the initial application having been denied by the court below. This is in line with what this Court has always held and directed. It is also in accord with Order 1, r.18 of the Rules of the Supreme Court which provides as follows:

“Whenever an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below but, if the Court below refuses the application, the applicant shall be entitled to have the application determined by the Court.”

See also In The State on Application of Gertrude Hiwa v Office of the President and Cabinet and Secretary to the President and Cabinet, MSCA Civil Re-application for Judicial Review Number 42 of 2021, and The State on the Application of Flatland Timbers Ltd v Department of Forestry (Director of Forestry) MSCA Civil Case No. 25 of 2021

This application has therefore been properly brought before this Court.

It has been argued on behalf of the Applicant that the Applicant's application shows contentious issues that should warrant a full Judicial Review hearing; that the High Court, when determining the application, wrongly dealt with the merits; and that the High Court raised issues of alternative remedy by way of appeal when none were raised and that such remedy does not exist for the Applicant. It has further been argued that if the Court finds that this application was brought out of time as claimed by the Defendant, the Court hold the same extended.

In the main, it has been argued on behalf of the Defendant that this application was brought five months late and that it is an inordinate delay. Further, that it would be prejudicial to prejudicial to the parties the decision having already been implemented by third parties who are not party to this application. And that the bank has already

changed its name to Centenary Bank. That the extension, if any, will fly in the face of three months notice required to commence Judicial Review.

I must state that indeed the Court ought not delve into the merits and demerits of the substantive matter at this stage. However, it is inevitable, that for the Court to make a reasonable determination as to whether leave or permission be granted to a party to commence judicial review, it will have to appreciate the issues raised. Otherwise the determination would just be mechanical and without a valid basis. I therefore do not find fault with the way the Court below dealt with the application.

It has not really been disputed that the application was brought five months late. However, the Court is being implored to exercise its discretion and extend the time for purposes of achieving substantial justice. This Court has repeatedly held that procedural justice is as important as substantial justice. Thus, I find no reason to extend the time within which the Applicant ought to have brought this application. On that basis alone I would dismiss this application. The Court below went further and rightly so.

In dismissing the application in the court below, Dr Kachale J had this to say:

“The material presented in this application has not established any tentative basis for impugning the exercise of the Defendant’s mandate in sanctioning the transfer of the shares as alleged by the Claimant; more needed to be shown to warrant the proposed judicial inquiry into the exercise of the regulator’s authority.”

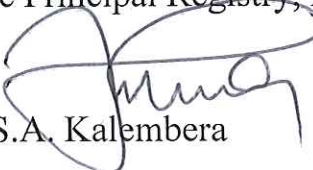
The Judge stated further as follows:

“In conclusion, the court does not find the Claimant to have demonstrated sufficient legal interest in the decision to justify judicial review; the basis of its claim having been lawfully declined validity in the first place (a decision which effectively maintained the exclusive legal ownership of MyBucks Banking Corporation in MyBucks SA). Any grievances in the predicate matters (such as the refusal to recognize the Deed of Settlement) could have competently been pursued through relevant appeals procedure available under the law i.e. section 82 and 92 of the

Financial Services Act. Any attempt at this stage to reinsert oneself into a lawful transaction premised upon a patently non-compliant transfer of equity or shares in MyBucks Banking Corporation would undermine the legitimate regulatory authority of the Defendant. Whatever grievance the Claimant might have, the remedy does not seem to lie in judicial review as there has not been any valid legal basis for the Claimant to question the procedural fairness and legal validity of the Defendant's decision."

I find no sufficient reasons to contradict the views of my learned brother Judge in the Court below. I find that indeed there was five months delay in bringing the application, which delay was inordinate. And further that the application does not raise any valid legal basis for the application and that there are no triable issues. Consequently, the application is dismissed with costs for the Defendant.

MADE this 23rd October 2023 at the Principal Registry, Blantyre.



S.A. Kalembere

JUSTICE OF APPEAL