



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
JUDICIAL REVIEW CAUSE NO. 29 OF 2025
(Before Honourable Justice Mambulasa)

BETWEEN:

**THE STATE (ON THE APPLICATION OF ROADS
AUTHORITY).....CLAIMANT**

-AND-

THE OFFICE OF THE OMBUDSMAN.....DEFENDANT

CORAM: HON. JUSTICE MR. MANDALA D. MAMBULASA

Mr. Bruno Matumbi, Advocate for the Claimant

Ms. Yankho B. Gama, Advocate for the Claimant

Ms. Hawa Chatepa, Advocate for the Defendant

Mr. Hezron P. Kuseli, Advocate for the Defendant

Ms. Caroline Machado, Court Clerk/Official Interpreter

RULING

MAMBULASA, J

Introduction

- [1] The claimant approached this Court seeking permission to apply for judicial review of the determination of the defendant directing it to re-assess and compensate Mr. Allan Mukhwapa for alleged damage to his house by road construction activities.
- [2] It also sought an order of injunction stopping the implementation of the defendant's determination requiring it to re-assess and compensate Mr. Allan Mukhwapa pending the hearing and determination of the within proceedings.
- [3] The application was brought under Order 19, rules 20 (3) and 22 of the Courts (High Court) (Civil Procedure) Rules. It was supported by a sworn statement. The Claimant also filed grounds on which relief was sought as well as skeleton arguments.
- [4] When this Court considered the applications brought by the claimant, it granted both, namely, permission to move for judicial review and an order of injunction stopping the implementation of the determination made by the defendant requiring the claimant to re-assess and compensate Mr. Allan Mukhwapa.
- [5] Considering that the order of injunction was granted on without notice basis, the Court directed that a with-notice application shall be held on 29th September, 2025.

- [6] On 29th September, 2025 when the matter came up for hearing, the defendant raised two preliminary objections to the claimant's application for permission to move for judicial review and the order for injunction.
- [7] The Court determined that it first deals with the application for preliminary objections made by the defendant since they had the potential of disposing of the entire matter.
- [8] This ruling, therefore, is on the application for preliminary objections that were brought by the defendant.

Issues for Determination

- [9] There are two issues to be determined by this Court at this stage.
- 9.1 First, whether or not the proceedings are irregular as the claimant has commenced proceedings against the wrong party, being the office of the Ombudsman rather than the Ombudsman as the decision maker?
- 9.2 Second, whether or not the present proceedings were commenced outside the 30 days stipulated under section 8 (5) of the Ombudsman Act, and are caught by the limitation period provided under that section?

The Defendant's Case

- [10] The defendant states that on or about 3rd June, 2025 it released a determination in the matter of Allan Mukhwapa -vs- The Roads Authority.
- [11] The said determination was served on the claimant through a letter dated, 3rd June, 2025. A copy of the letter was exhibited and marked as, “HC 1”.
- [12] The defendant, under paragraph 9 of its determination, which was on the right to seek review, duly informed the claimant and all other parties that in accordance with section 123 (2) of the Constitution and section 8 (5) of the Ombudsman Act, they had the right to seek review of the determination at the High Court within 30 days from the date of being notified of the determination, thus not later than 4th July, 2025.
- [13] Despite being clearly informed of its right to seek review of the determination of the defendant in the High Court within 30 days from being notified of the determination, the claimant invoked section 123 (2) of the Constitution and commenced review proceedings against the office of the Ombudsman as the responding party on 15th August, 2025 thus 71 days after being served with the determination.
- [14] The review proceedings are not only caught by the limitation period but they have also been commenced against a wrong party, the office of the Ombudsman instead of the Ombudsman as the decision maker.
- [15] The defendant thus prayed to this Court that it upholds the preliminary objections and dismiss the application with costs.

The Claimant's Case

[16] The defendant served the claimant with the application for preliminary objections on 17th September, 2025.

[17] However, the claimant did not file any sworn statement in opposition or reply. It just made its arguments to the application during the hearing.

Arguments by the Parties

[18] The defendant contended that the claimant filed an application for permission for judicial review on 15th August, 2025 and cited the responding party as the office of the Ombudsman.

[19] According to the defendant, section 123 (2) of the Constitution is clear that **the decisions and exercise of powers by the Ombudsman** shall be reviewable by the High Court on the application of any person with sufficient interest **in a case the Ombudsman** has determined.

[20] Similarly, section 8 (5) of the Ombudsman Act is to the effect that any person or organ of Government **aggrieved by a finding, directive, decision or recommendation of the Ombudsman** in respect of an inquiry or investigation in any instance or matter may, within thirty days after being notified of the decision apply to the High Court for a review of the finding, directive, decision or recommendation.

- [21] Order 19, rule 23 (2) (c) of the Courts (High Court) (Civil Procedure) Rules provides that an application for judicial review shall name as defendant, for an order about a decision, the person who made or should have made the decision.
- [22] It was submitted that from the reading of the above cited provisions, the decision, directive, finding to be reviewed is that of the Ombudsman. The correct party should have been the Ombudsman and not the office of the Ombudsman as it were.
- [23] Due to the fact that the claimant commenced these proceedings against a wrong party, the Court was invited to dismiss the application. The defendant cited several cases on this point including *Taulo and others –vs- Attorney General and another*.¹
- [24] On the second issue, the defendant relied on section 8 (5) of the Ombudsman Act² which provides as follows:

Any person or organ of Government aggrieved by a finding, directive, decision or recommendation of the Ombudsman in respect of an inquiry or investigation in any instance or matter may, within 30 days after being notified of the decision in accordance with subsection (1) (a) or (2), apply to the High Court for a review of the finding, directive, decision or recommendation.

¹ [1994] MLR 328 (HC).

² Cap. 3:07 of the Laws of Malawi.

- [25] The defendant submitted that this section along with other amendments in the Ombudsman (Amendment) Act, 2024³ came into effect on 2nd February, 2024⁴ and the need for any dissatisfied party to go for review within 30 days as stipulated under section 8 (5) was communicated to the parties under paragraph 9 of its determination.
- [26] It was the further submission of the defendant that the requirement in section 8 (5) of the Ombudsman Act to bring review proceedings within 30 days after being notified of the decision means that the time limits in relation to review proceedings against the Ombudsman's determinations is now very different from the limitation period under Order 19, rule 20 of the Courts (High Court) (Civil Procedure) Rules, which is not later than 3 months of the decision.
- [27] The claimant's application for permission to move for judicial review is caught by the limitation period and it should therefore be dismissed with costs to the defendant.
- [28] In response, the claimant counter-argued that the office of the Ombudsman and the Ombudsman are used interchangeably in the law. There is no legal separation of personality between the office of the Ombudsman and the Ombudsman *per se*.

³ Act No. 1 of 2024.

⁴ See The Malawi Gazette Supplement dated 2nd February, 2024.

- [29] The claimant contended that for instance section 120 of the Constitution is to the effect that there shall be a public office known as the office of the Ombudsman. This is the section that creates or establishes the defendant.
- [30] Section 121 of the Constitution is on the independence of the Ombudsman. It states that in the exercise of his or her powers, functions and duties the Ombudsman shall be completely independent of the interference or direction of any other person or authority, but shall otherwise be answerable to Parliament. Here, the provision has used the words, the Ombudsman.
- [31] Similarly, section 122 (1) of the Constitution provides that nominations for appointment to the office of Ombudsman shall be received from the public by way of a public advertisement placed by the Clerk to the National Assembly. Here, the provision has reverted to the use of the words, the office of the Ombudsman. The same is also true of section 122 (2) of the Constitution.
- [32] Again, section 123 (1) of the Constitution provides that the office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy. Section 123 (2) of the Constitution uses both, the office of the Ombudsman and the Ombudsman in the provision.
- [33] Further, section 124 of the Constitution which deals with powers of investigation of the Ombudsman uses the words, the Ombudsman and not the words, the office of the Ombudsman.

- [34] Furthermore, section 125 of the Constitution uses the words, a person holding the office of Ombudsman.
- [35] The interchange is also manifest in sections 126 and 127 on one hand and 128 of the Constitution, on the other. In short, the claimant submitted that the office of the Ombudsman is not a wrong party as was argued by the defendant.
- [36] The Constitution itself uses the words, the office of the Ombudsman, and, the Ombudsman, interchangeably as it has been demonstrated and that it would be unjust to punish the claimant for the sin of Parliament for its election to use one formulation and not the other.
- [37] The claimant thus prayed to this Court that the first preliminary objection should be overruled as it is misconceived and has no merit whatsoever.
- [38] On the second issue, the claimant's position was that it was opposed to the jurisprudence that specifically says that where there is a time limit indicated for a performance of an action and the statute does not specifically allow the court to extend that time, then, there is an ouster of jurisdiction.
- [39] The main reason, so it was argued, is that there is a distinction between a statute bar and an allocation of time for administrative purposes. In the jurisprudence of judicial review from time immemorial, the reason why there is a limitation of 3 months has been given as safeguarding the certainty of administrative purposes or functions.

- [40] Traditionally, there has always been that power to extend the limitation period, given to the Court. The claimant cited the case of *The State (On the application of FDH Bank Plc) –and- The Commissioner General of Malawi Revenue Authority*⁵ in support of this proposition.
- [41] The claimant also argued that there must be a purposive interpretation to the Ombudsman Act. According to the claimant, there is nothing special about the exercise of the Ombudsman power which conclusively separates it from the general regime of judicial review which limits the period to 3 months.
- [42] The claimant asks the question: was Parliament mindful of the fact that section 8 (5) of the Ombudsman Act was creating an ouster of jurisdiction? It was argued that if the Court adopts a purposive interpretation, the answer would be an emphatic no.
- [43] It was the further contention of the claimant that it was not arguing against the time of 30 days itself, but rather, the position that the period cannot be extended. Section 8 (5) of the Ombudsman Act is not a statute bar. It does not oust the jurisdiction of the Court.
- [44] It was also argued that there is no express provision in the Ombudsman Act that extinguishes the right to have the decision of the Ombudsman reviewed after the 30-day period. If that was the case, it would be contrary to the claimant's right of access to justice.

⁵ Judicial Review Case No. 06 of 2022 (High Court of Malawi) (Principal Registry) (Revenue Division) (Unreported).

[45] The claimant conceded that it filed the application out of time in terms of section 8 (5) of the Ombudsman Act and implored the Court to treat this as a non-compliance which is curable under Order 2 of the Courts (High Court) (Civil Procedure) Rules.

[46] The claimant urged the Court to have regard to the overriding objective of the Courts (High Court) (Civil Procedure) Rules, which is to deal with proceedings justly and give effect to it when interpreting section 8 (5) of the Ombudsman Act.

[47] The claimant thus prayed to the Court to overrule this preliminary objection as well.

The Law and Disposal of the Application

[48] It is trite law that where a wrong party is sued, the action or proceeding, is dismissed by a court of law.⁶

[49] Reverting to the first issue, are the proceedings irregular for being commenced against the wrong party, namely, the office of the Ombudsman rather than, the Ombudsman as the decision maker, as was argued by the defendant?

[50] This Court is fully persuaded by the arguments made by the claimant. Indeed, it is clear that the Constitution⁷ uses the words, *office of the Ombudsman* and

⁶ n1 above.

⁷ The Constitution of the Republic of Malawi.

the Ombudsman interchangeably in its provisions under Chapter X as we have seen. Section 123 (2) of the Constitution relied upon by the defendant cannot be read in isolation from the rest of the provisions under that chapter.

[51] It would indeed be unjust for the Court to punish the claimant for the sin of Parliament that elected to use both expressions interchangeably in no lesser a law than the Constitution itself. The Court therefore holds that it was open to the claimant to use either, *the office of the Ombudsman* or *the Ombudsman* as a responding party in the present review proceedings.

[52] The Court is quick to note that the Ombudsman Act however, consistently uses the words, *the Ombudsman* and not, *the office of the Ombudsman* in all its provisions. The Constitution being the supreme law of the land,⁸ the Ombudsman Act is accordingly dwarfed on this point.

[53] All in all, the first preliminary objection raised by the defendant that the proceedings are irregular because *the office of the Ombudsman* is a wrong party to the present review proceedings is hereby overruled.

[54] The Court will now move on to deal with the second issue, namely, whether or not the present review proceedings are caught by the limitation period stipulated in section 8 (5) of the Ombudsman Act.

[55] The starting point is Order 19, rule 20 (5) of the Courts (High Court) (Civil Procedure) Rules. It provides as follows:

⁸ See for instance, section 5 of the Constitution.

(5) Subject to sub-rule (6), an application for judicial review under sub-rule (3) shall be filed promptly and shall be made not later than 3 months of the decision.

(6) The Court may extend the period under sub-rule 5.

[56] Section 8 (5) of the Ombudsman Act, is to the effect that any person or organ of Government aggrieved by a finding, directive, decision or recommendation of the Ombudsman in respect of an inquiry or investigation in any instance or matter may, within 30 days after being notified of the decision in accordance with subsection (1) (a) or (2), apply to the High Court for a review of the finding, directive, decision or recommendation.

[57] It is settled law that limitation period for filing judicial review proceedings is generally not later than 3 months from the date when the decision, action or failure to act was made or taken.⁹

[58] The rationale behind this requirement is not difficult to understand. It is in the public interest that the legality of the formal acts of a public authority should be established without delay.¹⁰

[59] In terms of Order 19, rule 20 (6) of the Courts (High Court) (Civil Procedure) Rules this Court has power to extend the period within which an application for permission to apply for judicial review may be made.

⁹ Order 19, rule 20 (5) of the Courts (High Court) (Civil Procedure) Rules.

¹⁰ *The State (On the application of Alexander Ganiza) –and- Malawi Energy Regulatory Authority and The Ombudsman*, Civil Cause No. 46 of 2021 (High Court of Malawi) (Lilongwe District Registry) (Civil Division) (Unreported).

- [60] However, Parliament is at liberty to prescribe a different limitation period for filing judicial review proceedings in a subject specific statute. For instance, section 96 (3) of the Legal Education and Legal Practitioners Act,¹¹ provides that a person aggrieved by a decision of the Disciplinary Committee may, within thirty (30) days of the decision, commence judicial review proceedings against the decision at the High Court.¹²
- [61] It is trite that where a subject specific statute has provided for a shorter limitation period, it is that statute that takes precedence over any contrary limitation period provided for in a general statute or indeed subsidiary legislation.
- [62] In the context of these proceedings, section 8 (5) of the Ombudsman Act has provided a specific limitation period for filing review proceedings against the finding, directive, decision or recommendation of the defendant. That period is within thirty (30) days after being notified of the finding, directive, decision or recommendation by the Ombudsman.
- [63] It follows therefore that the applicable limitation period for filing for permission for judicial review or review proceedings against the finding, directive, decision or recommendation of the defendant is this specific one

¹¹ Act No. 31 of 2018.

¹² See *The State (On the application of Wellington Kazembe t/a Mackenzie and Patricks Associates) -and- Malawi Law Society*, (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

and not the one provided for under Order 19, rule 20 (5) of the Courts (High Court) (Civil Procedure) Rules.

[64] A statute takes precedence over any subsidiary legislation, namely, procedural rules, that provide anything to the contrary.¹³ In the same vein, this non-compliance or irregularity cannot be cured under Order 2 of the Courts (High Court) (Civil Procedure) Rules because it directly contravenes the Ombudsman Act.

[65] It should be noted that section 8 (5) or any other section in the Ombudsman Act has not given any power to the High Court to extend the period within which an application for seeking review may be made.

[66] This means that if a claimant for whatever reason is unable to file the application for permission to move for judicial review or review proceedings within thirty (30) days of being notified of the finding, directive, decision or recommendation, then, under the Ombudsman Act, the period cannot be extended by the Court.¹⁴

[67] In other words, the principle is that Courts may only extend time allowed under a statute for doing a thing where it is so allowed by the relevant statute

¹³ See for instance, *Johnstone Ndhlovu –vs- Malawi Electoral Commission*, Electoral Matter No. 1 of 2025 (High Court of Malawi) (Lilongwe District Registry) (Civil Division) (Unreported). See also *Jam Willem Akster -vs- The State*, Constitutional Referral Cause No. 02 of 2021 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported), a Ruling of 23rd January, 2023.

¹⁴ See for instance, *Banda and others –vs- Electoral Commission and others*, [2013-2021] MELR 250 where the High Court reached a similar conclusion in relation to filing of petitions under the Parliamentary and Presidential Elections Act (now repealed).

or law. Put differently, a court has no residual or inherent jurisdiction to extend or enlarge a period laid down by statute.¹⁵

[68] Another formulation of the principle would be that where a statute imposes limitation for the filing of an action, or review proceedings in this context, unless the very statute makes provision for extension of time to enable the action or review proceedings be filed out of time, the court would be without power to grant the prayer for extension of time for filing a belated action or indeed review proceedings.¹⁶

[69] The salient effect of a limitation in this case is that either a claimant initiates the review proceedings within the period of time prescribed and limited by the statute or they keep their peace forever.

[70] In *casu*, the defendant made its determination on 3rd June, 2015. The determination was served on the claimant on the same day. The claimant filed its application on 15th August, 2015. This was way out of time.

[71] This Court accepts the argument made by defendant that the claimant's review proceedings are clearly statute barred. They were filed outside the specific limitation period prescribed by section 8 (5) of the Ombudsman Act. This Court has no power under the said section or any other section in the

¹⁵ *The State and The Electoral Commission, ex-parte Friday Anderson Jumbe & 3 others* Judicial Review Cause No. 38 of 2014 (High Court of Malawi) (Principal Registry) (Unreported).

¹⁶ See for instance, *Audu -vs- Wada* (2016) 12 NWLR Part 1527 p 382 at 394-395 Para H-A, Per M. D. Muhammad JSC.

Ombudsman Act to extend or enlarge the specific limitation period for filing applications for permission to move for judicial review or review proceedings.

[72] Consequently, the court is unable to accept the claimant's arguments on this preliminary objection. The preliminary objection made by the defendant is upheld. The order granted to the claimant for permission to move for judicial review and an order of injunction restraining the implementation of the defendant's determination are hereby set aside and the review proceedings are dismissed.

[73] Costs are awarded in the discretion of the Court.¹⁷ Where the Court decides to make an order for costs, the general rule is that the unsuccessful party pays the costs of the successful party.¹⁸ Each party having succeeded on each preliminary objection, the Court makes an order that each party bears its own costs.

[74] Any party dissatisfied with this ruling is at liberty to appeal to the Supreme Court of Appeal within the time prescribed by the law.

[75] Made in Chambers this 10th day of October, 2025 at Blantyre, Malawi.


M. D. MAMBULASA
JUDGE

¹⁷ Section 30 of the Courts Act, Cap. 3:02 of the Laws of Malawi. See also Order 31, rule 3 (1) of the Courts (High Court) (Civil Procedure) Rules.

¹⁸ Order 31, rule 3 (2) of the Courts (High Court) (Civil Procedure) Rules.