



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL DIVISION

JUDICIAL REVIEW CAUSE NO. 13 OF 2024

(Before Honourable Justice Mambulasa)

**BETWEEN:**

THE STATE (ON THE APPLICATION OF:

ATUSAYE KAYANGE.....1<sup>ST</sup> CLAIMANT  
NEMA MKANDAWIRE.....2<sup>ND</sup> CLAIMANT  
RICHMAN TCHUWA).....3<sup>RD</sup> CLAIMANT

-AND-

ASSISTANT REGISTRAR OF THE HIGH COURT OF  
MALAWI.....DEFENDANT

**CORAM: HON. JUSTICE MANDALA MAMBULASA**

Mr. Obet Chitatu, Court Clerk/Official Interpreter

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**ORDER**

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## **MAMBULASA, J**

### **Introduction**

- [1] The Claimants have approached this Court seeking permission to apply for judicial review of the decision of the Defendant contained in the Order (Notice of Rejection) dated 11<sup>th</sup> January, 2024 rejecting to process/issue the Claimants' petitions for admission to the Malawi Bar in order that they may practice law in the courts of Malawi.
- [2] The application is brought under Order 19, rule 20 (3) of the Courts (High Court) (Civil Procedure) Rules, 2017. It is supported by a Sworn Statement made by the 1<sup>st</sup> Claimant, Atusaye Kayange, on his own behalf and on behalf of the other two Claimants. The Claimants also filed Form 86A, Grounds on which relief is sought and Skeleton Arguments in support of their application.

### **Issue for Determination**

- [3] There is only one issue to be determined by this Court at this stage. It is whether or not this Court should grant permission to the Claimants to apply for judicial review against the decision of the Defendant rejecting to process/issue the Claimants' petitions for admission to the Malawi Bar as sought and prayed for in their application.

### **The Claimants' Case**

- [4] The Claimants state that they were former students of the University of Malawi, Faculty of Law and they graduated therefrom in the year 2023. There are attached and exhibited to their application copies of their degree certificates marked as, “AK1a”, “AK1b” and “AK1c” respectively.
- [5] Having so graduated, the Claimants together with the rest of their classmates filed petitions for admission to the Malawi Bar in the High Court, Principal Registry, around mid-October, 2023. There are attached and exhibited to their application copies of the said petitions that were duly filed with the High Court marked as, “AK2a”, “AK2b” and “AK2c” respectively.
- [6] On or about 11<sup>th</sup> January, 2024, the Defendant communicated his decision on their petitions under the head, *notice of rejection*, the text of which was also attached and exhibited to their application and marked as, “AK3”.
- [7] In the said notice, the Defendant declined to process/issue their petitions on the grounds that they were not entitled/qualified to petition for admission to the Malawi Bar to practice law on the grounds that they had not undergone practical legal training at the Malawi Institute of Legal Education (MILE) after obtaining their law qualifications from the University of Malawi, Faculty of Law.
- [8] The Claimants contend that as per the Legal Education and Legal Practitioners Act,<sup>1</sup> they were not required to undergo the training preferred by the Defendant in order to be admitted to the Malawi Bar to practice law.

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<sup>1</sup> No. 31 of 2018.

- [9] The Claimants further contend that the decision of the Defendant to reject their petitions was *ultra vires* section 22 (3) of the Legal Education and Legal Practitioners Act in so far as the Defendant sought to determine the merits of their petitions and pronounced himself on them when such powers only vest in the office of the Chief Justice of the Republic.
- [10] The Claimants also contend that the decision of the Defendant to reject their petitions was *ultra vires* section 7(c) and 8 of the Courts Act as read with Order 25 of the Courts (High Court) (Civil Procedure) Rules, 2017 in so far as the cited provisions spell out the powers and functions of the Defendant and the Defendant then went and assumed the power to determine petitions when the same is not any of the said powers or functions of his office.
- [11] The Claimants allege that the decision of the Defendant to reject their petitions, without according them a hearing whatsoever offend rules of natural justice and that therefore it was procedurally unfair.
- [12] The Claimants state that the decision of the Defendant to reject their petitions on the basis of his interpretation of section 122(6) of the Legal Education and Legal Practitioners Act to mean that they were required to enroll at MILE before petitioning for their admission to practice law was so unreasonable given the plain and straightforward meaning of the words used in the provision.
- [13] The Claimants therefore pray that the Court would be pleased to grant them permission to apply or move for judicial review of the said decision of the

Defendant rejecting to process/issue their petitions of admission to the Malawi Bar.

- [14] If the said permission would be granted, the Claimants would seek a like order to *certiorari* quashing the decision of the Defendant rejecting their petitions; the Claimants would also seek an order directing the Defendant to process/issue their petitions and forward them to the Chief Justice so that they could be dealt with lawfully; and finally, the Claimants would also seek an order that all necessary and consequential directions be given and an order for costs of these proceedings.

## **The Law**

- [15] Order 19, rule 20 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:

- (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 (4), an application for judicial review shall be commenced *ex-parte* with the permission of the Court.
  - (4) The Court may upon hearing an *ex-parte* hearing direct an *inter-partes* hearing.
  - (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.
- [16] From the above, it is worth-noting that there are a number of requirements that must be fulfilled by a claimant before they are granted permission to apply or move for judicial review proceedings.
- [17] As Ruth Chinangwa, J noted in *The State (On application of Gertrude Hiwa, SC) and Office of the President and Cabinet and Secretary to the President and Cabinet*<sup>2</sup> from Order 19, rule 20 quoted above, the Court has to consider the following requirements in an application for permission to apply or move for judicial review:

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<sup>2</sup> Judicial Review Cause No. 42 of 2020 (High Court of Malawi) (Lilongwe District Registry) (Civil Division) (Unreported).

- 17.1 There must be a law, an action or a decision of the Government or a public officer for conformity with the Constitution where a right, freedom, interests or legitimate expectation of the claimant is affected or threatened; or
  - 17.2 There must be a decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness, its procedural fairness, its justification of the reasons provided, if any, or bad faith, if any, where a right, freedom, interests or legitimate expectation of the claimant is affected or threatened;
  - 17.3 A person making an application for judicial review should have sufficient interest in the matter to which the application relates; and
  - 17.4 An application for judicial review should be filed promptly and shall have to be made not later than 3 months of the decision, action or failure to act.
- [18] In addition to the above requirements, case law has also developed other additional principles upon which permission to apply or move for judicial review is considered in our jurisdiction. For purposes of the present proceedings, one such relevant principle is that judicial review is not available in cases where there are other alternative remedies and the same have not been

used or exhausted by a claimant.<sup>3</sup> An alternative remedy includes appealing against a decision to a higher or superior court.<sup>4</sup>

[19] In *R -vs- Inland Revenue Commissioners, ex-parte Preston*<sup>5</sup> the Court said:

...a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance.

[20] In *R -vs- Epping and Harlow General Commissioners, ex-parte Goldstraw*<sup>6</sup> Sir John Donaldson MR stated that:

But it is a cardinal rule that, save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used.

[21] It is not automatic that once there is an alternative remedy, then judicial review will not be available. The court must exercise its discretion in the particular case in light of the alleged alternative remedy. This is important because to give but one example, a tribunal may have been established under a statute

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<sup>3</sup> As above. See also *The State (On the application of Malawi Revenue Authority) -and- The Chairperson of the Industrial Relations Court and Roza Mbilizi* Judicial Review Case No. 52 of 2021, (High Court of Malawi) (Principal Registry) (Unreported) and *State (ex parte Aero Plastic Industries Ltd -vs- Director of Environmental Affairs* MSCA Civil Appeal No. 19 of 2019 (Unreported).

<sup>4</sup> *The State -and- The President of the Republic of Malawi et al, ex-parte Steven Mponda et al*, Judicial Review Case No. 13 of 2020 (High Court of Malawi) (Zomba District Registry) (Unreported).

<sup>5</sup> [1985] AC 835 at p. 852.

<sup>6</sup> (1983) 3 All ER 257 at p. 262.

but may not have been operationalized, and so, it cannot be said that an alternative remedy would be available. In that kind of case, a court would exercise its discretion in favour of granting permission to apply or move for judicial review as the alternative remedy only exists on the statute book and not in reality.<sup>7</sup>

- [22] The permission application like the present one serves two purposes. First, it eliminates at an early stage, applications that are either frivolous, vexatious or hopeless. Second, it ensures that an application is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.<sup>8</sup>
- [23] At the permission application stage, there is no need for the Court to go into the matter in depth. If the Court is satisfied that there is an arguable case, then it follows that permission to apply for judicial review should be granted where

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<sup>7</sup> This Court is alive to the fact that there are differences of opinion on this point by the High Court Bench in relation to the establishment of land tribunals in the country. One school of thought, led by Kenyetta Nyirenda, J holds that the High Court should not entertain such a case. See *Verijina Lobi -vs- Village Headman Kagwera*, Land Cause No. 213 of 2022 (High Court of Malawi) (Lilongwe District Registry) (Unreported). The other school of thought led by Mike Tembo, J holds that the High Court should still entertain such a matter. See *Kennes Msuku -vs- Elizabeth Manesi et al*, Civil Cause No. 204 of 2021 (High Court of Malawi) (Principal Registry) (Unreported). This Court belongs to the Mike Tembo, J school of thought for two reasons. First, it uses a human rights-based approach where a human being is placed at the centre of the action or activity. Second, there is realization that the resource envelop is thin and laws may not all be implemented at once due to other competing interests for financial resources by the State. The State has demonstrated that it is working towards full implementation of land related laws by establishing land tribunals in some districts in the country and the process is ongoing.

<sup>8</sup> *The State (On the application of Dr. Justice Michael Mtambo) -and- Judicial Service Commission and The President of the Republic of Malawi*, Judicial Review Case No. 25 of 2022 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

all the other requirements have also been fulfilled by the claimant.<sup>9</sup> Similarly, if the Court is not satisfied that there is a case fit for further investigation at the hearing, permission will be declined. The Court must also be satisfied that the public authority is of the type that may be amenable to judicial review.

### **Application of the Law to the Facts**

- [24] As correctly observed by Ruth Chinangwa, J in the case cited above in paragraph 17, it is noted from the reading of Order 19, rule 20 (1) (a) and (b) of the Courts (High Court) (Civil Procedure) Rules, 2017 that a claimant need not satisfy both requirements. A claimant needs only satisfy one of them at any given point in time.
- [25] In the instant case, the most applicable one is Order 19, rule 20 (1) (b) namely, a decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness; its procedural fairness; its justification of the reasons provided, if any; or bad faith, if any, where a right, freedom, interests or legitimate expectation of the claimant is affected or threatened. It speaks to judicial review of executive and administrative action developed in English public law.<sup>10</sup>

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<sup>9</sup> n8 above.

<sup>10</sup> See A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, 14<sup>th</sup> Edition, 725. See also, Austin Bwagadu Boli Msowoya, “Judicial Review in Malawi: Demystifying the Constitutional Grant, the Constitutional Court (?) and the Oxymoron of Certification” A paper presented at the Malawi Law Journal Launch Conference on 16<sup>th</sup> to 17<sup>th</sup> July, 2008 held at Sunbird Mount Soche Hotel in 2008; *The State (On the application of The Malawi Law Society) –and–Prosecutor Levison Mangani, SACP, The Chief Resident Magistrate (Lilongwe) and Secretary to the President and Cabinet*, Judicial Review Case No. 6 of 2023 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

- [26] Immediately, it calls into question the capacity in which the Defendant acted when he rejected the Claimants' petitions. The starting point is that the office of the Registrar or Deputy Registrar of the Supreme Court of Appeal or High Court is a judicial office. This is very clear from section 111(4)(c) of the Constitution. However, the Constitution does not define the word, "Registrar".
- [27] "Registrar" is defined under the Courts Act.<sup>11</sup> Section 2 thereof defines the term, "Registrar" to mean the Registrar of the High Court and includes a Deputy Registrar and an Assistant Registrar. Further, section 7(1) thereof is to the effect that there shall be a Registrar of the High Court and such Deputy Registrars and Assistant Registrars as may be appointed.
- [28] The jurisdiction, powers and duties that the Registrar exercises are given to them both by statutes and rules. Section 8(1) of the Courts Act provides that the Registrar shall exercise jurisdiction, powers and duties as the Chief Justice may, by Rules, prescribe from time to time. Section 8(2) thereof provides as follows:

Subject to the general or special directions of the Chief Justice, **or to the directions of the High Court** in any particular cause or matter, the manner in which Deputy Registrars, **Assistant Registrars and other officers of the High Court** (other than District Registrars and the staff of District Registries) carry out the duties imposed

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<sup>11</sup> Cap. 3:02 of the Laws of Malawi.

upon them by this or any other written law or otherwise shall be under the control and superintendence of the Registrar [*Emphasis supplied*].

- [29] Further, section 3(1)(a) of the Courts Act provides that all summonses, warrants, orders, rules, notices and mandatory processes whatsoever, whether civil or criminal, shall if issued or made by the High Court, be signed by the Registrar.
- [30] Likewise, section 6A(2) of the Courts Act empowers the Registrar, either on their own volition or on application, to transfer immediately a matter or an application in a division other than the appropriate division to the appropriate one.
- [31] In terms of rules, there are two sets of rules made under the Courts Act that regulate civil procedure and practice in the High Court. These rules are anchored on sections 7E, 29 and 67 among other sections.
- [32] The first and well-known rules are the Courts (High Court) (Civil Procedure) Rules, 2017. These were made by the Chief Justice pursuant to section 67 of the Courts Act as dictated by section 29 thereof. They apply across the entire spectrum of the High Court in civil litigation regardless of the registries.
- [33] The second and perhaps less known and less applied rules are the Courts (High Court) (Procedure in District Registries) Rules. These were made by the Chief Justice pursuant to section 7E of the Courts Act. These rules only apply in District Registries of the High Court as the name suggests.

- [34] The Courts (High Court) (Procedure in District Registries) Rules were not revoked by Order 35, rule 16 of the Courts (High Court) (Civil Procedure) Rules, 2017. As to why they are less used and applied by both the Bench and the Bar, is a matter for discussion for another day.
- [35] The above is not the only bizarre thing about them. The other is that while Order 35, rule 16(b) of the Courts (High Court) (Civil Procedure) Rules, 2017 purported to revoke the Rules of the High Court, rule 15 of the Courts (High Court) (Procedure in District Registries) Rules provides that the Rules of the High Court, except Order VI, shall apply, *mutatis mutandis* to the conduct of proceedings in District Registries.
- [36] Suffice to mention that both set of rules, give some specific jurisdiction, powers and duties to the Registrar and District Registrar. By reason of the fact that this application was transferred from Zomba District Registry of the High Court to the Principal Registry of the High Court by Chirwa, J the focus in this Order will be on the Courts (High Court) (Civil Procedure) Rules, 2017 for obvious reasons.
- [37] Order 5 of the Courts (High Court) (Civil Procedure) Rules, 2017 is on commencement. Rules 9, 10, 11, 12 and 13 are relevant to this matter. They provide as follows:

9. The Registrar may reject a document that is filed in the Court where-

(a) the document does not comply substantially with the requirements of these Rules;

- (b) there is an approved form for the document and the document is not properly completed;
- (c) a fee is payable for filing the document and the fee has not been paid subject to other written law; or
- (d) the address for service stated in the document is manifestly insufficient for a party or the Court to effect proper service of process.

10. Rules 11, 12 and 13 shall apply if a document that is filed in the Court appears to the Court on its face to be an abuse of the process of the Court, or to be frivolous or vexatious.
11. The Registrar may reject a document or refer the document to a Judge for directions about how to deal with it.
12. A Judge may direct the Registrar to accept or reject the document.
13. Where the Court rejects a document-
  - (a) the Registrar shall give notice of the rejection together with the grounds of the rejection to the person who filed the document with the Court;
  - (b) the Registrar shall return the document and copies of the document filed with the document; and
  - (c) the document shall be taken not to have been filed.

- [38] In *Democratic Progressive Party -vs- Attorney General (On behalf of the Office of the President of Malawi)*<sup>12</sup> the Court had this to say on the role of the Registrar:

As we have stated above, it is crucial for the Judiciary to be vigilantly on guard against this malpractice. To arrest this malpractice, we direct and order Registrars to diligently scrutinize originating processes and invoke Order 5, rules 9 to 13 of the CPR which empowers them to reject documents.

- [39] The question is, in what capacity does the Registrar act when he elects to reject a document for issuing as happened in this case? Admittedly, the Registrar has duo functions. There are times that they act in exercise of their administrative function. There are also times that they act in exercise of their judicial function.
- [40] Issuing and sealing of documents by the Registrar is not just a mechanical exercise. The Registrar has to scrutinize the documents and ensure that they comply substantially with all the legal requirements as prescribed by the rules of procedure and practice and also by statutory requirements. In this Court's most considered opinion, that cannot be an administrative function. It is a judicial function as the Registrar has to apply his judicial mind to the task before them.

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<sup>12</sup> Constitutional Reference No. 3 of 2021 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

[41] This Court is fortified in this view by the observation that was made by Palikena-Chipao, J when she said in the case of *The Financial Intelligence Authority -vs- Zahra Ali & First Capital Bank of Malawi*<sup>13</sup> that:

Issuance of Court Summons or whatever originating process that is brought before the court is not merely an administrative function of the Registrar. It is a judicial function to which the Registrar must apply his mind.

- [42] This Court is aware that there is a decision of this Court that held that issuing of receipt and signing of writ by the Registrar are acts of administrative nature or function.<sup>14</sup> Being a decision of concurrent jurisdiction, this Court is not bound by it.
- [43] The next question is, can judicial review lie against a decision of a Registrar who was exercising a judicial function? This Court is of the firm view that it cannot, for two reasons.
- [44] First, the office of a Registrar is a judicial office under section 111(4)(c) of the Constitution. As we have seen from the definition of “Registrar” under the Courts Act, it includes Deputy Registrar and Assistant Registrar. Here, one would also add, Senior Deputy Registrar, notwithstanding that it is an administrative arrangement within the Judiciary. A Registrar issues documents and all court processes made in the High Court. In terms of section

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<sup>13</sup> Civil Cause No. 02 of 2024 (High Court of Malawi) (Lilongwe District Registry) (Financial Crimes Division) (Unreported).

<sup>14</sup> *Gatrad et al -vs- Sterling International Ltd et al*, [1990] 13 MLR 117.

8(2) of the Courts Act, the Registrar, Deputy Registrar and Assistant Registrars are officers of the High Court. In addition, when the decisions of the Registrar, Deputy Registrar and Assistant Registrar comply with all the requirements of section 8(1) of the Courts Act and Order 25, rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 they are appealable direct to the Supreme Court of Appeal. In short, for all intents and purposes, the Registrar, Deputy Registrar and Assistant Registrar are part and parcel of the High Court. They are not an inferior court to which the remedy of judicial review may lie. It follows therefore that the High Court cannot conduct judicial review of itself. Stated differently, superior courts are not subject to judicial review.<sup>15</sup>

- [45] Second, as we have seen, the jurisdiction, power and duty to issue documents is conferred upon the Registrar by the Courts Act as well as the Courts (High Court) (Civil Procedure) Rules, 2017. If any person is aggrieved by any decision made by a Registrar in exercise of their judicial function, the proper remedy is to seek to appeal against the decision rather than to seek a judicial review. To the extent that the Claimants herein had an alternative remedy of appealing against the decision of the Defendant and they did not use it, the remedy of judicial review cannot be made available to them.
- [46] In view of the foregoing, this Court declines to grant permission to the Claimants to apply or move for judicial review proceedings against the Defendant as the decision that they made is not amenable to judicial review

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<sup>15</sup> See Stuart Sime, *A Practical Approach to Civil Procedure*, 21<sup>st</sup> Edition (Oxford University Press) at p. 549.

as they are not an inferior court and further that the Claimants did not exhaust an alternative remedy of an appeal to a higher or superior court. It should be remembered that judicial review proceedings are a remedy of last resort.<sup>16</sup>

[47] Made in Chambers this 12<sup>th</sup> day of August, 2024 at Blantyre, Malawi.

  
**M. D. MAMBULASA**  
JUDGE

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<sup>16</sup> *The State (On the application of Mable Lwanda & 21 others) -and- National Disciplinary Committee of Malawi Police Service Judicial Review Cause No. 22 of 2022 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).*