



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
LAND CAUSE NO. 884 OF 2013**

BETWEEN

NGALIPA CHIRAMIRAMADZI CLAIMANT

AND

LILONGWE DISTRICT COUNCIL 1ST DEFENDANT

MC LOY MAIKOLO 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Theu, Counsel for the Claimant

Mr. Chilenga & Ms. Mbidzi, Counsel for the Defendants

Mr. Gerald Kumwenda and Mrs. Mtenje, Court Clerks

JUDGMENT

Kenyatta Nyirenda, J.

1. This matter has a very troubled history. It was commenced in 2013. It has been the subject of a number of applications before several Judges and Assistant Registrars. I became seised of the case on 14th January 2021 when the case was at trial scheduling conference stage.

2. The action herein was commenced by the Claimant against the Defendant by a specially endorsed writ of summons issued by the Court on 19th August 2013. The case by the Claimant against the Defendants is that he is entitled to the right of first refusal to purchase the 1st Defendant's house which is situated on Plot No. DC 21 Kawale 1 Staff Quarters (House in issue).

3. The Defendants deny liability and pray that the action should be dismissed.

4. The case of the Claimant is set out in the following Statement of Claim:

- “1. *The Plaintiff is and was at all material times a tenant of the 1st Defendant renting the house on plot Number DC 21 Kawale 1 Staff Quarters and brings this action as such tenant.*
2. *The 1st Defendant was at all the material times the Plaintiff’s landlord and is being sued as such landlord.*
3. *The 2nd Defendant is a purchaser of the said house and is being sued as such purchaser.*
4. *The Plaintiff repeats paragraph 1 herein and avers that he has been the 1st Defendant’s tenant since 2006.*
5. *The 1st Defendant being a Government Department unlawfully sold the Plot to the 2nd Defendant*
6. *Plaintiff avers that the sale was unlawful in that the Plaintiff as a sitting in tenant and a Civil Servant was not accorded an opportunity to purchase the house and further that there was no advert made for the sale of the said houses.*
7. *By reason of the matter averred herein the Plaintiff has been denied an opportunity to purchase the house.*
8. **WHEREFORE** *the plaintiff claims:-*
 - 8.1 *A declaration Order that as a sitting tenant he is entitled to be accorded the first opportunity to purchase the house.*
 - 8.2 *A declaration Order that the sale of the house to the 2nd Defendant is unlawful.*
 - 8.3 *An injunction restraining the 2nd Defendant from evicting the Plaintiff from the house*
 - 8.4 *Costs incidental to this action.”*

5. The Defence is couched in the following terms:

- “1. *The Defendants admit paragraphs 1, 1, 3 and 4 of the Statement of Claim.*
2. *The Defendants deny paragraph 5 of the Statement of Claim.*
3. *The Defendants state that the house was sold pursuant to a housing scheme policy which limited eligibility to purchase the houses to employees of the 2nd Defendant.*
4. *The Defendants state that since the sale was limited to employees, any advert relating to the same could not be communicated to third parties like the Plaintiff.*
5. *The Defendants state that the Plaintiff was a mere tenant and did not acquire any rights beyond the terms of the tenancy agreement.*

6. *The 1st Defendant lawfully sold the house in question and the Plaintiff is not entitled to the reliefs sought or at all.*
7. *Save as hereinbefore expressly admitted the Defendants deny each and every allegation of fact in the Statement of Claim as if the same were herein set out and traversed seriatim.”*

6. It is trite that a claimant has the burden of proving the elements of his or her lawsuit on a balance of probabilities. This means that a claimant must prove a fact by showing that something is more likely so than not: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**. It, therefore, follows that in the present case the burden of proof is on the plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities the respective elements of the tort of false imprisonment.

7. Parties led evidence in support of their respective positions. First to testify was the Claimant (CW1). CW1 adopted his witness statement which reads:

- “4. *I am a Civil Servant. I work with the Malawi Police Service as a Sub-Inspector of Police. I joined the Malawi Police Service since 2006.*
5. *I currently live in the 1st defendant’s House at Plot No. 7/DC21 in Kawale 1 in Lilongwe. I have resided at this address since September 2006 as a tenant of the first defendant.*
6. *Sometime in 2013 while I was already a tenant of the 1st defendant at the above-mentioned house, rumor was rife that the 1st defendant was about to sell its houses, including the one I am staying in.*
7. *To establish whether the rumour was by any chance true, I went to the 1st defendant’s office to pay my rentals for the months of July to December 2013. I cannot remember the specific date I went there. But I roughly recall it was in June 2013.*
8. *When I tendered the money for rentals, the cashier, a Mr. Delvison Dalwin Chiwala, could not receive the money. He informed me that the 1st defendant was considering raising the rentals and changing some of its policies and until that was resolved; the 1st defendant was not receiving rentals at the time.*
9. *In July 2013, the rumour persisted. I also got to learn that the 1st defendant was selling its houses at the price of MWK400,000.00 and that the purchasers would start payments in that month until December of the same year 2013.*
10. *On or about July 2013 I found a letter from the 1st defendant informing me of the conclusion of sale of the house subject of this proceeding. A few days later I also received a notice to quit from the second defendant. I refer to the letter from the 1st defendant marked “NC 1”, and the letter from the second defendant marked “NC 2”.*

11. *I was surprised that as a sitting tenant who is also a civil servant I had neither been notified of the sale in advance, nor offered the chance to purchase the house as a sitting tenant and a civil servant. I had always known as a civil servant that Government's policy is that a civil servant who is a sitting tenant of a government house is offered the first right of refusal.*
12. *I made some inquiries about what had just happened. In the course of this proceeding, I have also been privy to documents either filed or served by each side which expose the scheme that was devised by employees of the 1st defendant to acquire themselves the 1st defendant's houses.*
13. *Firstly, I discovered that the idea of disposing of the 1st defendant's houses was devised by employees of the 1st defendant. At the time the 1st defendant's employees decided to dispose of and acquire the 1st defendant's houses, the 1st defendant did not have councilors. To my knowledge, they had no councilors for almost 9 years until 2014. From affidavits previously filed by the 2nd defendant and now the statements of both Mr. Mwenda and the 2nd defendant, I note that this point is not in dispute.*
14. *The scheme adopted by employees of the 1st defendant started with changing a purported an internal housing policy to exclude sitting tenants who did not work with the 1st defendant, despite such tenants being civil servants. This was purportedly done in September 2012.*
15. *The next step in the scheme was that five employees of the 1st defendant constituted themselves into the 1st defendant, convened a meeting, and agreed to dispose of the 1st defendant's houses, to serve their own interests in purchasing the houses. The employees went on the request the 1st defendants marked "MM 1" and "MM 2" in the statement of Mr. Mwenda dated 11th May 2018 confirms this.*
16. *I note that "MM 2" does not include the list that was attached. The list must be on the court file as it was previously produced by the 2nd defendant during one of the interlocutory applications. I produce and refer to the list marked "NC 4"*
17. *Notably, "NC 4" is a list of the 1st defendant's houses and the purported occupants at the time of the relevant developments. It lists the houses subject of this proceeding as "DC 21" and the occupant is indicated to be the 2nd defendant herein. I wish to categorically state that either at the time, or at any other time has the 2nd defendant ever occupied DC 21, the house subject of this proceeding. This was a false entry meant to give the impression that the 2nd defendant was applying to purchase a house of which he was the occupant, when in truth he never occupied the house in question. The reason for making this false statement was to appear to comply with the requirement that sitting tenants must buy the houses.*
18. *Secondly, after requesting the DC to approve disposal of house, it appears that the DC realized he had no authority to approve the disposal of houses. It was necessary that the Ministry of Local Government approves since there was no councilor at the time. It appears that the employees' request was forwarded to the Ministry of Local Government.*

19. *The next step taken by the employees was to have the houses revalued. On 3rd June 2013 an employee of the 1st defendant who was himself interested to purchase a house, Mr. Peter Dokali, wrote the Principal Secretary for Local Government and Rural Development on behalf of the DC referring to an already floating application on the Principal Secretary's table and requesting for a summary revision of ratable values of the houses to fit the income brackets of the employees. This letter is produced by the 2nd defendant and marked "MM 3". On the same day, the Principal Secretary minute that Lands should be requested to make correct valuations as the first 4 valuations appeared exaggerated as was meant for purposes of obtaining bank facilities.*
20. *It appears that another letter was written by the 1st defendant employees on 3rd June 2013 requesting for approval to sale the 1st defendant's houses. This letter is referred to in the document marked "MM 4" to the 2nd defendant's statement herein. "MM 4" is a response from the Principal Secretary for Local Government conveying the Ministry's approval to sell the houses to "occupants".*
21. *On 4th June 2013, the DC wrote the Principal Secretary for Local Government communicating of the Council's unanimous decision on how the sale was to be conducted. I produced this letter on a precious interlocutory application. I produce and refer to the letter marked 'NC 5'.*
22. *Notably, whereas the approval from the Ministry was for sale to occupants, "NC 5" refers to council staff in keeping with the scheme to dispose of the houses adopted by employees in the name of the council. At this point, everything seemed to go according to the employees plans. They had managed to obtain approval to dispose of the 1st defendant's houses and in the process stating falsely that the 2nd defendant was a sitting tenant or occupant of DC 21, the house subject of this proceeding.*
23. *Further I discovered a letter written by the then DC, a Mr. Felix Mkandawire, within the same month of June, dated 27 June 2013, to the defendant's internal Housing Allocation Committee advising that the latter had not complied with Government guidelines on sale of all public houses. I previously produced this letter under oath during one of the interlocutory applications in this proceeding. I refer to the said letter marked "NC 6" now for purposes of this statement.*
24. *"NC 6" refers to Annex III (a) and a letter from the Principal Secretary for Local Government. I do not have these two attachments to "NC 6". What is important is that "NC 6" clearly says that;*

"It is clear upon reading the two guidelines that Management of Lilongwe District Council (the 1st defendant) was not properly guided on the issue [sale of houses] by your committee and consequently the guidelines were not observed and complied with as stated by the Ministry."
25. *On 26th July 2013, I wrote the first defendant querying why and how the house had been sold without offering me as a sitting tenant, or at least giving me prior notice.*

I refer to a copy of the letter marked “NC 7”. I never received a response to this letter.

26. *Because I did not get any response to “NC 7” and fully aware of “NC 6”, I commenced this action in August 2013 and obtained an injunction to stop the eviction which had been notified by the second defendant.*
27. *Sometime in December 2013, whilst making further inquiries I made a complaint to the Ministry of Local Government about the issue. Following my complaint, the then Principal Secretary for Ministry of Local Government Rural Development wrote the 1st defendant’s DC on 13 December 2013 advising that sale of Council houses had been approved on conditions that only sitting tenants who were public officers could buy them, and specifically that I as a sitting tenant of the house subjected of the proceedings was the one to buy the house. The letter also directed that any money paid by the second defendant to the first defendant should be refunded and I should be allowed to pay for the house and execute all necessary documentation for this purpose. I attach a copy of the letter hereto marked “NC 8”.*
28. *When I got hold of the “NC 8”, I went to the Defendant to follow up whether they had since complied with the Ministry’s directive. I first went to the office of Mr. Peter Dokali, whom I was made to understand was Director of Administration. I understand that he is now deceased. I explained to him why I was there. Whilst in Mr. Dokali’s office, there came a Mr. Palinji, whom I got to learn was a driver working for the first defendant together with the second defendant. He appeared to know about the details of the issue I was there for. I had a brief conversation with Mr. Palinji concerning the issue. Then there also came in a Mr. Mwenda whom I learnt was the Lands Officer for the first defendant. I also had a brief conversation with Mr. Mwenda concerning the house. He also appeared to have been conversant with the issue. Mr. Dokali left me in the office and went to a Mr. Jimusole’s office. I learnt that Mr. Jimusole was the Director of Planning and Development for the first defendant.*
29. *A few moments later Mr. Jimusole came into Mr. Dokali’s office and Mr. Dokali introduced me to Mr. Jimusole. The three of us went into Mr. Jimusole’s office. I informed the two that I was there to follow up on the contents of “NC 8”. Mr. Jimusole asked me several questions concerning the house which I answered. Mr. Jimusole challenged me that I could never win the case wherever I could take it. He even dared me to a bet over the challenge, which I did not accede to. The meeting ended on that note. It was clear to me that the 1st defendant’s employees had decided to defy the clear directive of the Ministry of Local Government and Rural Development based on government policy, the same authority which had approved the disposal of the houses in the absence of the council.*
30. *As this case has been pending, there were further very important developments.*
 - 30.1 *Following the 2014 tripartite elections, the 1st defendant’s council was duly constituted with the election of councilors, after a long time without councilors. This is public knowledge.*

- 30.2 *On 4th March 2014 the Finance and Audit Committee of the 1st defendant held a meeting where the issue of sale of council houses by employees was considered. A member of the Committee who I know to be a lawyer, Hon. P. Chankwantha had been requested to look into the issue and advise the Committee. At the meeting, Hon. Chankwantha is recorded to have advised the Committee that the sales were illegal and the Ministry and Attorney General were to be written to that effect. The Director of Finance, an interested staff member informed the Committee that hiring a lawyer to consider the issue had budget implications. Curiously, by this time, the 1st defendant had already retained Messrs. TF Partners to represent it in this proceeding. The Committee resolved to rescind the sales in writing. I previously produced a copy of the minutes in one of the interlocutory proceedings herein. I refer to a copy of the minutes now marked “NC 9”. I draw attention to minutes numbers 1.5.0 and resolution at 1.5.1 of the minutes.*
- 30.3 *In the same month, on 23rd March 2015, the full Council as then duly constituted held a meeting. At this meeting, a member of the Finance and Audit Committee of the 1st defendant presented the resolution adopted on 4th March 2015 to rescind the sale of the houses and purchasers to be communicated in writing. A member of the Committee is recorded to have emphasized that the Committee worked under pressure on the issue of assembly houses. The minutes do not indicate the source of the pressure.*
- 30.4 *The issue was put to a vote at the full Council meeting. It was unanimously resolved to rescind the sale of the houses, including the house subject of the present proceedings. I refer to a copy of the minutes which I previously produced on an interlocutory application, now marked “NC 10”. I draw attention to the bullet points in bold under minutes FC/29/2015—Matters Arising.*
- 30.5 *I later discovered that as a follow up on the resolution of the full Council, some purchasers were written letters communicating the rescission of the sale of Council houses. I refer to a copy of such a sample letter which I produced previously on an interlocutory application, now marked: NC11”.*
- 30.6 *I note that neither of the two witnesses for the defendants has made reference to the resolutions to rescind the sale first by the Finance and Audit Committee on 4th March 2015, and the full Council on 23rd March 2015.*
- 30.7 *Strangely, the issue appears to have been raised again at full Council meeting held on 27 October 2015. At this meeting the full Council resolved to refer the sale of houses to the Finance Committee, but for a specific purpose and not to consider whether or not it should be upheld or rescinded as this had already been resolved by both the Finance Committee and the full Council. The referral to the Finance Committee was “...FOR advice in view of the legal and financial implications the issue holds”. I refer to a copy of the minutes of the full Council meeting on 27th October 2015*

produced in the statement of the 2nd defendant marked as “MM 12” and draw attention to minute number FC/39/2015.

30.8 *I am not aware of what transpired after “MM 12”.*

30.9 *I have noted the document marked “MM 13” to the statement of the 2nd defendant which refers to the Council resolution taken at a meeting held on 7th August 2015 to rescind the sale of houses, but then suggesting that the resolution was not implemented by the 1st defendant’s secretariat and therefore the houses belong to the purchasers. “MM 13” purports to have been signed by Councilor Samson Chamita. I doubt the authenticity and validity of “MM 13”. It does not refer to any further Council resolution not to implement the resolution to rescind sales. In any event, “MM 13” is at odds with “NC 11” which indicates that purchasers were notified of the Council’s resolution rescinding the sales.*

30.10 *It is clear that the 1st defendant’s employees who include the 2nd defendant decided to arrogate themselves the position and mandate of the Council, decided to dispose of the Council’s houses, decided to sought approval of the Ministry because there was no Council at that time, and then went on to evade the conditions of approval by the Ministry, defy both the Ministry’s follow up directive and the Council resolutions rescinding the sales.*

30.11 *This is even clear from the fact that whereas the Council which is the competent authority in taking decisions of the 1st defendant decided to rescind the sale, which is in keeping with what the Ministry directed in respect of the house in dispute, somehow the 1st defendant’s employees kept giving contrary instructions to the legal practitioners now on record for the defendants to defend this case. I have wondered who was giving instructions to the legal practitioners.*

31. *I verily believe that the matter in which the 1st defendant’s employees went about disposing of and sharing the Council’s houses was illegal. Accordingly, I pray that the sale of the house in dispute to the 2nd defendant be rescinded and the house be offered to me to purchase, and that the Defendants be liable for costs of this proceeding.”*

8. In cross-examination by Counsel Chilenga, CW stated that he obtained the house in issue from the 1st Defendant through the Human Resource Officer, whose name he could not recall. He also stated that he was allocated the house in issue as a tenant and he was paying rent on the property through a cashier, Mr. Brown Chiwalo, but he could not recall the amounts that were being paid. When asked whether he has a contract that specifies that he would be given the right to buy the house in issue, CW answered that he had no document to such effect.

9. CW stated that he works for the Malawi Police Service and that he has never worked for the 1st Defendant or the Ministry of Local Government. He confirmed

signing the tenancy agreement in his own personal capacity and that his employer, Malawi Police Service, played no part in his being allocated the house in issue.

10. CW denied having any knowledge of the resolution by the 1st Defendant to sale houses to its staff. He was shown Exhibit “NC 4” (Lilongwe District Council Staff Houses and the Occupants) and was asked to identify any occupant of the houses who was not working with the 1st Defendant. CW did not identify anyone.

11. CW was asked to explain how as a sitting tenant he believes he had an option to buy the 1st Defendant’s house, when he was neither employed by the 1st Defendant nor seconded to it, he responded that he was entitled to buy it as a tenant and as a public officer. CW agreed that the 1st Defendant was not part of the Home Ownership Scheme for Public Servants and did not participate in it.

12. CW confirmed that just as there was criteria to be followed in the allocation of the 1st Defendant’s houses, similarly, the selling of these houses was based on criteria. CW stated that the District Commissioner was in charge of the sale of the 1st Defendant’s houses.

13. CW was also asked about the houses belonging to Mr. Kaisi and Mr. Kheza. He said that he aware that initially the 1st Defendant had sold these houses to third persons but the decision was rescinded and the houses were sold to Mr. Kaisi and Mr. Kheza respectively. CW confirmed that both Mr. Kaisi and Mr. Kheza were at the material time employees of the 1st Defendant.

14. CW was referred to the Council’s resolution, at page 50 of the Claimant’s Trial Bundle, in relation to Minute FC/39/2015 (Matter arising from previous minutes). He read the resolution that the issue of sale of houses was sent back to the Finance Committee for advice in view of the legal and financial implication that it holds. CW was asked on whether he followed up on the resolution he responded in the negative. He was then referred to a letter marked ‘MM 13’ at page 117 of the Defendant’s Trial Bundle and asked its meaning. Exhibit MM13 is dated 16th May 2017 and it reads:

“REF: SALE OF LILONGWE DISTRICT COUNCIL STAFF HOUSES

The above topic refers.

The Council at its meeting held on 7th August, 2015 resolved to rescind the sale of its houses to staff who bought them.

Our writing is to inform you that the Council did not implement its resolution as such the houses belong to all the buyers. You may also wish to know that the developments are

underway by the owners who bought the houses.

For more information regarding the position of the rescission of the sale of houses do not hesitate to contact the office of the District Commissioner.”

15. CW explained that the letter meant that the buyers were not to return the houses. CW confirmed that he is not one of the buyers of the houses that previously belonged to the 1st Defendant. He also conceded that his name was not among the list of persons to be considered by the 1st Defendant to buy its houses.

16. Regarding rentals, CW stated that he last paid rentals in June 2013. He agreed that the owner of the house is entitled to be paid rentals. He stated that he did not know his new landlord. At this point, CW’s attention was drawn to Exhibit “NC 1” and asked what the letter was about. He replied that Exhibit “NC 1” was written to him by the 1st Defendant and the 2nd Defendant was described in the letter as the buyer of the house in dispute (Title Number 7/DC/21). Exhibit “NC1” is dated 16th July 2013 and the body thereof states as follows:

“NOTICE OF CONCLUDED SALE OF COUNCIL HOUSE NO. DC 21 (KAWALE)

This is to inform you that the house you are currently residing in as captioned above is now sold to one Mr Mc Loy Maikolo an employee of the Lilongwe District Council.

The implication now is that with effect from June, 2013 rental payment will be implemented via the new owner and not the Council as has been the case before.

Any arrangements to extend or terminate further occupancy of the house will have to be by mutual agreement between the parties involved i.e. yourself and Mr. Maikolo.”

17. CW stated that he has not made any negotiations with the 2nd Defendant regarding payment of rentals or the sale of the house.

18. In concluding the cross-examination of CW, Counsel Chilenga referred CW to Exhibit “NC 2” and CW acknowledged receiving the letter. The letter was written by the 1st Defendant and it is informing the Claimant to vacant the house on 31st August 2013 to pave way for the 1st Defendant to start occupying it as the owner thereof. CW agreed that he has not paid rentals in respect of the house for the last 10 years.

19. In re-examination, CW explained that he was not paying rent because there was a subsisting injunction on the matter. He also explained that he did not negotiate with the 1st Defendant regarding rentals because he (the Claimant) was not the 1st Defendant’s tenant. When referred to Exhibit “MM 13” [Sale of Lilongwe District

Council Staff Houses], CW stated that the right procedure to be followed in order for him to purchase the house was not explained to him otherwise he would have expressed his interest to buy the house.

20. CW stated that he was not fully aware of the 1st Defendant's housing criteria but he believed that it should have followed the guidelines given for public servants generally. CW also claimed that he had seen a letter from the Ministry of Local Government which stated that he was entitled to purchase the house as a public servant and as a tenant. CW reasoned that having allowed him to be a tenant in the house, the 1st Defendant should also have allowed him to purchase the house.

21. The Claimant closed his case at this juncture.

22. The Defendants called two witnesses, namely, James Leonard Mwenda (DW1) and the 2nd Defendant (DW2). DW1 is an employee of the 1st Defendant and he has been working as District Lands Official since 2001. He adopted his witness statement which states as follows:

- "6.6 In 2013, the 1st Defendant made a decision to dispose of its institutional houses located in Kawale, Falls Estate and Area 47 in the City of Lilongwe to its employees.*
- 6.7 The sale of institutional houses in question to its employees was conducted in terms of the 1st of the 1st Defendant's Housing Policy Scheme in which only direct employees or seconded employees by the Ministry of Local Government and Rural Development positioned at the 1st Defendant's place and doing Council's work were eligible.*
- 6.8 During the said period, there were no Councilors as such the 1st Defendant wrote the Secretary for the Ministry of Local Government and Rural Development informing the Ministry about the decision seeking approval to sell its institutional houses in the above mentioned locations at a rate affordable to the employees. I produce a letter dated 3rd May, 2013, marked as "JML1".*
- 6.9 The Secretary of the Ministry of Local Government and Rural Development approved the 1st Defendant's decision to sale its institutional houses to its employees with further conditions to be followed. I produce a letter dated 3rd June, 2013, marked as "JML2".*
- 6.10 Following the approval, the 1st Defendant entered into various sale agreements with concerned employees including the 2nd Defendant for the sale of its institutional houses.*
- 6.11 Furthermore, the 1st Defendant as per the letter from the Ministry of Local Government and Rural Development, ensured that the concerned employees had fully paid the purchase price by issuing certificates of completion of payment.*

- 6.12 *I was one of the employees who were allocated one of the 1st Defendant's institutional houses. However, having been allocated the said house I was written on 27th June, 2013, by the then District Commissioner for Lilongwe to surrender the said house to Miss C. Kheza. The reason was that at the time of allocation she had retired. However, she got posed back to Lilongwe District Council to work as Assistant Accountant (Grade K) from Ministry of Trade, on month to month contract. This situation was similar to that of Late Mr. Kaisi. I produce copies of posting instructions Ref. No. T1072 and a letter dated 22nd January, 2014, marked as "JML3" and "JLM4" respectively.*
- 6.13 *The 1st Defendant having effected the sale, wrote each of the then concerned tenants who were not eligible to buy the houses, notifying them of the sale and the need to vacate the houses. Some of the tenants vacated but others like the Claimant refused to vacate and took injunctions and commenced action against the 1st Defendant challenging the sale.*
- 6.14 *In 2015, when the councilors were elected, the issue of the sale of the institutional houses started to be discussed as the councilors were of the view that the sale was irregular.*
- 6.15 *On 23rd March, 2015, there was a Full Council meeting. One of the items on the agenda was the issue of the said sale of the 1st Defendant's institutional houses located in Kawale, Falls Estate and Area 47 in the City of Lilongwe.*
- 6.16 *After full deliberations, it was resolved that the sale of the said house should be rescinded on the ground that Councilors were not involved in the decision as there were no Councilors by then.*
- 6.17 *It was further resolved that employees of the 1st Defendant who had bought the houses should be notified in writing, that the sale was rescinded. I produce a copy of the Minutes of the said Meeting marked as exhibit "JLM5".*
- 6.18 *However, after hindsight on the financial and legal implications of implementing the decision on the 1st Defendant, the resolution to rescind the sale was not implemented. One of the practical considerations for not implementing the resolution was the financial implication on the 1st Defendant. It was considered that it would not be practical to refund only the purchase prices because some employees had demolished the old houses and built new ones. This meant that the 1st Defendant had to refund even the costs the employees had incurred in improving the pieces of land. Considering the meagre finances of the 1st Defendant this was not possible.*
- 6.19 *In view of the matters raised in paragraph 6.14 the Full Council in a meeting held on 27th October, 2015, resolved that the matter should be sent back to the Finance and Audit Committee to consider the said legal and financial implications. I produce a copy of the Minutes marked as exhibit "JLM6".*
- 6.20 *Having considered such implications, it was decided that the sale of the said houses be allowed and the decision to rescind the sale was reversed and a letter was duly*

issued by the Chairman of Full Council in May, 2017 on the same. I produce the copy of the said letter marked as exhibit "JLM7".

6.21 *In view of the foregoing, the sale of the institutional houses of the 1st Defendant in the said locations having been rectified by Full Council remains and the 2nd Defendant having fully paid the purchase price is the owner of property in question."*

23. In cross examination by Counsel Theu, DW1 was asked to elaborate on paragraph 6.12 of his witness statement in relation to the employment status of Mr. Kaisi and Miss Kheza at the time of allocation of the houses. DW1 stated that the said paragraph contained an error in that it was actually Mr. Kaisi who had retired and Miss Kheza who was transferred to the Ministry of Trade & Industry. He clarified that Miss Kheza was posted back to the Ministry of Local Government before the sale of the houses was concluded.

24. DW1 was referred to the posting instructions at page 29 of the Defendant's Trial Bundle marked "JLM 3" and confirmed that Ms. Kheza was transferred from the Ministry of Industry and Trade to Lilongwe District Council in June 2012. stated that the sale of the houses was concluded about July 2013 and the dateline for payments on the houses was December 2013. DW1 further explained that Miss. Kheza and Mr. Kaisi qualified to be offered to buy the 1st Defendant's houses as they were employees of the 1st Defendant at the time of allocation.

25. DW1 confirmed his statement at paragraph 6.19 of his witness statement that the Council on 27th October 2015, resolved to send the matter of the sale of houses to the Finance and Audit Committee to consider the legal and financial implications. DW1 was asked to name the responsible party that made the decision not rescind the sale. He responded that the Full Council made the decision. Minutes of the meeting of the Full Council were taken but not exhibited.

26. DW1 was referred Exhibit "JLM 7" [at page 56 of the Defendant's Trial Bundle] and whether the letter refers to a meeting by the 1st Defendant and he responded that it does not. He also stated that correspondence on behalf of the 1st Defendant is signed by either the Chairperson or the District Commissioner. He explained that communication related to matters of policy or matters critical in nature is signed by the Chairperson.

27. Finally, DW1 was asked how matters are dealt with when Council members are not there. DW1 stated that in such situations management seeks approval from Ministry of Local Government.

28. In re-examination, DW1 was referred to the minutes of the meeting of the Full Council that was held on 23rd March 2015 and he confirmed that the Council resolved to rescind the sale of staff houses. He was also referred to the minutes of the meeting of the Full Council held on 27th October 2015 and he confirmed that a resolution was made to the effect that the issue of the sale of staff houses should be sent back to the Finance Committee for advice in view of the legal and financial implications the issue holds.

29. DW2 adopted his witness statement and the material part reads:

“6.2 I am an employee of the 1st Defendant from 1986 working as a Ticket Seller.

6.3 In 1989 I was promoted as Office Messenger.

6.4 In 1990 I was further promoted to the position of Market Master.

6.5 In 1992 I was promoted again to the position of Revenue Collector.

6.6 In August 2003 I was promoted further to the position of a driver which I am currently holding.

6.7 I am currently residing in Area 36 in the City of Lilongwe.

6.8 My home village is Kunankhwazi in the area of Traditional Authority Masula in Lilongwe District.

6.9 In February, 2013, members of staff of the 1st Defendant held a meeting in which it was resolved that institutional houses of the 1st Defendant were too old as such, the 1st Defendant was finding it costly to maintain them due to financial constraints. As such, it was resolved that the said houses should be sold to members of staff of the 1st Defendant upon approval of the same by the Ministry of Local Government and Rural Development. I produce a copy of the minutes marked as exhibit “MM 1”.

6.10 That following the meeting, the members of staff of the 1st Defendant duly wrote the District Commissioner proposing to purchase the said houses. I produce a copy of a letter dated 26th April, 2013, marked as exhibit “MM 2”.

6.11 Later, the District Commissioner wrote the Ministry of Local Government and Rural Development for revaluation of the said houses in order to make them affordable to members of staff of the 1st Defendant. I produce a copy of a letter dated 3rd May, 2013, marked as exhibit “MM 3”.

6.12 On 3rd June, 2013, the Ministry of Local Government and Rural Development wrote the 1st Defendant as to the procedure and conditions to follow in disposing the said houses. I produce a copy of the letter marked as exhibit “MM 4”.

6.13 Pursuant to the conditions laid down in exhibit “MM 4” as an employee of the 1st Defendant, I was offered to purchase institutional house property title Number

7/DC/21, located in Kawale in the City of Lilongwe. As such a sale agreement was entered on the same between the 1st Defendant and myself. I produce a copy of the agreement marked as exhibit “**MM 5**”.

- 6.14. The offer of the said house was made to me as an employee of the 1st Defendant in accordance with its Housing Scheme Policy of September, 2012. In the said Housing Scheme Policy, the 1st Defendant was obliged to sell its institutional houses only to its employees or other employees (from Ministry of Local Government and Rural Development) on secondment basis. I produce a copy of the said Policy marked as “**MM 6**”.
- 6.15. I duly paid the purchase price of K400,000.00 for the said houses. Following the payment, the 1st Defendant issued a certificate of completion of payment for the house. I produce copies of receipts and the said certificate, marked as “**MM 7A**”; “**MM 7B**”, respectively.
- 6.16. Following the conclusion of the contract, the 1st Defendant and myself, separately wrote the Claimant notifying him of the sale of the said house and requested him to vacate the house as the same was no longer a property of the 1st Defendant. I produce copies of letters marked as exhibits “**MM 8A**”; and “**MM 8B**” respectively.
- 6.17. In response to the letters stated in paragraph 6.11 above the Claimant refused to vacate the house in question. I produce a copy of a letter dated 10th July, 2013, marked as “**MM 9**”.
- 6.18. The situation referred by the Claimant of Late Mr. Kaisi and Miss Kheza was different. The two used to be employees of the 1st Defendant during the time of the sale of the said institutional houses. However, in the middle of the arrangements of selling the houses, the two retired from working with the 1st Defendant and the later sought to remove them from purchasing the houses.
- 6.19. Following such a decision, the two wrote the Ministry of Local Government and Rural Development and lodged a complaint considering the fact that they were working on month to month basis with the 1st Defendant. Accordingly, the said Late Kaisi and Miss Kheza were referred and bought the houses. I produce a copy of Posting Instructions in relation to Miss C. Kheza marked as exhibit “**MM 10**”.
- 6.20. It should be noted that when the 1st Defendant’s legal practitioners sought clarification from the 1st Defendant on Claimant’s letter exhibited as “**MM 9**” above, in response the District Commissioner categorically dismissed that the Claimant was entitled to purchase the house in question in light of the Housing Policy Scheme for the 1st Defendant as he was not an employee of the 1st Defendant. I produce a copy of the letter dated 22nd January, 2014, marked as exhibit “**MM 11**”.
- 6.21. In the said exhibit “**MM 11**” the District Commissioner distinguished the Claimant’s case and that of Late Mr. Kaisi and Miss C. Kheza. The District Commissioner pointed out that the 1st Defendant had its own specific policy to bring

order in the manner of sale of its houses. This is opposed to the guidelines for Central Government policy on sale of houses.

- 6.22 *In this regard, the Claimant misconceived the cases of Late Mr. Kaisi and Miss C. Kheza. If this situation were similar to that of the Late Mr. Kaisi and Miss C. Kheza, it could have been resolved by the said Ministry long time ago. It is because that the Claimant's situation was different from the said Late Mr. Kaisi and Miss C. Kheza that he commenced the action in court.*
- 6.23 *In March 2015, there was a Full Council meeting which discussed the issue of the sale of the said houses. The Councilors deliberated and resolved that the sale be rescinded on the ground that the same was unprocedural as the decision was made in the absence of Councilors.*
- 6.24 *However, in reference to paragraph 6.16 above, after further consultations and the fact that the 1st Defendant made the decision with the approval the Principal Secretary of the Ministry of Local Government and Rural Development. The issue of the sale of houses was deliberated again during full council meeting held on 27th October 2015. The full council resolved that the matter be sent back to Finance Committee for advice in view of the legal and financial implications the issue holds. I produce copy of the minutes marked as exhibit "MM 12"*
- 6.25 *On 16th May 2017, the Chairperson of the Full Council issued a letter to all concerned parties to the effect that the Full Council did not implement its resolutions (rescission of the sale of houses). The letter continued to state that the houses belong to the employees who had bought the houses like myself. I produce a copy of the said letter marked as exhibit "MM 13".*
- 6.26 *As it stands now I am the owner of the house in question, however, since the time I bought the house I have been unable to occupy it or collect rentals from the house due to the Claimant's challenge of the sale of the said house.*
- 6.27 *The Claimant's failure to vacate the house has deprived me of my constitutional right to property and benefits like rentals as the Claimant no longer pays.*
- 6.28 *The Claimant was not eligible to buy the institutional house in terms of the Housing Policy Scheme for the 1st Defendant as he was and is not an employee of the 1st Defendant.*
- 6.29 *Furthermore, there was no contract between the Claimant and the 1st Defendant that conferred the right of first refusal to the former.*
- 6.30 *The first refusal being a contractual right, the Claimant has no legal basis to invoke the operation of the said right in the circumstances.*
- 6.31 *It is just and fair in the circumstances that the Claimant should deliver vacant possession of the said property to me as I am the rightful owner and pay all rental arrears due from June, 2013, with proper yearly adjustments taking into account inflation.*

6.32 **WHEREFORE** I pray to the Honourable Court for the following reliefs:

6.32.1 the Claimant should deliver vacant possession of property title number 7/DC/21 with immediate effect.

6.32.2 the Claimant should pay all rentals in arrears with proper yearly adjustments to me from June, 2013, to the present with immediate effect.

6.32.3 costs of the action.”

30. In cross examination by Counsel Theu, DW2 was referred to paragraph 6.12 of his witness statement and asked if he was an occupant of any house. DW2 stated that, as at July 2013, he was occupying a staff house in Kawale (Title Number 7/DC/25). He confirmed that he never occupied Title Number 7/DC/21. He stated that in July, 2015, he was staying in Area 36 in a house that did not belong to the 1st Defendant.

31. Finally, DW2 was referred to paragraph 6.14 of his witness statement and he stated that the 1st Defendant’s Housing Scheme Policy was adopted by management of the 1st Defendant in September, 2012.

32. In re-examination, DW2 confirmed that at the time of his purchase of Title Number 7/DC/21, he was employed by the 1st Defendant as a driver.

33. Looking at the respective statements of cases, there is three issues in this matter for the determination of the Court, namely, whether or not:

- (a) the Claimant as a sitting in tenant and a civil servant was entitled to be accorded an opportunity to purchase Title Number 7/DC/21 before the 2nd Defendant (the right to first refusal): see paragraph 6 of the Statement of Claim?
- (b) failure by the 1st Defendant to advertise the sale of Title Number 7/DC/21 was fatal: see paragraph 6 of the Statement of Claim?
- (c) the sale of Title Number 7/DC/21 by the 1st Defendant to the 2nd Defendant was unlawful: see paragraphs 5 and 8.2 of the Statement of Claim?

Whether or not the Claimant as a sitting in tenant and a Civil Servant had the right to first refusal?

34. It is the case of the Claimant that he has the right to first refusal. The issue of the Claimant’s right to first refusal is addressed in the Claimant’s Closing Submissions as follows:

- “2.1 *It is not in dispute that at all relevant times for the circumstances of this case, the first Defendant remained constituted because there had been no elections for Councilors. Accordingly, all matters requiring the first Defendant’s decisions or policy direction had to be approved by the Ministry of Local Government and Rural Development or the Cabinet at the time.*
- 2.2 *It is also not in dispute that the Claimant is a public servant, employed with the Malawi Police Service and at all material times the sitting tenant of the house subject of this case.*
- 2.3 *According to the conditions for sale of public institutional houses adopted by Cabinet at the relevant time, the conditions for sale were that only sitting tenants who were public servants could buy the houses they occupied. Exhibit “NC 8” tendered by the Claimant and on page 35 of the Claimant’s Trial Bundle is crystal clear in this regard. Nothing came in evidence to challenge the authenticity of the truth of the matters contained in exhibit “NC 8”.*
- 2.4 *As “NC 8” clear states, the Claimant is a public officer and a sitting tenant for house No. DC/21 subject of the present action.*
- 2.5 *As “NC 8” also states, it is the Claimant who was supposed to purchase DC/21 according to the conditions upon which the sale of houses had been approved by Cabinet at the time.*
- 2.6 *In the premise the policy conditions adopted by the Cabinet as communicated in exhibit “NC 8” form a firm basis for the Claimant right of first refusal to purchase house No. DC/21.*
- 2.7 *By the same token, the Claimant, who was aware of the Government policy position on disposal of public institutional houses, and being a sitting tenant in such a house which had been approved for disposal, he had a legitimate expectation to be accorded the right of first refusal.*
- 2.8 *As was stated by Lord Fraser in **A-G of Hong Kong v Ng Yuen Shiu [1983] AC 629, 638**, when a public authority has promised to follow a certain procedure or implement a certain policy in a matter affecting a subject, it is in the interest of good administration that the public authority should act fairly and implement its promise or policy.*
- 2.9 *Here, the prevailing policy conditions adopted by cabinet for disposal of public institutional houses upon which the sale of the first defendant’s houses was approved were that sitting tenants who are public servants must be accorded the first right to purchase the house. The Claimant had and continues to have a legitimate expectation that these policy conditions ought to apply with respect to the house subject of the present action.*
- 2.10 *Thus, both in terms of the policy conditions and the legitimate expectations created by the policy conditions adopted by cabinet, the Claimant as a sitting tenant and a public servant at all material times had and has an undoubted right of first refusal to purchase DC/21.”*

35. The Defendant holds the view that the claim by the Claimant that he is entitled to a right of first refusal to the purchase the house in issue lacks merit. Paragraphs 27 and 2.3.5 are pertinent and they will be quoted in full:

“5.1.1 The Claimant in this matter testified that he was a sitting tenant of the 1st Defendant. He did not produce any tenancy agreement conferring upon him any right of first refusal. He admitted that he has never been in employment of the 1st Defendant.

5.1.2 It must be acknowledged that according to section 39 of the Registered Land Act, a periodic tenant is entitled to notice which would be as long as the period of the tenancy. The period of the tenancy is by reference to the period in which rent is payable. In this instance, the Claimant was obliged to make monthly payments and was by law entitled to a month notice prior to termination.

5.1.3 It must be emphasized that the mere fact that the tenant happens to be a civil servant occupying the 1st Defendant’s house, does not in itself confer upon such tenant any other rights other than those expressly agreed upon by the parties or conferred by law.

5.1.4 The Claimant’s case is based on a Government’s policy, which in itself, cannot be said to have been legally binding on the 1st Defendant. This is attributed to the fact that the 1st Defendant was empowered by the now amended section 35(1) of the Local Government Act to dispose of its land in any manner that it wished. It is acknowledged that the legal position has now changed by the fact of the amendment of this provision, restricts the disposal of land by the Council and obliges it to be conformity with the Land Act and the Registered Land Act. However, the amendment cannot apply retrospectively. In any case, even if the amendment of section 35(1) of the Local Government Act (Amendment No. 10 of 2017) is applicable, the sale of the DC/21 conformed with the dictates of the Land Act and Registered Land Act as the Claimant was duly notified of the termination of his tenancy.

5.1.5 Furthermore, the Claimant in his testimony admitted that the 1st Defendant was not part of the Government’s Housing Ownership Scheme. In these circumstances, it can be reasonably assumed that the Government’s policy on housing did not apply to the 1st Defendant.

5.1.6 In light of the foregoing circumstances, it cannot be said that the Claimant had a right of first refusal to the purchase of DC/21. In any case, based on the evidence that was before the Court, it is evident that the Claimant was from 2006 to August 2013 a periodic tenant whose tenancy was terminated with notice. In these circumstances, any expectation of the Claimant to be offered by the 1st Defendant to purchase the house is illegitimate. The Claimant cannot at law, base his claim on illegitimate expectations.”

36. I have considered the respective submissions. A word or two about the right to first refusal might not be out of place. According to **Black’s Law Dictionary** (7th Edition) (1999), the right of first refusal means:

“A potential buyer’s contractual right to meet the terms of a third party’s offer if the seller intends to accept that offer. For example, if Beth has a right of first refusal on the purchase of Sam’s house and if Sam intends to accept Terry’s offer to buy the house for \$300,000, Beth can match this offer and prevent Terry from buying it”.

37. To my mind, the right of first refusal does not arise simply because there is a contractual relationship between persons. A person claiming a right of first refusal must point to a provision that creates that right: see **Spiro v. Glencrown Properties Ltd** [1991] 1 All ER 600, **Griffith v. Penton** [1975] 3 All ER 75 and **London and South Western Rly Co. v. Gomm** [1881-85 All ER Rep 1190

38. In **Griffith v. Penton** (supra), Jenkins, LJ, said, at page 83:

“The conditional contract constituted by the grant of the option is a chose in action the benefit of which can (if the terms of the contract are such as to show that it is not merely personal to the grantor) be assigned by the grantee to anyone he chooses subject to any restriction imposed by the contract as to the persons in whose favour assignment is possible.” - Emphasis by underlining supplied

39. It is clear from a perusal of the cited authorities that a right of first refusal must be expressly provided in the contract. As such, where there is no term under the contract on the right to first refusal, the prospective buyer cannot raise the same against the seller or landlord.

40. In the present case the tenancy agreement between the 1st Defendant and the Claimant did not provide such a right to the latter. The Claimant, therefore, cannot just rise up and bring this action, arguing that he was not accorded an opportunity to purchase the house. By raising the issue of the right of first refusal the Claimant seeks to add a term which was not in the tenancy agreement.

41. It is a trite principle that a contract as an agreement gives rise to obligations which are enforced or recognized by law. Thus parties’ rights and obligations emanate from the terms of the agreement: see G.H. Treitel, **The Law of Contract** (9th ed. 1995) Sweet & Maxwell: London, at page 1. This entails that a party to a contract enjoys those rights as agreed and not otherwise.

42. In **M’bwana v Blantyre Sports Club** Civil Cause No. 430 of 2009 (unreported), Kamwambe, J, (as he then was), made the following instructive remarks:

“Indeed it is trite law that every contract is governed by its own terms. The terms governing the relationship of the parties to a contract of employment are a matter of private law and therefore any issues arising therefrom must emanate from the contract of employment itself. Contracts of employment are also governed by the general

principles of the law of contract. It was clearly put by the Supreme Court in Council for the University of Malawi v Urban Mkandawire Civil Appeal No. 569 of 2000 as follows:

“We think it pertinent to say here that it is important to always remember that the general principles of the law of contract apply to the contracts of employment. And that it is also important to always remember that one of such principles is that the law of contract is concerned only with legal obligations as agreed by the parties themselves and not with any other expectations however reasonable they might be.”

43. In the present case the Claimant by appealing for right of first refusal by the virtue of being a sitting tenant is a misconception. He had no such right under the tenancy agreement.

44. Before moving away from this issue, the Court wishes to observe that the Claimant seeks to rely on the doctrine of legitimate expectation: see paragraphs 2.7 to 2.10 of the Claimant’s Closing Submissions. This is an exercise in futility. In the first place, it is trite that a statement of case of a party that wishes to rely on a statute or principle of law must identify the statute or principle of law. A perusal of the Statement of Claim shows that it does not directly or indirectly identify the doctrine of legitimate expectation.

45. Secondly, the doctrine of legitimate expectation falls within public law. The position at law has always been that 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 or she must proceed by way of judicial review and not by way of an ordinary action. The point was explained by Lord Diplock in **O’Reilly v. Mackman** [1983] 2AC 237 (HL) as follows:

“it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.”

46. See also **Chioza v. Board of Governors of Marymount Secondary School** [1996] MLR 109 and **Koreai v. Designated Board Schools** [1995] 2 MLR 649.

47. The upshot of all this is that the writ of summons procedure utilised in this case by the Claimant is so fundamentally different from the judicial review procedure that ought to have been employed. It would thus be wrong in principle for the Court to allow the Claimant to rely on the doctrine of legitimate expectation when the same was not pleaded and when the same ought to have been relied upon using the judicial review procedure.

48. In any case, the elements of legitimate expectation have not been made out. At its most basic, a legitimate expectation claim is based on the assumption that, where a public body states that it will or will not do something, a person who has reasonably relied on that statement should be entitled to enforce it; if necessary, through the courts. For a legitimate expectation to arise, the public body's statement must be clear, unambiguous and without qualification: see **R. v. Education & Employment Secretary, ex p. Begbie** [2000]1 WLR 1115.

49. It will be recalled that it is the case of the Claimant that Cabinet adopted a policy regarding disposal of public institutional houses upon which the sale of the 1st Defendant's houses was approved on the condition that sitting tenants who are public servants had to be accorded the first right to purchase the house: see paragraph 2.9 of the Claimant's Closing Submissions.

50. In the case before this Court, it is not denied that the Claimant did not adduce the rules and regulations governing the Public Servant Home Ownership Scheme: see paragraphs 11 and 24 of the Claimant's witness statement. In paragraph 11 of his witness statement, the Claimant alleges that he had always known that "*Government's policy is that a civil servant who is a sitting tenant of a government house is offered the first right of refusal*".

51. In paragraph 24 of the Claimant's witness statement, the Claimant concedes that he does not have attachments to Exhibit 6. Exhibit 6 is a letter written by the District Commissioner (Mr. Felix Mkandawire). The letter is headed "Sale of Houses" and it is dated 27th June 2012. It is expedient that the first paragraph of Exhibit 6 be quoted in full. It reads as follows:

"Please refer to the above subject matter. The letter from the Principal Secretary for Local Government and Rural Development refers. Also refer to Annex III (a) attached which guides all public offices on rules and procedures as regards the sale of public (Government) houses."

52. There is no denying that the claim by the Claimant is wholly or substantially premised on the provisions of Annex III(a). In this regard, Annex III(a) is very crucial to the Claimant's case. It is thus very surprising that the Claimant does not regard the same to be important. To him what is important is the interpretation given to Annex III(a) by the District Commissioner in Exhibit 6.

53. All in all, the Claimant having opted not to adduce Annex III(a), the Court is not in a position to decide that the statements therein are clear, unambiguous and without qualification in (a) extending the application of the rules and regulation governing the home ownership scheme by public officers to local authorities such as the

1st Defendant and (b) according to the Claimant the right of first refusal to purchase the house in issue and (b).

54. Further, I am not persuaded that the Claimant was unable to get hold of a copy of the legal instrument governing home ownership scheme for public officers. He was aware of the legal instrument but he did not want to adduce the same because it does not support his case.

55. In 1994, the Minister of Finance made the Public Service Home Ownership Fund Order, 1994 (Order): see Government Notice No. 29 of 1994. The Minister of Finance made the Order in exercise of powers vested in him under the Finance and Audit Act.

56. Paragraph 3 of the Order established the Public Service Home Ownership Fund (Fund) for financing a home ownership scheme for public officers (Scheme) under which they shall be entitled to:

“obtain loans out of the Fund, in accordance with this Order, to purchase or build residential houses principally for their own occupation as homes.”

57. Paragraph 5 of the Order stated that the Secretary for Housing and Physical Planning shall be responsible for administering the Fund.

58. Paragraph 6 of the Order established a Public Service Home Ownership Committee (Committee) whose main functions were to formulate the terms and conditions of the loans to be granted to public officers and to receive, evaluate, and consider applications for loans under the Fund: see paragraph 7 of the Order.

59. Paragraph 10 of the Order provided that an application for a loan had to be made in a prescribed form and, if no form be prescribed, the application had to be made in writing and addressed to the Secretary for Housing and Physical Planning.

60. The most significant points about the Order are that:

- (a) the entitlement that public officers have under the Scheme is to obtain loans out of the Fund, in accordance with the Order, to purchase or build residential houses principally for their own occupation as homes;
- (b) the Order does not in any way stop a government department or a statutory body to deal with its real property, including disposal of the same by way of

sale or otherwise, in any manner it deems fit within its operative legal framework;

- (c) there are no provisions in the Order to the effect that where a house belonging to a Government entity, including a statutory body, was to be offered for sale under the Scheme, the sale of the house had first to be offered to a public officer who was a sitting in tenant therein; and
- (d) the management and control of the Fund and the Scheme were vested in the Secretary for Housing and Physical Planning and, accordingly, this was the office from which direction ought to have been sought regarding eligibility of the Claimant to purchase Title Number 7/DC/21 under the Scheme.

61. The Order applied from 1994 to 2016 when it was replaced by the Public Service Home Ownership Fund) Order, 2016.

62. Furthermore, it is trite that where two instruments are inconsistent:

- (a) the latter instrument in time prevails over the earlier instrument in time: and
- (b) the specific instrument prevails over the general instrument.

63. In the present case, the 1st Defendant's Housing Scheme Policy of 2012 is latter in time than the Scheme under the Order. It is also the case that the 1st Defendant's Housing Scheme Policy of 2012 is specific to employees of the 1st Defendant while the Scheme under the Order applies to public officers generally. In this regard, it is my holding that Title Number 7/DC/21 was sold under the correct governing policy document, that is, the 1st Defendant's Housing Scheme Policy. This Policy does not bestow on the Claimant, whether as a sitting in tenant or as a Civil Servant, the right to first refusal.

64. On the basis of the foregoing, it is my holding that neither the Scheme under the Order nor the 1st Defendant's Housing Scheme Policy of 2021 bestowed on the Claimant the right to first refusal to purchase Title Number 7/DC/21 whether in his capacity as a sitting in tenant or as a civil servant.

Whether or not failure by the 1st Defendant to advertise the sale of Title Number 7/DC/21 was fatal?

65. According to paragraph 6 of the Statement of Claim, the Claimant appears to take issue with the fact that the sale of Title Number 7/DC/21) was not advertised. Surprisingly, no evidence was led by the Claimant in relation to this issue. It is equally

surprising that neither the Claimant's Skeleton Arguments nor the Claimant's Closing Submissions address this issue.

66. It is the case of the Defendants that in so far as the sale of the staff houses was limited to employees, any advert relating to the same could not be communicated to third parties like the Claimant: see paragraph 4 of the Defence. I fully agree with the reasoning of the Defendant. I am fortified in my view by sections 35 and 36 of the Local Government Act as they stood at the material time. The former section empowered the 1st Defendant to dispose land held by it in any manner as it wished. The latter section, in subsection (2), provided that disposal of land or buildings by the 1st Defendant in favour of any person shall not be invalidated by reason, among other things, that any requirement as to advertisement or consideration of objections has not been complied with.

67. By bringing up the question of advertisement, the suit by the Claimant offends section 36 (2) (b) of the Local Government Act which states that failure to advertise will not invalidate the disposal of the land. The cases of **Chakuamba & Others v. Attorney General & Others** [2000-2001] MLR 16 and **Nkhumbwe v. National Bank of Malawi** [2000-2001] MLR 261.

68. **Chakuamba & Others v. Attorney General & Others**, supra, stands for the proposition that when a court in interpreting a statute it should adopt an interpretation that serves public interests:

It is common ground that the primary rule of construction is that the words of a statute must prima facie be given their ordinary meaning... It is always presumed that the legislator intends the interpreter of an enactment to observe the maxim ut res magis valeat quam pereat (it is better for anything to have effect than to be made void"). On this maxim, Francis Benion in his book entitled "statutory interpretation", (3ed)", at page 43 says this: 'It is a rule of law that the legislator intends the interpreter of an enactment to observe the maxim ut res magis valeat quam pereat I it is better for a thing to have effect than to be made void); so that he must, construe the enactment in such a way as to implement rather than defeat the legislative purposes.

...

Furthermore, it is a basic principle of legal policy that law should serve the public interest. Therefore, when construing an enactment a court should presume that the legislator intended to observe this principle and so avoid adopting a construction which is adverse to the public interest."

69. In a nutshell, the facts in **Nkhumbwe v. National Bank of Malawi**, supra, were that the plaintiff obtained a loan using his landed property as a security and the defendant sold the property after the plaintiff failed to repay the loan. The plaintiff brought an action against the defendant challenging the sale on the grounds of illegality

and against public policy. Among other things, the Court considered section 71(3) of the Registered Land Act, which reads:

“A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.”

70. The reasoning in **Nkhumbwe v. National Bank of Malawi** applies to the present case with equal force. Section 36 of the Local Government Act states that any irregularities in the disposal of land by the Council do not have the effect of invalidating the transaction. This was the intention of Parliament and this Court has to give effect to the said intention.

71. All in all Parliament, in its wisdom, decided that in order for the 1st Defendant to ably discharge its statutory mandate, its decision on sale of land should not be defeated by failure to advertise the sale of the land. Accordingly, it is my holding that failure by the 1st Defendant to advertise to the general public (and the Claimant) the sale of Title Number 7/DC/21 was not fatal.

Whether or not the sale of Title Number 7/DC/21 by the 1st Defendant to the 2nd Defendant was unlawful?

72. It is the case of the Claimant that the sale of Title Number 7/DC/21 by the 1st Defendant to the 2nd Defendant was unlawful. The submissions by the Claimant on this issue are as follows:

“4. *The first Defendant’s act of purporting to sell the house to the second defendant who has never even been a sitting tenant in DC/21 as confirmed by the second defendant himself at trial, and thereby depriving the Claimant of the right of first refusal grounded in cabinet policy, is in these circumstances illegal.*

4.1 *Firstly, there was no first Defendant duly constituted at the time the decision to dispose of Council houses was adopted. No Councilor was in office at the time and this is beyond dispute. The Court may also take judicial notice of it for its notoriety.*

4.2 *The power to disposal of Council assets lies with the Council: s.24(1)(b) and s.35 of the Local Government Act.*

4.3 *It is precisely because there was no Council that the first defendant’s management sought approval from Government through the line Ministry of Local Government and Rural Development (as then designated). This is justifiable on the doctrine of necessity as considered by the Supreme Court in **A-G v Malawi Congress Party***

and others [1997] 2 MLW 181 and the authorities discussed therein including A-G of the Republic v Mustafa Ibrahim (1964) CLR 195. In the absence of a duly constituted Council, there was a pressing imperative and inevitable necessity for the functions and powers of the Council to be exercised, proportionate to the occasion, to avoid legal and governance chaos and to safeguard a semblance of the rule of law. Otherwise, the absurd corollary would have been that in the then absence of Council all powers and functions of the Council were in abeyance, and there would be legal chaos if anything done by the Cabinet on behalf of the Council is deemed illegal.

- 4.4 *It is the approval from Government through the Ministry of Local Government that formed the due basis of the disposal of council houses.*
- 4.5 *The approval came with clear conditions as adopted by Cabinet at the time as contained in “NC 8’ on page 35 of the Claimant’s part of the trial bundle.*
- 4.6 *The disposal of Council houses could only be valid if the Cabinet conditions for approval were complied with.*
- 4.7 *The departure from Cabinet approval conditions renders any sale affected by such departure illegal and this includes the sale to the second defendant. This point was made in no uncertain terms to management of the first defendant by letter from the Ministry of Local Government as per Exhibit “NC 8” tendered in evidence by the Claimant.*
- 4.8 *It is clear from the totality of evidence that employees of the first defendant had devised a scheme to solely benefit themselves from the disposal of the first defendant’s houses. For this purpose, they first changed the policy to limit eligibility to employees. They had no authority to do so.*
- 4.9 *Next they made a decision to dispose of the first defendant’s house. They had no authority to do so, but in the obtaining circumstance decided to seek approval from central government through the Ministry of Local Government and Rural Development. They obtained the approval but with conditions that differed from the self-serving eligibility criteria they had concocted for themselves in 2012.*
- 4.10 *Noting that the condition of the approval would stand in the way of their wishes, they decided to disregard the conditions, but retain the approval and proceeded under their own purported policy. Next they falsified information about occupants of the house to allow those who did not occupy a given house to purchase it nevertheless. This is the case of the second defendant. The same also happened to the houses occupied by a Ms. C. Kheza and Mr. Kaisi which were allocated to purchase to others. This was reversed when the Ministry directed that the houses must be offered to the sitting-in tenants who are public servants. This is apparent from exhibit “NC 6’ tendered by the Claimant, which is confirmed by Mr. Mwenda who testified for the first defendant: see paragraph 6.12 of his witness statement, page 12 of the Defendant part of the trial bundle.*
- 4.11 *By contrast, when the first defendant’s management were given a similar directive from the Ministry in terms of exhibit “NC 8” tendered by the Claimant, they opted*

to disregard it on the basis of their own purported policy which was inconsistent with the conditions upon which the disposal was approved by Cabinet.

- 4.12 *Thirdly, to the extent that the scheme devised by the first defendant's employees was solely aimed at serving their interest, the first defendant's employees including management clearly acted illegally by adopting a self-serving policy, the decision to purchase council houses, and in subsequently persisting in the sales of the houses to themselves, including the second defendant.*
- 4.13 *It is trite that a public officer shall not deal in a matter in which they have a personal direct or indirect interest. Where they have an interest, they ought to declare it and desist from participating in decision making. Failure to do so is an offence: vide s.32 of the Local Government Act as read together with s. 25D of the Corrupt Practices Act.*
5. *Penultimately, the defendants should not be heard in reliance on section 35 of the Local Government Act which at the material time provided that the first defendant could dispose of any land held by it in any manner it wished. This is for the simple reason that the first defendant's employees are not the first defendant. By the doctrine of necessity, decisions of the first defendant including on disposal of institutional houses were taken with the ultimate approval of the Ministry of Local Government as guided by Cabinet at the time. The phrase "in any manner it wishes" entails that the disposal in those circumstances could only be as the Government approved based on the Cabinet policy conditions for disposal of public institutional houses.*
6. *In that regard, in any manner it wishes means on the conditions contained in exhibit "NC 8" tendered by the Claimant and found on page 35 of the Claimant's part of the trial bundle. For the avoidance of doubt, in any manner it wishes, would not entail in any manner first defendant's employees wished when they had no authority in the first place and neither could they have filled the void in local government at the time.*
7. *Further, neither should the heard in reliance on the then s.36(2)(a) of the then Local Government Act which was since repealed by section 6 of the Local Government (Amendment) Act No. 10 of 2017). The repealed provision which was in force at all relevant times provided that:*
- Where the Council purports to ... dispose of land of buildings then (a) in favour of any person claiming under the Council, the ... disposal so purporting to be made shall not be invalid by reason that any consent of the Minister responsible for land matters which is required thereto has not been given ...***
8. *The repealed provision cannot by any stretch of interpretation be used to validate the illegal sale to the second defendant because the illegality of the said sale as canvassed above has nothing to do with obtaining the consent of the Minister responsible for lands matters. The illegality rests on precisely the root of the authority to dispose: conditions on which the approval to dispose was predicated.*
9. *Lastly, the Defendant seek to rely on the case of **Margret Dette v Lilongwe District Council, Civil Cause No. 520 of 2013** where a similar challenge was dismissed by*

summary judgment: see paragraph 4.1.14 of the Defendant's skeleton arguments on file herein.

10. *That case was on in a line including the case of **Beatrice Mangwiro & Innocent I.F Mkandawire v Lilongwe District Council & Miss. Patience Jimu, Civil Cause No. 1323of 2013**. In both the **Mangwiro** and **Dette** cases, the claims were similar in aim and tenor to the Claimant's claims in this case. The Defendant relief on s.35 of the Local Government Act and applied for disposal on a point of law. In both the **Mangwiro** and **Dette** cases, the Deputy Registrar granted summary judgment in favour of the Defendants, finding effectively that the first Defendant could disposal of its property in a manner it wished. The Policy now sought to be relied on by the defendant in this case was also relied upon on those cases.*
11. *It is interesting that **Dette** went before Honourable Justice Mwale on appeal to a judge in chambers while **Mangwiro** went before Justice Mkandawire as he then was on appeal to a judge in chambers. In **Dette**, Justice Mwale affirmed the decision of the Deputy Registrar. In **Mangwiro**, Justice Mkandawire as he then was set aside the Deputy Registrar's decision on the ground that the issues should not have been disposed of through a summary procedure.*
12. *Notably, it does not appear that the Court in **Dette** had had the benefit of more fully material including the conditions of approval of the disposal of the houses. It also does not appear that the Court in **Dette** heard and considered arguments on whether the decision to disposal of the houses was taken by a Council duly constituted. In short, a lot of the issues that come up for decision in the present case do not appear to have been raised and considered.*
13. *In the premises, it would be urged that the Court should not be persuaded by the decision in **Dette** at all. It is important that the Court herein considers the full implications of the conditions of approval by cabinet as being the manner it was wished to dispose of the houses under s.35 of the Local Government Act.*
14. *For the foregoing reasons, it is submitted that the sale of the DC/21 to the second defendant and the attendance deprivation of the Claimant's right of first refusal anchored on the policy for disposal of public institutional houses is illegal."*

73. The Defendant holds the view that the sale of the house in issue to the 2nd Defendant was lawful. It is expedient that the relevant part of the Defendant's Final Written Submissions be quoted in full:

"5.2.1 According to the Lilongwe District Council Housing Scheme Policy issued in September 2012 (marked and exhibited as 'MM 6'), Clause 6.0 provides as follows;

"... All other houses in Area 47, falls Kawale, shall be offered to staff as allocated by the Allocation Committee following the set criteria in order of priority;

- *Direct employees currently occupying the house.*
- *Some direct employees not occupying the house*

- *Seconded staff (Ministry of Local Government) and other Ministries doing Council work currently occupying the house.*
- *Some seconded staff by Ministry of Local Government not occupying the house...*”

- 5.2.2 *The Claimant challenges the authority of the 1st Defendant in disposing of the house to the 2nd Defendant who was not in occupation of the DC/21 at the material time. It must be acknowledged that according to the 1st Defendant’s Housing Policy, the mere fact that the 2nd Defendant was not in occupation of the house at the material time did not exempt him from being offered to purchase a staff house. At most, his lack of occupation of DC/21 made him second in priority to other direct employees who were occupying the houses. The 2nd Defendant being a direct employee of the 1st Defendant was eligible to be offered to purchase DC/21.*
- 5.2.3 *On the contrary, the Claimant herein confirmed that he has never worked with the 1st Defendant, neither has he ever been seconded by the Ministry of Local Government. In these circumstances, the Claimant was at all times ineligible to be offered the property in dispute. In the absence of direct employees occupying DC/21, the 1st Defendant, rightly so offered the plot to the 2nd Defendant who is second in priority as he qualified to purchase the house.*
- 5.2.4 *It must be acknowledged that at the time of the sale in 2013, section 36(2) of the Local Government Act was the applicable law and any changed thereto cannot apply retrospectively. Essentially, the Claimant challenges the sale to the 2nd Defendant on the basis that the 1st Defendant only got approval for sale of occupants and the 2nd Defendant herein was not an occupant. However, in light of section 36(2) of the Local Government Act, it would be absurd to expect the 1st Defendant to seek separate approval for the sale of the houses to non-occupants who nevertheless, qualified under its Housing Policy Scheme. According to the case of Chakuamba & Others vs. Attorney General & Others [2000-2001] MLR 16, the Court is entitled to adopt an alternative construction to statute if the court concludes that the legislator could not have intended an absurd or unworkable result. In any case, the Ministry of Local Government was notified of the intention to sale DC/21 to the 2nd Defendant herein who was an employee of the 1st Defendant at the material time and duly approved of the same. **See:** ‘NC 4’ at page 26 of the Claimant’s Trial Bundle. **See also:** ‘JLM 2’ at page 17 of the Defendants’ Trial Bundle*
- 5.2.5 *The 2nd Defendant entered into a sale agreement with the 1st Defendant and duly completed his payments for the same and is the rightful owner of DC/21. **See:** ‘MM 5’ at page 68 of the Defendant’s Trial Bundle. **See also:** ‘MM 7 A and B’ at page 76-77 of the Defendant’s Trial Bundle.*
- 5.2.6 *The Claimant herein was duly notified of the concluded sale, and was fully aware of the new owner, the 2nd Defendant. **See:** ‘NC 1’ and ‘NC 2’ at page 22 and 24 of the Claimant’s Trial Bundle. Despite being informed of the termination of his tenancy agreement he has neglected for a period of over 8 years to surrender possession of the property or remit rentals for the same. In this instance, the*

Claimant has unjustly benefitted from what he misconceives as his 'legitimate expectations'. In his testimony, the Claimant admitted not paying rentals to either the 1st Defendant or 2nd Defendant. He also admitted not negotiating to buy the same from the 2nd Defendant. The Claimant continues to retain possession merely because he was a sitting tenant who also happens to be a civil servant. Arguably, even if the sale was deemed to be unlawful, the same would not in itself, entitle the Claimant to purchase the house as he remains ineligible under the 1st Defendant's Housing Scheme Policy. In the absence of any tenancy agreement, the Claimant's occupation of DC/21 is unlawful.

5.2.7 *In this instance, it is evident that the Finance and Audit Service Committee initially resolved to rescind the sale of the houses at its meeting on 4th March 2015. See: 'NC 9' at page 37, 39 of the Claimant's Trial Bundle. The Full Council at its meeting on 23rd March 2015, approved the recommendation of the Finance and Audit Committee and resolved to rescind the sale. See: 'NC 10' at page 40, 43 of the Claimant's Trial Bundle. On 27th March 2015, the Full Council reversed its earlier decision of rescission and resolved to send the matter to the Finance Committee for advice on the matter. See: 'NC 12' at page 47, 50 of the Claimant's Trial Bundle.*

5.2.8 *Evidently, the Council did not proceed with the rescission. In a letter dated 16th May 2017, the 2nd Defendant was informed that the Council did not implement its decision to rescind the sale and that he remained the owner of the house. See: 'MM13' at page 117 of the Defendant's Trial Bundle. Whilst the Claimant challenges the authenticity of 'MM 13' and in particular the specific date when the Full Council meeting resolved not to rescind the contract. However, according to the evidence he exhibited to the Court particularly 'NC 12' it is evident that the Council did not proceed with implementing the decision for sale as such the 2nd Defendant remains the rightful owner of DC/21."*

74. I have considered the respective submissions. In terms of the sale agreement, Title Number 7/DC/21 was sold by the 1st Defendant to the 2nd Defendant on 6th June 2013. Being an agreement between two parties, that is, the 1st Defendant and the 2nd Defendant, under what legal authority could the 1st Defendant unilaterally rescind the sale agreement? The Claimant has not in any way given the authority under which the purported rescission was done. Clearly, the purported rescission was done without a consideration of the legal implications of such a decision, particularly having regard to the fact that the purported rescission was made after more than one year and eight months had elapsed following the sale of Title Number 7/DC/21. For example, having purchased Title Number 7/DC/21, the 2nd Defendant was entitled, if he so wished, to sell Title Number 7/DC/21 to a third party. In that case, how would the 1st Defendant proceed to enforce its decision to rescind the sale of Title Number 7/DC/21)?

75. In any case, there is documentary evidence by way of Exhibit JLM7 that the decision to rescind the sale of the houses was not implemented. The Claimant seeks

to challenge Exhibit JLM7 by way of parol evidence. It is trite that a party cannot introduce parol evidence to contradict a document: see **Kamwendo v. Bata Shoe Company Limited**, Civil Cause No. 2380 of 2004.

76. In view of the foregoing and by reason thereof, it is my holding that the sale of the house in issue by the 1st Defendant to the 2nd Defendant was lawful.

Conclusion

77. All in all, the Claimant has failed to satisfy the Court on balance of probabilities that as a sitting tenant he was entitled to be accorded the first opportunity to purchase Title Number 7/DC/21 and that the sale of Title Number 7/DC/21 to the 2nd Defendant was unlawful. In these circumstances, the action by the Claimant has to be dismissed with costs in its entirety. It is so ordered.

78. For avoidance of doubt, by reason of the dismissal of the action herein, the order of injunction that the Claimant obtained restraining the 2nd Defendant from evicting the Claimant from Title Number 7/DC/21 is no longer valid. It is so ordered. In this regard, it is ordered that the Claimant must:

- (a) deliver to the 2nd Defendant vacant possession of Title Number 7/DC/21 within 7 days of the date of this judgment; and
- (b) within 14 days of the date of this judgment, pay to the 2nd Defendant all rentals in arrears, with proper yearly adjustments, from June, 2013 to the date of this judgment.

Made in open Court this 14th day of November 2023 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE