REPUBLIC OF MALAWI

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL DIVISION**

**MISCELLANEOUS CAUSE NO. 9 OF 2022**

(Before Honourable Justice Mambulasa)

**BETWEEN:**

**CENTRE FOR ENVIRONMENTAL POLICY (CEPA).....1ST CLAIMANT**

**-AND-**

**NATIONAL YOUTH NETWORK ON CLIMATE CHANGE (NYNCC).....2ND CLAIMANT**

**-AND-**

**MOVEMENT FOR ENVIRONMENTAL ACTION (MEA)...3RD CLAIMANT**

**-VS-**

**SOUTHERN REGION WATER BOARD (SRWB).....1ST DEFENDANT**

**-AND-**

**ALGHANIM INTERNATIONAL GENERAL TRADING AND CONTRACTING COMPANY/PLEM CONSTRUCTION JV (AIG/PLEM).....2ND DEFENDANT**

**CORAM: HON. JUSTICE MANDALA MAMBULASA**

Mr. Paul M. Mzembe, Advocate for the Claimants

Mr. James Misty Masumbu, Advocate for the Defendants

Mr. Given Phiri, Advocate for the 2nd Defendant

Mr. Obet Chitatu, Court Clerk

Mrs. Annie Libukama, Court Marshal

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**RULING**

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**MAMBULASA, J**

**Introduction**

[1] On 24th February, 2022 the Claimants filed a without-notice application seeking an urgent relief for an interlocutory order of injunction restraining the Defendants, their servants, agents or whomsoever acting on their behalf, from carrying on any works, and/or continuing to carry out any works regarding the implementation of the 1st Defendant's Mangochi Water Extension Project (the Project) at Nkhudzi Bay, and specifically, any works on, or upon, Nkhudzi

Hill pending a further order of this Court, and/or resolution of the substantive matter to be brought before the Court.

[2] In the same application, the Claimants were also seeking an order compelling the Defendants to immediately provide the Claimants herein, with any and all documents, plans, studies, drawings and impact assessment reports, regarding, relating to, generated by or provided to the said Defendants in relation to the said Project.

[3] The application was supported by a sworn statement made by Advocate Iman Alleyabu and it was taken out under Order 10, rules 3, 8, 27 and 30 of the Courts (High Court) (Civil Procedure) Rules, 2017. Upon considering the application, this Court ordered that it should come on a with-notice basis on 11th March, 2022 so that the Defendants are also given an opportunity to be heard on the same. The Court also gave the parties timeframes within which to file their documents for their respective cases owing to the urgency of the application.

[4] The 2nd Defendant filed a Notice of Preliminary Objections. It also filed a Sworn Statement in Support of the Notice of Preliminary Objections to the Claimants' Application and Proceeding as well as Skeleton Arguments. The Court took a decision that due to the urgency of the application, both applications will be heard and dealt with simultaneously and that the Court will render an omnibus ruling. This practice happens from time to time and is allowed in our courts.[1]

[1] *See* for instance, *Mdolo -vs- Mdolo & Another*, MSCA Civil Appeal No. 44 of 2016 (Unreported).

**The Preliminary Objections**

[5] The objections that the 2nd Defendant raised were the following:

5.1 whether or not the Claimants have commenced the action in a wrong forum; and therefore, the proceedings are a nullity;

5.2 whether or not the 2nd Defendant has a legal capacity to be sued as such; and

5.3 whether or not the 2nd Defendant is a correct or necessary party to these proceedings.

[6] Upon the hearing of the above preliminary objections, the 2nd Defendant was to apply for the following orders:

6.1 that the present proceedings be struck out with costs; and

6.2 that the application for interlocutory injunction [and for the other order on provision of documents and information] be dismissed with costs.

[7] The Court will first deal with the preliminary objections. It is for an obvious reason. If they succeed, the Court will have to dismiss the application brought by the Claimants as prayed for by the Defendants.

[8] On the first objection, whether or not the Claimants have commenced the action in a wrong forum; and therefore, the proceedings are a nullity, the 2nd

Defendant argued that environmental rights cases are supposed to be filed in the Environmental Tribunal established by section 107 of the Environmental Management Act, (EMA, 2017).

[9] Section 107(1) of EMA, 2017 provides as follows:

> 107 (1)There is hereby established an Environmental Tribunal (in this Act otherwise referred to as "the Tribunal") which shall-
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> (a) consider appeals against any decision or action of the Authority, lead agency, Director General or inspector under this Act;
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> (b) hear and determine petitions on violation of the right to a clean and healthy environment or any other provision of this Act and any written law relating to environment and natural resources management;
>
> (c) receive complaints from any person, lead agencies, private sector or non-governmental organizations relating to implementation and enforcement of environment and natural resources management policies and legislation;
>
> (d) consider other issues and make declaratory orders the Authority, the Director General, lead agency or any person may refer to it under this Act.

[10] The 2nd Defendant further argued that the Environmental Tribunal has powers to issue injunction, order a person to produce documents or information, declare a particular act or conduct as null and void as provided for in section 108 of EMA, 2017.

[11] Section 108 (1) and (2) of EMA, 2017 reads as follows:

> (1) The Tribunal shall not be bound by rules of evidence and shall admit, as evidence, any matter which in its opinion shall assist it to arrive at a just and equitable decision for the advancement of the purposes of this Act.
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> (2) The Tribunal shall make its own rules of procedure and shall have power to-
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> (a) summon any person to give evidence in any proceedings before the Tribunal or to produce to the Tribunal, any document relevant to the proceedings before it;
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> (b) require the disclosure of information and production of documents of any kind from any person;
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> (c) confirm, vary, amend or alter a decision made by the Authority, the Director General, lead agency or inspector or reverse or substitute such decision or any decision which is just and equitable and which is in the interest of the protection and management of the environment or the conservation and sustainable utilization of natural resources;
>
> (d) declare any activity or practice that violates any provision of this Act or any other written law illegal and void; and
>
> (e) order a remedy, compensation including an injunction or similar order as it may deem necessary to advance the objects and principles provided for under this Act or any other written law relating to environment and natural resources management.

[12] Any person that is aggrieved with the decision of the Tribunal may appeal to the High Court on point of law, within thirty (30) days from the date of the

decision of the Environmental Tribunal. This is provided for under section 108(4) of EMA, 2017.

[13] The 2nd Defendant contended that looking at the Claimants' case and the urgent remedies being sought, the present proceedings squarely fit in section 107 of EMA, 2017. Accordingly, the case ought to have been filed in the Environmental Tribunal.

[14] The 2nd Defendant further contended that the High Court has been emphatic on the effect of commencing a matter in the High Court when it ought to have been filed in a specialized court or tribunal. It relied on a number of decisions of this Court. The first case is that of *Wolfram Cuepers -vs- Alex Armbruster (On his own and on behalf of the other subscriber of One Dollar Glasses) & Others.*[2] In that case, Kalembera J had this to say:

> Yes, the High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law (section 108(1) of the Constitution), including this matter. However, where special courts have been established to handle particular matters, that must be respected. Hence, commercial matters must be heard in the High Court (Commercial) Division though this court has unlimited original jurisdiction. So too, labour related matters ought to be heard in the Industrial Relations Court, unless otherwise stated or directed by the High Court.

[2] Civil Cause No. 130 of 2016 (High Court of Malawi) (Principal Registry) (Unreported).

[15] The second decision that the 2nd Defendant relied upon is the case of *Chilemba -vs- Malawi Housing Corporation.*[3] In this case, Potani J had this to say at page 141:

> Whilst this Court indeed has unlimited original jurisdiction in both criminal and civil matters, the Industrial Relations Court was specifically created to deal with labour related matters, and it would therefore [make] sense that labour related matters should first be dealt with by that court before they are pushed to this Court. In the scenario of this arrangement, the High Court despite having original unlimited jurisdiction would only come in as an appellate court and not a court of first instance. This is what the framers of the Constitution intended, for they could not provide for a separate and specific court in the name of the Industrial Relations Court having original jurisdiction over labour disputes and such other issues relating to employment whilst the High Court was still there. Clearly, the Industrial Relations Court was intended to be the first port of call.

[16] And the learned judge went on to apply with approval the case of *Armstrong Kamphoni -vs- Malawi Telecommunications Limited,*[4] where Kapanda J (as he then was) quoted with approval, Unyolo J (as he then was) in the case of *Beatrice Mungomo -vs- Brian Mungomo*[5] where he said:

> Next, learned Senior Counsel contended that this court is competent to hear the petition on the basis of section 108 of the new Constitution of the Republic of Malawi which provides that the High Court shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.

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[3] [2008] MLLR 137.

[4] Civil Cause No. 684 of 2001 (High Court of Malawi) (Principal Registry) (Unreported).

[5] Matrimonial Cause No. 6 of 1996 (High Court of Malawi) (Principal Registry) (Unreported).

> The section is very clear and I would agree with learned counsel that with such extensive jurisdiction and powers conferred upon it by the Constitution, which is the supreme law of the land, the High Court is competent to hear divorce petitions even in cases involving customary marriage as in the present case. It is to be observed, however, that although this is the position, the High Court has to look at the matter from a practical point of view. In my judgment, it would be both inappropriate and wrong for the High Court to proceed to assume jurisdiction over proceedings which fall within the jurisdiction of a subordinate court simply because the High Court has, as we have seen, unlimited original jurisdiction. Such an approach would create confusion, as parties would be left to their whims to bring proceedings willy-nilly in the High Court or in a subordinate court as they pleased...In short, the High Court should recognize the subordinate courts and decline jurisdiction in matters over which the subordinate courts have jurisdiction.

[17] The 2nd Defendant finally submitted on this objection that the application has been brought in a wrong forum and that it ought to be dismissed with costs.

[18] On the second objection, whether or not the 2nd Defendant has a legal capacity to be sued as such, the 2nd Defendant argued that it is cardinal law that only a legal person with capacity can sue or be sued. It relied on the following decisions, namely, *The State and Registrar of Financial Institutions, Ex-Parte Credit Data Reference Bureau,*[6] *Kaphale -vs- Malawi Communications*

[6] Miscellaneous Civil Case No. 4 of 2013 (High Court of Malawi) (Commercial Division) (Blantyre Registry) (Unreported).

*Regulatory Authority,*[7] *Muluzi and another -vs- Malawi Electoral Commission*[8] and *Davies -vs- Elsby Brother Ltd.*[9]

[19] It was the 2nd Defendant's submission that the 2nd Defendant is not a legal person i.e. has no juristic personality and therefore cannot be sued as such in a court of law and consequently, the proceedings against the 2nd Defendant are a nullity.

[20] On the third objection, whether or not the 2nd Defendant is a correct or necessary party to these proceedings, the 2nd Defendant contends that it is not. It cited the author, Stuart Sime, in his text, *A Practical Approach to Civil Procedure*[10] in Chapter 17, on Parties and Joinder, at page 224, para 17.49 where it is stated as follows:

> Generally, it is for the claimant to decide which causes of action to pursue in a claim and which parties to claim against. A claim is sufficiently constituted if it asserts a single cause of action by a single claimant against a single defendant.

[21] Referring to joinder of parties, Stuart Sime, specifically comments that:

> Apart from the operation of the overriding objective, the only restriction against joinder of parties appears to be that there must be a cause of action against each of the parties joined. There is no jurisdiction under the rule to join people purely for

[7] Civil Cause No. 315 of 2016 (High Court of Malawi) (Principal Registry) (Unreported).

[8] Constitutional Cause No. 1 of 2009 (High Court of Malawi) (Principal Registry) (Unreported).

[9] [1960] 3 All ER 672.

[10] 15th Edition.

the purpose of obtaining disclosure against them (Douihech v Findlay [1990] 1 WLR 269).

[22] The 2nd Defendant also relied on Order 6, rule 8 of the Courts (High Court) (Civil Procedure) Rules, 2017. It provides as follows:

> 8. The Court may, on an application by a party, order that a party in a proceeding is no longer a party where-
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> (a) the person's presence is not necessary to enable the Court to make a decision fairly and effectively in the proceeding; or
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> (b) there is no good and sufficient reason for the person to continue being a party.

[23] The 2nd Defendant submitted that there is no issue involving it which is connected to the disputes in the proceedings before the court. In order to succeed, the Claimants must prove that the 1st Defendant is embarking on the impugned project without following the law and in violation of the conditions imposed by the Malawi Environmental Protection Agency and the recommendations of UNESCO. In that regard, the 2nd Defendant cannot be said to be a necessary party as there is no allegation implicating the 2nd Defendant in the breaching of the said applicable law, the conditions or recommendations. What is clear from the documentation is that the 2nd Defendant is only a nominal party to the transactions. It will not be affected, legally or financially, in the outcome of the litigation. The 2nd Defendant does not wish to be a party to the claim and it should not be forced to take part in

the proceedings, bearing in mind the onerous obligations on a party to a claim. In keeping with the overriding objective of dealing with cases justly, it would seem unjust and unfair to force the 2nd Defendant to remain a party in the claim.

[24] The 2nd Defendant finally submitted that should the Court sustain the 2nd Defendant's objections, the Claimants should be condemned in costs.

[25] The Claimants responded to the objections raised by the 2nd Defendant on the points of law. On the first objection, whether or not the Claimants have commenced the action in a wrong forum; and therefore, the proceedings are a nullity, they argued that they are not in the wrong forum. They cited section 4(4) of EMA, 2017 in support of their position.

[26] The said section 4(4) of EMA, 2017 is couched in the following terms:

> In furtherance of the right to a clean and healthy environment and the enforcement of the duty to safeguard and enhance the environment, the Authority or the lead agency so informed under subsection (3) **or any person interested in enforcing the right to a clean and healthy environment shall be entitled to bring an action** against any person whose activities or omissions have or are likely to have a significant impact on the environment to-
>
> (a) prevent or stop any act or omission which is deleterious or injurious to any segment of the environment or likely to accelerate unsustainable depletion of natural resources;

(b) procure any public officer to take measures to prevent or stop any act or omission which is deleterious or injurious to any segment of the environment for which the public officer is responsible under any written law;

(c) require that any on-going project or other activity be subject to an environmental audit or monitoring in accordance with this Act; or

(d) seek a court order for the taking of other measures that would ensure that the environment does not suffer significant harm.

[27] The Claimants further argued that they have a choice under EMA, 2017 whether to commence legal action in a court of law or to file a written complaint to the Environmental Tribunal. In this case, they chose to come to court directly. In any case, the Environmental Tribunal is yet to be operationalized and that this fact is contained in a *Public Sector Reform Report, Area No. 5*. In support of this contention, they cited section 4(6) of EMA, 2017.

[28] The said section 4(6) of EMA, 2017 states as follows:

> Any person who has reason to believe that his right to a clean or healthy environment has been violated by any person may, instead of proceeding under subsection (4), file a written complaint to the Tribunal outlining the nature of his complaint and particulars.

[29] The Claimants also argued that section 4(8) of EMA, 2017 buttresses their argument that they are in the right forum. It provides that:

**Subsection (6) shall not be construed as limiting the right of the complainant to commence an action under subsection (4)**:

Provided that an action shall not be commenced before the Tribunal has responded in writing to the complainant, or where the Authority has responded in writing to the complainant, or where the Authority has commenced an action against any person on the basis of a complaint made to the Tribunal.

[30] The Claimants submitted that the establishment of the Environmental Tribunal cannot be used to bar them from accessing the court and obtain a remedy therefrom.

[31] On the second objection, whether or not the 2nd Defendant has legal capacity to be sued as such, the Claimants contended that this objection is premature as there is no substantive matter as no summons has been filed yet as required by Order 5, rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017. Furthermore, the Claimants cited Order 6, rule 4 of the Courts (High Court) (Civil procedure) Rules, 2017 in their support which is to the effect that a person may be added as a party without the permission of the Court before the summons has been served by endorsing that person's name on copies of the summons.

[32] The Claimants also contended that they sought various documents and information, including more particularly, a joint venture agreement, between the two partners constituting the 2nd Defendant from the 1st Defendant on divers occasions, but the 1st Defendant has failed to provide the requested documents, information and the said agreement. The request for the

documents, information and a joint venture agreement was made both directly to the 1st Defendant and also through its advocates but the 1st Defendant has simply ignored them. The Claimants further contended that they sued a correct party, the partner entities constituting the 2nd Defendant in the absence of the requested documents and information. The Claimants insisted that the 2nd Defendant was a correct party in the circumstances because it was the one which is carrying out the activities of the Project complained of. The Claimants argued that sustaining this preliminary objection, would be penalizing them for the conduct of the 1st Defendant in failing to provide the requested documents and information which would have assisted them to appreciate how their joint venture was set up. Finally, the Claimants reiterated that this objection is premature at this stage as no action has been commenced yet.

[33] The Claimants did not touch on the third objection, whether or not the 2nd Defendant is a correct or necessary party to these proceedings.

[34] In reply, the 2nd Defendant submitted that it still relies on the arguments it made in its Skeleton Arguments more especially the statement by Kalembera J in the *Wolfram Cuepers* case that this application should have been made or filed in the Environmental Tribunal before being heard by this Court. The 2nd Defendant stated that the application should have come before this Court by way of appeal as provided for in section 108(4) of EMA, 2017 and so, it was commenced in the wrong forum and should be dismissed with costs.

[35] On the non-operationalization of the Environmental Tribunal, the 2nd Defendant argued that no evidence had been placed before the Court to prove that point and so, that argument should be ignored completely.

[36] On the second objection, the 2nd Defendant argued that the matter is commenced because the Claimants are seeking an urgent interlocutory order of injunction. It is a misconception to say that the matter has not commenced. The 2nd Defendant argued that the 2nd Defendant ought to have been a juristic person as was decided in the *Muluzi* decision. The name of the 2nd Defendant does not exist.

[37] On the third objection, the 2nd Defendant stated that the Claimants did not touch on it and that therefore there was nothing more to say on it.

**Determination of the Preliminary Objections**

[38] The Court will deal with the objections in the manner in which they were argued by the parties. On the first one, whether or not the Claimants have commenced the action in a wrong forum; and therefore, the proceedings are a nullity, the first observation to be made is that there is no action before the Court as yet. The Claimants' application for an urgent interlocutory order of injunction and an order for information is premised on Order 10, rules 3 and 8 of the Courts (High Court) (Civil Procedure) Rules, 2017 among others.[11] Order 10, rule 3 provides, in part, that a party may apply for an interlocutory order at any stage, namely, before a proceeding has started. Order 10, rule 8

[11] *See* Paragraph 3 above.

is on application for an interlocutory order before commencement of a proceeding. The Claimants have gone into details explaining every requirement set out under rule 8 for the present application. Actually, the application itself states clearly that it is before a proceeding has started. In short, the framing of the first preliminary objection is problematic to the extent that it uses the diction, **action**. There is presently none before the Court. There is only an application before commencement of a proceeding or in the language of the 2nd Defendant, action. On this score alone, the Court would have been entitled to overrule it outright as being misconceived. However, it will not do so. The Court will deal with it on its merits, so to speak, as if it read, whether or not the Claimants have filed the application in a wrong forum; and therefore, the proceedings are a nullity.

[39] It is an established principle of law that when construing a statute, it must be read as a whole.[12] All provisions that have a bearing on a particular subject matter must be brought to bear before one can decipher a meaning out of them. In this application, the 2nd Defendant did not refer the Court to section 4 of EMA, 2017. It is as if it does not exist in that statute. It only concentrated on sections 107 and 108 that seemed to advance its position. The 2nd Defendant could have done better than that so that the Court is ably assisted to reach a just and fair decision.

[40] When one considers sections 4, 107 and 108 of EMA, 2017 in their totality, as reproduced in this ruling, the intention of Parliament is clear. The establishment of the Environmental Tribunal under section 107 was never

[12] *See* for instance, *Nseula -vs- Attorney General and another* [1999] MLR 313, at 324.

intended to bar any persons from having direct access to courts of law. The Court agrees with the submission of the Claimants that under EMA, 2017, persons have a choice whether they would like to go through the route of the Environmental Tribunal or have direct access to courts of law. It is therefore incorrect to suggest that persons can only approach this Court only by way of appeal from a decision of the Environmental Tribunal. Persons may also approach it as a court of first instance.

[41] The Court took its time to peruse all the decisions relied upon by the 2nd Defendant in support of its contention that the Claimants are in the wrong forum. What comes out clearly in the *Cuepers, Chilemba* and *Kamphoni* decisions, is that the High Court was dealing with matters that had been brought or filed in the High Court when there was a specialized court, or a specialized division of the High Court and Magistrates' courts with jurisdiction over the same subject matters. They never considered the question of tribunals, that are essentially quasi-judicial bodies, as the 2nd Defendant argued in its Skeleton Arguments. To that extent, those decisions do not aid the 2nd Defendant in its objection and contention that the Claimants have filed their application in the wrong forum. They are clearly distinguishable. Consequently, it is the Court's finding that the Claimants are in the right forum. On non-operationalization of the Environmental Tribunal, this Court agrees with the 2nd Defendant that the Claimants did not bring evidence before the Court to prove that point. This Court cannot rely on a statement made by the learned Advocate for the Claimants from the Bar that the fact of the non-operationalization of the Environmental Tribunal is contained in a *Public Sector Reform Report, Area No. 5* to the effect that the same will be

operationalized between the period 2021 to 2026 without that report being properly tendered in evidence, as it were.

[42] Even if this Court was wrong in its conclusion on this point in failing to extend, the application of the principle enunciated in the trio decisions referred to in the previous paragraph, to the Environmental Tribunal, that which is doubtful, it would still be firm on its position which is grounded on another principle. That principle is that a statute takes precedence over any court decision or decisions on any point of law. In this case, section 4 of EMA, 2017 allows direct access to a court of law notwithstanding the establishment of the Environmental Tribunal. It would be doing violence to the language of section 4 of EMA, 2017 for this Court to refuse to assume jurisdiction on the ground that a written complaint was not first filed to the Environmental Tribunal. This state of affairs is not unique to EMA, 2017. It is now settled law that the Electoral Commission also sits as a tribunal.[13] Under section 113 of the Parliamentary and Presidential Elections Act,[14] a person can submit a written complaint alleging an irregularity to the Electoral Commission as a tribunal. Under section 114 of the same Act, an appeal shall lie to the High Court against a decision of the Electoral Commission, as such tribunal, confirming or rejecting the existence of an irregularity. Under section 100 of the same Act, the same person can approach the High Court directly on the same complaint. Aggrieved parties who approach the High Court are never turned away on the basis that they did not first file their complaint with the Electoral

[13] *See* for instance, *Jessie Kabwila -vs- Electoral Commission* Election Case No. 2 of 2014 (High Court of Malawi) (Principal Registry) (Unreported).

[14] Cap. 2:01 of the Laws of Malawi.

Commission. Such parties have a choice whether to proceed by way of lodging their complaint with the Electoral Commission or directly with the High Court. There is absolutely no legal sanction for the choice that the parties make. Certainly, it cannot be different in this application before the Court now.

A similar situation also obtains under the Workers' Compensation Act,[15] which established a Workers' Compensation Tribunal, but section 63 thereof is clear that the Act does not bar any person from approaching a court of law directly on personal injury claims arising from workplace but commenced under the common law tort of negligence.[16] This Court therefore affirms its earlier holding and finding that the Claimants are not in the wrong forum. In terms of section 4 of EMA, 2017 they had the option of accessing this Court directly. Their application is therefore not a nullity. The first preliminary objection is now therefore overruled.

[43] This now takes the Court to the second preliminary objection whether or not the 2nd Defendant has a legal capacity to be sued as such. The 2nd Defendant's main contention is that the 2nd Defendant is not a legal person, and therefore it cannot be sued as such in a court law and that in the absence of proper parties before the court, the application must be dismissed. Going by the passage quoted from Stuart Sime's book, the 2nd Defendant was in essence also

[15] Cap. 55:03 of the Laws of Malawi.

[16] *See Universal Security Services -vs- Redson Pherewende* Miscellaneous Civil Review Case No. 77 of 2021, (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

contending that it had been joined to the application purely for the purpose of obtaining disclosure against it.

[44] It should be recalled that the Claimants contended that they sued the partner entities constituting the 2nd Defendant because the 1st Defendant has consistently refused to provide documents and information to them that would have enabled them to know how the joint venture was set up. They further argued that sustaining this preliminary objection, would be rewarding the 1st Defendant for their conduct of failing to provide the requested documents, information and joint venture agreement, if one exists. The Claimants submitted that in any event, this preliminary objection was premature as no proceeding has been commenced yet.

[45] It might as well be that the 2nd Defendant is not a legal entity *per se*. If indeed it is not, it was incumbent upon the 2nd Defendant to produce before the Court the evidence of what the correct legal entity is. It was the 2nd Defendant that was raising this objection and so it had the obligation to prove it. This was not done in its sworn statement in support of the notice of the preliminary objection. So, as things stand, it is not known how the joint venture of the partner entities constituting the 2nd Defendant was set up, whether it was through a third, separate, legal entity or indeed through a joint venture agreement. In the absence of that crucial information, would it be fair to dismiss the Claimants' application based on this objection? This Court thinks not.

[46] The Court would therefore agree with the contention of the Claimants that they have been led to sue the partner entities constituting the 2nd Defendant

due to the conduct of the 1st Defendant in refusing to provide documents and information which they requested pursuant to their right of access to information under both the Republican Constitution of Malawi, Access to Information Act[17] and EMA, 2017.

[47] In *The State and Malawi Electoral Commission and Attorney General, Ex-Parte Ellock Maotcha Banda*[18] the 1st Respondent raised an objection that the application had been commenced against a non-entity, the Malawi Electoral Commission. The Court observed that the 1st Respondent was calling itself the Malawi Electoral Commission on its logo and other official documents. The Court took the view that it was a clear case where equitable estoppel must be invoked to restrain the 1st Respondent from asking the Court to dismiss the matter on the point of a wrong citation of its name in point of law. The Court said:

> As is well known, equitable estoppel applies to restrain a person, body or entity from taking unfair advantage of another person by seeking to rely on the technical instrument of the law, when, through his/her/its own conduct or representations, it has induced that other person to act in a certain way.

[48] The Court observes that the Claimants have been led to sue the 2nd Defendant using the partner entities constituting the 2nd Defendant because of the 1st Defendant's conduct in failing to provide the documents and information that they requested from it. Just like in the *Ex-Parte Ellock Maotcha Banda* case, the Court takes the view that the 2nd Defendant should be restrained from

[17] Act No. 13 of 2017.

[18] Election Case No. 13 of 2019 (High Court of Malawi) (Zomba District Registry) (Unreported).

taking unfair advantage of the Claimants by seeking to rely on the technical instrument of the law when through the conduct of its principal, the 1st Defendant, they both have caused the Claimants to act in the way they did. For this reason and also the failure by the 2nd Defendant to produce proof of what the actual legal entity is, the second objection is also overruled. The names of the partner entities constituting the 2nd Defendant with the addition of, "JV" suffice as a correct party having legal capacity to be sued as such for purposes of this matter.

[49] On the third objection, whether or not the 2nd Defendant is a correct or necessary party to these proceedings, the Claimants did not touch on it. Procedurally, it should have been sustained if it was based on a factual situation. But it is not. It is based on a legal point and so the Court has to determine it.[19] In the view of this Court, this preliminary objection is not very much different from the formulation of the second one. The Court takes the view that the 2nd Defendant is a necessary party to the proceedings. The aspect of being a correct party has already been addressed under the second preliminary objection and so it will not be repeated here. The long and short of it, is that the 2nd Defendant is a known or disclosed agent of the 1st Defendant. The 2nd Defendant cannot therefore seek to be excluded from the direct consequences of the agency relationship it has with the 1st Defendant, more particularly, when the Claimants are seeking an order restraining the 1st Defendant, its servants, **agents** or whosoever acting on its behalf from carrying out and or implementing activities of the Project in issue in breach of the conditions issued to it by MEPA as well as in total disregard to the

[19] *See* n1 above.

UNESCO recommendations and other legal requirements. It cannot be correct that the 2nd Defendant was only joined to the proceedings purely for the purpose of obtaining disclosure against it. It is beyond that. It was open to the Claimants to join the 2nd Defendant as an agent of the 1st Defendant. Resultantly, the third objection must be and is also hereby overruled. The present proceedings cannot therefore be struck out with costs at this stage. The Court will now proceed to deal with the application for an urgent interlocutory order of injunction and order for the release of or provisions of various documents and information.

**The Application for an Interlocutory Order of Injunction and Order for Release of Documents and Information**

**The Claimants' Case**

[50] The 1st Defendant's Project is meant to extract water from Lake Malawi at Nkhudzi Bay to a treatment facility to be located at the foot of Nkhudzi Hill, then pump the treated water to a reservoir to be built atop Nkhudzi Hill so that it flows by gravity to the various surrounding areas that are to be supplied with the water.

[51] The Claimants state that the said Nkhudzi Hill is a protected area and that it is within the boundaries of Lake Malawi National Park – a United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Site, so inscribed, since 1984.

[52] They further state that before the said Project is further implemented or recommenced, certain legal requirements, by prescription of local and international law must be met – which requirements include prior approvals of impact assessment reports, consultations, and the obtaining of licenses, amongst others.

[53] The Claimants allege that the Defendants herein however, in or about January 2021 began implementation of the Project without the requisite approval of the 1st Defendant's Environmental and Social Impact Assessment (ESIA) by MEPA, amongst others.

[54] As a result, MEPA thereafter by an Environmental Protection Order (EPO) dated 11th May, 2021, immediately stopped the Project and fined the 1st Defendant the sum of MK5,000,000.00.

[55] By a letter dated 25th June 2021, the 1st Defendant sought from MEPA a waiver, allowing it to continue construction works of its staff houses and office block, which MEPA duly granted by its letter dated 27th June, 2021 and that MEPA further informed the 1st Defendant that, "*the granting of the waiver does not mean that the EPO has been lifted*".

[56] The Defendants herein however continued to implement other aspects of the Project in breach of the EPO and waiver which precipitated in MEPA issuing a Closure Order of the Project on 9th November, 2021.

[57] Subsequently, on 21st December, 2021, MEPA issued a *Notice of Approval to Proceed with the Project* but **with conditions**. On 6th January, 2022 the Closure Order was finally lifted.

[58] Some of the pertinent conditions imposed by MEPA with the *Notice of Approval to Proceed with the Project*, are that the 1st Defendant must, before continuing or implementing the Project:

58.1 institute a robust multi-stakeholder monitoring arrangement for the project which shall include representation from relevant lead agencies, Mangochi District Council, **civil society**, local leaders and cottage/lodge owners within the Project area;

58.2 support conservation, surveillance monitoring, and environmental audit requirements during the construction and operation of the project, with particular focus on the Nkhudzi Bay area;

58.3 sign Memorandums of Understanding (MoU) with Departments of National Parks and Wildlife, Monuments and Museums; Fisheries; Forestry; Water Resources; and the District Technical Team for an integrated approach to resources and ecosystems management and conservation which shall include preparation of by-laws for protection of Nkhudzi Hill project site to avoid further destruction;

58.4 involve relevant authorities responsible for the protection and management of cultural heritage resources in Malawi such as the Department of Museums and Monuments, and Malawi National Commission for UNESCO in the implementation of the project's cultural heritage management plan;

58.5 develop and implement a grievance redress mechanism for the project;

58.6 fully comply with recommendations and mitigation measures outlined in the Environmental and Social Management Plan, and the Cultural and Heritage Management Plan in the approved ESIA report;

58.7 comply with all other relevant legislation applicable to the project including the Occupational Safety, Health and Welfare Act, Water Resources Act and Environmental Management Act;

[59] The Claimants allege that regrettably, the Defendants herein upon receipt of the *Notice of Approval of Project* and *Lifting of Closure Order* from MEPA, have, without complying with the conditions imposed, recommenced implementing the Project.

[60] They further allege that as of Wednesday, February 16, 2022, the Defendants had brought onto the base of Nkhudzi Hill, inside Lake Malawi National Park, machinery to, and began to fell trees, cut down vines, remove vegetation and clear a path or roadway to and on said Nkhudzi Hill.

[61] The Claimants state that since Nkhudzi Hill is within the boundaries of Lake Malawi National Park – which is a protected area and UNESCO inscribed World Heritage Site/Property and Malawi being both a signatory to the 1972 UNESCO World Heritage Convention (concerning the protection of the World Cultural and National Heritage), as well as, the 2003 UNESCO Convention of Safeguarding of Intangible Cultural Heritage, further conditions, obligations, mandates and operating guidelines must be followed and complied with, such as notice to the World Heritage Committee, through its Secretariat, so that the Committee may assist in seeking appropriate solutions to ensure the outstanding universal value of the property is fully preserved, before any Project is implemented.

[62] On or about, 19th July, 2021, the 1st Defendant submitted a draft of its ESIA Report to UNESCO's Secretariat.

[63] On 27th July, 2021, UNESCO responded to the 1st Defendant's submission, and amongst others, recommended the following:

63.1 The revision of the ESIA to address several important highlighted points and **for the resubmission of the revised ESIA** to the World Heritage Centre **before** taking a final decision on the Project;

63.2 UNESCO **strongly recommended** that a reasonable timeframe be factored in for consultation processes, noting that the consultation period was very short;

63.3 Given UNESCO's **analysis and potential negative impacts of the project on Lake Malawi National Park**, UNESCO recommended that **alternative locations be considered** in order to allow the services (of the Project) to be provided to people while avoiding any potential impacts on the World Heritage Property;

63.4 That in accordance with the Operational Guidelines for Implementation of the World Heritage Convention, all projects with potential impacts on the Universal Outstanding Value of World Heritage Properties should be subject to an environmental impact assessment in accordance to the **IUCN World Heritage advice note on Environmental Assessments**; and in case of cultural properties, **ICOMAS Guidance on Heritage Impact Assessment** for Cultural World Heritage Properties; and

63.5 That UNESCO **be informed before undertaking any activities** that may have irreversible impacts on World Heritage Properties.

[64] The Claimants state that to their knowledge and information, the Defendants have begun to carry out works and activities in the said World Heritage Site without first conforming to any and or all the above listed UNESCO recommendations.

[65] They further state that the Republican Constitution of Malawi, affords and requires the full recognition of the rights of future generations by means of

environmental protection and the sustainable development of natural resources; the conservation and enhancement of the biological diversity of Malawi; and prevention of the degradation of the environment.

[66] In the circumstances, as described herein, the Claimants state that the Defendants are proceeding with the whole Project:

66.1 Unsupervised, unmonitored and without any environmental safeguards in place and in direct breach of the conditions imposed by MEPA under its *Notice of Approval of the Project*;

66.2 In a UNESCO World Heritage Site/Property without considering, abiding by, and or conforming to the recommendations of UNESCO, thus risking the loss of Lake Malawi National Park's status as a World Heritage Site, as well as, the benefits and protections the same provides to the environment and the cultural heritage and artefacts, the said park; and,

66.3 In derogation of rights and duties enshrined in the Republican Constitution of Malawi.

[67] The Claimants state that under all these circumstances, the Defendants' continued work of the Project, including its unfettered incursion into Lake Malawi National Park would, can, and will, result in irreparable and irreversible harm for which damages would be an inadequate remedy, which damages include but are not limited to:

67.1 The loss of trees and vines that are in some instances are over 100 years old;

67.2 Exposing the slopes of Nkhudzi Hill to erosion, and the waters of Lake Malawi National Park to siltation, which has already began to take place after rains fell on Tuesday, February 22, 2022 which will inevitably lead to the extinction of the endemic *mbuna* fish, found nowhere else in the world, which fish thrive in clear water and feed of rocky edifices which are being covered by the siltation and erosion;

67.3 Through the blasting of rocks to create an access road, the loosening, dislodging and destruction of caves and rock paintings already discovered on the said hill and other undiscovered artefacts which will result in the permanent loss to important historical and archaeological findings;

67.4 The loss and destruction of other archaeological sites, specifically, grave sites and ancient pottery, some of which have been discovered along the path where the Defendants' access road is proposed to transverse;

67.5 The likely loss to Lake Malawi National Park of its World Heritage Status, as well as, and the protection and benefits the said status brings to the park's, biosphere and wildlife;

67.6 The likely outcome that if the World Heritage Site status is stripped from Lake Malawi National Park, then all other sites, within Malawi, awaiting inscription by UNESCO as World Heritage Sites, will not be approved – which sites include: Mulanje Mountain Biosphere Reserve; Nyika National Park; Khulubvi and Associated *Mbona* Sacred Rain Shrines; Malawi Slave Routes and Dr. David Livingstone Trail; Lake Chilwa Wetland; and Vwaza Marsh Wildlife Reserve.

[68] The Claimants also state that, the 1st Defendant is, and has been, unwilling to either voluntarily, or upon request, provide pertinent information regarding the Project to, amongst others, the Claimants herein.

[69] Finally, that the Claimants, through their legal representative, have, on multiple occasions requested, information from the 1st Defendant but the said Defendant has not provided the same to the Claimants to-date.

[70] The Claimants have attached various exhibits to their application proving every allegation that requires proof.

**The Defendants' Case**

[71] The Defendants state that the Claimants have not disclosed the actual nature of proceedings that they intend to bring against the 1st Defendant other than that their claim is commenced to protect the degradation and destruction of the environment, specifically, that of Lake Malawi National Park, a protected

area and a UNESCO World Heritage Site and that the claim arises from the 1st Defendant's implementation of its Project at Nkhudzi Bay.

[72] The Defendants allege that from the substance of the claim, the likely proceedings the Claimants may take out against the 1st Defendant is judicial review proceedings.

[73] They state that the Claimants have conveniently not disclosed the actual nature of the proceedings they intend to commence against the 1st Defendant with the aim of obtaining the orders being sought through the backdoor.

[74] The Defendants allege that the Claimants have suppressed a material fact that on or about 20th October, 2021 in Miscellaneous Cause No. 91 of 2021, they applied for permission for judicial review against the 1st Defendant's several decisions including the one to implement the Project at Nkhudzi Hill which is part of Lake Malawi National Park, a World Heritage Site, and decision to refuse or fail to provide and release documents and information, which application was dismissed on 30th November, 2021 on the ground that the Claimants had delayed in commencing the proceedings.

[75] In the previous application, the Claimants also applied for the following interim reliefs, if permission was to be granted:

75.1 An order of interlocutory injunction restraining the 1st Respondent (1st Defendant herein) by itself, its agents, its contractor(s) or by whosoever, from implementing or continuing

to implement the Project pending final determination of this matter or a further order of the Court;

75.2 An order commanding Respondents (who included the 1st Defendant herein) to make available to the Applicants (Claimants herein) any and all information touching upon the Project including but not limited to: the Project brief, if any, submitted by the 1st Respondent (the 1st Defendant) to the 2nd Respondent (MEPA); full contract between the 1st Respondent and Alghanim/PLEM JV (2nd Defendant herein) or any other contractor; any and all pre-feasibility studies, if any, conducted by the 1st Respondent in relation to the Project; any and all communications between the Respondents and any other local and international body in relation to the Project; and all documentation concerning the Project.

[76] The Defendants state that the conduct of the Claimants in taking out the present application in which they are seeking similar interim reliefs as those in Miscellaneous Cause Number 91 of 2021 amounts to an abuse of court process.

[77] They state that paragraphs 7, 8 and 9 of the Sworn Statement in Support of the Claimants' application raise the very same issues that the Claimants raised in the judicial review proceedings that was dismissed. The Defendants have exhibited the entire application in the previous case as their evidence.

[78] The Defendants further referred to paragraphs 10 and 11 of the Sworn Statement in Support of the Claimants' application and stated that if the 1st Defendant has not complied with the conditions set down by MEPA in the *Notice to Proceed with the Project*, which the 1st Defendant denies, the solution lies in the Claimants taking up the matter with MEPA.

[79] The Defendants referred to paragraph 14 of the Sworn Statement in Support (on UNESCO recommendations) and stated that all those issues had been addressed by the 1st Defendant and that is why MEPA issued a *Notice to Proceed with the Project* to them.

[80] Finally, the Defendants stated that the present proceedings are not only an abuse of court process but have also failed to satisfy the requirements for an urgent relief before starting a proceeding by not disclosing the actual nature of the claim the Claimants intend to bring against the 1st Defendant.

**Issues for Determination**

[81] The issues for determination before this Court are:

81.1 Whether or not the Claimants' application is an abuse of court process?

82.2 Whether or not it should grant the urgent interlocutory order of injunction being sought by the Claimants?

81.3 Whether the Court ought to order the Defendants to provide the Claimants herein with all the information, documents, drawings, feasibility studies and assessment reports, conducted, produced, received or exchanged by the Defendants in relation to the Project?

**The Law**

[82] Order 10, rules 3, 8, 30, 27 and 28 of the Courts (High Court) (Civil Procedure) Rules, 2017 state as follows:

> 3. A party may apply for an interlocutory order at any stage, namely; before a proceeding has started, during a proceeding, or after a proceeding has been dealt with, and whether or not the party mentioned the particular relief being sought in his summons or counterclaim.
>
> 8. (1) A person may apply for an interlocutory order before a proceeding has started by filing an application in a proceeding and the application shall-
>
> (a) set out the substance of the claim;
>
> (b) have a brief statement of the evidence on which the applicant will rely on;
>
> (c) set out the reasons why it is appropriate that the order be made before a proceeding has started; and,

(d) have with it a sworn statement in support of the application.

(2) The Court may make the order if it is satisfied that that –

(a) the applicant has a serious question to be tried and, if the evidence brought by the applicant remains as it is, the applicant is likely to succeed; and

(b) the balance of convenience favours the making of the order.

(3) When making the order, the Court may also order that the applicant file an application by the time stated in the order.

30. Where a party seeks an urgent relief, the party shall –

(a) state the urgent relief; and

(b) inform the Court, that the party is seeking urgent relief.

27. The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court-

(a) there is a serious question to be tried;

(b) damages may not be an adequate remedy; and

(c) it shall be just to do so,

and the order may be made unconditionally or on such terms or conditions as the Court considers just.

28 The Court may make an interim declaration by an interlocutory order when it appears to the Court to be just and convenient to do so and the order may be made unconditionally or on such terms or conditions as the Court considers just.

[83] Section 13(d) of the Republican Constitution of Malawi provides as follows:

13. The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals-

(d) *The Environment*

To manage the environment responsibly in order to-

(i) prevent the degradation of the environment;

(ii) provide a healthy living and working environment for the people of Malawi;

(iii) accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and

(iv) conserve and enhance the biological diversity of Malawi.

[84] In *Forum for National Development Limited -vs- Richard Msowoya, MP & Anor*[20] the Court stated that:

This Court is aware of the applicable law on interlocutory injunctions as submitted both the claimant and the 1st defendant. The court will grant an interlocutory

[20] [2018] MWHC 1104.

injunction where the claimant discloses a good arguable claim to the right he seeks to protect. This court will not try to determine the issues on sworn statements but it will be enough if the plaintiff shows that there is a serious question to be tried. See Order 10 rule 27 (a) Courts (High Court) (Civil Procedure) Rules, 2017. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality. Beyond that, it does not matter if the claimant's chance of winning is 90 per cent or 20 per cent. See Mothercare Ltd v Robson Books Ltd [ 1979] FSR 466 per Megarry V-C at p. 474; Alfred Dunhill Ltd v. Sunoptic SA [1979] FSR 337 per Megaw LJ at p. 373.

If the claimant has shown that he has a good arguable claim and that there is a serious question for trial this Court then next has to consider the question whether damages would be an adequate remedy on the claimant's claim. See Order 10 rule 27 (b) Courts (High Court) (Civil Procedure) Rules, 2017.

Where damages at common law would be an adequate remedy and defendant would be able to pay them, an interlocutory order of injunction should be refused, irrespective of the strength of the claimant's claim. See Mkwamba v Indefund Ltd [1990] 13 MLR 244.

Where damages are an inadequate remedy the court will consider whether it is just to grant the injunction. See Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules, 2017. This will involve weighing whether the balance of convenience or justice favours the granting of the interim order of injunction. See Kanyuka v Chiumia Civil Cause Number 58 of 2003 (High Court) (unreported); Tembo v Chakuamba MSCA Civil Appeal Number 30 of 2001 both citing the famous American Cynamid Co. v Ethicon Ltd [1975] 2 WLR 316.

[85] In *Fole -vs- Malawi Housing Corporation*[21] the Court stated that:

> In the case of Mangulama and four others v Demmat Civil Cause No. 983 of 1999 Tambala J, as he was then, stated like this:
>
> > *"Applications for an interlocutory injunction are not an occasion for demonstrating that the parties are clearly wrong or have no credible evidence....The usual purpose of an order of interim injunction is to preserve the status quo of the parties until their rights have been determined."*
>
> An application for an order for an interlocutory injunction is determined on affidavit evidence because it is enough that the applicant has shown that there is a triable issue and that damages would not be adequate compensation. If damages turn out to be adequate compensation the court is better not to grant the request. At times even if damages may be adequate or not the court is called to consider the principle of the least injustice or inconvenience. The court will lean in favour of the least injustice outcome between granting and refusing to grant the injunction (American Cynamid Company v Ethicon Limited [1975] A C 396). In considering this the court is actually looking at which outcome would bring more harm. The court must weigh one need against another and determine where the balance of convenience lies. However, where the balance of convenience is evenly placed then it is prudent to preserve the status quo.
>
> Damages would not be sufficient if the wrong is irreparable, outside the scope of pecuniary compensation or if damages would be very difficult to assess.

[86] In *The State and Lilongwe Water Board & Ors, Ex Parte: Malawi Law Society*[22] the Court stated:

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[21] [2016] MWHC 530.

[22] [2017] MWHC 135.

... The Applicant states that the application for the provision of information ... herein is made in terms of Section 37 of the Constitution which guarantees the "right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his or her rights." The MLS states that it needs such information in order to properly prosecute the judicial review application herein.

I am persuaded that this request falls within the remit of the right of access to information under Section 37 of the Constitution. The Court therefore grants the prayer for an Order requiring the 1st Respondent to make available to the Applicant the Project Brief, if any, submitted to the 3rd Respondent; the contract between the 1st Respondent and Khato Civils (Pty) Ltd; and any relevant document concerning the project; and a further Order requiring the 3rd Respondent to make available to the applicant the documents submitted by the 1st Respondent and any other relevant document concerning the project in its custody.

[87] Section 37 of the Republican Constitution of Malawi provides as follows:

> Every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his or her rights.

[88] Section 41(3) of the Republican Constitution of Malawi state that:

> Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.

[89] Section 46(2) and (3) of the Republican Constitution of Malawi provides as follows:

(2) Any person who claims that a right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled—

(a) to make application to a competent court to enforce or protect such a right or freedom;

(3) Where a court referred to in subsection (2) (a) finds that rights or freedoms conferred by this Constitution have been unlawfully denied or violated, it shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a court finds that a threat exists to such rights or freedoms, it shall have the power to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated.

[90] Section 4 and 5 of EMA, 2017 in pertinent part states:

4. (1) Every person has the right to a clean and healthy environment and has the duty to safeguard and enhance the environment.

(4) In furtherance of the right to a clean and healthy environment and the enforcement of the duty to safeguard and enhance the environment, the Authority or the lead agency so informed under subsection (3) or any person interested in enforcing the right to a clean and healthy environment shall be entitled to bring an action against any person whose activities or omissions have or are likely to have a significant impact on the environment to:

(a) prevent or stop any act or omission which is deleterious or injurious to any segment of the environment or likely to accelerate unsustainable depletion of natural resources;

(d) seek a court order for the taking of other measures that would ensure that the environment does not suffer significant harm.

[91] Section 5 (1) of EMA, 2017 states that:

(1) For purposes of ensuring effective public participation, enforcement of rights and duties created under this Act, the Authority shall promote the right of every person to-

(a) access environmental information and lead agencies, private sector and non-governmental organizations shall have a duty to provide such information in a timely manner;

(b) ...

(c) be afforded an adequate and effective administrative or judicial remedy for any harmful or adverse effects resulting from acts or omissions affecting the environment.

[92] The Access to Information Act provides as follows:

Section 4.

The objects of this Act are to-

(a) make provision for access to information that is held by information holders;

(b) ensure that public bodies disclose information that they hold and provide information in line with the constitutional principles of public trust and good governance;

(c) provide for a framework to facilitate access to information held by information holders in compliance with any right protected by the Constitution and any other law;

(d) promote routine and systematic information disclosure by information holders based on constitutional principles of accountability and transparency

Section 5(1)

A person shall have the right to access information, in so far as that information is required for the exercise of his rights which is in the custody of, or under the control of a public body or a relevant private body to which this Act applies, in an expeditious and inexpensive manner.

Section 6(1)

Subject to the Constitution an any other written law, when interpreting this Act, the presumption that favours access to information shall be preferred to that restricting information.

Section 15(2)

An information holder shall, pursuant to subsection (1), publish the following information produced by, or in relation to, that institution within sixty working days of generation or receipt of the information –

(e) Information on any programmes implemented with public funds;

(f) all contracts, licences, permits, authorizations granted, and public-private partnership arrangements entered into by the institution;

(g) reports on surveys, studies or tests prepared by the institution.

[93] The Access to Information Regulations, 2021 state:

> Regulation 28(1)
>
> An information officer shall be deemed to have prevented disclosure of information where -
>
> (b) information is not disclosed within the prescribed time without reasonable excuse.

[94] In *Bentley -vs- Republic*[23] Edwards J, referred to Volume 9 of Halsbury's Laws of England in reference to abuse of court process and stated and applied the following position in law:

> The High Court has an inherent jurisdiction to strike out pleadings or to stay or dismiss proceedings which are an abuse of its process...The inherent jurisdiction to stay or dismiss should be sparingly exercised, and only in very exceptional cases. A person may be prohibited from taking proceedings without leave.
>
> It is stated in the same work (vol.8, at 16): 'Abusing the process of the court is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious, or oppressive, the ordinary remedy in such a case being to

[23] [1973-74] 7 MLR 118.

apply to strike out a pleading or stay the proceedings, or to prevent further proceedings being taken without leave.

[95] Practice Note 18/19/34 of the Rules of the Supreme Court (1999) states:

> If a party seeks to raise a new question which has already been decided between the same parties by a court of competent jurisdiction, this fact may be brought before the Court by affidavit, and the statement of claim, though good on the face of it, may be struck out, and the action dismissed; even though the plea of *res judicata* might not strictly be an answer to the action; it is enough if substantially the same point has been decided in a prior proceeding. But if there be a matter of fact fit to be investigated which the Plaintiff is not estopped from proving, the Court will refuse to stay the action.

[96] In *Kasungu Flue Cured Tobacco Authority -vs- Zgambo*[24] Tambala, J said at page 178 that:

> It seems to me an abuse of the court process to seek relief in one court and when the same is granted to refrain from acting on it but to apply for a substantially similar relief from another court.

[97] The Court's power to dismiss an action for being frivolous, vexatious and or an abuse of court process is beyond question as it derives from the Court's inherent jurisdiction to prevent an improper use of its machinery for being used as a means for vexation.[25]

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[24] [1992] 15 MLR 174 (HC).

[25] *George Yiannakis t/a GPY Investments -vs- Inde Bank Limited* Civil Cause No. 57 of 2016 (High Court of Malawi) (Principal Registry) (Unreported) and *Apex Parts and Accessories -vs- Mangula Transport & Sales Ltd* [1993] 16 (1) MLR 4 (HC).

[98] The categories of conduct rendering a claim frivolous, vexatious or an abuse of court process are not closed and depend on all the relevant circumstances. Some of the examples of conduct consisting of abuse of court process are spurious claims and hopeless proceedings.[26]

[99] In *Bestobell (Mw) Limited -vs- Shire Limited*[27] the Court reasoned that frivolous and vexatious claims are those that are obviously unsustainable.

[100] The position of the law is that generally, it would amount to an abuse of the process of the court for a claimant to maintain two causes of action on the same issues.[28]

**Analysis and Application of the Law to the Facts**

[101] The first issue to be dealt with is whether the Claimants' application is an abuse of court process. This issue must be disposed of first because in the event that the Court agrees that it is, the other remaining issues would automatically fall away.

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[26] *Grace Mijiga Mhango t/a GWC Investments -vs- Ecobank Malawi Limited*, Civil Cause No. 300 of 2015 (High Court of Malawi) (Principal Registry) (Unreported).

[27] Civil Cause No. 1197 of 2003 (High Court of Malawi) (Principal Registry) (Unreported).

[28] *The State (On the application by Mapeto (DWSM) Limited -vs- Malawi Revenue Authority,* Judicial Review Cause No. 84 of 2015.

[102] The Defendants oppose the Claimants' application on two grounds. First, they contended that the Claimants have not disclosed the actual nature of the proceedings that they intend to bring against the 1st Defendant as required by Order 10, rule 8(1)(a) of the Courts (High Court) (Civil Procedure) Rules, 2017 other than that their claim is commenced to protect the degradation and destruction of the environment - specifically, that of Lake Malawi National Park, a protected area and a UNESCO World Heritage Site and further that the claim arises from the 1st Defendant's implementation of the Project in issue. They said this was deliberate because the Claimants intend to obtain the orders being sought through the backdoor.

[103] The Claimants' response was that the details they have given on page 4 of their application are adequate to disclose the nature and substance of the claim. They reiterated that the claim is essentially the protection of the environment as corrected summarized by the Defendants themselves in their argument.

[104] The Defendants further argued that from the substance of the claim stated by the Claimants, the likely proceedings to be commenced by them against the 1st Defendant are judicial review proceedings. They went further to argue that actually, the Claimants did not disclose to the Court that on or about 20th October, 2021 they applied for permission for judicial review against the 1st Defendant's several decisions including the one to implement the Project in issue and that the application was dismissed by Justice N'riva on 30th November, 2021 on the ground that the Claimants had delayed in bringing that application as provided for under Order 19, rule 20 (5) of the Courts (High Court) (Civil Procedure) Rules, 2017. The Defendants exhibited the Ruling

that N'riva, J rendered in Miscellaneous Cause No. 91 of 2021 as, "PCM1". The Defendants contended that in the initial application, the Claimants were also seeking the same or similar interim reliefs that they are applying for now. They argued that the conduct of the Claimants in taking out the present application amounts to an abuse of court process. Advocate Mr. Masumbu also pointed out that the information contained in paragraphs 9 and 13 of the Claimants' Sworn Statement in Support of the Application regarding the EPO dated 11th May, 2021, various letters exchanged between the 1st Defendant, MEPA and UNESCO dated 25th June, 2021; 27th June, 2021; 19th July, 2021; 27th July, 2021 and 13th September, 2021 were all part of the application that was before N'riva, J. He contended that this is evidence that there is re-litigation of the same issues here, even though the Claimants wanted to give an impression that their application is based on entirely new issues. Advocate Mr. Masumbu argued that, this should not be allowed. He further argued that if the Claimants had wanted to pursue this matter further, they should have appealed against the decision rendered by N'riva, J, which they did not. In support of this contention the Defendants cited case and other authorities reflected in this Ruling from paragraphs 94 to 100 above. They also cited the case of *Finance Bank of Malawi Limited (In Voluntary Liquidation) -vs-Lorgat and Others*.[29]

[105] In response, the Claimants argued that as far as they are aware, there is no Order and rule in the Courts (High Court) (Civil Procedure) Rules, 2017 to the effect that in all cases where an interlocutory order before the commencement of proceedings is being sought, the species of proceedings to

[29] Commercial Case No. 56 of 2007 (High Court of Malawi) (Commercial Division) (Blantyre Registry) (Unreported).

be brought thereafter shall be judicial review proceedings. They contended that the Defendants' argument on this point is misplaced.

[106] On the initial application which was dismissed by N'riva J, the Claimants further contended that they sought to determine whether certain decisions made by the 1st Defendant were lawful. Unlike in the present application which has two Defendants, the first one had four Respondents. The Claimants confirmed that there was indeed a prayer for interim reliefs as described by the Defendants but that they were based on decisions that were made prior to October, 2021 which is not the case now.

[107] The Claimants argued that the ruling by N'riva, J was not on the merits. It was on a technicality that the application had been filed late. They further argued that the current application does not relate to any breach committed by the Defendants prior to October, 2021. The essence of the present application relates to transactions that have taken place between November 2021 to February 2022.

[108] On the exchanges between the 1st Defendant, MEPA and UNESCO pointed out by Advocate Mr. Masumbu earlier on, the Claimants responded that while the UNESCO matter indeed took place before October, 2021, the N'riva, J application did not deal with those recommendations as the 1st Defendant had not disclosed that information to them. Advocate Mr. Mzembe emphasized that the issue before the Court in the present application is that the 1st Defendant, through its agent, the 2nd Defendant is proceeding to implement the Project in breach of conditions issued by MEPA and UNESCO recommendations. On the other letters, the Claimants argued that they were

meant to lay the foundation so that the Court has an appreciation of how the matter has come about. Advocate Mr. Mzembe stated that at the end of the day, the question is, if the N'riva J application had been disclosed to the Court, would it have affected the current application? Are the various letters and the initial application materials facts? In his view, they are not. In support of their position, they cited two authorities, *Hon. J. Z. U. Tembo et al -vs- Hon. Gwanda Chakwamba et al*[30] and *Aida Maida -vs- Ali Maida and Salim Bagus*.[31]

[109] On the case of *Finance Bank of Malawi Limited (In Voluntary Liquidation) -vs- Lorgat and Others*, cited by the Defendants in aid of their position, the Claimants highlighted that the doctrine of abuse of court process does not apply where there has been mere procedural defect and the court never went into the merits of the case, even though both parties might have been present before it, as was held in *Jelson Estates Ltd -vs- Harvey* [1983] 1 WLR 1401 cited therein.

[110] Finally, Advocate Mr. Mzembe invited the Court to take note that the Defendants have not denied anything in their Sworn Statements and that they were on technical and procedural issues.

[111] In reply, Advocate Mr. Masumbu argued that procedurally, they could not be expected to go into the details of defence, so to speak, as doing so, they would be deemed to have waived their right to oppose the issues they have raised,

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[30] Civil Cause No. 1750 of 2001 (High Court of Malawi) (Principal Registry) (Unreported).

[31] Civil Cause No. 14 of 2003 (High Court of Malawi) ( Principal Registry) (Unreported).

more particularly, that the present application is an abuse of court process and that it should be dismissed with costs.

**Determination**

[112] On the first issue taken by the Defendants that the Claimants have not disclosed the nature of the claim or proceedings to be brought against the 1st Defendant, this Court is of the view that the same has been sufficiently set out as required by Order 10, rule 8 (1) (a) of the Courts (High Court) (Civil Procedure) Rules, 2017. As the Claimants argued and pointed out, the first part of the claim is to protect the degradation and destruction of the environment, more specifically, that of Lake Malawi National Park, a protected area and a UNESCO World Heritage Site. The second part of the claim relates to the implementation of the 1st Defendant's Project as already described earlier on, in breach of conditions that were issued to it by MEPA in its *Notice of Approval to Proceed with the Project* dated 21st December, 2021 as well as the UNESCO recommendations contained in its letter to the 1st Defendant dated 27th July, 2021.

[113] On the related issue that from the substance of the claim set out by the Claimants, the likely proceedings to be commenced by them against the 1st Defendant will be judicial review proceedings, the Court takes the view that, that was mere conjecture, at best. When one considers Order 10, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 used by the Claimants in their application, towards the end, it states...**and whether or not the party mentioned the particular relief being sought in his summons or counterclaim**. There is a presumption under that rule that the proceeding

envisaged would most likely be commenced or was commenced by summons. In any case, this Court does not think that it lies in the mouth of the Defendants or indeed the Court to dictate or predict the nature of the claim to be commenced by the Claimants. At this stage, the nature of the claim and the mode of commencement that will be employed by the Claimants is neither here nor there. The Court finds that the Claimants had sufficiently set out the substance of the claim.

[114] On the second issue that the Claimants did not disclose the fact that they had applied for permission for judicial review and that they were also seeking the same or similar interim reliefs and that the same was dismissed by N'riva J and that therefore the present application is an abuse of court process, this Court does not agree with the Defendants' submission. First, it has read the Ruling rendered by N'riva J and indeed, as argued by the Claimants, the same was not decided on merits. It was dismissed on a mere procedural defect that the application for permission for judicial review had been filed out of time. Second, the parties in that application and the present one are also different. For the doctrine of abuse of court process to apply, the parties to the new application or case must be the same. The first application had four respondents, while this application has two defendants. The first application had four applicants, while this application has three claimants. Of course, it must be acknowledged that three of the claims in this application were part of the four applicants and one of the defendants in this application was part of the four respondents. Third, while the orders being sought are the same or similar, some of the issues are totally different. For instance, in the first application, some of the decisions being challenged related to, among others, failure by the 1st Defendant to conduct an Environmental and Social Impact

Assessment (ESIA); the decision by the 1st Defendant to carry out construction works of the Project despite an EPO which had been issued by MEPA; the 1st Defendant's decision to schedule a public hearing, against advice, in a highly populated Islamic area on a holy Islamic holiday, when it knew, should have known, and was informed, that the same would restrict, prevent and circumvent the participation, provision of input, or addressing of the concerns by the very people and the very area, the said project will mostly impact. These are no longer in issue in the present application. Therefore, the doctrine of abuse of court process would not apply in the circumstances of this application as was held in *Jelson Estates Ltd -vs- Harvey*.

[115] In the final analysis, this Court rejects the Defendants' arguments that the Claimants seek to bring through the backdoor the same issues that were before N'riva, J. The issues in the two applications are different, while the background information is the same. The Claimants have also satisfied the requirements of Order 10, rule 8 of the Courts (High Court) (Civil Procedure) Rules, 2017. The present application is therefore not an abuse of the court process.

**Determination of the Urgent Orders Sought**

[116] The first question to be dealt with is whether there is a serious question to be tried. The Claimants state that the cause of action of their claim will be around whether the Defendants have complied with: (a) the conditions imposed on them by MEPA before proceeding with the implementation of the Project; (b) the recommendations of UNESCO in regards to the World Heritage Site; and (c) all the applicable laws relating to the Project. To their knowledge and

information, these have not been complied with by the Defendants. It must be stated at this point that the Defendants deny that they have failed to comply with all these in their Sworn Statement in Opposition, more particularly in paragraph 4.8.

[117] The Court then moves on to consider whether damages would be an adequate remedy. The Claimants aver that if the Defendants are allowed to continue the Project, without supervision, monitoring and in breach of MEPA's conditions, and without consideration of UNESCO's recommendations the following will occur:

(a) irreparable and irreversible harm and damage to the felled trees, cleared forest vegetation, disturbance of the natural paths and migratory routes of various wildlife;

(b) the extinction of the one-of-a-kind *mbuna* species of fish, only found in Lake Malawi due to siltation and erosion that will occur due to the removal and/or clearing of the ground protection (vegetation) on the slopes of Nkhudzi Hill when such erosion and siltation contaminates the waters of Lake Malawi and covers the rocky edifices that the *mbuna* fish feed from;

(c) the loss of the World Heritage Status of Lake Malawi National Park and the protection and benefits the said status provides to the said park and species therein;

(d) the likely result that all other sites currently being considered for World Heritage Status will never obtain the said status – which sites currently are: Mulanje Mountain Biosphere Reserve; Nyika National Park; Khulubvi and Associated Mbona Sacred Rain Shrines; Malawi Slave Routes and Dr. David Livingstone Trail; Lake Chilwa Wetland; and Vwaza Marsh Wildlife Reserve;

(e) the derogation of constitutional rights such as not according full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and the failure to conserve and enhance the biological diversity of Malawi.

[118] It is the Claimants' contention that all the foregoing damage and loss as outlined above constitutes irreparable damage that is both outside the scope of pecuniary compensation and for which damages would be an inadequate remedy. Notably, at worst, if the urgent injunctive relief is granted and it turned out that the Claimants are not successful, the worst damage that the Defendants would suffer is delay in the Project – which damages can adequately compensate.

[119] On the question whether it is just to grant the interlocutory order of injunction in this matter, the Court takes the view that it is. The balance of convenience or justice weighs in favour of granting the order. It would be unjust to suffer the damage and loss described by the Claimants in paragraph 117 above. While granting the interlocutory order of injunction being sought by the Claimants would ensure that the 1st Defendant's Project is implemented in a

manner that does not cause such damage and loss and so the country would be able to achieve both the Project and the protection of the environment as well as upholding the rule of law while at the same time respecting Malawi's international obligations. The consideration of the other sites referred to by the Claimants for World Heritage Status would also not be prejudiced. The scales in this matter weigh in favour of granting the interlocutory order of injunction being sought by the Claimants and this Court proceeds to grant them as prayed.

[120] The last issue to be considered is whether the Court should order the Defendants to provide the Claimants herein with all the information, documents, drawings, feasibility studies and assessment reports, conducted, produced, received or exchanged by the Defendants in relation to the Project.

[121] The Claimants' right to a protected environment is enshrined in the Republican Constitution of Malawi and their right and duty to protect the said environment is prescribed by law as we have already seen.

[122] The Claimants' right to actively participate in the protection of the environment by, amongst others, having access to environmental information is also mandated by EMA, 2017.

[123] The Claimants' right of access to information for purposes of enforcing their rights is also enshrined in section 37 of the Republican Constitution of Malawi, as well as, under sections 5(1) of the Access to Information Act.

[124] Where information is not disclosed within the prescribed time and without reasonable excuse, when sought, as has been the case in the instant matter when the Claimants have sought the said information from the 1st Defendant, the said 1st Defendant is deemed, by law, to have prevented disclosure of information in terms of regulation 28(1) of Access to Information Regulations, 2021.

[125] The 1st Defendant's failure to disclose information is a further breach of the Claimants' constitutional right of access to information as well as rights guaranteed by other legislation for which both the Republican Constitution of Malawi and other legislation provide remedies for – which remedies include enforcement of that right by the Court through its coercive powers.

[126] In the instant application, the 1st Defendant has consistently refused/denied to provide the Claimants with the requisite information. The Claimants' request for information and the prayer being sought are consistent with the mandates of the Republican Constitution of Malawi and the pieces of legislation cited herein. Consequently, this Court hereby invokes its coercive powers and orders the Defendants herein to provide all the requested information within 15 days from the date of this Ruling as prescribed in the Access to Information Act.

[127] The Claimants shall have 7 days from the date on which they will have been provided with the requested information to file their claim as provided for under Order 10, rule 8 (3) of the Courts (High Court) (Civil Procedure) Rules, 2017.

[128] The Court makes no order as to costs.

[129] Made in Chambers this 16th day of March, 2021 at Blantyre, Malawi.

**M. D. MAMBULASA**

**JUDGE**