



**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL DIVISION**  
**JUDICAL REVIEW CASE NUMBER 9 OF 2023**

**BETWEEN:**

**THE STATE (On the application of**

**HELLEN BULUMA)**

**CLAIMANT**

**AND**

**THE OMBUDSMAN**

**DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO,**

M. Msuku, Counsel for the Claimant  
Makhambera, Court Clerk

**ORDER**

1. This is the order of this Court on the claimant's application seeking permission to apply for a judicial review of the putative defendant's decision, the impugned decision, declaring that the appointment of the claimant as Deputy Chief Executive Officer of National Oil Company of Malawi Limited (NOCMA) is null and void and that the claimant should not be paid emoluments, terminal benefits or other payments accrued to her during the time the claimant rendered services as Deputy Chief Executive Officer (CEO) of NOCMA.
2. The impugned decision is contained in the defendant's determination in Inquiry number 10 of 2022 dated 30<sup>th</sup> September, 2022.

3. The application was brought in the usual manner, without notice to the putative defendant, pursuant to Order 19 rule 20 (3) of the Court (High Court) (Civil Procedure) Rules.
4. As correctly submitted by the claimant, in her skeleton arguments, it must be observed at the outset that the purpose of an application for permission to apply for judicial review, like the instant one, is firstly to eliminate at an early stage, applications which are either frivolous, vexatious or hopeless and secondly to ensure that an application is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. See *State and Governor of the Reserve Bank of Malawi ex parte Finance Bank of Malawi* Miscellaneous Civil cause number 127 of 2005 (High Court) (unreported); *Ombudsman v Malawi Broadcasting Corporation* [1999] MLR 329 and *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Limited* [1981] 2 All ER 93. This Court must therefore determine whether the claimant's case is fit to proceed to a substantive hearing.
5. The facts of this matter are that the claimant was appointed as Deputy CEO of NOCMA on the directive of the former President of the Republic of Malawi, Professor Arthur Peter Mutharika. The putative defendant got a complaint from a number of persons and upon a thorough analysis of the relevant framework for the appointment to the position to which the claimant was appointed found that the appointment was void *ab initio* meaning that the appointment was void from the beginning and had no legal effect. The main consideration of the putative defendant was that the claimant was appointed by the wrong authority namely, the former President of the Republic instead of the Board of Directors of NOCMA and without following the relevant procedures of advertisement and competitive open recruitment applicable to NOCMA.
6. The putative defendant resolved that she had the mandate to investigate the issues concerning the claimant at NOCMA pursuant to her mandate under section 123 of the Constitution and section 5 of the Ombudsman Act as explained in the binding legal authority in the Supreme Court decision in *The State v The Ombudsman ex parte The Principal Secretary for Finance and Others* MSCA Civil Appeal number 24 of 2017. This is the decision in which

the Supreme Court of Appeal posited that there are no institutions or decisions that are beyond the reach of the Ombudsman, so long as there is maladministration and no remedy reasonably available in a court of law or by way of appeal thereto.

7. The putative defendant noted that according to comparable foreign persuasive legal authority it is not possible to cure an illegal recruitment which was not made by the rightful authority as the Board of NOCMA had attempted to by ratifying the claimant's illegal appointment herein. See *Singh v The State of Bihar and Others* Civil Writ Jurisdiction Case number 7247 of 2011. Specifically, the putative defendant then made the following directives in her determination which are relevant on the present application, namely,

6.3.1 The Board of NOCMA should immediately proceed to effect the attendant administrative action as if the recruitment and appointment of the Ms. Hellen Buluma as Deputy CEO, in fact never happened and did not take place, and on this basis, cause for any purported renewal or extension of the said purported contract to be withdrawn forthwith as well as for the attendant emoluments and benefits under the purported renewed/extended contract to be withdrawn forthwith.

6.3.2 For the avoidance of doubt, on the basis of the findings herein, which in the main, are to the overall effect that Ms. Buluma's contract was void *ab initio* due to its being founded on an irregular, unprocedural and unlawful recruitment and appointment process, the Board of NOCMA should not proceed to either extend or renew the purported initial contract [and] in the event that either the extension or renewal has been effected the same should [be] voided since it is a nullity.

6.3.3 The Board of NOCMA should forfeit payment of any terminal benefits, including gratuity due to Ms. Buluma for the role of Deputy CEO and subsequently acting CEO to avoid creating or perpetuating a situation where Ms. Buluma unduly benefits from an illegality. Ms. Buluma does not have a legitimate expectation in respect of such terminal benefits, since a person cannot be deemed to have a legitimate expectation over an illegality.

8. The case of the claimant is that the decision of the putative defendant is vitiated at law. She asserted that the defendant's decision targeted her and nullified her employment even though she was not responsible for her own recruitment. She further asserted that by section 5 of the Ombudsman Act, the putative defendant is meant to inquire into injustices inflicted on citizens and not victimize the citizens and that the putative defendant acted vice versa in the present case. The claimant further asserted that the putative defendant did not appreciate her powers and ventured into areas of private law. She posited that her employment and entitlements are matters of employment law which is a matter of private law and cannot fall within the arena of section 5 of the Ombudsman Act.
9. The claimant submitted that this is a proper case in which permission to apply for judicial review ought to be granted as there are serious issues fit for further investigation at a full hearing on judicial review.
10. This Court observes that the claimant has not provided a legal basis to assail the well taken legal position of the putative defendant in her determination, which was supported by legal authority, to the effect that it is not possible to cure an illegal recruitment which was not made by the rightful authority as the Board of NOCMA had attempted to by ratifying the claimant's illegal appointment herein. That well taken position by the putative defendant cannot be assailed by the claimant's contention on this application, namely, that the claimant was not responsible for her own recruitment. Further, the decision of the putative defendant is well grounded at law to avoid creating or perpetuating a situation where Ms. Buluma unduly benefits from an illegality given that Ms. Buluma does not have a legitimate expectation in respect of terminal benefits, since a person cannot be deemed to have a legitimate expectation over an illegality. Just as it has been held that a legitimate expectation cannot be had *ultra vires* the relevant statute. See *R. v Inland Revenue Commissioner, ex parte M.F.K. Underwriting Agents Limited*. [1990] 1 W.L.R. 1545 AT 1569-1570.
11. The claimant has also not provided any legal basis for assailing the well taken legal position of the putative defendant on her mandate under the Constitution and the Ombudsman Act that was authoritatively backed by the Supreme

Court of Appeal decision in the case of *The State v The Ombudsman ex parte The Principal Secretary for Finance and Others* MSCA Civil Appeal number 24 of 2017. This is the decision in which the Supreme Court of Appeal posited that there are no institutions or decisions that are beyond the reach of the Ombudsman, that includes the employment decision at NOCMA herein, so long as there are elements of maladministration amenable to investigation by the putative defendant and no reasonably available remedy in a court of law or by way of appeal thereto.

12. In the foregoing circumstances, this Court finds that the present case is not fit for consideration at a full hearing. There are no serious issues fit for further investigation at a full hearing on judicial review. The application for permission to apply for judicial review is accordingly declined.
13. This Court observes that while the application for permission to apply for judicial review pertains to only the single decision considered on the permission application herein, the Form 86 attached appears to allude to additional decisions, some of which pertain to the procedural aspects of the putative defendant's inquiry herein. Those additional decisions cannot be considered as they are precluded on the face of the claimant's permission application.

Made in chambers at Blantyre this 23<sup>rd</sup> February, 2023.

M.A. Tembo  
**JUDGE**