

INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

SAMSON MAKOMBE.....COMPLAINANT

AND

JUDICIARY.....RESPONDENT

INQUIRY NO: 31/2016

FILE NUMBER - BLK-15-OMB-27

DETERMINATION

CORAM

Hon. Martha Chizuma-Mwangonde	-	Ombudsman
Complainant	-	Present
Respondent	-	Absent

DETERMINATION

1. THE INQUIRY

By his letter dated 31st July 2015 the complainant lodged a complaint against the Malawi Judiciary alleging failure by this organ of government to enforce a judgement he had secured at Bilila Magistrate Court. Considering the circumstances surrounding the matter the office decided to investigate the matter by way of public inquiry which took place in Balaka on 19th May 2016. Below is our determination on the same.

2. THE EVIDENCE

The facts of the case are that the complainant herein Mr Samson Makombe instituted civil proceedings against Mr Jokanesi Makombe at Banda Magistrate Court in Bilila, Balaka. He was claiming compensation from Mr Magumbwa who was caught red handed committing adultery with his wife. A day before the hearing one Mr Patrick Banda a court clerk told him that he needed to pay K5000 as it was always important to give the magistrate something before such hearings. The complainant did not have that money and on the date of hearing he could only afford K3000 which he gave to Mr Banda in the presence of Tamani another court clerk of Banda Magistrate. The judgement was in his favour and the magistrate ordered that Mr Magumbwa pay a total compensatory award of K60, 000 to the complainant in instalments of K6, 000 a month.

The first instalment was supposed to be paid on the same day of judgement but the defendant did not have that money and was locked up. However his relations managed to get the K6000 and paid it in court. However it took about 5 days for the court to pay the same to the complainant with the court giving a number of excuses as to why the same could not be paid to him. He was then told to go and get the next instalment together with court fees money on a specific date the following month. When he went he was simply told that the defendant in his case had not paid anything and asked to check with them the following month. This happened for 6 consecutive months and when he went to inquire in the 7th month he was told to pay K3000 to be used for apprehending the defendant and take him to Ntcheu Prison. The complainant however told them that he could not afford that amount but K1000 only. They accepted that amount and told him that he can pay the K2000 later and that the K1000 be paid to the police officer to use to apprehend the defendant. He had to ask for the K1000 from his parents which he gave to the police officer who actually apprehended the defendant and brought him to Banda Magistrate Court. However it later transpired that the defendant gave the K1000 to Mr Banda the clerk who later released him.

After a few months the other clerk, Tamani came to him and demanded K1500 to enforce the judgement which he gave. When he later went to follow up if there had been any progress on the case he was again referred to Mr Banda who demanded more money from him amounting to K2500. Obviously the complainant did not have that money. From that time onwards Mr Banda started ignoring the complainant. One day the complainant met the

Magistrate in town and gave to him K2500 which Mr Banda had earlier on demanded. After some days he was informed that they had executed on the defendant's bicycle but later the story changed to that they had apprehended the defendant. This was however later on disputed by his relations who informed him that the defendant was walking freely in the village.

Despite a cross-examination by His Worship Robert Thindwa, the current magistrate at the court and Patrick Banda the court clerk, the complainant herein was unwavering in his testimony and maintained his story. The respondent's main representative Mr George Chisuse opted not to proffer this own evidence and asked us to simply proceed with the determination.

3. THE ISSUES

Following from the above the main issues requiring determination are:

- a. Whether the Malawi Judiciary failed to assist or act and therefore guilty of any maladministration
- b. Whether the complainant has suffered an injustice
- c. Whether there is an appropriate remedy for the complainant.

4. THE LAW AND ITS APPLICATION TO THE ISSUES

- a. Whether the Malawi Judiciary failed to assist or act and therefore guilty of any maladministration

A combined reading on section 123 of the Constitution and Section 5 of the Ombudsman Act clearly shows that the Ombudsman is mandated to investigate cases of injustices suffered by the citizenry as a result of maladministration perpetrated by amongst others public officers. Some of the maladministration practices are as stated in section 5(1) of the Ombudsman Act and include alleged instances of abuse of power, unfair treatment or oppressive or unfair conduct. However Maladministration has many tenets and as stated by S De Smith and R Braze *'Constitutional and Administrative Law'*, 6th edition p649 :

"...maladministration covers a multitude of administrative sins; sins of commission and omission, corruption, bias, unfair discrimination, harshness, misleading members of the public as to his rights, failing to notify him properly of his rights or to explain the reason for a decision, general highhandedness, using powers for a wrong purpose, failing to consider relevant materials, taking irrelevant materials into account or failing to reply to correspondence'.

In the instant case to ably answer if the respondents failed to enforce the judgement what needs to be established first is whether they had a duty to act in the first place. In this matter the court was faced with a non-complying judgement debtor who defaulted on the payments he was ordered. Order XXI and XXII of the Subordinate Court Rules provides

for enforcement of judgement debt. Whilst other forms of enforcement of payment of judgement debt are driven by the judgement creditor as in issuance of the judgement debtor summons the other forms like arrest or execution can be court initiated or indeed the judgement creditor can also move the court on the same. In the present matter there is no evidence that the respondents who ought to have been aware of these processes applied them as provided for by the law or indeed informed the complainant of his options on the same. Instead all they did was to demand money from the complainant even before the hearing of his case started till the judgement was passed in his favour which money was not even receipted. To date the judgement debt remains unsatisfied and the complainant remains uncompensated despite him giving the demanded money. Based on this it is my considered opinion that the respondents failed to enforce the judgement and therefore are guilty of maladministration.

b. Whether the Complainant has suffered an injustice

Just as with maladministration again there is no specific definition of injustice. However It includes outrage for wrongfully being held in suspense for any other reason, loss of opportunity, could also be financial loss or unnecessary expense, hurt feelings, distress, worry or inconvenience, loss of right or amenity, time and trouble of pursuing a justifiable complaint. That the complainant herein has suffered an injustice in the present case goes without saying. Apart from the financial loss as a result of having not been paid the compensation and also money spent in enforcing its payment, the complainant herein has been abused by a justice system that was supposed to help him with some sort of relief for his emotional pain. Here is a man whose wife, the person who is supposed to be the closest to him next to God of course, commits the ultimate betrayal any married person can commit against his or her spouse; caught red handed in adultery with another man. Now in trying to assuage the pain that he suffered as a result of such betrayal he approaches the courts for compensation against the culprit who led his wife into the adulterous affair. Instead of the court officers assisting him accordingly they add to the distress by demanding money from him even before the hearing of his case started. Upon winning the case, the court officers continue to distress him with more demands for money for enforcing the judgment debt which apparently was never used for the intended purpose because to date the judgement remains unsatisfied. My own observation of the complainant herein is that he is not even one of those you can describe to be of modest means. He belongs to the lowest level of the social strata. Here is a man who as the evidence shows clearly struggles to simply go through a day. Whilst going through this ordeal he even had to ask his parents for K1000 to give to the court officers for the enforcement of his judgement. And yet the court officers mercilessly kept on demanding for more. Thus other than the financial loss the complainant herein has also suffered unfortetold distress, anger and anxiety as a result of the maladministration by the respondents herein.

a. What kind of a remedy is the complainant entitled to

In as far as a remedy is concerned then the basic guiding principle should as far as possible be to put the Complainant in a position he would have been had the maladministration not occurred. Thus the remedy should heal the injustice that has been suffered. Accordingly the Ombudsman can recommend that a certain specific act or new decision be taken; or a direct redress be made as a result of a loss of expense incurred or value of the service that ought to have been provided; or recommendations for systematic change for the benefit of others. However over and above the tangible remedies stated above in almost all cases where maladministration is identified an acknowledgement of responsibility and apology will be expected. It is recommended that the Public Bodies should never underestimate this approach. See generally John Halford and Caroline Robinson, Bindman LLP, *Ombudsman Remedies: Creative Hybrid or Curate Eggs?* (www.publiclawproject.org.uk)

In the instant case the appropriate remedy would be for the respondents to pay back the judgement debt which they have failed to enforce and also the costs that he has suffered in pursuing this justifiable claim.

5. DIRECTIVES

By powers vested in me by section 126(a) of the Constitution and section 8(1)(b) of the Ombudsman Act I hereby make the following directives;

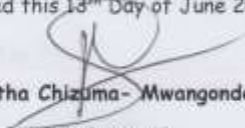
- a) That the respondents should within 21 days from the day of this determination pay the complainant K54,000 being the balance on the judgement debt they have failed to enforce and also K135,000 that the complainant has spent in trying to have his judgement enforced.
- b) That the respondents should within 30 days from the date of this determination take disciplinary actions against Mr Banda and Tamani the court clerks at Banda Magistrate court for money extortion and failure to discharge their duties professionally. The evidence of such action should be sent to this office.
- c) That the Registrar of the High Court and Supreme Court in his capacity as the respondent's controlling officer should within 21 days from the date of this determination write a letter of apology to the complainant herein in Chichewa for the suffering that he has gone through at the hands of his officers. This letter should be copied this office.
- d) This is a typical case that echoes the general discontent amongst the general populace that the justice system only favours the rich. These were also the very sentiments by the complainant in his final words to the inquiry whereby he stated that because he didn't have money he could not get his compensation money. I am aware that the judiciary does a lot of good work in dispersing justice. But I cannot ignore the fact that there are these kind of injustices perpetrated on the poor

people by the judicial system more especially by courts in the remote areas. To this end I direct that the Registrar of the High Court and Supreme Court should within 30 days from the date of this determination demonstrate to me by way of write up the administrative systemic changes within the judicial system that they intend to effect or they are already applying especially in the courts that are within the remote areas that help protect people like the complainant herein from this kind of abuse by his officers.

6. RIGHT OF REVIEW.

Any dissatisfied party may apply for review of this Determination by the High Court pursuant to section 123 (2) of the Constitution within 3 months from the date hereof.

Dated this 13th Day of June 2016


Martha Chizuma-Mwangonde
OMBUDSMAN

DETERMINATION