

# INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

MRS. R. CHISALE & OTHERS.....COMPLAINANT

AND

MACHINGA DISTRICT COUNCIL.....RESPONDENT

INQUIRY NO: 06/2016

FILE NUMBER - LL-07-OMB-0331

## DETERMINATION

### CORAM

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

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## 1. THE INQUIRY

In July, 2007 the Office of the Ombudsman in Lilongwe received a complaint from the three Complainants herein Mrs Regina Chisale, Mrs. M. Kamwendo and M.r W.S Mphaya through Civil Liberties Committee. The claim was delay in the repayment of deceased funds held in various minors' trustee accounts and misappropriated in or around 1994 by a Mr Khauke who worked in the Respondent's Deceased Estate office. The Office of the Ombudsman wrote letters seeking comments from the Respondents in February 2008, July 2008 and June 2010 but the Respondents never responded to the communication. Later on the office undertook three on spot investigations which basically revealed that there were no records to indicate how much was owing to each beneficiary as the records had been deliberately destroyed. Other than that nothing tangible came out of the investigations and thus when this matter was set down for Public Inquiry which took place on 16<sup>th</sup> March 2016.

## 2. THE EVIDENCE

Only one of the Complainants, Mrs Regina Chisale attended the Public Inquiry. According to her one of the other Complainants, Mrs M. Kumwenda died some years back and she has since lost touch with the other Complainant. She testified that her husband who worked for Malawi Army died in 1983. She was paid her death benefits but the funds for her four children were put in Minor's Trust Accounts with each child given K9,995. However the money was only ready for withdraw in April 1994 and she was told to be visiting Machinga District Council every term to draw money for the kid's education. She first went to the DC's office in December 1994 where she withdrew K200 for each child. She went again in the following term in 1995 and withdrew K200 for each child. It was later in 1995 at the beginning of the third term of the school year that she went again to withdraw money for her children. Whilst she was waiting to be assisted in the office she spotted the account books for her children amongst the other books that were on the table. Out of sheer curiosity she decided to look into them. She was shocked to notice that the money for her children had been depleted in the books ; she further noted that the books indicated withdraws of K2000 from each book in that week which she knew nothing about and that when she looked on the other previous pages of the books she noticed numerous K200 withdraws which she never effected.

When she inquired from a Mr Maluwa who was in the office at that time about what this all meant he told her that there had been a fraud by one of the employees at the office, Mr Khauke and that a lot of money belonging to deceased minors accounts had been stolen by him. He

further told her that Mr Khauke in question was under arrest for fraud and that she only needed to wait for the investigations to be finalised. For more than 10 years the Respondents gave her the same excuse that the matter was still under investigations. In 2007 she reported the matter to this office but still continued to make follow ups with the Respondents only to be told to wait more. She explained that she has waited for 22years to see justice done. That within those 22 years one of her children died of HIV/Aids and that she could not afford to properly take care of her due to lack of finances. She further stated that she could not afford to properly educate her remaining children who because of lack of financial assistance could not get good and proper education. Her 2 boys ended up failing MSCE and since she could not afford to support them she simply sent them to South Africa where they are doing manual piece jobs. Her remaining daughter failed her MSCE too and she is simply sitting at home with her.

Mr Masauko Chisale, a clerk at Machinga District Council office agreed with everything that the Complaint had said. He further said that when the incident was discovered there was a first audit that took place which showed that Mr Khauke had stolen a total of K4, 800. Mr Khauke was convicted and sentenced to 18 months imprisonment based on that audit. However whilst he was still serving sentence another audit revealed that a total of K92, 400 had been stolen. However since the investigations involved a lot of money, Police called a lot of people for interview and by this time Mr Khauke had finished his sentence and gone to his home village where apparently he sooner died. Accordingly the Police could not take him to task nor could money be recovered from him. The Respondents then wrote their Headquarters a number of letters asking them to repay the money. Their Headquarters acknowledged receipt of the letters but did nothing more. Because of that the Respondents have also been just waiting till to date. He told the Inquiry that as an office they would want to put this matter to rest and pay the Complainants their money. All they want is for the Ombudsman to direct them on the amount to pay.

### 3. THE LAW AND ITS APPLICATION

Under section 123 of the Constitution and section 5 of the Ombudsman Act, the Ombudsman is mandated to inquire into and investigate all cases of injustices as a result of maladministration by public officials and provide an appropriate remedy. As to what amounts to maladministration and injustice depends on what the respective Ombudsman regards as maladministration and injustice with regard being had to particular facts of each case before him or her. However going by the law and previous determinations, maladministration may

include unfair treatment, delay in providing a service, failure to respond to a communication and failure provide a service. In as far as injustice is concerned the same includes financial hardship, loss of opportunity, distress or outrage.

The three Complainants claim in the present matter is for money under deceased estates belonging to their children stolen by an official of the Respondents in 1994 or thereabouts. The Respondents are not denying the claim. I must say that it is always disheartening to see how deceased estates are handled in most District Councils in Malawi. Going by the number of complaints that this office receives on this issue and also media reports it would seem there is a tendency by Public Officials charged with administration of deceased estates in District Councils to consider deceased estate money as their own personal property and misappropriate it as they wish at the expense of bonafide beneficiaries who most times having lost a parent or spouse have no any other means of survival but that money alone. It is further disheartening to see how public offices like Machinga District Council taking too long to investigate such cases let alone pay back the same to the concerned beneficiaries. In the present case the Respondents admission that the Complainants are owed money is of little comfort to them because a wrong was committed and 22 years later nothing has been done to remedy it. This is totally unjustifiable and it is maladministration in its purest sense.

As a result of such unjustifiable delay in paying back the misappropriated money the Respondents have put the Complainants especially Ms Rose Chisale, the only Complainant who made it to this Inquiry, together with her children in a disadvantaged position. As per her own evidence they have suffered many hardships as a result of being deprived of their late father's money. The children failed to properly finish school due to lack of school fees and other school necessities. One of the kids died whilst she was struggling to make ends meet and provide for her family. In short it has been a hard life for this family all because of the selfishness of one civil servant who stole her money and failure by a public office to make good her loss for 22 years. This is injustice of highest order. And am sure if the other Complainants could make it to the Inquiry their story would not have been different from this one.

In as far as the remedy is concerned it was the Respondents testimony that they could not find any information from the audit report for Ms Rose Chisale's children nor Mr Mphaya's dependant in their audit reports. They only found information for Mrs kamwendo's children. He however admitted that not all accounts were fully audited and that there were some books which were taken to Police during the investigations and went missing whilst in police custody. Accordingly in my view the misappropriated amount that was mentioned could even be more

than K92400 and the number of beneficiaries more than the stated 200 mentioned in the audit. According to Mrs Chisale she had 4 children who each had K9950 in their respective accounts. She however only managed to withdraw K400 for each child leaving a balance of K9550 per child and a total of K38, 200 as at 1994. Obviously after 22 years the money has lost value. Thus it is only fair that the payment should ensure that value of the money is maintained on the date of payment.

In as far as the other two complainants are concerned it is sad to note that Mrs M Kumwenda passed away whilst this matter was going on. As for Mr Mphaya it would seem everyone has lost touch with him. There is no indication of how much was remaining in each of their children's accounts. Thus it is not easy for me to assess how much is due to them. At the same time I cannot ignore the fact that an injustice happened here and that I will be failing my job as a public protector if I do not award them anything. This is because it is clear to me that if I throw them out now their claims will never again see the light of the justice system. Considering all these factors, the appropriate remedy in my view would be to assume that in 1994 the total amount remaining in their minors beneficiary accounts was K12,000 for each of them.

#### **4. FINDINGS**

Following from the above it is my finding that;

- a. Machinga District Council has unjustifiably delayed in paying back the money misappropriated by one of their officials to the Complainants and are therefore guilty of maladministration
- b. As a result of such maladministration the Complainants herein have suffered a lot of hardships and are entitled to a remedy.

#### **5. DIRECTIVE**

Following from the above, I hereby direct

- a. That within 30 days from the day of this determination, the Respondents should pay the Complainants herein as follows;
  - i. Mrs Regina Chisale- K38,200
  - ii. Mrs M Kumwenda (deceased)- K12,000
  - iii. Mr Mphaya- K12,000

The above amounts should be paid at the value that accounts for devaluation over the 22 years that the money has been outstanding.

- b. That the Respondents should within the same period also demonstrate to me by way of write up the systematic changes that they have effected in their office that would ensure that deceased estate funds are protected and that the kind of maladministration as what happened herein does not happen again.
- c. Looking at the manner this issue was handled by the Respondents, to delay re payment for 22 years, I further direct that the Respondent's Principal Secretary writes a letter to the Complainants herein that acknowledges the wrong that happened and apologises for the injustice suffered by the Complainants.

**6. RIGHT OF REVIEW**

Any Party dissatisfied by this determination and with sufficient interest in the matter has a right to apply for review to the High Court in accordance with section 123 (2) of the Constitution within 90 days from the date of this determination.

Made this 4<sup>th</sup> Day of April 2016.

  
Martha Chizuma Mwerigonde

**OMBUDSMAN**

**DETERMINATION**

COMPLAINT

For: Martha Chizuma Mwerigonde

Complainant

Respondent

Complainant

Respondent

Respondent