



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 933 OF 2006**

**BETWEEN:**

**UMIA MARGARET MLOMBA  
(Alias Ex – Chief Chamba (female).....PLAINTIFF**

**- AND -**

**THE ATTORNEY GENERAL .....1<sup>ST</sup> DEFENDANT  
MINISTER OF LOCAL GOVERNMENT .....2<sup>ND</sup> DEFENDANT  
ELIOT TAMBALA (Male) .....3<sup>RD</sup> DEFENDANT**

**CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA  
Mr Makhalira, of Counsel, for the plaintiff  
Mr Kayuni, of Counsel, for the defendant  
Mr Nsomba – Official Interpreter**

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**RULING**

**Manyungwa, J**

This is the plaintiff's Originating Summons against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in which the plaintiff is seeking this court's determination and declarations on the questions as appearing hereunder. The plaintiff is Umia Margaret Mlomba, who is also ex – Chief Chamba while the 1<sup>st</sup> defendant is the Attorney General, the 2<sup>nd</sup> defendant is Minister of Local Government, a Ministry responsible for all Traditional Chiefs in the country and the 3<sup>rd</sup> defendant is Mr Eliot Tambala, who was sometime in October 2004 installed

as new Chief Chamba following the alleged fraudulent retirement of the plaintiff as Chief Chamba in 2002. The plaintiff sought determination and declaration of the court on the following issues.

1. The plaintiff is and was at all material times the lawful Chief Chamba in Machinga District in the Republic of Malawi.
2. On or about the 16<sup>th</sup> November 2002 the 2<sup>nd</sup> defendant unlawfully and fraudulently caused a letter to be written to the effect that the plaintiff had retired as Chief Chamba, when it was in fact, not correct.
3. That by reason of matters aforesaid the plaintiff prays for the following declarations and relief:
  - a) That the 2<sup>nd</sup> defendant acted unlawfully in causing the said letter to be written and have the same acted upon by the addresses.
  - b) The appointment of the 3<sup>rd</sup> defendant as new Chief Chamba sometime in October, 2004 be declared null and void.
  - c) That the plaintiff be reinstated in her position as Chief Chamba.
  - d) That the defendants be condemned in damages suffered by the plaintiff as a result of their unlawful act.

- e) That the court be at liberty to grant further or any relief that the court may deem fit.
- f) Costs of this action.

The Originating Summons herein were returnable on the 11<sup>th</sup> day of May 2006 and on that day the hearing was adjourned at the instance of counsel for the Attorney General, who requested for some more time. The matter was then adjourned to 16<sup>th</sup> May, 2006 and on this date Mr Kayuni Senior State Advocate for the Attorney General raised a preliminary issue, arguing that the mode of commencing proceedings by the plaintiff was not the right one.

Mr Kayuni argued that the plaintiff begun the action in relation to the Chief's Act and that since the issues raised in the summons concern public law rights then the proper mode of commencing these proceedings was by way of judicial review, and not by Originating Summons under Order 5 rule 3 of the Rules of the Supreme Court. Mr Makhalira counsel for the plaintiff, on the other hand submitted that the plaintiff has the right to commence these proceedings by Originating Summons since the same concerns an Act of Parliament to wit the Chief's Act Cap. Further Mr Makhalira submitted that the 1977 Judicial Review Act does not displace the rights of the parties to start an action.

## **THE LAW**

Order 15 Rule 16(4) of the Rules of the Supreme Court quotes with approval the dictum of Viscount Simmonds in the case of **Pyx Granite Co Ltd Vs Ministry of Housing and Local Government**<sup>1</sup>

“It is a principle not by any means to be whittled down that the subject’s recourse for the determination of his rights is not to be excluded except by clear words. That is as McNair J. called it in **Francis Vs Yiewsley and West Drayton UDC**<sup>2</sup> a ‘fundamental rule’ from which I would not for my part sanction any departure.”

Further, it is clear in my view, that the provisions of Order 5 rule 3 make it mandatory for a party to begin an action by Originating Summons wherever the same concerns an Act of Parliament. The said Order 5 rule 3 is as follows:-

Order 5 Rule 3 “Proceedings by which an application is to be made to the High Court or a judge thereof under any Act must be begun by Originating Summons except where by these rules or by or under any Act the application in question is expressly required or authorised to be made by some other means.”

Clearly, the act involved here is the Chief’s Act and therefore the proper mode of commencing proceedings is by way of Originating Summons. In the case of **Maurice Maulidi Vs Hanif Motani**<sup>3</sup>, the High Court said:-

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<sup>1</sup> **Pyx Granite Co Ltd Vs Ministry of Housing and Local Government** [1960] AC 260 at 286

<sup>2</sup> **Francis Vs Yiewsley and West Drayton UDC** [1957] 2QB 136

<sup>3</sup> **Maurice Maulidi Vs Hanif Motani** Civil Cause Number 612 of 1989

“First, learned counsel argued that the plaintiff was wrong in instituting the present proceedings by Originating Summons. He contended they should have been begun by Writ of Summons. He cited Order 5 of the Rules of the Supreme Court in support of the submission. *With respect, I do not agree. As I understand it, proceedings by which an application is made to this court under An Act should normally be instituted by Originating Summons, unless the relevant Act expressly says the proceedings should be begun otherwise.* See Order 5 Rule 3. As earlier indicated, the present proceedings were brought under the provisions of the Copyright Act and I opine, therefore, that they were properly brought by Originating Summons.” (emphasis mine)

## **CONCLUSION**

In these circumstance and by reason of the foregoing, I am of the considered opinion that the plaintiff properly brought these proceedings by way of Originating Summons. It is therefore my finding that the defendant’s preliminary objection is unsustainable and consequently I dismiss it forthwith with costs.

*Pronounced in Chambers* at Principal Registry this 11<sup>th</sup> January, 2008.

Joseph S Manyungwa

**JUDGE**