



**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL CAUSE NUMBER 538 OF 2013**

**BETWEEN:**

**BARTON CHIMTENGO**

**PLAINTIFF**

**AND**

**EVELYN MEMAYAKO**

**1<sup>st</sup> DEFENDANT**

**TRADITIONAL AUTHORITY NJOLOMOLE**

**2<sup>nd</sup> DEFENDANT**

**PARAMOUNT CHIEF GOMANI V**

**3<sup>rd</sup> DEFENDANT**

**Coram: Justice M.A. Tembo,**

Gondwe, Counsel for the Plaintiff

Kambuwa, Counsel for the Defendants

**ORDER**

This is this court's order on the plaintiff's application for an interim injunction sought to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by themselves, their servants and agents from recognizing, appointing, nominating or installing the 1<sup>st</sup> defendant to the throne of Village Headman Kabango or performing any function of the said

office or calling herself as such until determination of this matter. The application is opposed by the defendants.

Both the plaintiff and the defendants filed affidavits which were in evidence on this matter. The plaintiff also filed skeleton arguments which this Court appreciates.

The plaintiff's case is that for the purposes of his application the historical background of the chieftaincy in dispute on this matter shall date back to 1993 when he was instructed by members of the royal clan to be acting Village Headman Kabango on behalf of his sister Eluby Chintengo who was then staying in Blantyre. The plaintiff states that he acted as Village Headman Kabango until 2006. He states further that soon after the death of Eluby Chintengo the Inkosi Gomani IV instructed the royal family to choose a successor to the chieftaincy and that Mr Loneck Kabango was appointed to the throne. However, the plaintiff states further, that Mr Loneck Kabango at that time was staying in Mozambique and would not be in a position to run the village. The plaintiff states further that, to the surprise of the royal clan, the 1<sup>st</sup> defendant Memayako Kabango, the sister of Mr Loneck Kabango, replaced Mr Loneck Kabango as Village Headman Kabango without consulting the family members and the same was unilaterally done without informing Inkosi Gomani IV. That the 1<sup>st</sup> defendant only served as Village Headman for two years and later on the plaintiff was once again appointed in consultation with Inkosi Gomani IV and he was installed as Village Headman Kabango. The plaintiff was appointed on 10<sup>th</sup> April 2010 and has been village head since then. The plaintiff attached an identity card that identifies him as Barton Kabango.

The plaintiff states that on 30<sup>th</sup> September 2013 Inkosi ya Makosi Gomani V informed him, through Mrs Malinki, that they no longer recognize the plaintiff as Village Headman Kabango and that they would be installing the 1<sup>st</sup> defendant as Village Headman kabango instead. Consequently the plaintiff seeks that the installation of the 1<sup>st</sup> defendant be restrained until his claim to the chieftaincy is resolved.

On the contrary, the defendants' case is that the Village Headmanship Kabango runs on the paternal side. That the 1<sup>st</sup> defendant is nee Kabango. The defendants allege that the plaintiff comes from the maternal side of the Chintengo family who

are related to the Kabango family and therefore cannot properly be Village Chief. The defendants allege that what actually happened is that when the previous Village Headman Kabango had died the successor was either Mr Loneck Kabango or the 1<sup>st</sup> defendant. However, Mr Loneck Kabango was appointed Village headman Kabango. Mr Loneck Kabango was resident in Mozambique and indicated that he was going to Mozambique to get his family so that they come back to Malawi and he would run the Kabango village. The defendants state that it is at this point that the plaintiff went to Inkosi Njolomole, and not Inkosi Gomani IV, where he misled Inkosi Njolomole that Mr Loneck Kabango had abandoned his chieftainship. The defendants state further that Inkosi Njolomole asked the plaintiff to convey a message to the Kabango family to go and see Inkosi Njolomole about the Kabango Chieftainship. The defendants state that this message was deliberately never conveyed by the plaintiff and consequently Inkosi Njolomole was left with the impression that the Kabango family was not interested and ordered that the plaintiff be installed as Village Headman Kabango.

The defendants therefore argue that the plaintiff deliberately suppressed material facts that he is on the maternal side of the Chimtengos and cannot be Village Headman Kabango as only Kabangos can be Village Headman Kabango. The defendants also point out that the plaintiff is a Chimtengo despite his identity card showing that he is a Kabango. This fact is conceded by the plaintiff who said that he started using the Kabango name since he is Village Headman Kabango.

This Court finds from the foregoing that the plaintiff is indeed not a Kabango. He has not disputed the allegations that he came in to the Chieftaincy after Loneck Kabango went to Mozambique. Further the other allegations that the 1<sup>st</sup> defendant and Loneck Kabango were next in line for the Chieftainship have not been disputed at this stage. This Court wishes to further add that the defendants also added that the 1<sup>st</sup> defendant was advised by Inkosi Njolomole that she could not be installed Village Headman because Government had stopped installing female chiefs and that is why the plaintiff was allowed to act as Village Headman.

The defendants have also exhibited a letter from the District Commissioner for Ntcheu to Inkosi Njolomole dated 1<sup>st</sup> April 2010, copied to both the plaintiff and the 1<sup>st</sup> defendant, asking the Inkosi to suspend the installation of Village Headman

Kabango until a dispute in relation to who was the rightful heir to the said chieftainship was resolved then.

In the premises the defendants contend that the plaintiff should not be granted the injunction sought as he has no claim to the Kabango chieftaincy as he has deliberately suppressed material facts on this matter. The defendants ask that the installation should go ahead.

The plaintiff however maintains that he was installed Village Headman in consultation with Inkosi Gomani IV in full recognition of customary practices of the area and that the matter herein will go to trial for a determination of whether he is the rightful heir and in the meantime the status quo ought to be maintained.

This Court is aware of the applicable law on interim injunctions as submitted by the plaintiff. The court will grant an interim injunction where the applicant discloses a good arguable claim to the right he seeks to protect. The court will not try to determine the issues on affidavit evidence but it will be enough if the plaintiff shows that there is a serious question to be tried. If the plaintiff has shown that he has a good arguable claim and that there is a serious question for trial then the court will consider whether the balance of convenience favours the granting of the interim order of injunction. See *Tembo v Chakuamba* MSCA Civil Appeal Number 30 of 2001. 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.

In the present case it appears that from the affidavit evidence of both parties there is a serious question to be tried namely, who is the rightful heir to the Kabango Chieftaincy. Customary law will have to be proved on that point at trial.

This Court also has to determine whether the plaintiff has a good arguable claim to the right sought to be protected namely that he is the rightful heir to the Kabango Chieftaincy. On this point, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the custodians of the customs in the area of the dispute. They are the Inkosi and Paramount Chief. It appears at this stage that these defendants state that the plaintiff used deception to

get himself installed as Village Headman Kabango. The plaintiff has not disputed this fact at all. It is doubtful in these circumstances that the plaintiff has a good arguable claim to be the right person to occupy the chieftaincy.

If this Court is wrong and the plaintiff actually has a good arguable claim to protect since he is the sitting chief then this Court would have to consider the other factors on application for an injunction.

This Court would then have to consider the question whether damages would be an adequate remedy to either party if the injunction is granted. 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 plaintiff's claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244. Clearly in a chieftainship wrangle it would be difficult to determine damages either way so the issue of adequacy of damages is out of the question. This is a matter involving an office and it would not be possible to quantify damages at all. They would not be an adequate remedy.

This Court would then have to determine if the balance of convenience favours the granting of the injunction. Most injunction cases are determined on the balance of convenience. In *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396 Lord Diplock said, at p. 408:

. . . it would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

In other cases, such as *Cayne v Global Natural Resources plc* [1984] 1 All ER 225, the courts have insisted that it is not mere convenience that needs to be weighed, but the risk of doing an injustice to one side or the other. Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* said the extent to which the disadvantages to each party would be incapable of being compensated in damages is always a significant factor in assessing where the balance of convenience lies.

The question in the present matter becomes: where does the balance of convenience lie i.e. whether it is in favour of granting the interim order of injunction or not. It appears the granting of an order of injunction in this chieftaincy wrangle would perpetuate an injustice to the 1<sup>st</sup> defendant who,

according to the affidavit evidence which the plaintiff has not disputed, was next in line to be the Village Headman Kabango had it not been for the misleading conduct of the plaintiff to Inkosi Njolomole. The balance of convenience therefore seems at this point to lie in favour of refusing the injunction so that custodians of the customary law in the area make things right with regard to the Kabango village head man by installing the 1<sup>st</sup> defendant as Village Headman Kabango. If this Court has not properly assessed the balance of convenience, and injustice to the parties in this matter would be even either way, then this Court has to make further considerations.

In *American Cyanamid Co. v Ethicon Ltd* Lord Diplock said at p. 408 that, in considering the balance of convenience: ‘Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo’. From *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, it appears that the status quo ante is the state of affairs before the defendant started the conduct complained of, unless there has been unreasonable delay, when it is the state of affairs immediately before the application.

The status quo ante in the present matter, where the plaintiff is alleged to have engaged in deceptive conduct by not advising the Kabango family to meet Inkosi Njolomole and then got himself installed headman, is actually what obtained before this deceptive conduct. And it is clear that the next in line to be village headman was the 1<sup>st</sup> defendant after Mr Loneck Kabango who went to Mozambique. Preserving the status quo would therefore involve the installation of the 1<sup>st</sup> defendant as village headman by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are custodians of custom in the area otherwise you would continue to have a village headman that was allegedly installed as a result of dishonest conduct on his part.

In the foregoing premises, the injunction sought by the plaintiff is therefore declined with costs to the defendants.

Made in chambers at Blantyre this                      November 2013.

M.A. Tembo

**JUDGE**