



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

JUDIAL REVIEW CAUSE NO 109 OF 2010

BETWEEN:

THE STATE

-AND-

THE ATTORNEY GENERAL 1ST RESPONDENT

LASTON KALIBA 2ND RESPONDENT

EX PARTE:

**ALLACKSON WILLIAM (on his own
behalf and on behalf of the other Members
of THE CHINKAZICHINA FAMILY) APPLICANTS**

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

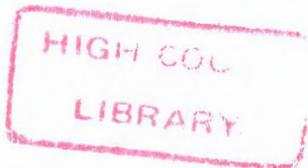
Applicants, present and unrepresented
Mr. Chipeta, of Counsel, for the 2nd Respondent
Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

This case is before this Court, through the judicial review machinery within the purview of Order 53 of the Rules of the Supreme Court (RSC). This case has a very troubled history. It was commenced on 19th August 2010. Three other Judges handled it before I became seised of it in 2014.

The Applicants were on 25th November 2010 granted leave to move for judicial review of *“the decisions of the Government recognizing and installing the 2nd*



Defendant as Chief Kunthembwe” [hereinafter referred to as the “challenged decisions”]. The Court also ordered a stay of the installation process pending the judicial review proceedings.

The challenged decisions are set out in the Notice of Application for Leave to Apply for Judicial Review, otherwise known as “Form 86A”. The reliefs sought by the Applicants are also contained in Form 86A and they read as follows:

- i. *A declaration that the manner in which the 2nd Respondent was installed as **Chief Kunthembwe** is against **Mang’anja** culture and lacked full consultation amongst the stakeholders.*
- ii. *A declaration that according to **Mang’anja** chieftaincy custom(s), children of **sisters of the Chief** succeeds the **Chief** after death.*
- iii. *An interim relief in the form of an injunction order restraining the 2nd Respondent performing the functions of **Chief Kunthembwe** until full consultations among all stakeholders according to **Mang’anja** customs and beliefs and until the **Chief Kunthembwe** is duly chosen following **Mang’anja** customs, belief and procedures.*
- iv. *A Declaration that the due process of choosing **Chief Kunthembwe** be held according to **Mang’anja** custom and belief.”*

Form 86A has a section entitled “**GROUND S ON WHICH RELIEF IS SOUGHT**” and it is couched in the following terms:

“The manner in which the 2nd Respondent was installed as Chief Kunthembwe is unjust, arbitrary and unreasonable”

Form 86A is supported by an Affidavit Verifying Facts on which Leave for Judicial Review was sought, and it reads as follows:

3. ***THAT** this action is commenced on my own behalf and on behalf of other members of the **Chinkazichina Kunthembwe family** whose names addresses and descriptions are shown in form 86A.*
4. ***THAT** the current **Chieftaincy of Kunthembwe** emanated from the **Chinkazichina Kunthembwe Chieftaincy**.*
5. ***THAT** I am a member of the **Chinkazichina Kunthembwe family** and I am therefore familiar with the **Chieftaincy of Chinkazichina Kunthembwe and Kunthembwe**.*
6. ***THAT** **Chieftaincy of Chinkazichina Kunthembwe and Kunthembwe** are one and the same.*
7. ***THAT** our forefather **Chief Chinkazichina Kunthembwe** left **Chikhwawa district** and settled in **Blantyre** where the **Chieftaincy** continued until he died in **1924**.*

8. *THAT Chief Chinkazichina Kunthembwe was supposed to be succeeded by his nephew Henry Makunje when he died in 1924 according to Mang'anja customs and beliefs.*
9. *THAT Henry Makunje failed to succeed Chinkazichina Kunthembwe because he was preoccupied with missionary work.*
10. *THAT the son of Chinkazichina Kunthembwe, Bigelesi succeeded his father because all eligible successors were preoccupied with other works.*
11. *THAT it was contrary to Mang'anja customs and beliefs for Bigelesi to succeed his father.*
12. *THAT Bigelesi was succeeded by Amosi Gwadani who was a son to his sister Apachete.*
13. *THAT Amosi Gwadani was succeeded by his brother Henderson Gwadani who was later succeeded by Dyson Jobo who was his nephew.*
14. *THAT succession line from Bigelesi until Dyson Jobo did not follow Mang'anja culture and beliefs.*
15. *THAT the 2nd Respondent succeeded Dyson Jobo when he died in August, 2009 despite concerns raised by the Applicants over the irregularities in the succession line.*
16. *THAT the 1st Respondent failed to resolve the matter when it came before the Blantyre District Assembly.*
17. *THAT the 1st Respondent intends to install the 2nd Respondent despite the irregularities in the succession line.*
18. *THAT I am the rightful heir to the Chieftaincy according to Mang'anja culture and beliefs.*

WHEREFORE I humbly pray before this Honourable Court that leave to move for judicial review be granted and the decision of the Malawi Government to recognize the 2nd Respondent as Chief Kunthembwe be stayed and an injunction be granted restraining the 2nd Respondent from performing the functions of Chief Kunthembwe."

The 1st Respondent opposes the motion for judicial review and he has, to this end, filed an affidavit in opposition wherein he deposes as follows:

- “3. *I refer to the documents, including affidavit, filed by the Applicant in this matter and respond as follows in opposition to the Applicant's motion.*
4. *Nomination of my name to take over the office of Chief Kunthembwe was done on 23rd April 2010 at Chikowa Headquarters, following due and appropriate process. Copy of minutes of the proceedings of 23rd April 2010 is attached as exhibit "LKI".*

5. *On 13th May 2010, the 2nd Respondent duly communicated my said nomination to the Secretary for Local Government. Copy of the 2nd Respondent's letter dated 13th May 2010 is attached hereto as exhibit "LK2"*
6. *On 7th July 2010, the State President approved my name and appointed me to the office of Chief Kunthembwe. My installation into office was set for 12th August 2010. Copy of the letter from Secretary for Local Government dated 9th July 2010, communicating the State President's decision, is attached hereto as exhibit "LK3"*
7. *The Applicant commenced the action herein on 23rd November 2010. I am reliably informed by my lawyers, and I verily believe the same to be true to the best of my knowledge and belief, that the Applicant commenced the action herein outside the prescribed period of three months for commencing Judicial Review. The action herein was commenced more than three months from the day I was nominated on 22nd April 2010; the day the 2nd Respondent communicated my nomination to the Secretary for Local Government on 13th May 2010; the day the State President appointed me on 9th July 2010; and the day I was set to be installed on 12th August 2010.*
8. *Further, I am also informed by my lawyers, and I verily believe the same to be true to the best of my knowledge and belief, that the action herein has been commenced against wrong parties because, under section 4 of the Chiefs Act, the decision to recognize my entitlement to and appoint me to the office of Chief Kunthembwe is vested in the State President and not the 2nd Respondent.*
9. *I repeat paragraph 8 above and state that, as such, the State President's decision to recognise my entitlement to and appoint me to the office of Chief Kunthembwe, including my installation thereto, cannot, as the Applicant purports to do in the present action, be challenged by suing me and the 2nd Respondent.*
10. *Leave for Judicial Review in the present action was, as such, wrongly obtained by the Applicant and the action herein lacks merit."*

The Respondent's skeleton arguments and oral submissions followed very closely the "arguments" set out in the affidavit in opposition. Counsel Chipeta submitted that the action herein was commenced outside the prescribed period for commencing judicial review proceedings, contrary to Order 53, r.4 (1) of the RSC. He further submitted that the Applicant has sued wrong parties in that the decisions being challenged are vested in the President under section 4(1) of the Chiefs Act.

The submissions by the Applicant were also concise and brief. With respect to commencement of the judicial review proceedings, the Applicant invited the Court to note that leave to commence the proceedings was granted not on 23rd November 2010, as alleged by the 1st Respondent, but on 19th August 2010.

As regards the appointing authority, the Applicant submitted that it is not true that it is the President who appoints chiefs. In the Applicant's view, the President only approves the nomination. The Applicant also argued that the District Commissioner was properly made a party to the action because he acts on behalf of the Government. It was thus submitted that the objections by the 1st Respondent lack merit and must be dismissed.

It is trite law that the Attorney General cannot be a party to judicial review proceedings unless it is shown that the office of the Attorney General was itself privy to a decision that is being challenged: see **The State v. Attorney General (Ministry of Education), HC/PR Miscellaneous Civil Cause No. 49 of 2006 (unreported)** wherein Kapanda, J made the following instructive observations:

*"Before I further delve into the matter, let me make an observation here. The applicants have cited The Attorney General (Ministry of Education) as the respondent. As I had noted in the matter of **The State and Attorney General, Mapeto Wholesalers and Faizal Latif Civil Cause No. 253 of 2005**, applicants in judicial review cases should learn to distinguish them from civil procedure (suits by or against the Government or public officers) Act, Cap 6:01 of the Laws of Malawi. Certainly, judicial review proceedings are not legal suits. In the latter, the Government is sued through the Attorney General who is the Principal Legal Advisor. The position is therefore clear that the Attorney General cannot be a party to such proceedings unless it is shown that the office was privy to a decision that is being challenged. The cases of **Kool Temp Co vs The Controller of Customs and Excise and the Attorney General (1992) TLR 523 at 524** and **Forbes vs Attorney General of Jamaica No. 2004/HCV 01286** have emphasized that point that the Attorney General is not a proper party in judicial review proceedings. These decisions have also been followed in the Republic of Belize in the case of **Regina vs Attorney General ex parte Belize Telecommunications Ltd Action No. 40 of 2002**. Here in Malawi, similar approach has been taken in the case of **Hon Brown Mpinganjira and others vs The Speaker of the National Assembly and Attorney General Miscellaneous Civil Cause No. 3140 of 2001 (unreported)**. The applicants therefore should not have cited the Attorney General herein. The correct party is the Ministry of Education as put in brackets."*

Further, the present case involves the office of a Chief, namely, the office of Chief Kunthembwe. In this regard, it is important to bear in mind that appointment of Chiefs is governed by section 4 of the Chiefs Act, which provides as follows:

"(1) The President may by writing under his hand appoint to the office of Paramount Chief, Senior Chief or Chief such person as he shall recognize as being entitled to such office."

(2) *No person shall be recognized under this section unless the President is satisfied that such person-*

- (a) *is entitled to hold office under customary law;*
- (b) *has the support of the majority of the people in the area of jurisdiction of the office in question; and*
- (c) *in the case of the office of Senior Chief, is a chief and is recognized by all chiefs in his district as being entitled under customary law prevailing in that district to be appointed Senior Chief.*

(3) *The appointment of any person to the office of Senior Chief under subsection (1) shall not affect the status of the substantive office of Chief or in any way confer on that person additional jurisdiction to the jurisdiction which he had before being appointed Senior Chief."*

It is crystal clear from a reading of section 4 of the Chiefs Act that it is only the President who is vested with the power to appoint a person to take over the office of Chief Kunthembe. The Respondents do not at all have such mandate. In the premises, I fully agree with Counsel Chipeta that the application for judicial review has been directed at wrong parties.

In the circumstances, the Court has no option but to dismiss the action herein. The upshot of the Court's ruling is that there is no basis for the sustenance of the Order obtained by the Applicant staying the installation process. Consequently, the said Order is also hereby discharged.

Pronounced in Court this 9th day of June 2017 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE