



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NUMBER 480 OF 2010

BETWEEN:

NUMELI BAUDALA (Group Village Headman Sambani)-----PLANTIFF

AND

FANUEL KAWALE(Group Village Headman Gusu)-----1ST DEFENDANT

DISTRICT COMMISSIONER FOR DOWA-----2ND DEFENDANT

MINISTRY OF LOCAL GOVERNMENT-----3RD DEFENDANT

ALFRED CHIDYAUDZU (Senior Chief Dzoole)-----4TH DEFENDANT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE

Kalasa, Counsel for the Plaintiff

Mtupila, Counsel for the Defendant

Mrs Namagonya Court Reporter

Itai, Court Interpreter

JUDGMENT

“Kusesa Kusiwa”. The first defendant was invited to this ceremony but he never turned up. The plaintiff said he was very surprised when he later heard that on 25th March 2009 that the name of the 4th defendant had been submitted to the District Commissioner by the 1st defendant to be the successor of the late Foster Gusu without performing the ceremony of “Kusesa”. The 1st defendant has no authority to submit the name

of the successor on his own without consulting the plaintiff. The plaintiff also said that there is need for rotation of the

Chieftaincy as there are several royal families. He also went on to state that only three families out of the eight were involved in appointing the 4th defendant. The families such as Sambani (Salima), Nkanthama and Kanyowe did not take part. The Sambani family from Salima the sisters had to be involved in the nomination of the Chief. According to the evidence of the second witness, the "Mbumba" were responsible for choosing the successor to the deceased. The term Mbumba referred to the sisters, daughters, and nephews. **But when choosing the chief only women go into the house to choose.**

The defendants also gave their detailed evidence. Fanuel Kawale was the first witness. He confirmed that the Dzoole Chieftaincy is of Chewa tradition and it comprises the royal This matter commenced by originating summons filed by the plaintiff Numeli Baudala (a.k.a. Group Village Headman Sambani) on 18th of August 2010. It is 7 years since the matter first saw the corridors of justice. The vexing question that one would be tempted to ask is that why has the matter taken so long. It is not my intention to go into the minute details of what has been happening at each and every stage since August 2010. I however felt duty bound to narrate some skeleton history of the matter so that parties to this case do appreciate what has been happening in case they have forgotten some events. I can however confess that it has really been a bumpy road to justice for the parties.

The history of the matter in a nutshell is as follows:

1. The matter commenced on 18th of August 2010.
2. On 21st of August 2014 Justice Fiona Mwale delivered a default judgment in favour of the plaintiff.
3. On 28th of August 2014 the defendant obtained a stay of execution of the judgment before Justice Fiona Mwale.
4. On 14th of October 2015 Justice Chifundo Kachale ordered that the judgment delivered by Justice Fiona Mwale should be set aside and further ordered that the matter be re-heard as the defendant did not have the opportunity to be heard.
5. The matter was fully re-heard before Justice Kachale. On 5th August 2016 Justice Kachale delivered a judgment. In that judgment, the judge observed that the proceedings are deemed to fall below the standard of propriety worth of fair trial. The judge in particular discovered that counsel Rodrick Makono had acted as a legal practitioner for both the plaintiff and the defendants in the course of the same proceedings. The court found that counsel Makono was in breach of his professional duty. The judge therefore decided to set aside the entire proceedings and ordered that there should be fresh trial before another judge and that the two defendants namely Fanuel Kawale (1st Defendant) and Alfred Chidyaudzu (4th Defendant) were advised to identify a different legal practitioner other than counsel Rodrick Makono.

6. The defendants on 24th October 2016 did appoint Messrs Chibwana & Associates as their new legal practitioners in place of Messrs Makolego & Company who so previously acted for them.
7. On 21st of November 2016 the defendants changed legal practitioners from Messrs Chibwana & Associates to Mtupila and Company.
8. I first came on the scene in this matter on 13th September 2016 when I granted an injunction in favour of the plaintiff.
9. On 4th January 2017 after hearing an inter-parte application I ruled that the said injunction should be maintained.

It was now clear that I had taken over the matter from Justice Kachale and started hearing the matter on 22nd June 2017. It has therefore taken me 7 months to complete the matter hence the judgment today.

For purposes of record, it would have been more appropriate for the plaintiff to have cited the Attorney General as a party instead of the District Commissioner Dowa and Ministry of Local Government as 2nd and 3rd defendants respectively.

The plaintiff in his originating summons claimed against the defendants for:-

- a) An interpretation that in exercising his duties of appointment of a Chief under section 4 of the Chiefs Act,

the President must take into account rules of relevant customary law.

- b) A declaration that the first defendant has no right under the Chewa customary law to nominate anyone to succeed to the Dzoole Chieftaincy and that the nomination was fraudulently done.
- c) An order that Alfred Chidyaudzu should cease to hold the substantive position of chief or Senior Chief Dzoole as he was a mere care taker.
- d) An order that the Dzoole Chieftaincy should revert to the plaintiff in his customary role as the mother of the Dzoole Chieftaincy pending the performance of the ritual and the formal nomination of the person to succeed to the Dzoole Chieftaincy.
- e) An order of costs.
- f) Any such order that the court deems just in the circumstances.

There are three witnesses for the plaintiff's side. The first witness is the plaintiff himself. The second witness is Zambuloni Chithumba Mwale who is village headman Dzoole. The third witness is Sandulizani Josephy Mkanthama. Their evidence is very similar although the plaintiff in his evidence had more details. It is their common story that the origin of the Dzoole Chieftaincy in Malawi can be traced through Sambani in Salima district. It is also their evidence that the Dzoole Chieftaincy is governed by the Chewa customary rules of succession. As of now, group village headman Sambani the plaintiff is regarded

as the mother of the Dzoole Chieftaincy which also encompasses the Chakhadza Chieftaincy which is the creation of the Dzoole which is settled in Dowa District.

The plaintiff told the court that according to the Chewa tradition or custom, in relation to the Dzoole Chieftaincy, Chief Dzoole cannot be installed without being allowed or endorsed by group village headman Sambani. The plaintiff told the court that when the late Chief Dzoole who was Foster Gusu died on 4th September 2008, Fanuel Gusu 1st defendant sent a message to him as the “mother” to preside over the funeral. As per their Chewa culture, a temporary chief called “Chilinda Siwa” had to be appointed. Alfred Chidyauzdu the 4th defendant was the one appointed as “Chilinda Siwa”. According to the custom, after mourning, the “Mbumba” should gather at the “Siwa” to choose the new Chief Dzoole. This ceremony is known as families of Gusu, Matekwe, Khwema and Chakhadza families. Historically he said that Chief Dzoole has an uncle/nephew relationship with Group Village Headman Chidothi and Sambani. Sambani who is an uncle to Dzoole settled in Salima district whilst Chidothi another uncle came with them in Dowa. Sambani the uncle later followed them in Dowa but left the “Mbumba” in Salima. Sambani was allocated land in Dowa and he was also appointed as Group Village Headman. The plaintiff in this case came from Salima in 2006 and he was appointed as care taker Group Village Headman Sambani. As per Chewa tradition, he said that it is the caucus of the “Mbumba” who come up with the name of the successor to the chief which

name is communicated to the royal families including the two uncles Chidothi and Sambani.

After the death of Foster Gusu on 8th November 2008, a caucus of mbumba, nkhoswes, and family members including GVH Chidothe and Sambani the Plaintiff as uncles identified the 4th defendant to be successor to the deceased. The ceremony of "kusesa kusiwa" also known as "kutuluka pa khonde" which as per the Chewa custom is conducted after a day after burial was conducted accordingly. It is possible that the plaintiff missed this function because he left on the day of burial under the pretext that he was escorting a delegation which had come from Salima and did not return. The name of the 4th defendant was thus submitted to the District Commissioner Dowa on 25th March 2009 and this led to the 4th defendant being appointed Chief Dzoole by the State President with effect from 9th August 2010.

The second witness was the 4th defendant. He told the court that he is a direct nephew to the deceased chief. He said that the "Mbumba", and Nkhoswe plus uncle held caucus to identify successor to Foster Gusu. He said that after the process he was identified as the successor. On 25th of March 2009 his name was sent to the DC and on 17th of August 2010 he was appointed Chief Dzoole.

The third witness was Enita Kawale. She is mother to the 4th defendant. It is her evidence that her son the 4th defendant was chosen by the "Mbumbas" and that all the procedures as per

the Chewa culture were followed. In cross examination, the witness however said that at first the 4th defendant was nominated to act and he was doing well. They thereafter did not meet again but recommended his name to the DC. The witness however said the name of the 4th defendant was presented at "siwa" before it was given to the DC at Mponela. She however maintained that the name of the 4th defendant was given at kusesa siwa.

The fourth witness was Samson Masopa who is one of the Nkhoswes (elders) of the Dzoole Chieftaincy. This witness is Group Village Headman Kanyenda. It is his evidence that during the funeral, the "Mbumba" met to choose "Chilinda Siwa" and the 4th defendant was the one chosen to be the care taker chief. After three days, "Kusesa pasiwa" took place and the name of the 4th defendant emerged. At that time, the plaintiff had deserted the funeral ritual process immediately after burial. The name of the 4th defendant was forwarded to the DC for appointment as the successor to Chief Dzoole.

The fifth witness was James Shadreck Andrew Manyetela who was DC for Dowa at the time when these events were unfolding. This witness told the court that his office waits for communication from the royal family as to who will be the successor to the chief. He confessed that he too is from the Chewa tribe and is very conversant with the Chewa culture. It is his evidence that the "Mbumbas" are the ones who choose the name of the successor to the chief. In the instant case, when his

office got the name of the 4th defendant at Mponela where they had decided to meet the Dzoole royal family , it was assumed that the royal family through the “Mbumba” had chosen the successor. It however later transpired that the plaintiff had difficulties to appreciate the 4th defendant being the successor and he lodged a complaint. There were enquiries instituted and at the end of the day, it was decided that the 4th defendant was properly chosen by the Mbumbas and a recommendation was made to the State President to appoint him as Chief Dzoole.

Apart from these witnesses, the court had ordered the parties to agree for a witness who is so conversant with Chewa culture to come and assist the court with objective evidence on the customary practice that prevails amongst the Chewas when it comes to choosing a successor to the chief. The parties on their own volition settled to invite the Right Honourable Justin Malewezi who is former Vice President of the Republic of Malawi. The evidence of Hon. Malewezi was very detailed and to the point. He first gave an analysis of how the Chewa Chieftaincy operates. The Chewa Chief is through a lady. The child of the sister becomes the chief not the child of the chief. There are what is called “mawele” of the chieftaincy. For example, the chief may have three sisters. These would be referred to as bele loyamba, lachiwili or lachitatu i.e. first, second and third. At Chewa custom, the chief may be male or female. The witness said that these women with the children are what is called “Mbumba”. According to the Chewa custom,

the “Mbumba” is very critical when it comes to choosing the successor to the chief. Apart from the Mbumba, there are also nhkoswes but the nkhoswe (counsel) is not part of the discussion and choosing of the chief. Whatever the “Mbumbas” have agreed on, not even a paramount chief can change. He gave an example of a scenario where even Gawa Undi who is the head of all Chewas that he cannot impose a chief on any royal family. He has to respect what these “Mbumbas” have chosen. According to the witness, the eldest lady has the priority to have her children considered first. But in choosing the successor chief, the “Mbumbas” also consider the character of the children and if they find bad characteristics they may move to consider children from the second lady. Amongst the Chewas, there is also “Nkhoswe (counsel)”. It is the Mbumba who choose this family advocate who knows the royal family history very well. This person is an adult and he can also include other elders to be helping him. The Nkhoswes assist in several aspects. Once the chief has died, the eldest sister Kuka sends a message to the Nkhoswe. They tell the Nkhoswe that they want to enter in the Kuka. After the Nkhoswe says yes, then they secretly go in the sealed house. They secretly invite each other in that house and in that house there would be Mbumbas and Nephews of the deceased. There may also be relatives there but they are not allowed to take part in the choice of the successor. Even the Nkhoswe is not part of the discussions. The Nkhoswe will just wait. If the chief is chosen before burial, they announce the name right at the funeral place. If they are still

discussing, they choose “Kalinde” or “Gwiriza” who is also known as “Linda Siwa”. This Kalinde is just a care taker awaiting the choice of the chief. The witness conceded that it’s very rare that “Lindasiwa” becomes a chief. It was the evidence of Hon. Malewezi that what he had said is the general customary practice of the Chewas and the Mbumba concept is applicable to all Chew Chieftiancy. He further said that according to the research that he has done, the first Chieftaincy of Dzoole was Sambani Dzoole who remained at the lake. Although the Dzoole Chieftaincy gives Sambani of Salima respect but there is no way Sambani from the lake can choose a chief in Dzoole in Dowa. If there is any mistake made by the royal family, the Nkhoswe can check the mistake.

Having listened to the evidence of all the witnesses in this matter, let me put it on record that the court is extremely indebted to Hon. Justin Malewezi for his important contribution in this matter. His evidence is very important in this case because it further broadened the court’s understanding of the Chewa culture on Chieftaincy. Hon. Malewezi was also a witness who had nothing at stake in this matter and he appeared objective and very impartial. I therefore thank both counsel for having settled for Hon. Malewezi as a witness who understands the chewa heritage.

Having heard all the evidence, I should now go back to the issues that the plaintiff has raised in his originating summons for determination of this court.

The first point was that this court should determine that in exercising his duties of appointment of a chief under section 4 of the Chiefs Act, the President must take into account rules of the relevant customary law. This point can only be best appreciated if the court does a survey of the law that gives the President the powers to appoint a chief in the Chiefs Act. Section 4 of the Chiefs Act provides:

“ (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”.

From the reading of this very important and relevant section which was ably cited by the plaintiff in his claim, it is very clear that there are two things that are very crucial before the President can appoint a Chief. These are:

- (i) The person to be appointed should be entitled to hold such office under customary law.
- (ii) The person to be appointed has the support of the majority of the people in the area of jurisdiction.

It is of common knowledge that the Office of the President uses offices of District Commissioners for purposes of ascertaining

that the requirements under section 4 above are satisfied. The District Commissioner for Dowa in this case was the one on the ground. The court heard for itself from Mr Manyetela Dw no 5 who was the DC Dowa that his office had to wait for a name from the royal family as per the Chewa custom. The witness tendered in evidence minutes of the meeting where the name of the 4th defendant was nominated by the royal family. The court is now very live to the fact that the 4th defendant is at custom of the Chewa of Dzoole Chieftancy in Dowa entitled to be a chief as he is a nephew to the deceased Foster Gusu. The unchallenged evidence on record is that under Chewa custom, the successor to the chief Dzoole is chosen by the Mbumba. It was clear from the evidence on record that the plaintiff under the Chewa custom has got no powers to choose or approve who should be chief Dzoole. Much as the plaintiff had tried to sound as if he has those powers under their custom, I am afraid to say that there was overwhelming evidence from the witnesses that were paraded in this court that this was not the case. I was also satisfied that the mbumba from Sambani who are left in Salima have no role to play when it comes to the choosing of Chief Dzoole in Dowa. Much as Sambani is the mother of the Dzoole Chieftancy, but only the mbumbas of the Dzoole family take part in the choosing of the successor chief. The court also believed the evidence of the witnesses that the Mbumba from the relevant royal families met to choose who should be the next Chief Dzoole and they settled for the 4th defendant. There is unchallenged evidence on record

that the plaintiff had deserted the funeral ceremony and it is very likely that when the royal families were finalizing the issue about chieftaincy, the plaintiff was miles away. Certainly he did not behave like a responsible uncle because you do not expect an uncle to leave the place before things are finalized. The law requires that the President should be satisfied that the person he is to appoint has the support of the majority of the people in the jurisdiction. Since Chiefs are not elected, the issue of majority may be philosophical. I however take it that the President would be assisted by the DC to ascertain the popularity of the would be chief. This popularity would be gauged through the consensus of the royal family. It is strange that the only complainant is the plaintiff and no one else from the alleged royal families. The plaintiff had mentioned about eight royal families that were to choose the chief. The defendants said it is three families. If there were indeed eight royal families it meant that five were sidelined. Surprisingly, none of these five alleged royal families have come forward to challenge the choice of the 4th defendant as a chief. In this case before me, the plaintiff is only Numeli Baudala and he is not even suing in a representative capacity. What I find therefore is that the President had rightly satisfied himself under section 4 of the Chiefs Act before he appointed the 4th defendant as Chief Dzoole.

On the second point that I should declare that the 1st defendant has no right under customary Chewa customary law to nominate anyone to succeed to the Dzoole Chieftaincy, I was at

pains to appreciate the evidence of the plaintiff that it was the 1st defendant who had nominated the name of the 4th defendant. The evidence from several witnesses was to the effect that the name was taken to the DC by the family which included even the Nkhoswe DW no 4. The minutes from the DC when they met at Mponela also show that the nomination was by the royal family and not the 1st defendant alone. It would therefore be unfair to single out the 1st defendant having nominated the 4th defendant. I therefore find it inappropriate for me to issue a declaration against the 1st defendant. I therefore find that the 4th defendant was properly appointed as Chief Dzoole and that the President had complied with section 4 of the Chiefs Act. I noted that the plaintiff was an attention seeker. I therefore order that the 4th defendant should be deemed to have been appointed as Chief Dzoole with effect from 9th August 2010 being the effective date as per the approval of the State President.

The plaintiff's case is dismissed with costs.

**DELIVERED IN OPEN COURT THIS
2018 AT LILONGWE**

DAY OF JANUARY

**M.C.C. MKANDAWIRE
JUDGE**