



IN THE HIGH COURT OF MALAWI  
MZUZU DISTRICT REGISTRY  
CIVIL CAUSE NO. 62 of 2013

BETWEEN

YOHANE M. KAWECHE ..... PLAINTIFF

AND

DISTRICT COMMISSIONER (NKHATA BAY) ..... 1<sup>ST</sup> DEFENDANT

GROUP VILLAGE HEADMAN CHAMAOYA ..... 2<sup>ND</sup> DEFENDANT

AND

CIVIL CAUSE NO. 30 of 2015

BETWEEN

DOANLD S.C. KAUNDA ..... PLAINTIFF

AND

TRADITIONAL AUTHORITY KABUNDULI ..... 1<sup>ST</sup> DEFENDANT

DISTRICT COMMISSIONER (NKHATA BAY) ..... 2<sup>ND</sup> DEFENDANT

YOHANE M. KAWECHE ..... 3<sup>RD</sup> DEFENDANT

CORAM: Honourable Justice T.R. Ligowe

E. Mbotwa, Counsel for the Claimant

A. Amidu, Counsel for the Defendant

F. Luwe, Official Interpreter

R. Luhanga, Recording Officer and Court Reporter

JUDGMENT

Ligowe J,

1 By a consent order of 20<sup>th</sup> July 2015 Civil Cause No. 62 of 2013 and Civil Cause No. 30 of 2015 were consolidated into Civil Cause No 62 of 2013.

2 Civil Cause No. 62 of 2013 was commenced by Yohane M. Kaweche on 9<sup>th</sup> May 2013 by way of judicial review of the decision of the District Commissioner for Nkhata-bay (DC) to stop him from performing duties as Village Headman Chipimbininga without consulting or hearing from him or the elders of Chipimbininga clan and without giving any reasons whatsoever. So he sought:-

- (a) a declaration that the DC acted *ultra vires* in deciding to stop him from performing the duties of Village Headman Chipimbininga without consulting him or clan elders and without giving proper reasons and without giving him an opportunity to be heard;
- (b) a declaration that the DC's decision is unconstitutional and unreasonable in the *Wednesbury* sense; .
- (c) a like order of certiorari quashing the DC's decision of stopping him from performing duties of Village Headman Chipimbininga;
- (d) an order of permanent injunction restraining Group Village Headman Chamaoya from taking charge of the affairs of Chipimbininga village;
- (e) an order of *mandamus* compelling Group Village Headman Chamaoya to recognise Yohane M. Kaweche as Village Headman Chipimbininga;
- (f) an order of *mandamus* compelling the DC whether by himself, his agents or servants or any person howsoever acting in his behalf to recognise Yohane M. Kaweche as Village Headman Chipimbininga;
- (g) an order directing that Yohane M. Kaweche should be paid his mswahala calculated from December, 2010 to the date of determination of this matter, wrongly withheld by the DC; and
- (h) an order for costs of this action.

3 He sought all this on the grounds that:-

- (a) the DC acted *ultra vires* in deciding to stop him from performing duties as Village Headman Chipimbininga without consulting him or elders of Chipimbininga clan and without giving proper reasons and without giving him an opportunity to be heard;
- (b) the DC's decision to stop him from performing his duties as Village Headman Chipimbininga is unconstitutional and unreasonable in the *Wednesbury* sense;
- (c) the decision of the DC to ask Group Village Headman Chamaoya to take charge of the affairs of Chipimbininga village instead of Yohane M. Kaweche is unreasonable because it is Yohane M. Kaweche who is mandated to take charge of the affairs of the village;
- (d) the DC contravened the provisions of the Chiefs Act in discharging his duties by refusing to recognise Yohane M. Kaweche as Village Headman Chipimbininga who is enjoying the support of the majority of the people of the area; and
- (e) the DC acted *ultra vires* the provisions of the Chiefs Act by refusing to recognise Yohane M. Kaweche as Village Headman Chipimbininga.

4 Let me at this point address an issue of formality I have observed in the present proceedings. Yohane M. Kaweche's application is for judicial review of the decision of the DC and being such the title of the proceedings needed to be reflective of the same. Judicial review is a process under which any law, and any action or decision of the Government is subjected before the High Court for conformity with the Constitution. See s.108(2) of the Constitution. At common law judicial review lies against any person or bodies which perform public duties or functions. In Malawi this is so because of the underlying principles upon which our constitution is founded. That is:-

- (i) all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with the Constitution solely to serve and protect their interests;
- (ii) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;

- (iii) the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice;
- (iv) the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect fundamental human rights and afford the fullest protection of the rights and views of all individuals, groups and minorities whether or not they are entitled to vote;
- (v) all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and
- (vi) all institutions and persons shall observe and uphold the constitution and the rule of law and no institution or person shall stand above the law. See s.12 of the Constitution.

Technically therefore an application for judicial review is brought to the High Court by the State against the person or body carrying out public duties or functions on the application of an individual(s) with sufficient interest in the matter to which the application relates. Thus the title of the application has to be *The State v. Defendant Y, On the application of Claimant X*. In the instant case, *The State v. District Commissioner (Nkhata-bay) and Group Village Headman Chamaoya, On the application of Yohane M. Kaweche*.

5 Civil Cause No. 30 of 2015 was commenced by Donald S.C. Kaunda on 3<sup>rd</sup> July 2015 by way of originating summons for determination of the questions:-

- (a) whether T/A Kabunduli, the DC and Yohane M. Kaweche violated Donald S.C. Kaunda's right to undertake his duties as Village Headman Chipimbininga;
- (b) whether T/A Kabunduli violated Donald S.C. Kaunda's right by installing and crowning Yohane M. Kaweche as Village Headman Chipimbininga;
- (c) whether the DC violated Donald S.C. Kaunda's right by accepting the name of Yohane M. Kaweche as Village Headman Chipimbininga;



- (d) whether Yohane M. Kaweche violated Donald S.C. Kaunda's right by claiming and being installed/crowned Village Headman Chipimbiniga; and
- (e) whether the actions of T/A Kabunduli, the DC and Yohane M. Kaweche of taking away Donald S.C. Kaunda's chieftainship are lawful.

6 Donald S.C. Kaunda therefore seeks declarations:-

- (a) that he, upon being born and staying in the Chipimbiniga family for a period of over 50 years from the 1950s to the present and after having the chieftaincy since early 80s, has better rights over the chieftainship than those alleged by Yohane M. Kaweche;
- (b) that T/A Kabunduli, the DC and Yohane M. Kaweche violated his right to undertake duties and functions as Village Headman Chipimbiniga;
- (c) that the conduct of T/A Kabunduli, the DC and Yohane M. Kaweche is unconstitutional and unjustifiable; and
- (d) that Yohane M. Kaweche has no any right over the Chipimbiniga chieftainship and T/A Kabunduli and the DC erred in installing and accepting Yohane M. Kaweche to be Village Headman Chipimbiniga.

7 He also seeks:-

- (a) an order stopping T/A Kabunduli, the DC and Yohane M. Kaweche from interfering with his chieftainship;
- (b) an order of permanent injunction against T/A Kabunduli, the DC and Yohane M. Kaweche, their servants or agents from interfering in any manner whatsoever with the undertaking of duties and functions of the Chipimbiniga chieftainship by him.
- (c) an order of damages for the conduct of T/A Kabunduli, the DC and Yohane M. Kaweche; and
- (d) any order or direction as the court deems just and proper.

8 Before the two matters were consolidated there was in support of the application for judicial review an affidavit sworn by Yohane M. Kaweche. Thereafter Yohane M.

Kaweche filed a court bundle which contains on top of the affidavit in support, his supplementary affidavit, an affidavit of Vincent Manda, an affidavit of Webster Kaunda (Group Village Headman Chamaoya) and an affidavit of T/A Kabunduli, all in support of the application for judicial review.

9 In support of Daonald S.C. Kaunda's originating summons are the affidavits sworn by Donald S.C. Kaunda, Burton Chirwa, Rodwell Martin Mwase (Gogo Kabila), Group Village Headman Chamaoya and Staffson Mphande.

10 On 20<sup>th</sup> July 2017 the parties entered another consent order that the within matter be deemed to have been commenced by writ of summons and as such all the deponents should be subject to cross examination. This is allowed under O.53, r.9(5) and O.28, r.8(1) Rules of the Supreme Court, the rules of procedure applicable then. O.53, r.9 provided for the hearing of an application for judicial review and in sub rule 5 it stated:-

"Where relief sought is a declaration, an injunction or damages and the court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the court may instead of refusing the application, order the proceedings to continue as if they had been begun by writ; and order 28, rule 8 shall apply as if, in the case of an application made by motion, it had been made by summons."

This is to ensure that the realm for judicial review remains public law remedies and so an application which includes private law remedies or in fact a private law claim, brought inadvertently by judicial review, to continue without the need to start all over again.

11 O.28, r.8(1) provided:-

"Where in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may,

in particular, order that any affidavits shall stand as pleadings, with or without any liberty to the parties to add thereto or to apply for particulars thereof.”

Under O.5, r.4 of the Rules of the Supreme Court, the originating summons procedure was appropriate for proceedings in which the sole or principle question at issue was or was likely to be one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or in which there was unlikely to be any substantial dispute of fact. So it was in circumstances where there appeared to be a substantial dispute of fact in a cause or matter begun by originating summons that the court would order it to continue as if it begun by writ. The particular order made would be for pleadings to be served quickly and then for the matter to be restored for final directions.

- 12 What is important to note at this point is that whatever the change, from judicial review to writ or from originating summons to writ, the nature of the proceedings change. From then on it is a matter commenced by writ and the relevant rules of procedure apply.
- 13 After the consent order of 20<sup>th</sup> July 2017, on 24<sup>th</sup> August 2017, Yohane M. Kaweche filed supplementary affidavits of Goodwill Mwase (T/A Kabunduli) and Vincent Manda. This should not have been the case after the matter was continuing as begun by writ. It appears to have been acquiesced by the other side and so this is not a big issue in the present case.
- 14 There would be at this point an issue as to whether the subject matter of the present proceedings is appropriate to continue otherwise than by way of judicial review considering that the appointment of village headmen is a public function. It was held by Lord Diplock in *O'Reilly v. Mackman* [1983] 2 A.C. 237 that “... it would ... as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O.53 for the protection of such authorities.” *O'Reilly v. Mackman* is the authority for the proposition that if a person



commences an ordinary action where he should have applied for judicial review, the action will be struck out by summary process.

- 15 Now the law regarding the appointment of Village Headmen is that they are supposed to be appointed by Chiefs under s.9(1) of the Chiefs Act and not DCs. The judicial review matter herein was against the DC and Group Village Headman Chamaoya. Judicial review in this matter could not lie against them. A judicial review directed at wrong parties was dismissed in *The State v. The Attorney General and Laston Kaliba, Ex parte Allackson William*, Judicial Review Cause No. 109 of 2010 (HC) (Principal Registry) (unreported).
- 16 I have noted apparently that the DC never bothered to respond to the present proceedings despite having been served with the originating process for Civil Cause No. 62 of 2013. The originating process in Civil Cause No. 30 of 2015 was not served at all on the DC despite being the 2<sup>nd</sup> defendant. In the course of the trial the parties did not even bother about the absence of the DC. As it will unfold in the course of this judgment, this matter is essentially between Yohane M. Kaweche and Donald S.C. Kaunda, each claiming to be the rightful heir to Village Headman Chipimbiniga.
- 17 Let me state at the outset that it is the duty of Chiefs under s.9(1) of the Chiefs Act to appoint Group Village Headmen and Village Headmen. "Chief" under s.2 of the Chiefs Act means a person holding or acting in the office of Chief under the Act. Just like it is required of the President when appointing a Chief under s.4 of the Act to recognize for appointment a person who is entitled to hold office under customary law and who has the support of the majority of the people in the area of jurisdiction of the office in question, so is the Chief when appointing Group Village Headmen and Village Headmen.
- 18 On top of the affidavits earlier mentioned, during the trial, Mr Ron Goodwill Chiwiwi Mwase, the current T/A Kabunduli, Mr Vincent Manda, and Mr Yohane M. Kaweche gave oral evidence for the side of Yohane M. Kaweche, while Mr Donald S.C. Kaunda, Mr Burton Chirwa, Mr Rodwell Martin Mwase (GogoKapira), Mr Staffson Mphande and



Mr Winter Manda (Group Village Headman Chamaoya) gave evidence for the side of Donald S.C. Kaunda.

- 19 From the affidavits and the oral evidence, the account of the matter on the part of Yohane M. Kaweche is that the Chipimbiniga chieftaincy was established in the 1920s by Chikweta Kaweche Chipimbiniga. The Chipimbinigas belong to the Nyalughanga order of Tongas in the North of Nkhata-bay who follow the patrilineal system of inheritance. In or about 1933 Chikweta Kaweche Chipimbiniga appointed his son Samson Kaweche as the heir apparent but he later went to work in Tanzania. At the same time the British Protectorate Government required Village Headmen to be literate and so Chikweta Kaweche Chipimbiniga chose Symon Phiri Kaunda, who was then literate, to act as the Village Headman assisted by Simeon Kaweche, young brother to Samson Kaweche. Symon Phiri Kaunda was a step-nephew to the said Chikweta Kaweche Chipimbiniga, being a son to Nyabanda, a sister to Chikweta Kaweche Chipimbiniga but from a different father. This was a temporary arrangement as the people still waited for when Samson Kaweche would return from Tanzania. Unfortunately he died there and this was known after some time.
- 20 In or about 1956 Simeon Kaweche attempted to get back the chieftaincy from Symon Phiri Kaunda but this was resisted due to Symon Phiri Kaunda's mistaken belief that the chieftaincy was matrilineal. The struggle to get back the chieftaincy continued even after 1964 until Simeon Kaweche died in 1972 when Symon Phiri Kaunda appointed his son Donald Kaunda to be the Village Headman.
- 21 In or about 1996 Donald Kaunda suggested of establishing sub-village Chikweta headed by Mathias Kaweche or Francis Kaweche under the new approach to Government development programs to assist in distribution of farm inputs. This was not accepted by the Kaweche family.
- 22 It is not clear from the evidence, how and when changes began but later the elders of the Kaweche family approached the Kaunda family on the need to get the chieftaincy back. This was resisted and it prompted Group Village Headman Chamaoya under whose

jurisdiction is Chipimbinga village to refer the matter to T/A Kabunduli. The T/A sanctioned the Group Village Headman to resolve the matter with the help of other Group Village Headmen within T/A Kabunduli. This happened on 17<sup>th</sup> September 2011 and the meeting was attended by Group Village Headmen Mchingalombo, Dembathuli and Mkuli and the Kaweche and Kaunda royal families including Donald Kaunda. This meeting resolved that Yohane M. Kaweche is the rightful heir to Village Headman Chipimbinga. A judgment is exhibited marked GM1 signed by Group Village Headmen Chamaoya, Mkuli, Mchingalombo and Dembathuli, as well as Vincent Manda the master of ceremonies at the meeting, Pearson Chiumia, the Group Village Headman's secretary and Y. M. Kaweche the new Village Headman Chipimbinga.

- 23 Group Village Headman Chamaoya reported this to T/A Kabunduli upon which the T/A sent him back again to confirm that the issues had indeed been resolved and that Yohane M. Kaweche had the support of the villagers. After this was done the T/A instructed for the installation of Yohane M. Kaweche as Village Headman Chipimbinga and it was done. In his letter of 24<sup>th</sup> January 2012, the T/A reported the change to the DC. It is the T/A's evidence that he never received any complaint from anyone in the village and the royal family after this was done.
- 24 Turning to Donald S.C. Kaunda, his account is that Yohane M. Kaweche is not the rightful heir to Village Headman Chipimbinga but Village Headman Chikweta which ruled as from 1996. Donald S.C. Kaunda is a son to Symon Kaunda who was Village Headman Chipimbinga from 1933 to 1980. Donald S.C. Kaunda succeeded his father in 1980 before he died in 1986. The six royal families of the chieftaincy comprising Chimuduki Chunda, Kadawilanga, Manda, Soka Chiumia, UKaweche, UKaunda and Chimuzi Chirwa led by Group Village Headman Chamaoya presented his name to Kabunduli Kalonga the then T/A Kabunduli and the T/A accepted.
- 25 In 2010 after the death of the then Village Headman Kaweche the UKaweche expressed no interest in that chieftaincy and so led by Yohane M. Kaweche claimed the Chipimbinga chieftaincy. The matter had to be resolved by Group Village Headman Chamaoya with the help of other surrounding Group Village Headmen. The matter failed

to take place on the first day of hearing. On the second date, while the royal families waited at Group Village Headman Chamaoya's house, the Group Village Headmen had gone to Yohane M. Kaweche's house at Ekwendeni. They returned to deliver a ruling for the hearing that occurred in the absence of the royal families, giving the throne to Yohane M. Kaweche.

- 26 Donald S.C. Kaunda disputes that Village Headman Chamaoya presided over the hearing but Group Village Headman Dembathuli. The same is repeated by Mr Winter Manda (Group Village Headman Chamaoya). Winter Manda expresses no knowledge of having called and presided over a hearing over the issues regarding the chieftaincy of Village Headman Chipimbinga in his evidence. He has no knowledge of GM1. The explanation however is that around 2011 the Group Village Headman was his father, Christon Manda, who is now working at Luwanga in Mzuzu and stopped performing the duties and functions of Group Village Headman Chamaoya. Winter Manda was given power to act by his father but he has not yet been formerly installed.
- 27 It is interesting to note that there appears to be four distinct personalities involved in this matter in the capacity of Group Village Headman Chamaoya. The first is Webster Kaunda who swore an affidavit in support of Yohane Kaweche but was not called to give oral evidence. The second is the one who swore an affidavit in support of Donald S.C. Kaunda. His proper name has not been disclosed in the affidavit. He disputes having presided over the hearing of the issues regarding the Chipimbinga chieftaincy because the other Group Village Headmen left him aside and appointed Group Village Headman Dembathuli to preside. He accuses the other Group Village Headmen involved, of sidelining Donald S.C. Kaunda at the hearing and meeting Yohane M. Kawache at his house at Ekwendeni, a process which led them to make a wrong determination. He was not called to give oral evidence. The third is Winter Manda and the fourth is his father Christon Manda.
- 28 The parties consented to proceed with this matter as if it begun by writ specifically to allow for cross examination of the deponents of the affidavits. The purpose of cross



examination is to test the credibility of the witness and the veracity of his evidence. Looking at the two opposing accounts to this matter, it was indeed proper that the deponents be cross examined. After all is said and done the court settles for the account that is more probable than the other, because the burden of proof in civil matters is on a balance of probabilities.

- 29 What is clear so far from the totality of the evidence from both sides is that the first Village Headman Chipimbininga was Chikweta Kaweche Chipimbininga from around 1920s to 1933. Then came his nephew Symon Kaunda from 1933 to 1980. From 1980 it has been Donald S.C. Kaunda and now we have this case. It is also clear that the chieftaincy is patrilineal although Symon Kaunda succeeded his uncle in 1933.
- 30 What is not clear and where the cross examination needed to have assisted is the hearing process before Group Village Headman Chamaoya and its outcome. But Webster Kaunda was not called to be cross examined and Counsel for Donald S.C. Kaunda never queried. The group Village Headman who swore an affidavit in support of Donald S.C. Kaunda was not called and counsel for Yohane M. Kaweche did not query either. Winter Manda had not sworn any affidavit but he was called and his evidence has not been helpful because he has no knowledge of the issues herein. His father Christon Manda was not called but perhaps he would have clarified issues. An issue also arose, which was not settled, as to the eligibility of Mr Ron Goodwill Chiwiwi Mwase to appoint Village Headmen in the capacity of T/A Kabunduli.
- 31 Donald S.C. Kaunda and his family had complained to the DC about the outcome of the hearing before Group Village Headman Chamaoya and the subsequent installation of Yohane M. Kaweche as Village Headman Chipimbininga. The DC issued an order stopping Mr Donald Kaunda and Mr Kaweche from performing the duties of Village Headman Chipimbininga because it had come to the notice of the DC that the issues had not been fully settled as claimed by the Group Village Headman in his letter to the DC of 21<sup>st</sup> February 2012. In his order the DC requested Group Village Headman Chamaoya to continue taking charge of the village until the issue is resolved. The DC first called for a hearing of the matter on 23<sup>rd</sup> January 2013 which was shifted to 24<sup>th</sup> January 2013 at



which he invited six members from the Kaweche family, six members from the Kaunda family, Group Village Headmen Chamaoya, Mkuli, and Mchingalombo, Village Headmen Dambathuli, Wasanga, Japiro and Yavimbo, plus Mr Pearson Chiumia and Mr Tambikeni Kasamabala. It is not clear why the invitation did not include T/A Kabunduli. Was it because the outcome was going to be presented to him as the appointing authority or the issues of eligibility of Mr Ron Goodwill Chiwiwi Mwase? The matter remained unresolved until the parties commenced the present proceedings. No party brought evidence that the DC concluded on the matter.

- 32 There was a similar issue in *LevisonMitala v. Andrew Patrick Mdelu* [2014] MLR 163 before the Supreme Court of Appeal. The Mitala family and the Lutere family were quarrelling over the throne of T/A Mduwa in Mchinji. Richard Mitala had been the T/A from 1945 to 1975 when he was arrested and detained on allegations of having killed Mr Mbalu of the Lutere family. While he was in custody Isaac Lutere took over the chieftaincy. Richard Mitala was later acquitted and released. He tried to claim his chieftaincy back through the DC for Mchinji and Ministry of Local Government but to no avail. He was advised to wait until there was a vacancy in the chieftaincy. He died in 1983 and later Isaac Lutere died before the matter was resolved. The Mitala family still pursued the matter. The DC called for all the chiefs and elders from the area, and members of the Mitala and Lutere families to a hearing of the issue. Following this hearing a decision was arrived that the Mitala family were the rightful heir to the chieftaincy. In commending the DC for what he did, the Supreme Court of Appeal stated at page 168-69:-

“We observe that the District Commissioner convened the meeting in order to hear the views of the chiefs and all the concerned people such as the elders in the area and family members from both sides. We are of the view that there was nothing wrong with the procedure followed. The dispute between the two families had to be resolved. It was the chiefs who actually resolved the dispute and the District Commissioner just indorsed it and communicated it to the concerned parties. ...We are of the view that there would not have been any better way of coming up with a decision in a dispute of chieftaincy as in the present case other

than what the District Commissioner followed by having a hearing as he did. The decision arrived at after the said hearing cannot be faulted having regard to what the chiefs and elders said.”

The Supreme Court of Appeal also held that the Ministry of Local Government is the authority in matters of appointment of chiefs and in the several cases it had dealt with, the Ministry of Local Government facilitated the resolution of the disputes. It then went on to say:-

“We do not see anything wrong with the role it plays in these disputes.”

33 Having that in mind, it is the view of this court that the parties prematurely rushed to court before the DC had concluded on the matter. It was only fair for the DC to order both Mr Donald S.C. Kaunda and Mr Yohane M. Kaweche to stop performing the functions and duties of Village Headman Chipimbinanga and appoint Group Village Headman Chamaoya to act while the matter was being resolved. The forum the DC was preparing is better placed to tie the loose ends that have shown before this court in this matter. In my view it is proper that the courts should be involved after the District Commissioners and the Ministry of Local Government have failed in matters of this nature.

34 I therefore order the parties to go back to the District Commissioner for Nkata-bay and allow him to conclude on the matter. Meanwhile Group Village Headman Chamaoya should continue acting in the capacity of Village Headman Chipimbinanga.

35 The action is dismissed and each party pays their own costs.

36 Delivered in open court this 12<sup>th</sup> day of February 2018.

  
T.R. Ligowe  
JUDGE