



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 466 OF 2016**

BETWEEN

GERALD VANESI CLAIMANT

AND

ALESI KAISALA 1ST DEFENDANT

GROUP VILLAGE HEADMAN SAFARI 2ND DEFENDANT

**THE ATTORNEY GENERAL (MULANJE
DISTRICT COUNCIL) 3RD DEFENDANT**

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Master, of Counsel, for the Claimant

Mr. Katsichi, of Counsel, for the 1st Defendant
2nd Defendant, present

Mr. Mandala, of Counsel, for the 3rd Defendant

Mrs. Jessie Chilimapunga, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

Introduction

This action was brought by way of specially endorsed writ. The Claimant seeks a declaration that the Claimant is the rightful Group Village Headman (GVH) Bona. The action is hotly contested by the 1st Defendant.

The 2nd and 3rd Defendants did not file any defence. It should also be mentioned upfront that the 2nd and 3rd Defendants did not testify as they failed to comply with the rules by failing to file necessary documents, to wit, Witness Statements and Skeletal arguments.

Pleadings

The Statement of Claim is couched in the following terms:

- “1. *The Plaintiff is a Malawian national of full age.*
2. *The Plaintiff avers that he is a member of Bona royal family and is by custom eligible to hold the office of GVH Bona.*
3. *The 1st Defendant is a mere member of Bona Village and is not a member of the royal family, hence does not by custom or otherwise qualify to ascend to the mantle of Bona GVH.*
4. *The 2nd Defendant is GVH for a village close to Bona village and he has no power or authority whatsoever on the affairs of Bona Village.*
5. *The Plaintiff pleads that he ascended to the throne of GVH Bona on or about 27th December, 1999.*
6. *The Plaintiff refers to paragraph 5 hereof and state that his ascendancy to the chieftaincy herein was in full compliance with Lomwe custom which governs Bona Chieftaincy.*
7. *The Plaintiff further avers that around August, 2012 he was promoted to the position of GVH Bona.*
8. *The Plaintiff pleads that he had been discharging chieftaincy powers over the aforesaid village without anyone challenging his legitimacy until around 2015 when the 1st Defendant started claiming to be the legitimate GVH Bona.*
9. *The Plaintiff pleads that succession of chieftaincy over Bona Chieftaincy follows matrilineal system where one of the nephews or nieces of the outgoing chief is appointed at a meeting of the Council of elders from the royal family.*
10. *The Plaintiff repeats paragraph 9 hereof and avers that in the absence of a nephew or niece members of the royal family would appoint any person they deem fit to ascend to chieftaincy.*
11. *The Plaintiff further plead that the last rightful chief Bona was Diston Khota having succeeded his uncle, founder and first chief for Bona village one Kamwenda Bona Nasulu.*
12. *The Plaintiff avers that he was next in the Bona Chieftaincy lineage with the result that the said Diston Khota who happened to be his uncle appointed him as his Assistant in 1991.*

13. *It was when the said Diston Khota died that Council of elders of the Bona royal family had a meeting whereat they appointed the Plaintiff as Village Headman Bona.*
14. *The Plaintiff pleads that all of a sudden the 1st Defendant started claiming that she is the rightful heir to the chieftaincy herein around 2015 with the result that she complained before Traditional Authority Njema (T/A Njema) but her complaint did not succeed as the same was dismissed.*
15. *Subsequently the 1st Defendant complained before the 3rd Defendant where instead of calling Traditional leaders to preside over the complaint considering its nature, it was officers of the 3rd Defendant that took great role in making a decision.*
16. *On 26th November, 2016 the said officers of the 3rd Defendant passed an oral verdict which dethroned the Plaintiff and appointed that 1st Defendant as GVH Bona.*
17. *Soon after the decision herein the 2nd Defendant started recognising the 1st Defendant by presenting her in different functions. He further made demands on the Plaintiff to surrender all chieftaincy items.*
18. *The Plaintiff avers that the decision and conduct of the 2nd and 3rd Defendants herein is baseless and unfounded in that the same is not supported by law and prevailing customary practice for Bona village.*
19. *The Plaintiff pleads that the conduct of the Defendants has the effect of depriving his right to exercise chieftaincy powers over Bona village.*

WHEREFORE the plaintiff claims for the following:

- a. *A declaration that the Plaintiff is the rightful GVH Bona*
- b. *A declaration that the 1st Defendant is not entitled or eligible to hold the office of GVH Bona*
- c. *A declaration that the 2nd and 3rd Defendants have no power or authority to appoint the 1st Defendant as GVH Bona.*
- d. *An order of permanent Injunction restraining the 1st Defendant by himself or through his agents from exercising chieftaincy powers over Bona Village and the 2nd and 3rd Defendants from implementing their decisions dethroning the Plaintiff and appointing the 1st Defendant instead as GVH Bona or otherwise reorganizing her as GVH Bona or the Defendants either by themselves or their agents from interfering with the Plaintiff's exercise of chieftaincy powers over Bona village or aiding and/ or abetting the said interference or doing anything of the like effect*

e. *Costs of this action.*”

Issues for Determination

There are principally two issues for determination, namely, whether or not (a) the Claimant is the rightful heir to the throne of GVH Bona and (b) the 2nd and 3rd Defendants have power to appoint the 1st Defendant as GVH Bona.

Burden and Standard of Proof

The Court reminds itself that, as these are civil proceedings, the required standard of proof is proof on a balance of probabilities. This is a lesser standard than that required in criminal proceedings which is proof beyond reasonable doubt. The Court also bears in mind that the party on whom lies a burden of proof must adduce evidence of the disputed facts or fail in his contention: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**

In the present case, the assertion comes from the Claimant. If I am to find for him, he needs to satisfy me on a balance of probabilities that his complaint against the Defendants is justified. Countless Malawian case authorities have acknowledged that this rule of procedure and evidence represents the correct standard as spelt out in the famous case of **Miller v. Minister of Pensions (1947) 2 All ER 372** which has virtually been adopted in wholesale fashion in Malawi.

Where the evidence between adverse parties is equal then the benefit of doubt is given in favour of the Defendant. This seems to be founded on the common law maxim “*pari delict potior est condition est defendantis*” which means that where both parties are equally at fault, the condition of the Defendant is best. This point was emphasised by Mkandawire J in **A. Musa Ali v. Circle Plumbing (Malawi) Limited** Civil Cause No. 3440 of 2006 in the following terms:

“The matter herein is civil one. The standard of proof required in civil cases is the one that is expressed as proof on a balance of probabilities. The court should therefore look at the evidence, and if the evidence is such that the court can say that it thinks it is more probable than the burden is discharged. But if the probabilities are equal then it is not.”

Evidence

The Claimant paraded three witnesses, namely, the Claimant (CW1), Ndini Nahipa (CW2) and Mishoni Kaminyu (CW3).

CW1 adopted his witness statement wherein he stated as follows:

“2. I was born on 17th August, 1975.

3. *I hail from Bona Village in the area of T/A Njema in Mulanje district.*
4. *I was born and have since my birth continuously lived in the village herein.*
5. *I am the reigning GVH Bona.*
6. *Bona Village is governed by Lomwe custom.*
7. *I was born during the reign of the late Diston Khota who was the second Village head for Bona village after the first Village Head one Kamwenda Bona Nansalu.*
8. *I am directly related to the said Diston Khota and Kamwenda Bona Nansalu.*
9. *The late Diston Khota was my grandfather.*
10. *My mother is Nesile (Mary) who was daughter to Lize.*
11. *Lize was a biological sister to Diston Khota.*
12. *Diston Khota was a nephew to Kamwenda Bona Nansalu having born from his sister Awongati.*
13. *In 1991 I was appointed by Diston Khota to be assisting him in running the affairs of Bona Village as he was aged.*
14. *I refer to paragraph 13 hereof and state that I so assisted the said Diston Khota until his death on 16th October, 1998.*
15. *When Diston Khota died, the royal family through the meeting of the council of the elders appointed me as the rightful heir to the Bona chieftaincy.*
16. *Pursuant to my appointment herein I was installed as Village Headman Bona on 27th December, 1999 by the late T/A Njema.*
17. *Around September, 2012 I was promoted to GVH Bona.*
18. *I am therefore the first person to hold the office of GVH Bona as there has never been any who had ever held the same before.*
19. *Since his appointment as an Assistant to Diston Khota and his subsequent appointment and promotion to Village and GVH Bona respectively none protested the same including the 1st Defendant.*
20. *Around 2015 the 1st Defendant who is not a member of the Bona royal family but a mere member came from nowhere and complained before the late T/A Njema that after his promotion she was not given the position of GVH Bona.*

21. *Having received the complaint herein late T/A Njema called all concerned parties to a hearing.*
22. *Upon hearing both parties, T/A Njema together with his Councillors advised the 1st Defendant that she was not a member of the Bona royal family and that she could not ascend to the position of Village Headwoman Bona as there were rightful heirs for the position.*
23. *The late T/A Njema and his Councillors further advised the 1st Defendant that if she wanted the position she could have requested for the same from the royal family and not claim for it as if she was a member of the royal family.*
24. *Around August, 2016 the 1st Defendant complained before officers of the 3rd Defendant on a new claim that Bona Chieftaincy was hers.*
25. *Having received the complaint officers from the 3rd Defendant slated 17th November, 2016 as the date of hearing both parties on the 1st Defendant's complaint.*
26. ***THAT** I repeat paragraph 24 hereof and state that surprisingly, on the said 17th November, 2016 only officers from the 3rd Defendant namely Mr. Chimuyaka, Mr. Njema and one GVH (Ngoloweka) presided over the meeting.*
27. *I was surprised with the delegation herein because being a new claim the matter ought to first go before T/A Njema and after that the same could be referred to the 3rd Defendant to facilitate mobilization of Chiefs from other jurisdictions to hear the appeal.*
28. *Ordinarily when a chieftaincy matter is decided by a T/A, his subordinates cannot handle the same. The 3rd Defendant was only required to facilitate the mobilization of at least Chiefs from other territories to rehear the matter. Instead the officers presided over the hearing together with a GVH Ngoloweka whose status is similar to mine.*
29. *When both sides presented their sides of the story, the said officers of the 3rd Defendant gave an oral verdict on 26th November, 2016. In essence the said verdict dethroned me from the chieftaincy and declared the 1st Defendant as the rightful GVH Bona.*
30. *On 1st December, 2016 he went to the offices of the 3rd Defendant with a view to get a copy of the judgment and further get a letter for appeal but the officers thereat could not produce the same.*
31. *Since the verdict herein was passed by the officers of the 3rd Defendant, the 2nd Defendant started recognizing the 1st Defendant by involving her in the activities of my village although it is not within his jurisdiction. He further presented her in various functions as GVH Bona*

32. *The 2nd Defendant has also been inviting me alleging that he was advised by the 3rd Defendant that he surrenders all chieftaincy items.*
33. *It is abundantly clear from the foregoing that the Bona chieftaincy belongs to his family.*
34. *It is further vivid that he is a rightful heir for the Bona Chieftaincy in terms of Lomwe custom and he is entitled to exercise chieftaincy powers over Bona village having been duly appointed by the royal family and exercised the same for almost 16 years when the 1st Defendant came from nowhere and started claiming for the same.*
35. *The foregoing also clearly entails that the 1st Defendant is not a member of the royal family and is by custom not entitled to claim and/or ascend to the chieftaincy herein.*
36. *It is therefore his prayer to this Honourable court to grant him the reliefs sought in the Statement of Claim."*

In cross examination by Counsel Kansichi, CW1 confirmed that (a) Bona Village is governed by Lomwe custom, (b) he is Lomwe by custom, (c) he is directly related to Diston Khota and Kamwenda Bona Nansalu. He stated that Diston Khota was nephew to Kamwenda Bona Nansalu and the latter had 4 relatives, namely, Mphere Kwawona, Angalande, Amalire and Awongati.

CW1 explained that Awongati was female and she gave birth to Diston Khota and two female children (Diston Khota's sisters). Regarding Kamwenda Bona Nansalu, CW1 stated that he came from Mozambique. When he reached Malawi, he found a place to live which is now called Bona.

CW1 stated that he doesn't know Juwawo Kanjiraway and Lunguzi but he knows Lowani, a relative to Wilfred Tchale. He denied that Lowani had ever been a Village Head for Bona Village.

Regarding the throne, PW1 stated that Diston Khota succeeded Kamwenda Bona Nansalu and there was no other village head between Kamwenda Bona Nansalu and Diston Khota. He told the Court that he doesn't know the year that Kamwenda Bona Nansalu died. He concluded by stating that his evidence was true.

In re-examination, CW1 stated that he was directly related to Kamwenda Bona Nansalu. His mother's grandmother was Kamwenda Bona Nansalu's grandchild and his grandmother was granddaughter to Kamwenda Bona Nansalu.

CW2 adopted his witness statement and this formed his evidence in chief. The witness statement provides as follows:

- “2. *I was born in 1952.*
3. *I hail from Maliyera Village in the area of T/A Njema in Mulanje district.*
4. *I once served as a Councillor to the late T/A Njema.*
5. *I served on this position from around 1997 until the demise of the late T/A Njema.*
6. *Among his duties on the position of Councillor herein were to advise Chief Njema and resolve disputes that came to the office of T/A Njema.*
7. *Due to the position herein I am highly acquainted with the customary laws of T/A Njema’s territory on matters of chieftaincy, land and others.*
8. *Around 2015, the 1st Defendant complained before the late T/A Njema that upon the promotion of the Plaintiff to GVH Bona around 2012, she was not considered to be Village Head Bona.*
9. *Having received the complaint the late T/A Njema called all parties to a hearing.*
10. *The hearing herein was presided over by the late T/A Njema and he was being assisted by me and another Councillor one GVH M’namani.*
11. *Upon hearing both parties, T/A Njema together with the two Councillors, resolved that the 1st Defendant had no claim as she was not a member of the Bona royal family.*
12. *In view of the matters hereof we passed a verdict that the 1st Defendant was wrong in claiming for the Bona Village Headman ship as she was not a member of the royal family.*
13. *We further advised the 1st Defendant to apologise to the Plaintiff and the royal family for her claim herein.*
14. *Finally we advised her to go back and that if she wanted the chieftaincy she ought to request the same from the royal family.*
15. *Since then I never heard anything on the matter until late 2016 when I heard that the 1st Defendant took the matter to the 3rd Defendant.*
16. *Thereafter I heard that officers of the 3rd Defendant and a GVH declared the 1st Defendant as the rightful GVH Bona.*

17. *According to my experience, I found the decision in paragraph 16 strange in that a GVH and officers of the 3rd Defendant cannot hear a matter which was already heard by a Chief, in this case T/A Njema.*
18. *I repeat paragraph 17 hereof and state that the proper way of handling a claim which was already heard by the Chief is to call other Chiefs from other jurisdictions to hear the same.*
19. *Following his attendance of the hearing involving this matter and his knowledge on customs in T/A Njema, it is clear that the Plaintiff is the rightful GVH Bona having succeeded his grandfather one Diston Khota who ruled the village for so many years."*

In cross examination by Counsel Kansichi, CW2 confirmed that the dispute was taken before T/A Njema and the verdict that T/A Njema gave was that the 1st Defendant should go back and request the same from the Claimant. CW2 reiterated that the 1st Defendant was not related to the Claimant and she is not a member of the royal family that was the reason her claim was rebuffed by T/A Njema.

In re-examination by Counsel Master, CW2 stated that the decision by the T/A Njema was against the 1st Defendant because T/A Njema determined that she was not of the Bona lineage.

CW3 adopted a witness statement wherein he stated as follows:

- "2. *I was born in 1947.*
3. *I hail from Bona Village in the area of T/A Njema in Mulanje district.*
4. *I am one of the senior members for Bona Village.*
5. *I was born and have since my birth continuously lived in the village herein.*
6. *I was born during the reign of the late Diston Khota who was the second Village head for Bona village after the first Village Head one Kamwenda Bona Nansalu.*
7. *During the reign of the said Diston Khota I never heard any one claiming that he was not a rightful person to hold the office.*
8. *When Diston Khota was getting aged, he appointed the Plaintiff, his grandchild, as his Assistant.*
9. *When Diston Khota died in 1998 the royal family appointed the Plaintiff to succeed the said Diston Khota and he was installed.*

10. *After the Plaintiff's appointment and installation there was not complaint on his ascendance.*
11. *Thereafter the Plaintiff was promoted to GVH Bona and there was also no protest on the same.*
12. *Since my birth, the 1st Defendant's side has never produced any Village Head for Bona Village.*
13. *I was therefore astonished to hear in 2016 that officers of the 3rd Defendant and a GVH had declared that the Bona chieftaincy belonged to the 1st Defendant.*
14. *To the best of my knowledge the Bona chieftaincy belongs to the Plaintiff who succeeded his grandfather Diston Khota who also succeeded his uncle Kamwenda Bona Nansalu."*

In cross-examination by Counsel Kansichi, CW3 stated that he knows the history of Bona village because he was born and grew up in Bona Village. The first village head for Bona village was Kamwenda Bona Nansalu. He could not say where Kamwenda Bona Nansalu came from as that was before his birth. He knows that Kamwenda Bona Nansalu was succeeded by Diston Khota. Diston Khota was nephew to Kamwenda Bona Nansalu. When Diston Khota died, he was succeeded by Gerald. Gerald's father's name is Vanesi.

CW3 stated that he doesn't know Agoma, Kampango Bona and Lunguzi hence he could not say anything regarding them. He only knew the history from the time of Roy Welensky (the time of the Federation of Rhodesia and Nyasaland).

In cross examination by the 2nd Defendant, CW3 reiterated that he could not tell the whole history of the Bona Chieftaincy as he was born in 1953, well after the chieftaincy had already started. He stated that before Bona was promoted to GVH, Bona village was under GVH Songwe. He doesn't know the period when Bona was under GVH Safari. He recalled that it was during the time of President Muluzi that Bona was under Safari.

In cross-examination by Counsel Mandala, CW3 stated that he had never been out of Bona Village and that he had been keenly following the events of Bona Village from 1999. He confirmed that he heard that officers of the 3rd Defendant had gone to Bona Village at a time when he was at his wife's place.

In her defence, the 1st Defendant paraded three witnesses, namely, the 1st Defendant (DW1), Richard Bambala (DW2) and Wilfred Tchale (DW3).

In her examination in chief, DW1 adopted her witness statement wherein she stated as follows:

- "4. My uncle, called Kampango Bona came from Mozambique together with his sister Agoma to visit their grant parents Safari.*
- 5. Upon entering Malawi, Agoma did not continue with the journey and instead remained at Nsona while Bona continued to go to Safali.*
- 6. The said Bona stayed with the grandparents for three (3) weeks and when he wanted to leave, the grandparents asked him to stay for good.*
- 7. Kampango Bona then went and fetched his sister from Nsona and was given land to settle in bordering with Songwe.*
- 8. The land that was given to them kept extending and it was Agoma who ruled over it.*
- 9. After Agoma died, her brother Kampango Bona succeeded her of the chieftaincy and maintained this position as chief for a long time.*
- 10. At some point some people, including Diston Khota, came along looking for work in Bona's village and Bona gave them a job as his farm cultivators and they were given a piece of land to live so that they should not be far from where they were working.*
- 11. After sometime, Bona died and his son Jalasi took over as chief and upon his death, was succeeded by his son Lunguzi who died a sudden death not long after being installed as chief.*
- 12. Lunguzi's death came as a shock to the clan that the successor, Lowani, took the necessary papers pertaining the chieftaincy and gave them to Diston Khola who was one of the farm workers to be the acting chief until a suitable successor was picked by the Bona family.*
- 13. Khola and his relations connived not to give back the chieftaincy to the rightful owners and since that time they have been succeeding the position in their family line sidelining the Bona's.*
- 14. Diston Khola was chief until the time he died in 1998 and Gerald Khelekhele was installed as Chief Bona succeeding his uncle Diston Khola.*
- 15. All the while I have been reminding the Plaintiff and his siblings that the chieftaincy rightfully belongs to their line but they have ignored the reminders.*
- 16. The matter was reported to Safali who instructed that the matter be taken to Namani where the parties were instructed to take the matter to T/A Njema.*

17. *The matter was heard before three village headmen, to wit, Ngoloweka, Njema and Gulumba who proceeded to give their verdict in favour of her. He exhibited a copy of the verdict marked "AK"*
18. *Before T/A Njema delivered the judgment, there was chaos pertaining the chieftaincy which prompted the parties take the matter to the District Commissioner for Mulanje (DC) who on the 24th of November 2016 delivered his verdict in her favour.*
19. *From the foregoing, it is clear that the Bona Chieftaincy rightly belongs to her and the Plaintiff is not part of the lineage of the same.*
20. *It is therefore, my prayer before this Honourable Court that the Plaintiff's application be dismissed and the injunction be discharged as I am the rightful heir to the throne of Bona."*

In cross-examination by Counsel Master, DW1 stated that she was born on 14th June, 1979 and that at the time of her birth it was Diston Khota who was ruling Bona village. She conceded that what she was telling the Court regarding the history of the chieftaincy was what she heard from her grandmother.

DW1 stated that the Claimant got promoted following a report from the Ministry. She and her relations were there when the Claimant was being installed as Village Headman Bona and his subsequent promotion to GVH Bona.

She did not commence any action at the time of the Claimant's installation and promotion. She only complained upon the Claimant's promotion to GVH Bona. She explained that she complained at this time because the Claimant decided to appoint his sister as village head Bona. The complaint he instituted was against the Claimant's decision of appointing his sister as village head Bona.

DW1 stated that Lowani has never been a village head for Bona Village. Mr Charlie is still alive when Diston Khota was ruling the village. After the death of Diston Khota he was succeeded by the Claimant. The Claimant is a grandchild to Diston Khota. The Claimant was installed by GVH Safari and he was subsequently promoted to GVH Bona followed a report from Lilongwe (ministry).

Regarding her complaint, DW1 stated that her complaint was made before T/A Njema heard the complaint together with his Councillors but T/A Njema did not give any verdict as there was chaos. She explained that at first she complained before GVH Safari who referred the complaint to Namani who in turn also referred to T/A Njema. After the chaos at T/A Njema, she took the matter to the office of the DC. She was appealing against the decision of T/A Njema.

DW1 stated that the DC sent his delegation which heard the matter. She could not remember names of the members of the delegation. The delegation constituted of 5 to 6 people. There were 6 officers from the DC and there were 3 Village Heads from other areas and GVH Safali. She couldn't recall the names of the village heads. GVH Safali was not part of the decision making but a witness for her side. When it was put to her that the Report on the Dispute dated 18th November 2016 (Exhibit AK) doesn't contain GVH Safari's testimony, DW1 insisted that Exhibit AK is still valid. She stated that to the best of her knowledge only two GVH heard the matter and not three GVH.

Counsel Master concluding questions focussed on Exhibit AK. DW1 confirmed that (a) there were three GVH on page two of Exhibit AK, (b) the first two GVH did not sign on Exhibit AK, (c) since her birth Bona village has been ruled by Diston Khota and the Claimant, (d) the Claimant and Diston Khota were related, (e) she was neither related to Diston Khota nor the Claimant and (f) Mr. Wilfred Charlie was there when the Claimant was being installed.

In cross-examination by the 2nd Defendant, DW1 stated that GVH Safali was not part of the delegation that heard the matter: he was only there to welcome visitors.

In cross-examination by Counsel Mandala, DW1 reiterated her earlier statements, that is, (a) T/A Njema did not make a verdict because chaos erupted on the day, (b) she is the one that went to complain before the office of the DC, (c) she complained because the T/A did not pass a verdict, (d) the DC sent a delegation whose members included Village Heads, (e) officers from the DC asked her questions during the hearing, (f) officers of the DC passed the verdict and (g) She doesn't know the names of the officers from the office of the DC.

In her re-examination by Counsel Kansichi, DW1 stated that it was her grandparents who told her the history of the chieftaincy. It was officers of the DC that passed the verdict. At the DC, he was requested to give her side of the story and she narrated the history of the chieftaincy. When the Claimant appointed his sister as sub village head they went to complain before GVH Namani. GVH Safali was welcoming the visitors at the hearing. She got Exhibit AK from the office of the DC.

DW2 adopted his witness statement wherein he stated as follows:

" 2. *I was born in 1926 at Bona in Mulanje District.*

3. *I depone to matters of fact from my personal knowledge and I verily believe the same to be true.*
4. *This matter was commenced on 9th December, 2016 by way of an injunction before the Principal Registry registered as Civil Cause Number 466 of 2016.*
5. *The rightful heir to the throne of Bona Chieftaincy is the 1st Defendant as the relations to the Plaintiff only came to the area as visitors and one of the relations by the name Juwawo Kanjira Waya was employed by Bona.*
6. *The relations that came for employment were seven in number, three ladies and four gentlemen and most notable names were Mphere Kuona, Kanjira Waya, Maliyera and Ngalande.*
7. *In the course of working at the estate, one of the sisters to Juwawo Kanjira Waya got married to a chief's son.*
8. *After the death of Bona, Lowani succeeded as chief and proceeded to take the "census" book which he did.*
9. *After the death of Lowani, Lunguzi succeeded him but died a sudden death.*
10. *Because of the sudden death of Lunguzi, the clan chose Khota to be the caretaker chief and the said Khota was only a mere worker of chief Bona.*
11. *After Kherekhere was made village headman, he made Khota to be a subordinate to him.*
12. *The matter for the "census" was taken to Safali for arbitration which he rightfully sated that Khota or Gona lineage only took over the chieftaincy as caretakers.*
13. *After the death of Gona, his relatives wanted to bury him at the chief's cemetery but people of the area refused since he was only a caretaker and not the rightful chief per se.*
14. *Chaos broke down on the day for the crowning of a new chief of the area since the 1st Defendant's relations wanted to take back the chieftaincy and on the other hand the Plaintiff's relations wanted to maintain the same regardless of the fact that they were only caretakers.*
15. *The Plaintiffs relations proceeded to install Gerald Vanesi, also known as Kherekhere, who is the Plaintiff as chief of the area.*
16. *The matter was taken before T/A Njema and the DC where in all the institutions the 1st Defendant was recognised as the rightful heir to the throne of the Bona chieftaincy.*

17. *From the foregoing, it is clear that the Bona chieftaincy rightly belongs to the 1st Defendant and the Plaintiff is not part of the lineage of the same.*"

In his cross-examination by the Counsel Master, DW2 stated that he was born in Bona Village but he lives in Namasalima Village where he married. At the time of his birth, Bona Village was being ruled by Village Headman Bona. He doesn't know the name of the Bona as he was installed before his birth.

When asked about Kamwenda Bona Nansalu, DW2 stated that he knows him because he once ruled Bona village. Kamwenda Bona Nansalu was the first Village head for Bona village. When Kamwenda Bona Nansalu died, his sister by the name of Alesi succeeded him. If a person does not mention Alesi's name in the history of Bona chieftaincy, he is a liar.

DW2 then narrated what took place after the death of Alesi. There was meant to be an election to appoint her successor. His grandparent, Lunguzi, was called to participate in the elections. The elections were scheduled to take place on a Sunday. Before the date of the elections, Lunguzi died. After Alesi, Diston Khota became the Village Head.

Counsel Master's following questions focussed on Lowani. DW2 stated that Lowani has never been a village head for Bona Village. If someone says Lowani succeeded Bona, he or she is not telling the truth. He disputed the contents of paragraph 8 of his witness statement (*After the death of Bona, Lowani succeeded as chief and proceeded to take the "census" book which he did*). He affirmed that it was wrong to say Lowani succeeded Bona.

DW2 disputed the contents of paragraph 9 of his witness statement (*After the death of Lowani, Lunguzi succeeded him but died a sudden death*). He insisted that Lunguzi wanted to be village head Bona that was the reason he wanted to participate in the elections to appoint new village head Bona. He confirmed that Lunguzi died before the elections. If anyone says Lunguzi was a village head he would be lying.

Regarding Diston Khota, DW2 stated that he knew him very well. Diston Khota was older than him. Diston Khota was installed before the coming of Kamuzu Banda to Malawi. The Claimant succeeded Diston Khota. Diston Khota is the Claimant's uncle.

DW2 confirmed that the dispute only emerged when the Claimant was promoted to be GVH Bona and he appointed his sister as Village Head Bona. He confirmed that

the 1st Defendant took the matter to T/A Njema. T/A Njema and his Councillors only heard their side but the Claimant's side was not heard. He was there when his side was testifying at T/A Njema. If someone says both sides were there, he or she would be lying. T/A Njema did not pass a verdict. He disputed the contents of paragraph 16 of his witness statement (The matter was taken before T/A Njema and the DC where in all the institutions the 1st Defendant was recognised as the rightful heir to the throne of the Bona chieftaincy) in as far as it says his side won at T/A Njema.

DW2 stated that the 1st Defendant and Diston Khota are not related. DW2 is related to the 1st Defendant - she is his niece. He just heard that Diston Khota was installed but he was not there. When he heard that Diston Khota was installed he did not say anything. The 1st Defendant started claiming the chieftaincy in 2014. The Claimant was promoted to GVH Bona in 2014. He couldn't say the exact year of the Claimant's promotion as he was not there.

During cross-examination by the 2nd Defendant, DW2 stated that the letter that was written by GVH Safali was titled "ufumu oyamba". The letter was written because the Claimant could not cooperate with him. It was not the present GVH Safali who wrote the letter but his predecessor.

In re-examination, DW2 reiterated that (a) he was born in Bona village but he is now living in Namasalima because that is where he got married, (b) Diston Khota was an uncle to the Claimant, (c) the 1st Defendant's claim before T/A Njema was that she wanted the chieftaincy to return back to them as it was in the wrong hands, (d) the office of the DC ruled that the chieftaincy belonged to the 1st Defendant.

DW3 adopted his witness statement which provides as follows:

- "2. *He was born in 1930 at Bona in Mulanje District*
3. *I depone to matters of fact from my personal knowledge and I verily believe the same to be true.*
4. *This matter was commenced on 9th December, 2016 by way of an injunction before the Principal Registry registered as Civil Cause Number 466 of 2016.*
5. *The rightful heir to the throne of Bona Chieftaincy is the 1st Defendant as the relations to the Plaintiff only came to the area as visitors and one of the relations by the name Juwawo Kanjira Waya was employed by Bona.*
6. *The relations that came for employment were seven in number, three ladies and four gentlemen.*

7. *In the course of working at the estate, one of the sisters to Juwawo Kanjira Waya got married to a chief's son.*
8. *After the death of Bona, Goma succeeded as chief and proceeded to take the "census" book which he did.*
9. *The matter for the census was taken to Safali for arbitration which he rightfully stated that Khota or Gona lineage only took over the chieftaincy as caretakers..*
10. *After the death of Goma, his relatives wanted to bury him at the chief's cemetery but people of the area refused since he was only a caretaker and not the rightful chief per se.*
11. *Chaos broke down on the day for the crowning of a new chief of the area since the 1st Defendant's relations wanted to take back the chieftaincy and on the other hand the Plaintiff's relations wanted to maintain the same regardless of the fact that they were only caretakers.*
12. *The Plaintiff's granny, Mulama, wanted to beat the rest of the people in the other clans but ended up fleeing from the area and later is when Gerald Vanesi (Kherekhere) was installed as chief of the area.*
13. *During the crowning of kherekhere as chief of the area, there were in fact four clans that wanted to ascend to the chieftaincy but all these clans were not the rightful heirs to the throne*
14. *The Plaintiffs relations proceeded to install Gerald Vanesi, also known as Kherekhere, who is the Plaintiff as chief of the area.*
15. *The sudden death of Lunguzi is what prompted the Plaintiff's clan to have a grasp of the chieftaincy but only in caretaker capacity otherwise the lineage to the chieftaincy is that of the 1st Defendant.*
16. *The matter was taken before T/A Njema and the DC where in all the institutions the 1st Defendant was recognised as the rightful heir to the throne of the Bona chieftaincy.*
17. *From the foregoing, it is clear that the Bona chieftaincy rightly belongs to the 1st Defendant and the Plaintiff is not part of the lineage of the same."*

In cross-examination by Counsel Master, DW3 confirmed that he was born in 1930. He knows that he is 71 and not 88 years old. At the time of his birth it was his uncle Bona who was ruling the village. DW2 is older than him.

On questions relating to succession to the Bona village headship, DW3 stated that he does not know Bona Maponi. The first village head for Bona Village was Kamwenda, his grandparent. Kamwenda was succeeded by Bona and then Agoma.

If someone says Agoma started then Bona, he is wrong. He met Agoma when he was young. Agoma died when he was young. ///After Agoma, it was Lunguzi who wanted to succeed the chieftaincy. Lunguzi did not rule the village. He was appointed but died before installation. After Lunguzi, it was Jalisi who was acting. After Jalisi, it was Diston Khota who succeeded him. There was no relationship between Jalisi and Diston Khota. He was there when Diston was being installed. They had problems with his appointment as he was not from their family. They did nothing when they were being installed. He was around 30 years old when Diston Khota was being installed. Diston Khota was installed when Kamuzu had already come to Malawi. After Diston Khota it was the Claimant who succeeded him. He was there when the Claimant was being installed. The Claimant was installed as Village Headman. He does not know that the Claimant was promoted to GVH. He confirmed that the disputed started when the Claimant was promoted to GVH.

The 1st Defendant complained before T/A Njema. T/A Njema called both sides and both sides testified. During the hearing of the matter, T/A Njema was being helped by Councillors. He recalls Mr. Ndini who was one of the Councillors. The T/A did not give a verdict because he was removed due to corruption. T/A Njema was not removed but rather died.

DW3 stated that paragraph 16 of his witness statement contains untruth where it says T/A Njema ruled in the 1st Defendant's favour (*The matter was taken before T/A Njema and the DC where in all the institutions the 1st Defendant was recognised as the rightful heir to the throne of the Bona chieftaincy*). He was there when the matter was heard at the DC. The matter was heard by GVHs. Two of them were GVH. GVH Safali was not among them. He knows Lowani - he was his grandparent. Lowani has never been a village head.

In re-examination by Counsel Kansichi, DW3 stated that the first village head Bona was Bona. He could not recall Bona's full name. The 1st Bona is related to the 1st Defendant. The 1st Defendant and Agoma are related. The 1st Bona and the Claimant are not related. Agoma and Diston Khota are not related. When Bona died, he appointed Lunguzi as his successor but Lunguzi died before the date of his installation. Lunguzi is related to the 1st Defendant. Lunguzi and Diston Khota are not related. Diston Khota and the Claimant are related.

Analysis and determination

As already mentioned hereinbefore, there are two issues for determination and each issue will now be considered in turn.

Whether or not the Claimant is the rightful GVB?

It is the case of the Claimant that he started assisting his predecessor and grandfather, one Diston Khota, on the position of Village Headman Bona in 1991 having been so appointed by the said Diston Khota: see paragraphs 13 and 14 of his witness statement and paragraph 8 of CW3's witness statement. Upon the death of Diston Khota in 1998, the Claimant was appointed by the royal family as a successor and got installed by T/A Njema in 1999 as Village Headman Bona: see paragraph 9 of CW3's witness statement. It is important to bear in mind that CW 3 who is a senior member of Bona Village.

Further, the testimony by the Claimant's witnesses shows that the Claimant was promoted to GVH Bona. In this regard, the Claimant became the first person to hold the office of GVH Bona as there has never been any person to have held the same before.

In his evidence, the Claimant was able to demonstrate his relationship with his predecessor, Diston Khota. For instance, at paragraph 9 of his witness statement he clearly stated that Diston Khota was his grandfather. He further went ahead in paragraphs 10 to 12 of his witness statement to connect himself to the first village head for Bona village, one, Kamwenda Bona Nansalu. Throughout his testimony including cross examination, he maintained his version in as far as his relationship with the past leaders of the village is concerned.

Additionally, PW 1 and PW 3 were uniform and consistent in their testimony regarding the number of village heads that have ruled Bona Village. Their testimony was such that the first village head was Kamwenda Bona Nansalu who was succeeded by his nephew Diston Khota. The Claimant is the third having succeeded the said Diston Khota who happened to be his grandfather.

The Defendants miserably failed to discredit the Claimant's evidence. To the contrary, the defence witnesses agreed with the Claimant on his installation, promotion and succession from Diston Khota. For example during cross examination, DW1, DW 2 and DW 3 admitted that they were all present when the Claimant was being installed as Village Headman Bona but they did not dispute his installation. The same was the case when the Claimant was being promoted to the position of GVH. Further, during cross examination of DW1, she testified that at the time of her birth in 1979, Bona Village was being ruled by Diston Khota. DW2 was as well emphatic that he witnessed the installation of Diston Khota way before the dawn of independence in Malawi.

The evidence also shows that the 1st Defendant only started claiming for the Sub Village Headship and not GVHship in 2015 when she complained before T/A Njema that upon the promotion of the Claimant she was not considered to be Sub Village Head. In cross-examination, DW1 expressly confirmed that she was not happy with the appointment of the Claimant's sister as Village head Bona and that was when she hatched an idea of disputing the appointment before T/A Njema. In essence the 1st Defendant's claim had nothing to do with the Claimant's position herein as GVH.

On my analysis of the evidence, the only thing that the Defendants are challenging is that T/A Njema did not make a decision. The challenge also lacks merit. T/A Njema was not alone when she heard the complaint. All defence witnesses were agreeable to the fact that CW 2 was one of the Councillors that helped T/A Njema in hearing the 1st Defendant's claim. According to CW2's testimony, the 1st Defendant's claim was dismissed by the said T/A Njema on the ground that she was not a member of the royal family hence her claim for village headship was misplaced: see paragraphs 10 to 14 of his witness statement. CW2's testimony ought to be given much weight in the circumstances considering that he was among those that made the said decision. T/A Njema, being the highest custodian of custom in the area, must be taken to have certainly analysed the custom of the area and came up with the within decision.

In light of the foregoing and by reason thereof, it is my finding that the Claimant is the rightful person to hold the office of GVH Bona in terms of the custom of the area.

In any event, even if the 1st Defendant was, for the sake of argument, indeed entitled to the chieftaincy herein, her claim for the same is doomed to fail on account of being made very late in the day. It is trite law that a person who seeks to lay claim to chieftaincy must do so timeously. In the landmark case of **Group Village Headman Kakopa & Others v. Chilozi & Another [2000-2001] MLR 140 (SCA)**, the Supreme Court had this to say on this aspect:

"Upon reading the judgment of the trial court, we are unable to agree with this finding by the court below. Our opinion is that the custom advanced by the appellants would apply if the wrongly appointed chief is to be removed timeously. But where the so-called illegally appointed chief is allowed to reign for almost twenty years and a new chief is appointed according to the local customary law, this Court will be unwilling to assist the appellants. The appellants are deemed to have acquiesced to the situation. As we observed earlier on, such an application to remove the wrongly appointed chief should have been made as soon as the opportunity to do so arose"

In the present case, the unchallenged evidence is that the 1st Defendant started claiming the chieftaincy herein when the Claimant had ruled the village for more than 15 years. The Claimant's grandfather, Diston Khota, ruled the Bona Village before the coming of Kamuzu which is as early as 1964 if the evidence of DW 2 is anything to go by. The Claimant's family has thus ruled the village for more than 54 years. Needless to say, the 1st Defendant's claim is inordinately delayed: see **Group Village Headman Kakopa & Others v. Chilozi & Another**. It cannot be entertained.

Whether or not the 2nd and 3rd Defendants have power to appoint the 1st Defendant as GVH Bona?

In terms of section 9(1) of the Chiefs Act, the power to appoint GVH and Village Headmen is vested in a Chief. The subsection provides as follows:

"A Chief may appoint such number of Group Village Headmen and Village Headmen as he may consider necessary to assist him in carrying out his functions."

It follows that any person, other than a Chief, has no powers to appoint or fire a village Headman: See **Vutani Kondwani Chibwana v. Harry Matekenya & 2 others MSCA Civil Appeal Case No. 10 of 2016 (unreported)** and **Village Headman Chiswe v. Donata Chipagaza & Group Village Headman Nyaka, Civil Cause No. 203 of 2009 (unreported)**.

In the present case, the 1st Defendant relies on a purported decision of the 3rd Defendant's officers and GVH or village heads. However, the law is crystal clear that none of these people have the power to appoint a GVH. By the same token, these people do not have the power to dethrone the Claimant from the position of GVH: see **Village Headman Chiswe v. Donata Chipagaza & Group Village Headman Nyaka**, supra, and **Lennox Njikho & 5 others v. Senior Chief M'bwana & 3 Others Lennox Njikho & 5 others v. Senior Chief M'bwana & 3 Others** Miscellaneous Civil Cause no. 62 of 2013 (unreported)

The 2nd and 3rd Defendants have not adduced any evidence to controvert the Claimant's evidence. They did not help this Court with reasons that made them make the within decision considering that they had no such powers. In any event, T/A Njema already made a decision on this matter and the 1st Defendant was rebuffed for not being a member of the royal family.

Conclusion

To sum up, the Claimant has succeeded in this action. As such, all the reliefs sought by the Claimant in the Statement of Claim are granted. For the avoidance of doubt, the following declarations and orders be and are hereby granted:

- (a) a declaration that the Claimant is the rightful GVH Bona;
- (b) a declaration that the 1st Defendant is not entitled or eligible to hold the office of GVH Bona;
- (c) a declaration that the 2nd and 3rd Defendants have no power or authority to appoint the 1st Defendant as GVH Bona;
- (d) an order of permanent Injunction restraining the 1st Defendant by himself or through his agents from exercising chieftaincy powers over Bona Village and the 2nd and 3rd Defendants from implementing their decisions dethroning the Claimant and appointing the 1st Defendant instead as GVH Bona or otherwise reorganizing her as GVH Bona or the Defendants either by themselves or their agents from interfering with the Plaintiff's exercise of chieftaincy powers over Bona village or aiding and/ or abetting the said interference or doing anything of the like effect; and
- (e) Costs of this action⁴.

Pronounced in Court this 18th day of June 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE