



**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**PERSONAL INJURY CAUSE NO. 182 OF 2017**

**BETWEEN**

**EGILE CHINTENGO ..... CLAIMANT**

**AND**

**AUSTIN DALABANI ..... 1<sup>ST</sup> DEFENDANT**

**TRADITIONAL AUTHORITY LUNDU ..... 2<sup>ND</sup> DEFENDANT**

**CORAM : HER HONOUR MRS. BODOLE, ASSISTANT REGISTRAR**

Master, of Counsel for the Claimant

Goba Chipeta, of Counsel for the Defendants

Ms. Kazembe, Court Clerk

**RULING**

**Introduction**

This is an application by the 1<sup>st</sup> defendant for an order striking out action for being frivolous and an abuse of the court process.

## The Evidence

Both parties filed sworn statements and skeletal arguments. The essence of the application is that the claimant commenced the action by writ of summons on the 21<sup>st</sup> June, 2017. Counsel for the 1<sup>st</sup> defendant contended that the action was wrongly commenced as it was supposed to be commenced by judicial review. It should have commenced by judicial review because the claimant is challenging public powers both of the 1<sup>st</sup> and 2<sup>nd</sup> defendants with respect to the appointment of a village headman and acting in a public office of a village headman. The 2<sup>nd</sup> defendant is a Paramount Chief, a public authority established under section 3 of the Chiefs Act and the Schedule thereunder. He is, under section 9 of the Chiefs Act, vested with public power to appoint village headmen as he may consider necessary to assist him in carrying out his functions.

In paragraph 9 of the Statement of Claim, the claimant pleads that the 2<sup>nd</sup> defendant failed to take all necessary steps to install the claimant as village headman. That pleading is challenging the statutory powers under the Chief's Act. In the same vein the office of a village headman is a public office set up under the Chief's Act. In paragraph 10 of the Statement of claim, the claimants pleads that the 1<sup>st</sup> defendant has been acting unlawfully as village headman Chatama. These two points show that the claimant is challenging public powers by ordinary action and not judicial review.

Counsel for the 1<sup>st</sup> defendant further contended that the law is very clear that a person is not allowed to commence ordinary action where he is challenging statutory powers. That amounts to abuse of court process and it is against public policy. In such a situation, the court will summarily struck out the action. Counsel for the 1<sup>st</sup> defendant cited the case of **Frackson Chibwana v Dorothy Lyton and Others** Civil Cause No. 161 of 2014 whereby the claimant's action was dismissed for being commenced using a wrong mode.

Counsel for the claimant contended that paragraph 9 and 10 of the Statement of Claim should not be read in isolation rather, the Statement of Claim should be read as a whole. The claimant is not challenging the merits which led to the ascendancy of the 1<sup>st</sup> defendant to village headman Chatama. This is evidenced by the relief

sought by the claimant under paragraph 11 of the Statement of Claim where the claimant is claiming the chieftaincy of Chatama as the rightful person according to culture and the laws of Malawi.

Counsel for the claimant further contended that it is trite law that judicial review scrutinizes the procedure that was taken by the decision maker before making the decision. It does not look at the merits of the decision. In paragraph 5 of the Statement of Claim the claimant praised the conduct or decision of the 2<sup>nd</sup> defendant, in that he heard both parties and made a ruling in favour of the 1<sup>st</sup> defendant. The claimant is challenging the merits of the decision and as such, he is entitled to commence the action by way of writ of summons or originating summons. Counsel for claimant cited the case of **Kossa and 4 Others v Paramount Chief Lundu and 5 Others** Civil Cause No. 224 of 2017. In this case, the court showed which matters can be commenced by judicial review and ordinary action.

Counsel for the claimant further contended that the 1<sup>st</sup> defendant does not have *locus standi* to make the present application. The proper person was the 2<sup>nd</sup> defendant as his powers are the ones that are being challenged. In reply, Counsel for the 1<sup>st</sup> defendant stated that the 1<sup>st</sup> defendant is a party to this action. The claimant is the one who made him a party and that makes him to have *locus standi*.

#### Applicable Law

A person can be a party to an action if that person has what is known as *locus standi* or has standing. This is having a legal right or substantive interest in the subject matter. It goes further to the protection and enforcement of rights generally, even if the rights may be currently infringed or threatened – **The Registered Trustees of the Public Affairs Committee v Attorney General and Others** Civil Cause No. 1861 of 2003.

It is trite law that the court has inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process – **Reichel v Magrath** (1889) 14 App. Cas. 665. In such cases, the court will dismiss before the hearing, actions which it holds to be frivolous or vexatious.

It is important that the processes of the law must be used *bona fide*, properly and must not be abused. The court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation – ***Willis v Earl Beauchamp*** (1886) 11 p.59 at 63. In ***Frackson Chibwana v Dorothy Lyton and Others*** (supra) the plaintiff commenced an action by writ of summons against the defendants restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from installing the 3<sup>rd</sup> defendant or anyone as chief of Chibwana village. The 1<sup>st</sup> defendant was Traditional Authority Mchiramwera. The court held that

*“It is trite law that where a person seeks to establish that a decision of person or body infringes rights which are entitled to protection under public law, he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration, or an injunction or otherwise... And if a person commences an ordinary action where he should have applied for judicial review, the action would be struck out by summary process.”*

The court then had this to say

*“It is clear from the action commenced by the plaintiff, as aforesaid that the plaintiff is challenging the decision of the 1<sup>st</sup> defendant, a chief appointed under section 4(1) of the Chief’s Act, which he believes infringes his rights as village headman Chibwana of the Chibwana Village. Such an action as per the rules ought to be commenced by way of judicial review and not by way of ordinary action.”*

The court then dismissed the action for being commenced by way of ordinary action and not by way of judicial review.

### Analysis

The claimant commenced this action against the defendants. The claimant is the one who made the 1<sup>st</sup> defendant party to this action. By being made a party to this action, the 1<sup>st</sup> defendant has legal right or substantive interest in the matter. His rights, whether actual or threatened need to be protected. The 1<sup>st</sup> defendant, therefore, has *locus standi* and is entitled to bring the application.

appointed under section 3 (1) of the Chiefs Act in installing the 1<sup>st</sup> defendant as village headman Chatama. The claimant believes that the defendant's decision infringes his rights as village headman Chatama. He is claiming that he is rightful person to be installed as village headman Chatama. By doing so, he is challenging the exercise of the powers of the 2<sup>nd</sup> defendant under section 9 of the Chiefs Act which gives him powers to appoint a village headman. The appointment of a village headman is a right which is protected by the Chiefs Act.

The claimant is dissatisfied with the decision of the Chief and not the procedure he used. The claimant's action is concerned with the merits and not procedure. The case of *Frackson Chibwana v Dorothy Lyton and Others* (supra) is clear that even where the action is against the decision of a person or body which infringes his rights under public law, the judicial review is the proper mode of commencing the action. This, therefore, is a proper case to be commenced by judicial review and not ordinary action i.e. writ of summons.

The claimant's action is clearly frivolous and an abuse of the court process. The claimant's action is hereby struck out with costs to the 1<sup>st</sup> defendant.

Made in court this 9<sup>th</sup> day of July, 2018 at Blantyre.



**E. BODOLE (MRS)**

**ASSISTANT REGISTRAR**