

REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

BLANTYRE PRINCIPAL REGISTRY

CIVIL DIVISION

JUDICIAL REVIEW CAUSE NO. 44 OF 2017

BETWEEN

THE STATE

-And-

CHIEF KATUNGA.....RESPONDENT

EX- PARTE: CHIEF MASSEAH.....APPLICANT

Coram: Honourable Mr. Justice D. Madise

Mr. Goba Chipeta Counsel for the Applicant

Respondents absent/unrepresented

Mr Mbekeani Official Court Interpreter

Madise, J

JUDGEMENT

1.0 Introduction

1.1 The Applicant in this matter obtained leave to move for Judicial Review on 28th July, 2017. On the same day the Applicant filed a notice of originating motion for Judicial Review.

1.2 The case was called for hearing on 22nd June, 2018 at Blantyre at 9.00 in the fore afternoon. The Respondent did not follow up and no reasons were given for their non-attendance. The Applicant then filed an affidavit of service and allowed him to present his case.

1.3 The Applicant filed an affidavit verifying the facts relied on in support of the motion for Judicial Review. The said facts are outlined in the statement of grounds on which the relief is sought.

2.0 The grounds

2.1 The Respondent has not opposed the summons and I will proceed to give judgment on the merits.

2.2 Grounds on which relief is sought

1. The decision by the Respondent to operate and exercise functions of a chief in the Applicant's area of jurisdiction, is a decision that squarely fits in the labels unreasonable, *ultra vires*, illegal, unconstitutional and invalid.
2. The Respondent and the Applicant are public authorities' established under section 3 (1) of the Chiefs Act and the Schedule to the Act. They have neighbouring areas of jurisdiction: the Respondent authority is restricted to Section 5 of Chikwawa district, under the Schedule, while the Applicant's authority is restricted to section 6 of the said district.
3. There once was a dispute regarding the boundary between the parties' areas of jurisdiction and, when the dispute was brought before

Paramount Chief Lundu, the Paramount Chief found and ordered that the boundary between the parties' areas of Jurisdiction, with effect from 14th September, 2010, was Mthumba river. Copy of the determination is attached hereto as exhibit **"CM1"**

4. On 6^h September, 2013, the Ministry of Local Government instituted a Commission of Inquiry composed of Senior Chief Malemia, Chief Phuka and Chief Makata to, *inter alia*, examine the boundary issue between the parties again. The said Commission of Inquiry again confirmed and maintained Mthumba river as the boundary between the parties' areas of Jurisdiction. Copy of letter from District Commissioner for Chikwawa District to that effect is attached hereto as exhibit **"CM2"**
5. As exhibit **"CM2"** clearly shows, that with Mthumba River as the boundary between the parties' areas of jurisdiction, the following village headmen fall under the Applicants area of Jurisdiction: group village headman Ntondeza, group village headman Biyasoni, village headman Matekenya, village headman Khwawa and village headman Simbi.
6. Despite the well- established boundary between the parties' areas of Jurisdiction as foresaid, the Respondent in the month of July 2017 decided to cross Mthumba River into the Applicant's area of jurisdiction to exercise therein functions of a chief by arranging the installation of Village Headman Matekenya into Group Village Headman on the 29th July, 2017. Copies of notices to that affect are attached hereto as exhibit **"CM3."**
7. The Respondent's decision in issue is *ultra vires* the Chiefs Act in that the Respondent, without lawful authority, seeks to exercise functions of Chief in the Applicant's Section 6 of Chikwawa District, when the said

Respondent's authorised jurisdiction under the Schedule to the Act is only restricted to Section 5 of Chikwawa district.

8. The Respondent's said decision, to the extent that it is *ultra vires* the Chiefs Act, as aforesaid, flouts the fundamental constitutional principle of observance and upholding of rule law in section 12 (1) (f) of the Constitution, and is as such, unreasonable, illegal, unconstitutional and invalid.

3.0 The Law

Burden and Standard of Proof

3.1. The burden and standard of proof in civil matters is this: He/she who alleges must prove and the standard required by the civil law is on a balance of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than a positive.

As Denning J., stated in Miler vs. Minister of Pensions [1947] 2 A II E.R. 372.

If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not

3.2 Similarly the degree of probabilities will depend upon the subject matter. When a civil court is deciding on a charge of fraud, it naturally follows that a higher degree of probability is required than when deciding an issue of negligence. However the standard does not reach as high as that required in a criminal court which is beyond a reasonable doubt. The general principle is that the court must require a degree of probability which suits the occasion and is commensurate with the law and facts.

3.3 Leave for Judicial Review

It is settled law that an applicant requires the leave of the Court before a notice for judicial review can be filed (0.53 r1 RSC). The purpose of seeking the leave of the court is to avoid busy bodies who simply want to abuse the process of the court. The granting of leave therefore blocks away frivolous, vexatious and hopeless applicants which simply inundate the courts but yield no serious legal development.

3.4 What is Judicial Review?

Judicial Review is the most effective means by which courts control administrative actions and stops abuse by public persons/bodies. (Including inferior courts and tribunals.) Section 108 (1) and (2) of the Constitution is the starting point.

(1) There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.

(2) The High Court shall have original jurisdiction to review any law and any action or decision by government for conformity with this constitution save as otherwise provided by this constitution and shall have such other jurisdiction and powers as may be conferred on it by this constitution or any other law.

3.5 The concept of Judicial Review is enshrined in section 43 of the Constitution of Malawi which is a lead provision in this case. The section provides as follows:

Every person shall have the right to:

- a) Lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and
- b) Be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected or threatened if those interests are known.

3.6 Judicial review is a supervisory jurisdiction which reviews administrative actions by public bodies rather than being an appellate jurisdiction. For judicial review proceedings to be entertained by courts the following preliminary issues must be satisfied.

3.7 Public Law

Only decisions or actions which are made in a constitutional or public law context are amenable to judicial review. This therefore means that even if a body is susceptible to judicial review not every decision will be reviewable if it is outside the ambit of public law. A clearer example will be matters of employment which are generally regulated by contract within the ambit of private law. On the issue of public law and judicial review Lord Diplock stated in O'Reilly vs. Mackman [1983] 2 AC 237.

It would in my view as a general rule be contrary to public policy and as such an abuse of 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 (governing judicial review) for the protection of such authority.

3.8 The Parties

Judicial review can and must not be brought by or at the instance of the government. In general, judicial review only lies against anybody charged with the performance of a public duty in a public law context.

3.9 Locus Standi

An applicant in a judicial review proceeding must have “*sufficient interest*” in the matter. The purpose is to exclude the so called busy bodies. There must be a direct or personal interest. Whether a general interest qualifies within the meaning of *locus standi* is a question of law and fact. However courts have in recent times adopted a much broader and flexible approach. The more important the issue and the stronger the merits, the more readily will a court grant leave to move for judicial review notwithstanding the limited personal involvement of the applicant.

3.10 The Grounds

Judicial review proceedings must not issue merely because the decision maker has made a mistake. The applicant must show that there has been a departure from accepted norms. That the decision making process has been characterized by illegality, procedural impropriety and irrationality. This is called the tripartite distinction. Based on the above this Court is convinced that this is a suitable case for judicial review.

3.11 The Wednesbury principle

In Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] All ER 680, Lord Green MR stated as follows

Decisions of persons or bodies performing public duties or function will be liable to be quashed or otherwise dealt with by an appropriate order in Judicial Review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the

relevant law and acting reasonably could have reached that decision.

3.12 A court when reviewing a decision making process will not simply quash a decision because it does not agree with it, but that it was unreasonable regard being had to the circumstances of the case and the dictates of administrative law. The court must be satisfied that no decision maker properly directing his mind to the law and facts before him could have made such an absurd decision. Once the decision is adjudged to be unreasonable it must be declared null and void within the Wednesbury test and must be quashed.

4.0 The Determination

4.1 There is no dispute that when this matter arose Paramount Chief Lundu was called upon to adjudicate on it. At the conclusion of the hearing he ruled that the boundary between the two chiefs was Mthumba River. The Applicant has attached a copy of the determination **(CM1)**. In this letter of 14th September, 2010 addressed to the District Commissioner of Chikwawa, the Paramount Chief stated that with effect from 14th September, 2010 the boundary between Maseya and Katunga was the Mthumba river.

4.2 There is no dispute that after this determination the District Commissioner for Chikwawa wrote a letter **(CM2)** to Paramount Chief Lundu dated 30th March, 2016 in which he advised that government had set up a Commission of Inquiry on 6th September, 2013 to determine the boundaries between the two Chiefs.

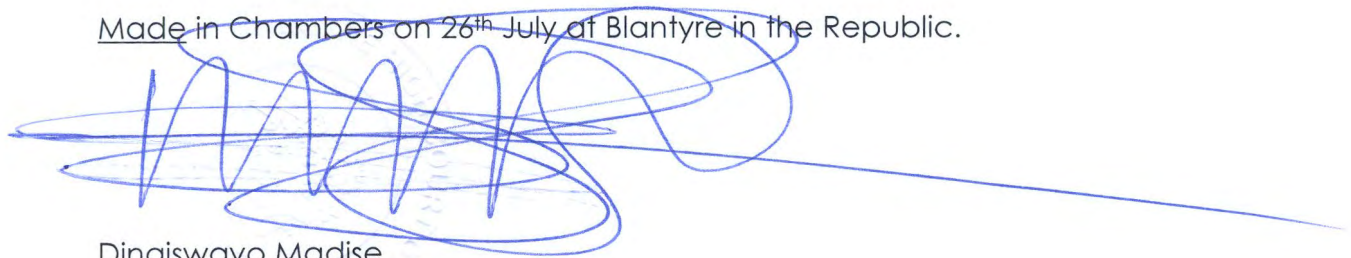
4.3 The Inquiry comprised of Senior Chief Malemia of Nsanje, Traditional Authority Phuka of Thyolo and Traditional Authority Makata of Blantyre. In the report the Commission found that the issue of the boundary between the two "Chiefs" was already determined by Paramount Chief Lundu and the Commission did not make contrary findings in that regard. The Commission of Inquiry simply confirmed the decision of Paramount Chief Lundu.

4.4 In this matter for Judicial Review the Respondent has not opposed the summons. There is no evidence to suggest that Paramount Chief Lundu and Commission of Inquiry's findings were wrong. The question before me is whether the determination by Paramount Chief Lundu was reasonable regard being had to all the circumstances of the case and the dictates of administrative law? Secondly whether the findings of the Commission of Inquiry was within the ambit of the law regard being had to all the evidence presented.

4.5 During the hearing of the matter before Paramount Chief Lundu, Maseya and Katunga were all given an opportunity to present their case. I therefore, confirm the decision of Paramount Chief Lundu and I condemn the Respondent actions as being unlawful, unconstitutional and *ultra vires*. On a balance of probabilities I now grant the Applicant the reliefs sought in the Originating Summons plus costs of this action. This decision is effective from the date of this judgement.

I so order.

Made in Chambers on 26th July at Blantyre in the Republic.

A large, stylized handwritten signature in blue ink, consisting of multiple overlapping loops and a long horizontal stroke extending to the right.

Dingiswayo Madise

Judge