



**MALAWI JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**JUDICIAL CAUSE NO. 44 OF 2018**

**IN THE MATTER OF SECTION 9 OF THE CHIEFS ACT (CAP 22:03) OF THE LAWS  
OF MALAWI**

**AND**

**IN THE MATTER OF THE DECISION OF SENIOR CHIEFG KUNTAJA AND  
INSTALLATION OF KONDWANI DICK AS VILLAGE HEADMAN MUOTCHA**

**AND**

**IN THE MATTER OF ORDER 19 RULE 20 OF THE COURTS (HIGH COURT) (CIVIL  
PROCEDURE RULES 2017**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**BETWEEN:**

**THE STATE (ON THE APPLICATION OF CHIYEMBEKEZO  
BASIKOLO).....CLAIMANT**

**AND**

**SENIOR CHIEF KUNTAJA.....1<sup>ST</sup> DEFENDANT**

**GROUP VILLAGE HEADMAN NTEFULA .....2<sup>ND</sup> DEFENDANT**

**KONDWANI DICK.....3<sup>RD</sup> DEFENDANT**

**DISTRICT COMMISSIONER FOR BLANTYRE.....4<sup>TH</sup> DEFENDANT**

**CORAM: THE HON JUSTICE HEALEY POTANI**

**Mr. Sitolo, Counsel for the Claimant**

**Mr. Chikabvumbwa, Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

**Mr. Mathanda, Court Clerk**

## RULING

The claimant approached this court with an *ex parte* application seeking two orders namely: an order for permission to commence judicial review proceedings with regard to succession to the throne of Village Headman (VG) Muotcha and an order staying the installation of the 3<sup>rd</sup> defendant as VG Muotcha. The court readily granted the permission to commence judicial review but directed that the plea for an order of stay should be heard *inter partes* and this is now the court's determination thereon.

The evidence which the court has been provided with for purposes of the application under consideration are sworn statements of Benjamin Masulani, Dikilani Austin Nkolokosa, Chiyembekezo Basikolo (the claimant) and Mai Difa Basikolo in support of the application while in opposition, there are sworn statements of Samuel Nangantani(1<sup>st</sup> defendant), Sosten Gabriel (2<sup>nd</sup> defendant) and Charles E. Mphepo, Assistant Human Resources Management Officer for the 4<sup>th</sup> defendant.

The court has been presented with oral arguments and submissions in addition to the written skeleton arguments from counsel for the parties. It should be observed that in the arguments presented to the court, the law relied on by counsel on both sides is essentially that governing applications of interlocutory injunction. This seems to be the approach that has evolved and developed in our jurisdiction in applications for stay of decisions complained of in judicial review proceedings and it is quite understandable considering that in essence, the effect of a stay order is more or less like that of an prohibitive injunction order. Thus, the court has to first consider whether is a serious question to be tried and if the answer is in the affirmative, it must move on to consider whether damages would be an adequate remedy and if not, the further consideration is whether it would be just to grant the stay order. These parameters are age as case law would show. In *American Cyanamid Co. v. Ethicon Ltd* [1975] A.C. 396; [1975] 2 W.L.R. 316 which arguably is the leading case on the subject, broadly it was authoritatively held that when an application is made for an interlocutory injunction, the initial question that calls for consideration is whether the applicant has a good arguable claim to the right he seeks to protect with the aid of the injunction. If the answer to that question is in the affirmative, then court must move on to consider whether



damages would be an adequate remedy for a party injured by the court's grant of or refusal of an injunction and if not where does the balance of convenience lie.


In the case at hand, it is quite evident from the facts presented by the parties in their respective sworn statements that there is a tussle over succession to the Muotcha village headship between the claimant on the one hand, and the 3<sup>rd</sup> defendant as supported by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendant on the other hand. Significantly, the claimant's side alleges that succession to the Muotcha throne is not governed by the Man'ganja custom under which it is the nephew to the immediate past village head who takes over as the defendants allege. According to the claimant, it is governed by the Chikunda custom under which it is not necessarily the nephew who takes over; rather the whole royal family consults and decides on who should take over. That said, the court would hasten to state that it is no part of its function at this stage of the matter to try to resolve conflicts of evidence on sworn statements as to facts on which the claims of either party may ultimately depend or to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. This is because the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete as is given on sworn statements and has not been tested by oral cross-examination. Clearly therefore there is a serious question to be tried being who between the claimant and the 3<sup>rd</sup> defendant is entitled to ascend to the throne.

The next aspect the court has to consider is whether damages would be an adequate remedy for the damage that would accrue as a result of the grant or refusal of the stay order being sought. It is trite law that where damages would be an adequate remedy, no injunction should be granted no matter how strong the applicant's case might be. As the facts plainly show and as earlier indicated, what is at stake in this case is ascendancy to the throne of village headman which is a position of authority to govern others at a local traditional level and it is almost a notorious fact that the position entitles the holder to receipt of monthly honoraria. While the latter can be quantified in monetary terms the latter former cannot be. It means once one has been stopped from ascending to the throne, he loses the authority to govern which cannot be compensated in monetary terms as the loss is difficult if not impossible to quantify. It is therefore the position of the court that considering the bone of contention in this case, monetary compensation would not be an adequate remedy for the damage that would accrue due to the grant or refusal of the injunction being sought.

This leads to the question whether or not it is just to grant the stay order sought. It is not in each and every case where damages would not be an adequate remedy that the court has to grant the stay sought. The court still has the duty to consider whether it is just to grant the stay order. From the facts in totality, if the order of injunction sought were to be granted, it means there will be no village head for the Muotcha village until the final determination of the matter. In the estimation of the court, the power vacuum that would be created will not be a good state of affairs. Leadership at village is crucial and always needed. Thus, it would be a better evil to have at least a leader in place even if his legitimacy is in question than have no leader at all as the matter awaits resolution by the court. And it should be mentioned for what it is worth that should in the end it turns out that the 3<sup>rd</sup> defendant has no legitimacy, then an appropriate order would be made to strip him off the authority. The court therefore is of the inclination in the meantime, it would not be just to grant the stay order sought by the claimant.

Costs of the application are awarded to the defendant.

**Made this day of March 14, 2019, at Blantyre in the Republic of Malawi.**



**HEALEY POTANI**  
**JUDGE**