



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 967 OF 2013**

BETWEEN

**BENSON CHIMDIMA (ON BEHALF OF
THE ELEN TAMBALA FAMILY) 1ST APPLICANT**

**SELLINA KAUNDE (ON BEHALF OF
THE REBECCA TAMBALA FAMILY) 2ND APPLICANT**

**CHIPILIRO MANUEL (ON BEHALF OF
THE SALOME MPHENZI FAMILY) 3RD APPLICANT**

**NAMASEKO MTOSO (ON BEHALF OF
THE ELINATI KAWELAMA FAMILY) 4TH APPLICANT**

AND

JEREMIAH CHIKUSE 1ST RESPONDENT

MADIASI MASIYE 2ND RESPONDENT

TRADITIONAL AUTHORITY MAZENGERA 3RD RESPONDENT

**THE DISTRICT COMMISSIONER, LILONGWE
DISTRICT ASSEMBLY 4TH RESPONDENT**

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Ms. Mlelemba, of Counsel, for the Applicants

1st Respondent, present and unrepresented

2nd Respondent, present and unrepresented

3rd Respondent, absent and unrepresented

4th Respondent, absent and unrepresented

Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

The present action was commenced on 11th October 2013 by way of an originating summons, The Applicants seeks the following two declarations:

- “(A) *A declaration that under Chewa custom law selection of successor to a chief is done by the majority of the members of the royal family.*
- (B) *A declaration that Traditional Authority Mazengera, Village Headman Khama and Village Headman Namanga was wrong in unilaterally having Jeremiah Chikuse chosen as successor to Group Village Headman Matapila and Madiasi Masiye as Nduna contrary to the agreed procedure that the chieftaincy would move to Allen Tambala’s family in accordance with the rotation tradition.”*

The originating summons is supported by an affidavit sworn by Sellina Kaunde and it states as follows:

- “1. ***THAT*** *I am an Applicant in this matter and I make this affidavit on behalf of myself and the other 3 Applicants.*
2. ***THAT*** *I am of full age and therefore authorized to swear this affidavit.*
3. ***THAT*** *the Chieftaincy of Matapila was occupied by Matapila Chimzizi, who died on 10th June, 2012.*
4. ***THAT*** *the tradition as regards the election of heir to the Matapila Chieftaincy is that it rotates within 4 families, the Atten Tambla Family. The Rabecca Tambala Family, the Salome Mphenzi Tambala Family, and **Elinati Kawalama Family**).*
5. ***THAT*** *Allen Tambala, Rabecca Tambala. Salome Mphenzi and Elineti Kawelama are sisters and the Chieftaincy from their uncle, Matapila Kamkodzo.*
6. ***THAT*** *the eldest of these sisters are Rabecca, followed by Allen and then Salome and lastly Elinati.*
7. ***THAT*** *the Rabecca Tambala Family have occupied the Chieftaincy tow consecutive times.*
8. ***THAT*** *Matapila Chimzizi who died in 2012 was from the Rabecca Family.*
9. ***THAT*** *on 23rd February, 2013 the four families sat down and agreed that the Chieftaincy would now move to Allen Tambala’s Family.*

10. **THAT** consequently money was collected from all the four families in preparation of making the announcement to T/A Mazengela of the Family's decision.
11. **THAT** a delegation comprising of GVH Malaza, VH Chikupula and VH Mphonde and VH Mphambanya was chosen by the four families to go to the T/A.
12. **THAT** two village Headmen, V H Khama and V H Namanga who were also supposed to comprise the delegation gave excuse and did not travel with the delegation.
13. **THAT** when the delegation made announcement of the family's decision to the T/A they were surprised that the T/A refused to attend them and demanded that could hear the delegation in presence of the two Village Headman who has absented themselves on this occasion.
14. **THAT** when the delegation went back home they invited the other two Village headman who had absented themselves to a meeting of the delegation members and the members of the Matapila Family.
15. **THAT** the two chiefs did not attend the meeting and did not give reason for their absence.
16. **THAT** at the meeting, it was resolves that the delegation would go back to the Traditional Authority and inform him of the family's second resolution, confirming their earlier decision.
17. **THAT** when the delegation attended before the T/A the second time, the Traditional Authority again refused to hear them and stated that the bereaved family had requested that the election of their heir to the chieftaincy should wait until a tombstone had been construction for the departed chief.
18. **THAT** we were surprised of this because the tradition is that the heir is elected soon after the death of the occupier of the throne.
19. **THAT** there is no rule of tradition or custom that demands a tombstone to be built first before an heir to a throne is identified.
20. **THAT** we were also surprised that the bereaved family on their own halted the process of electing the heir when we had agreed at several meetings where all families, including them, had been in attendance that the process would proceed.
21. **THAT** consequently, chiefs Khama and Namanga were told to inform the bereaved family of the Traditional Authority's position and that the be revealed family would inform all members of the families.
22. **THAT** the bereaved family was informed but nothing is being done up to now as regards constructing the said tombstone.
23. **THAT** noting the delay in the process, members of the other three families, the family of Rebecca, Allen, Salome and Elinati, went to the District Commissioner and lodged a complaint.

24. *THAT we received a notice that officials from District Commissioner would come to the village to facilitate the resolution of the matter.*
25. *THAT in the month of June, 2013, Officers for the District Commissioner's office came but surprisingly stated that they could deal with the issue then as they had forgotten the file at the office and that they would reschedule later date.*
26. *THAT this meeting never saw any light of day.*
27. *THAT on 29th August, 2013, we received a letter from the District Commissioner's office informed us that the 1st Respondent had been elected as the Group Village Headman and the 2nd Respondent had been elected as Nduna to the 1st Respondent. A copy of the letter is hereby exhibited and marked 'SKI'.*
28. *THAT the letter did not state who made those election.*
29. *THAT the letter from the District Commissioner had an attached letter which further states that the advisers to the GVH would be Mai Maganiza and Mai Kachomoza.*
30. *THAT the authors of this attached letter are unknown. A copy of the attached letter is hereby exhibited and marked "SK 2"*
31. *THAT the author's of the letter did not state who comprised the forum that the conducted the of the 1st Respondent and the 2nd Respondent.*
32. *THAT there has never been any meeting or forum at the Matapila Village where we made these elections.*
33. *THAT it was therefore wrong, unlawful and unfair for the 3rd Defendant to refuse to hear the delegation on the Village's and the Matapila Family's decision as regards the election of the heir to Group Village Headman Matapila.*
34. *THAT it was wrong, unlawful and unfair for the 4th Defendants to endorse there choice of an heir to the throne when there was no indication as to who and where the said people were elected.*
35. *THAT the decision by the 3rd and 4th Respondents has negatively affected me and other Applicant's as we are all potential heirs to the throne.*
36. *THAT the Respondents can only be restrained from proceeding with the installing of the unlawful chosen persons to the position of GVH and Nduna with an order of injunction from this court.*
37. *THAT the Respondents are now in the process of organizing the installation ceremony of the 1st Respondent."*

On 6th September 2013, the Court granted an order of injunction restraining the Respondents, their agents, or otherwise from proceeding to install the 1st Respondent as Group Village Headman Matapila and from proceeding to install the 2nd Respondent as the Nduna of Group Village Headman Matapila. The order was to be

valid for 60 days during which period the Applicants were to file inter-parte summons for the hearing of the application.

On 11th November 2013, the Court made the following ruling:

“As per the agreement between the parties, I order that the substantive matter herein be adjourned sine die until the parties hereto undergo the following:

- (a) That the immediate royal family hereto, should discuss their tradition and culture practice with regard to the issue of inheritance of chieftaincy.*
- (b) That the parties hereto involve their legitimate nkhoswes in their discussions.*
- (c) That the parties seek the guidance and directions of their T/A Mazengera who will identify the appropriate councilors who can give direction on the practice and procedures with regard to chieftaincy succession of the royal family in issue.*
- (d) All these activities to be undertaken before the end of April 2014.*
- (e) If the parties hereto fail to reach agreement before the said date then the matter be referred to the District Commissioner for Lilongwe who may institute a commission of inquiry to fully investigate the chieftaincy succession practice with regard to the chieftaincy in issue.*

The injunction proceedings is adjourned to the 2nd day of May 2014 for the Court to be updated on the mediation proceedings described above.”

On 27th March 2015, Messrs Makolego & Company, acting on behalf of the Applicants filed with the Court a certificate to the effect that the parties had failed to reach an agreement in line with the Court’s Ruling dated 11th November 2013 and that the District Commissioner had done nothing.

Between 27th March 2015 and 4th December 2018, the case was set down for hearing on a number of occasions by hearing failed to take place for various different reasons.

On 18th February 2020, the Legal Aid Bureau filed with the Court a Notice to the effect that the Claimants had appointed it to represent them.

On the set hearing date of 5th March 2020, Counsel Makwemba informed the Court that her instructions from the Claimants was that they no longer wish to proceed with the case. She accordingly prayed that the case be withdrawn. Upon being pressed by

the Court on whether her prayer was for withdrawal or discontinuance of the case, she clarified that her prayer was for discontinuance of the case.

The inquiry by the Court was not just an exercise in legal gymnastics. The Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as “CPR”] does not provide for withdrawal of cases: Order 12, rules 42 to 53, of CPR deal with discontinuance of claims.

The procedure for discontinuance of claims is set out in Order 12, rule 46, of CPR and it states as follows:

- “(1) In order to discontinue a claim or part of a claim, a claimant must-*
- (a) file a notice of discontinuance; and*
 - (b) serve a copy of the notice on every other party to the proceeding.*
- (2) The claimant shall state in the notice of discontinuance which he files, that he has served the notice of discontinuance on every other party to the proceeding.*
- (3) Where the claimant needs the consent of another party, a copy of the consent must be attached to the notice of discontinuance.*
- (4) Where the claimant needs the permission of the Court, the notice of discontinuance shall contain details of the order by which the Court gave permission.*
- (5) Where there is more than one defendant, the notice of discontinuance shall specify against which defendant the claim is discontinued.”*

The Claimants wish to discontinue their claim against the Respondents but such a course of action cannot be achieved by simply making an oral application before the Court. The Applicants have to follow the procedure laid down in Order 12, rule 46, of CPR. It so ordered.

Pronounced in Chambers this 10th day of March 2020 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE