

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 392 OF 2018**

BETWEEN:

LIMBANI EVANS LAWRENCE SOMANJE MAKATA
(On his own behalf and on behalf of the royal family for
Makata Chieftaincy)

CLAIMANT

AND

**GOLDEN MAKATA
NEFFIE MAKATA (MRS KALAIRE)
EGSON KUBWALO
MR MALINDI
TRADITIONAL AUTHORITY KAPENI
LAWRENCE GUNDAPHIRI**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT
4th DEFENDANT
5th DEFENDANT
6th DEFENDANT**

CORAM: JUSTICE M.A. TEMBO

Maliwa, Counsel for the Claimant
Masanje, Counsel for the Defendants
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is the decision of this Court on the claimant's claim seeking several reliefs, namely, a declaration that he is the rightful heir to the office of Group Village Headman Makata in Blantyre District, a declaration that the 6th defendant is not entitled to ascend to the office of Group Village Headman Makata according to the customary practice of the Makata area and an order

- of permanent injunction restraining the defendants from exercising the powers of Group Village Headman Makata and from installing the 6th defendant as Group Village Headman Makata. The claim is opposed by the defendants.
2. By his statement of case, the claimant asserted that in December, 2009, three months after his father's demise and following the Makata custom and tradition, he was installed as Group Village Headman Makata at a ceremony that took place at Ndirande.
 3. He then indicated that on or about July, 2016, the claimant was summoned by Traditional Authority Kapeni to a meeting at his Lunzu office. Further, that when he went to the meeting he found his family elders such as Golden Makata, Mrs. Neffie Kalairé, Aubrey Makata, and other family members.
 4. He stated that at the said meeting, Traditional Authority Kapeni declared that he had suspended the claimant for six months for insubordination as a result of the claimant's decision to go ahead and deliver a petition to Parliament on Government land reform Bills against the calls by Traditional Authority Kapeni not to do so.
 5. He asserted that his family members were asked to suggest a name who will take over as Group Village Headman Makata in an acting capacity as the claimant was on suspension. He indicated that Aubrey Makata, now deceased, was appointed as acting Group Village Headman Makata.
 6. He then stated that he was reliably informed that Traditional Authority Kapeni in conjunction with members of the Makata Elders Council comprising of Golden Makata, Aubrey Makata, Mrs. Neffie Kalairé, Egson Kubwalo and Mr. Malindi intended to install Lawrence Gundaphiri as Group Village Headman Makata in place of the claimant on 16th December, 2018.
 7. He asserted that Lawrence Gundaphiri is a grandson of Somanje Makata. He asserted further that Lawrence Gundaphiri is not heir to the office of Group Village Headman Makata and cannot ascend to the said office because the only person to ascend has to be a child of the predecessor and must belong to the Makata royal family. He added that Lawrence Gundaphiri is his cousin and son to his late father's sister and not a member of the royal family.
 8. In view of the foregoing, he asserted that it is clear that Lawrence Gundaphiri is not the rightful heir to the office of Group Village Headman Makata since his appointment is not in line with the cultural practices prevailing in Makata Village. The claimant therefore seeks the reliefs outlined above and costs of this action.
 9. On their part, the defendants filed a defence. They asserted that they are part of the royal family except for the Traditional Authority Kapeni. They therefore denied that the claimant commenced this matter on behalf of the royal family.
 10. They asserted that the Makata Chieftaincy is Yao and therefore follows the

Yao custom on succession which is matrilineal.

11. The defendants then indicated that when Lawrence Somanje Makata was Group Village Headman in the late 1950s he got involved in politics against the wishes of his clan and was forced to step down and he gave the chieftaincy to his cousin because the proper heirs were very young then. They added that the said cousin clung on to the chieftaincy such that a number of persons served in the chieftaincy until around the year 2000 when the Makata Family reclaimed the chieftaincy herein.
12. They then asserted that since the chieftaincy had just been reclaimed, there had to be an interim chief. And that, as such, Evance Lawrence Makata was made the interim Chief herein while awaiting proper enthronement procedures but that otherwise he was not supposed to be a Chief. They added that Evance Lawrence Makata was son to Lawrence Makata, who had stepped down due involvement in politics, and was the claimant's father. Further, that Evance Lawrence Makata was never enthroned.
13. The defendants asserted that when Evans Lawrence Makata died in 2009, the claimant, though not the proper heir to the Makata chieftaincy per the Yao custom, proclaimed himself as chief even before the end of the customary mourning period. They explained that they acquiesced in the claimant's conduct, giving respect to the mourning period, as well as taking cognizance of the fact that to start quarrelling over the chieftaincy at that stage a few years after a similar dispute with another family would create weakness and create further chaos in the Makata chieftaincy. They indicated that they therefore let the claimant get enthroned but that otherwise he ordinarily was not an heir to the chieftaincy.
14. They claimed that it is Yao custom that a chief is subject to the clan's directions and that the clan has power to replace a chief who does not rule his people well or is oppressive. They added that under Yao custom, a chief will be under the direct powers and supervision of his senior Traditional Chief. They claimed that, contrary to custom, the claimant was found guilty of misbehavior bordering on oppression of the people, indulging in politics and insubordination to Traditional Authority Kapeni.
15. The defendants claimed that Traditional Authority Kapeni then suspended the claimant and a Council of elders was put in place to lead the village. And that the clan decided to replace the claimant and proper procedures were followed which led the 6th defendant, Lawrence Gudaphiri, being selected as the next Group Village Headman Makata herein. They asserted that the 6th defendant is son to Evance Lawrence Makata's sister and therefore entitled to succeed his uncle Evance Lawrence Makata. The defendants denied the claimant's claim to the reliefs he sought in this matter.

part of the laws of Malawi.

28. This Court agrees with the parties that customary law has been defined under section 2 of the General Interpretation Act as the customary law applicable in the area concerned. And that, in the present case, the reference to customary law will be in relation to the customary law of Makata chieftaincy as law practised in the area in question.

29. This Court also agrees with the parties that section 64 of the Courts Act provides that:

If in any proceeding a matter of customary law is material, such law shall be treated as a question of fact for purposes of proof. In determining such law, the court may admit the evidence of experts and persons whom the court considers likely to be well acquainted with such law: Provided that a court may judicially note any decisions of its own or of any superior court, determining the customary law applicable in a like case.

30. This Court agrees with the parties that, in short, it is a legal requirement under the cited section that customary law issues should be treated as any other matter of fact that requires evidence to prove their existence, with exception of judicial notice and precedents.

31. This Court further observes that in commenting on the requirement of proof of customary law under section 64 of the Courts Act the Supreme Court in *Chakumba v The District Commissioner for Lilongwe and others* M.S.C.A. Civil Appeal Case No 91 of 2013 said:

Proof, just like proof of foreign law, is because it (sic) customary law is a special area of law not obvious to the conventional legal system except in the circumstances where there is a judicial precedent or where a court takes judicial notice of decisions of its own or of a superior court, determining the customary law applicable in a like case.

32. According to the evidence before this Court it is not in dispute that the claimant was properly enthroned as Group Village Headman Makata. The proof provided shows that despite the Makata Chieftaincy herein being Yao, historically it is sons of the previous chiefs that had been enthroned subsequent to the demise of the previous chief. There was a clear departure from the matrilineal custom alleged by the defendants whereby only the children of the previous chief were to be enthroned. In any event, the enthronement of the claimant is not a critical issue to the disposal of the present matter.

33. The crucial issue is whether the claimant was correctly and properly suspended and subsequently dethroned herein. The claimant submitted that he was never heard before he was dethroned herein by the Traditional Authority.

He observed that the meeting at which he was allegedly heard by the Makata Council of elders and where it was resolved that the claimant be removed actually never took place as indicated by Group Village Headman Makata from Traditional Authority Makata.

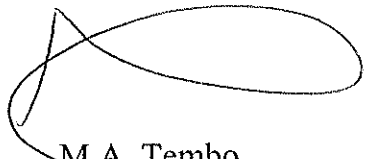
34. The claimant submitted that he could not be removed without any cause and without being heard. And that his removal without being heard and for no reason was contrary to section 43 of the Constitution which requires that a person be heard before a decision is taken against him.
35. On their part, the defendants submitted that there were valid reasons to do with the insubordination of the claimant towards the Traditional Authority and the claimant's oppression of the people which warranted the dethronement of the claimant on the recommendation of the Makata Council of elders.
36. This Court observes that the claimant was never called to the alleged meeting where he was confronted about his alleged insubordination to the Traditional Authority and his oppression of his people. Such a meeting never took place as was clearly indicated by Group Village Headman Makata from Traditional Authority Makata. The assertion to the contrary by Golden Makata on this aspect is found to be not credible by this Court.
37. In the circumstances, this Court agrees with the claimant's submission that there was no reason advanced for the removal of the claimant and he was never heard. There was no reason given in writing indicating why the claimant was dethroned. This is contrary to section 43 of the Constitution, which requires reasons in writing to be given when someone's rights are affected by a decision maker in the public sphere, and to which the customary law under which the claimant was removed herein is subject. It is therefore the finding of this Court that the claimant was not properly dethroned.
38. With regard to the suspension of the claimant by the Traditional Authority Kapeni there was indeed no evidence from the defendants herein as to the justification for the lengthy suspension of the claimant as submitted by the claimant. The impression that this Court got on the evidence is that the claimant had indeed been involved as Secretary for the grouping of chiefs from Blantyre who expressed opposition to the land reform Bills and he was involved as such in presenting their views to Parliament. There was no evidence to contradict the claimant's assertion that actually the Traditional Authority Kapeni had actually approved the convening the grouping of the Blantyre chiefs. What is vital is that the Traditional Authority never gave any evidence before this Court to justify the suspension of the claimant herein. Contrary to the assertions of the defendants, it cannot be said that in the circumstances that the suspension as justifiable.
39. In the final analysis, this Court agrees with the claimant that he was not

- properly suspended and dethroned by the Traditional Authority Kapeni.
40. In view of the foregoing finding of this Court, the subsequent questions for determination become inconsequential, namely, whether or not the 1st, 2nd, 3rd and 4th defendants as representatives of the Makata clan had the right and the power to choose the 6th defendant to replace the claimant; whether the 5th defendant having been presented with the 6th defendant, by the Makata clan, as the proper person to replace the claimant, had the power to enthrone him.
41. Given that the suspension and dethronement of the claimant herein has been found to have been unlawfully done the 1st, 2nd, 3rd and 4th defendants could not properly exercise their customary law role to choose the 6th defendant to succeed the claimant or to present him to the Traditional Authority for appointment as Group Village Headman Makata. The submissions by the defendants to the contrary in that regard are untenable.
42. For the avoidance of doubt, this Court wishes to state that the 1st, 2nd, 3rd and 4th defendants could however, in proper circumstances and whilst acting lawfully, properly exercise their customary law role to choose an eligible heir to succeed a Group Village Headman or to present such an heir to the Traditional Authority for appointment as Group Village Headman Makata.
43. The final issue for determination is a legal issue which was raised in the skeleton arguments by the defendants as to whether the matter was properly commenced in respect of the 5th defendant, Traditional Authority Kapeni.
44. The defendants essentially contended that the suspension and dethronement of the claimant herein was pursuant to exercise of powers by the Traditional Authority Kapeni under the Chiefs Act. And that the proper procedure to be followed by the claimant herein ought to have been under judicial review and not by seeking declarations by summons.
45. The defendants correctly submitted that it is trite law that where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he must, as 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. If a person commences an ordinary action where he should have applied for judicial review, the action will be struck out by summary process. Further that it would as a general rule be contrary to public policy, and as such an abuse of the 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 ordinary action and by this means to evade the judicial review provisions for the protection of such authorities. See *O Reilly v*

Mackman [1983] 2 A.C. 237; 3 All E.R. 1124, HL.

46. On his part, the claimant submitted that no prejudice has been suffered by the Traditional Authority Kapeni and that it would be unjust to deny the claimant the remedies he sought herein on account of the mode of commencement especially given that the issue was never raised at any point during the proceedings but only in the final submissions.
47. While this Court agrees with the statement of the law as submitted by the defendants herein, this Court notes that there are, however, cases where it is permissible to litigate public law issues in private law proceedings, for instance where the invalidity of the decision of the public authority arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the proceedings being continued by way of ordinary action. see *O'Reilly v. Mackman*, per Lord Diplock at 285/1134.
48. This Court observes that the defendants, in particular the Traditional Authority Kapeni, never objected to the proceedings herein being proceeded with as an ordinary action. And is persuaded that it would therefore not be just for this Court to refuse to exercise its discretion in such circumstances. The objection on the mode of proceeding has therefore come too late on the part of the defendants.
49. In the circumstances, where the defendants are found to have acted unlawfully in suspending and dethroning the claimant, this Court grants the claimant the declarations and reliefs that he sought herein.
50. The claimant shall get costs of these proceedings which shall be assessed by the Registrar if not agreed within 14 days.

Made in open Court at Blantyre this 16th July, 2021.


M.A. Tembo
JUDGE

