



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW CASE NUMBER 44 OF 2019

BETWEEN:

THE STATE (On the application of LABSON BWANALI) CLAIMANT

AND

**THE MINISTER OF MALAWI GOVERNMENT
RESPONSIBLE FOR LOCAL GOVERNMENT**

DEFENDANT

LAMECK BLACK

INTERESTED PARTY

CORAM: JUSTICE M.A. TEMBO

Pearson, Counsel for the Claimant
Chamkakala, Counsel for the Interested Party
Mankhambera, Court clerk

JUDGMENT

1. This is the decision of this Court made under Order 19 Rule 20 (1) Courts (High Court) (Civil Procedure) Rules, on an application by the claimant for judicial review of the defendant's decision, namely, the decision of the defendant made in April, 2019 appointing the interested party herein as Acting Traditional Authority Nsamala in Balaka District, with authority to appoint village headmen and group village headmen throughout, without following the due process of the prevailing customs in the Traditional

Authority Nsamala, without involving the royal family of the Traditional Authority Nsamala and without complying with sections 4 and 10 of the Chiefs Act.

2. By the said application, the claimant sought the following reliefs, namely, a declaration that the defendant's decision is contrary to sections 4 and 10 of the Chiefs Act and ultra vires, illegal and devoid of the claimant's legitimate expectation. A declaration that on the true construction of the Chiefs Act, even if the defendant were to have powers to appoint an Acting Chief is mandated to consult the claimant's royal family on the observance of and compliance with customs prevailing on the appointment of the Acting Traditional Authority Nsamala and the proper person who has been appointed by the majority in the area to be acting as such. A declaration that it is unreasonable in the Wednesbury sense and ultra vires for the defendant to appoint the interested party as Acting Traditional Authority Nsamala without following the due process of the prevailing customary practices and that it is *void ab initio* and illegal. An order akin to certiorari quashing the impugned decision. And order of mandamus requiring the defendant to withdraw the impugned decision. The claimant also seeks costs.
3. As correctly submitted by the parties to this matter, in terms of Order 19 rule 20 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017, judicial review shall cover the review of:

- (a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or
- (b) A decision, action, failure to act in relation to the exercise of a public function in order to determine:
 - (i) Its lawfulness;
 - (ii) Its procedural fairness;
 - (iii) Its justification of the reasons provided, if any; and
 - (iv) Bad faith, if any,

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

4. The case of the claimant is as follows. That he is a member of royal family of Traditional Authority Nsamala. He claims to be eligible to be appointed

and enthroned as Traditional Authority Nsamala having complied with customary practice prevailing in the area of Traditional Authority Nsamala and having support of the majority of the people from the said area.

5. He asserted that the defendant without complying with the requirements on the appointment of an Acting Chief, has recommended and appointed the interested party as Acting Traditional Authority Nsamala without warning himself whether he has powers to so appoint and on the compliance with the conditions for the appointment of the Acting Chief. He added that the decision was conclusively made in the course of the month of April, 2019 on an exact date unknown to him.
6. The claimant asserted that the interested party is now discharging his duties as Acting Traditional Authority Nsamala and has further been given the mandate to appoint village headmen and group village headmen throughout the area of Traditional Authority Nsamala. He indicated a list of nine village headmen appointed by the interested party herein. He added that when he approached the defendant within April, 2019, to rectify the anomaly herein the defendant confirmed the appointment of the interested party and indicated that the same cannot be reversed.
7. The claimant then contended that the defendant's decision is contrary to sections 4 and 10 of the Chiefs Act and ultra vires, illegal and devoid of the claimant's legitimate expectation since it is the President that has powers to appoint Traditional Authorities and Acting Traditional Authorities. Further, that on the true construction of the Chiefs Act, even if the defendant were to have powers to appoint an Acting Chief, the defendant is mandated to consult the claimant's royal family on the observance of and compliance with customs prevailing on the appointment of the Acting Traditional Authority Nsamala and the proper person who has been appointed by the majority in the area to be acting as such. He also contended that it is unreasonable in the Wednesbury sense and ultra vires for the defendant to appoint the interested party as Acting Traditional Authority Nsamala without following the due process of the prevailing customary practices and that it is *void ab initio* and illegal. And that therefore he is entitled to an order akin to certiorari quashing the impugned decision. And to a further order of mandamus requiring the defendant to withdraw the impugned decision.

8. The defendant has not filed any papers on this matter and has not contested the claimant's case. However, the interested party joined the application and contested the claimant's case.
9. The case of the interested party is that the claimant is not part of the royal family of Traditional Authority Nsamala. Further, that he was never appointed by the defendant as Acting Traditional Authority Nsamala. He asserted that he exercised these powers by virtue of his appointment as such by the royal family.
10. He indicated that the history of this matter is that in when the previous Traditional Authority Nsamala died, the royal family appointed him as the rightful heir to the office of Traditional Authority Nsamala. And that subsequently, a faction led by the claimant made competing claims to the throne and a dispute arose as to who was the rightful heir.
11. The interested party indicated that on 15th February, 2017 the dispute was resolved in his favour by Traditional Authorities Kalembo and Siwali. And that this prompted the claimant to go to the High Court at Zomba on 19th July, 2019 and he commenced an action by originating summons against the interested party and Balaka District Council following the decision made by the two Senior Chiefs. By the originating summons, the claimant sought a determination whether on a true construction of section 4 of the Chiefs Act the District Council can appoint and recommend the interested party, cited as co-defendant, heir to the Traditional Authority Nsamala without regard to the relevant prevailing customary law on succession and sought a declaration that the District Council had no such powers.
12. The interested party noted that, in view of the court action, no further steps were taken to install him until when in April, 2020 the claimant withdrew the originating summons. He asserted that, following the notice of discontinuance, steps were taken to officially install him as Traditional Authority Nsamala and the enthronement ceremony was set for 11th June, 2020 and that enthronement was halted on 5th June, 2020 when the present proceedings were brought to the attention of the defendant. The present proceedings having been commenced in April, 2019.
13. The interested party is of the view that, given the withdrawal of the originating summons at Zomba and that the defendant never made the

- appointment decision herein, the present proceedings are oppressive, frivolous, vexatious and an abuse of the court process and must be dismissed.
14. This Court will determine the question whether the current judicial review proceedings are an oppressive, frivolous, vexatious and an abuse of the court process.
 15. As correctly submitted by the parties, it was held in the case of *Kasungu Flue Cured Tobacco Authority v Zgambo* [1992] 15 MLR 174 that it is an abuse of the court process to seek relief in one court and, when relief is granted, to refrain from acting on it but to seek substantially similar relief from another court. And that categories of conduct resulting in a claim being oppressive, frivolous, vexatious and an abuse of the court process are not closed. See *Yiannakis t/a GPY Investments v Indebank Limited* civil cause number 57 of 2016 (High Court) (unreported). This Court must therefore examine the facts and make the relevant determination on the question of abuse.
 16. This Court notes that, on one hand, the claimant contends that the current proceedings and the originating process are different. Further, that the originating process was withdrawn to pave way for an out of court settlements. On the other hand, the interested party contends that the claimant is abusing the court process by commencing different proceedings on the same issue.
 17. This Court having carefully reflected on and reviewed the sequence of events observes that although the issues in the originating summons and on this judicial review broadly relate to the office of Traditional Authority Nsamala, the originating process concerned the District Council and the interested party on the question of the authority of the District Council to appoint and recommend the interested party as heir to that office. In contrast, the judicial review proceedings relate to a different matter of appointment of the interested party as Acting Traditional Authority Nsamala by the responsible Government Minister.
 18. In the circumstances, this Court is compelled to agree with the claimant that contrary to the interested party's submission it cannot be said that the present application is oppressive, frivolous, vexatious and an abuse of the court process.
 19. The interested party also objected to the proceedings herein on account of the fact that there is no decision that can be reviewed. He insisted that whatever

he has been doing, such as appointing village headmen, has been at the instance of the royal family and has nothing to do with the defendant. He made particular reference to the absence of any written decision by the defendant in the circumstances and also that the claimant refers only to the month of May, 2019 as the exact date of the decision is unknown as telling of the fact that there is no decision as alleged by the claimant. On the contrary, the claimant asserted that the defendant has not contested the allegation that it appointed the interested party herein. Further, that the interested party has been acting as Traditional Authority Nsamala with the tacit approval of the defendant and that the absence of the exact date of the decision does not take away this Court's jurisdiction. He cited the case of *State v Attorney General ex parte Abdul Pillane* [2006] MLR 442.

20. On this point, this Court wishes to note that the interested party has clearly indicated that he has been acting as Traditional Authority Nsamala. The claimant has indicated that the extent of such acting goes as far as appointing some village headmen. These village headmen are under the charge of the defendant as the Government Minister responsible for Local Government.
21. Contrary to the assertions by the interested party, it is highly unlikely that the interested party has been exercising these very important public law functions without the tacit approval of the defendant at local government level. It occurs to this Court that therefore it is more probable than not that the defendant made the decision to accept the interested party as Acting Traditional Authority Nsamala. The defendant made the decision to have the interested party as Acting Traditional Authority Nsamala notwithstanding that nothing was written down to that effect. There lies a decision that is amenable to review by this Court. There is no requirement in the circumstances that the decision should have been in writing for it to be amenable to review. Otherwise, the interested party will unlawfully exercise public powers and escape the jurisdiction of this Court by reason of the absence of a written decision but in the face of an unwritten tacit decision of the defendant.
22. The interested party then contended that the application herein is inept for having been taken out outside the three months' period allowed for judicial review applications to be lodged after the impugned decision in terms of Order 19 rule 20 (5) Courts (High Court) (Civil Procedure) Rules. He

contended that, if at all the decision sought to be reviewed indeed exists as a tacit decision by the defendant then that must have emanated from 2017 when the two Senior Chiefs resolved the chieftaincy dispute herein in favour of the interested party who started acting as Traditional Authority Nsamala.

23. This Court is unable to agree with the interested party in the absence of any indication from the defendant as to when the defendant actually tacitly accepted him as Acting Traditional Authority Nsamala. But more importantly, the claimant has indicated in paragraph 6.2 of his sworn statement that he has continually acted as Traditional Authority Nsamala as the matters to do with that office have been before the courts. The decision to tacitly accept him as Acting Traditional Authority Nsamala cannot therefore be attributed to 2017 when the Senior Chiefs ruled in his favour as heir to the office of the Traditional Authority Nsamala. There is no material to support this. It may as well be that the claimant confirmed in April, 2019 that the defendant had then tacitly decided definitely to accept the interested party as Acting Traditional Authority Nsamala. In such circumstances, the claimant is entitled to apply for judicial review as he did within three months of April 2019. All this arises as a result of the decision herein being by reason of the conduct of the defendant who has allowed the interested party to act illegally and without hindrance.
24. The last issue for consideration relates to the illegality of the decision by the defendant appointing the interested party as Acting Traditional Authority Nsamala. The President is empowered to appoint an Acting Chief under section 10 of the Chiefs Act.
25. The claimant contended that the appointment of the interested party by the defendant as Acting Traditional Authority Nsamala is illegal since only the President can exercise such a power under section 10 of the Chiefs Act. The interested party contended that the defendant as Minister Responsible for Local Government would be delegated such power of appointment and can legally effect such an appointment. The claimant retorted that such can indeed be done but only where the power is delegated in writing which appears not to be the case in the present matter.
26. This Court observes that indeed the President can delegate his powers in terms of section 35 (1) of the General Interpretation Act. But as held in the case of *State v Attorney General ex parte Abdul Pillane* [2006] MLR 442,

such delegation has to be in writing in terms of section 89 (6) of the Constitution. There is no evidence showing that the President delegated the defendant to accept the interested party as Acting Traditional Authority Nsamala. The conduct of the defendant in that regard is therefore illegal and ultra vires section 10 of the Chiefs Act.

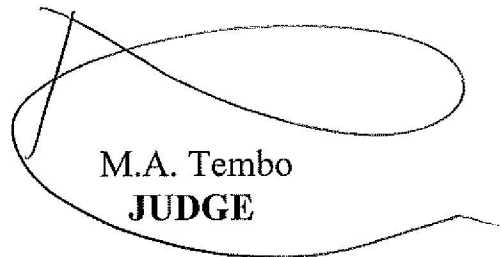
27. Related to the foregoing is the question whether when making an appointment of an Acting Traditional Authority under section 10 of the Chiefs Act due to the infirmity of the incumbent, the President is supposed to act in accordance with the customary law of the area as is the case when the President appoints a substantive Traditional Authority under section 4 of the Chiefs Act. The interested party contended essentially that the President need not have regard to the customs of the area as to eligibility of a person appointed as Acting Traditional Authority and whether the person has majority support in the area in question as is required on a substantive appointment under section 4 of the Chiefs Act. The claimant took a contrary view.
28. This Court has considered the philosophy guiding the Chiefs Act and comes to the conclusion that the President may not necessarily have to appoint in an Acting Capacity the same person that will have to eventually be appointed as successor to the Traditional Authority. The Acting appointment is during the life of the incumbent who may have suffered some incapacity. However, the President will have to have recourse to the customary processes as to who may be appointed as Acting Traditional Authority from the area in question. The royal family will have to be consulted in any event otherwise the President may appoint a total stranger as an Acting Traditional Authority and that would not be in line with the prevailing philosophy of the Chiefs Act that is premised to customary law governing occupation of the offices of Traditional Authorities. It follows therefore that, if the defendant were to properly appoint the interested party in an acting capacity as Traditional Authority Nsamala then the customary law prescriptions would still have to be followed in making sure that the interested party was an acceptable person at customary law to act in the office of the Traditional Authority.
29. In the foregoing circumstances, this Court grants the claimant the following reliefs, namely, a declaration that the defendant's decision is contrary to section 10 of the Chiefs Act and ultra vires, illegal and devoid of the

claimant's legitimate expectation; a declaration that on the true construction of the Chiefs Act, even if the defendant were to have powers to appoint an Acting Chief the defendant is mandated to consult the claimant's royal family on the observance of and compliance with customs prevailing on the appointment of the Acting Traditional Authority Nsamala and the proper person who has been appointed by the majority in the area to be acting as such; a declaration that it is unreasonable in the Wednesbury sense and ultra vires for the defendant to appoint the interested party as Acting Traditional Authority Nsamala without following the due process of the prevailing customary practices and that it is *void ab initio* and illegal. An order akin to certiorari quashing the impugned decision.

30. This Court also makes an order of mandamus requiring the defendant to withdraw its impugned decision by ensuring that the interested party ceases and desists from discharging any functions as Acting Traditional Authority Nsamala.

31. Costs are for the successful claimant and shall be assessed by the Registrar, if not agreed within 14 days.

Made in open Court at Blantyre this 5th July 2021.



M.A. Tembo
JUDGE

