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IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CIVIL DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 42 of 2012

Between

Alick Singini Applicant

-and-

Bowoyo Nya Msuku 1st Respondent
Nkhatabay District Council..... 2nd Respondent
STA Fukamalaza 3rd Respondent
VH Zamandele 4th Respondent
Alifeyo Msumba 5th Respondent
Khakolo Chiumia 6th Respondent
Manthepa Longwe 7th Respondent

CORAM:

HONOURABLE JUSTICE D.A. DEGABRIELE

Mr. C. Duke	for the Applicant
Mr. G.K. Nyirenda	for the Respondents
Mr. A. Kanyinji	Official Interpreter

DeGabriele, J

JUDGEMENT

Introduction

The applicant, Alick Singini took *ex parte* summons for an order of injunction pursuant to Order 29 RSC on 21st November 2012, which order was granted on 30th November 2012, restraining the 1st respondent and any other person to perform duties and act as Group Village Headman (GVH) Kandezu; and restraining the other respondents from dealing with the 1st respondent in the capacity of GVH Kandezu; and allowing the applicant to continue as GVH Kandezu without interference until the matter is determined.

The Application

The Applicant then took originating summons stating that he had been appointed as GVH Kandezu on 17th June 2005. He was called to a meeting on 14th August 2012 where allegations were made and a plea was made to remove him from the position of GVH Kandezu. He received minutes of the hearing which indicated that the Senior Traditional Authority (STA) Fukamalaza had resolved that he be removed from the position of GVH and another person, the 1st respondent was appointed as acting GHV Kandezu.

In October 2016, an affidavit was sworn by Manthepa Longwe that the 1st respondent Bowoyo NyaMsuku had passed away. On 25th November 2016 the applicant applied for leave to amend pleadings and leave was granted on 28th November 2016. The respondents then applied to add Manthepa Longwe and the addition was permitted on 27th March 2017.

The applicant is challenging the decision of Nkhata Bay District Council to dethrone him from the position of GVH Kandezu. The originating summons were amended following the death of the 1st respondent. The applicant swore an affidavit in support of the amended originating summons which was adopted in this hearing. The brief facts are that the applicant was enthroned as GVH Kandezu from 2005 and he served until 2012. The 1st respondent sought to have Traditional Authority (T/A) Mkumbira dethroned the applicant but the T/A refused to do so.

The respondents appealed to Nkhata Bay District Council and the applicant was invited to a meeting which took place on 14th August 2012. At the meeting, five allegations were made which were used as proposed grounds to dethrone the applicant, that a) he had misappropriated project funds; b) he did not consult family members when planning projects in the area; c) that he had a case to answer at the police; d) that he was not elected by the royal family and e) that he shouts at other members of the royal family and his subjects, (*see paragraph 6.0 of document marked and exhibited as AS1/ML1*). The applicant claims that under paragraph 13.0 of the same document (AS1/ML), the grounds for dethronement were not established. However the office of the District Commissioner (DC) made

orders that the applicant should stop discharging duties as GVH Kandezu and that the royal families had to choose another person to appoint as GVH Kandezu.

The applicant is seeking the following reliefs as outlined in the originating summons:

1. A declaration that the concerned royal families acted unlawfully in appealing to the DC against the decision of T/A Mkumbira
2. A declaration that the office of the DC had acted unlawfully in entertaining an appeal against the decision of the T/A
3. A declaration that the office of the DC had acted unlawfully in dethroning the applicant when the T/A had declined to do so
4. A declaration that the office of the DC had acted unlawfully in ordering the royal families to choose another person to be crowned as GVH Kandezu.
5. An order quashing the decision of the DC which purported to dethrone the applicant
6. An order quashing the decision of the DC which purported to order the royal families to choose another person to be crowned as GVH Kandezu
7. An order condemning the respondents in costs.

The response

The respondents joined issues in their response. The amended affidavit in opposition was sworn by Manthepa Longwe who stated that the applicant was indeed appointed GVH Kandezu in 2005 to 2012 but his reign was characterised by chaos and discomfort as the majority of his people were not happy with the applicant. The applicant was also appointed GVH Kandezu without following customary procedures. He also stated that the applicant was dethroned by STA Fukamalaza and not the DC of Nkhata Bay. The office of the DC and his representatives were just facilitators in finding a solution to the dispute. He further stated that the dispute was heard on a number of times before T/A Mkumbira who advised the applicant to change his behaviour, but when no change was noted, the matter was re-lodged with the DC's office, and there was no appeal. He stated that the minutes of the meeting found that the procedure for appointing GVH Kandezu was not followed and as such the royal families needed to meet

and agree on appointing another person as GVH Kandezu. The applicant was ordered to step down and the decision was made by STA Fukamalaza.

There is also an affidavit in opposition sworn by Kaligong'a Mhone, who is Village Headman Zamandere. He states that the applicant was not chosen in accordance to the tradition, but that it was Mhone himself, together with a politician late Salima who chose the applicant without consulting with his nieces and nephews. He apologized for the mistake. He also stated that the applicant was badly behaved to the extent of cursing the Senior Chief and Mhone himself at the hearings in 2010 to 2012. He stated that even though he had recommended the applicant for appointment as GVH Kandezu, he was now in support of the removal of the applicant from the position of GVH Kandezu. He also stated that following the ruling of STA Fukamalaza, he called together and conducted a meeting of the royal families and the late Bowoyo NyaMsuku was chosen to be GVH Kandezu. He further stated that the applicant's claim was not due to blood pedigree but that his father and the applicant himself were offered chieftaincy on acting capacity, based on friendship.

The respondents seek that the originating summons be dismissed with costs.

Issues for determination

Having looked at the submissions as well as the sworn affidavits of the parties, the major issues for determination are as follows;

- i. *Whether the applicant was appointed as GVH Kandezu in accordance to the prevailing custom*
- ii. *Whether STA Fukamalaza had jurisdiction to remove the applicant from the position of GVH Kandezu*
- iii. *Whether or not the DC's inquiry was properly conducted within the tenets of administrative justice and the law*
- iv. *Whether the DC had jurisdiction to resolve chieftaincy wrangles, and or remove a person from the position of GVH*

The law and its application to the Facts

- i. *Whether the applicant was appointed as GVH Kandezu in accordance to the prevailing custom*

Section 4(1) of the Chiefs Act, gives guidance on the process of appointing chiefs in the country, even though the section is referring to the appointment of Paramount Chiefs, Senior Chiefs and Chiefs by the President of the Republic of Malawi. The guidelines that apply to the appointment of all chiefs is to the effect that the person being so appointed must be entitled to hold the office under customary law; and that he or she must have the support of the majority of the people in the area of jurisdiction of the office in question.

In this matter, it is not disputed that appointment of GVH Kandezu had to be done by the royal families who would sit together and agree. This was verified in the sworn affidavits in opposition as well as the finding of the meeting held on 14th August 2012, whose minutes are exhibited as AS1/ML1. Furthermore, the affidavit of Kalingong'a Mhone clearly indicates that there was no consultation with the royal families as it was only Mhone and another who recommended the applicant for appointment as GVH Kandezu.

The applicant does not dispute this fact but relies on the decision of the MSCA in the case of *Group Village Headman Kakopa and others v Chiloza and another [2000 – 2001] MLR 140*. The MSCA held in that case that when a person was wrongly appointed, the challenge on the appointment and his removal must be done timely. The applicant herein avers that even if his appointment was wrong, the respondents had not challenged the same in a timely manner. The applicant herein claims that he enjoyed his reign for 7 years without any challenges as such the defendants had no basis to dethrone him. I find that the present case can be distinguished from the MSCA case cited above, in that the MSCA decision, the wrong appointment had been challenged after the Chief had ruled for over 20 years, had died and another person who was his descendant was appointed in accordance with the customary law and procedures. In the present case, there is evidence from the sworn affidavits in opposition, and from T/A Mkumbira in the minutes of the 14th August 2012 meeting (AS1/ML1) that there were complaints raised against the applicant over the 7 year period he was GVH Kandezu. I find that the applicant's reign was challenged over the period and he cannot rely on the MSCA decision above. It is sufficient that the applicant acknowledges that he was not appointed in

accordance to customary law and procedures prevailing in his area and therefore I find that his legitimacy was highly questionable. Furthermore, Kaligong'a Mhone acknowledged that it was him and a politician, late Salima, who chose and appointed the applicant as GVH and he apologized to the whole family stating that his choice was a mistake. This clearly shows that the requirement that there should be consultation among the royal families in choosing a GVH was not followed.

ii. *Whether STA Fukamalaza had jurisdiction to remove the applicant from the position of GVH Kandezu;*

Under section 9 of the Chiefs Act, a Chief may appoint such number of Group Village Headmen and Village Headmen as he may consider necessary to assist him in carrying out his functions. This means that the power to appoint a GVH is vested in the Chief, in this case T/A Mkumbira. Section 11 of the Chiefs Act provides for the removal and suspension of persons holding the office of Paramount Chief, Senior Chief, Chief and Sub-Chief. The removal would occur where it has been established through an inquiry that

- a) *The person has ceased to be entitled under customary law to hold such office;*
- b) *The person has lost the confidence of the majority of the people residing in his area; or*
- c) *Such removal is necessary in the interest of peace, order and good government.*

Therefore a perusal of these two sections leads to the interpretation that the appointing authority has powers to remove from office a person he so appoints.

The applicant argues that he was appointed by T/A Mkumbira and he should not have been dethroned except by T/A Mkumbira himself. The applicant cited the case of *The State and GVH Chamaoya and another, ex parte Evance Nyirenda Civil Cause No 56 of 2013 (unreported)* in which the Judge held that the power to appoint and remove a GVH from office was vested in the Chief. The court also observed that the Chiefs Act is silent on who actually removes a GVH or Village headman from his position. The Court went on to state that,

"However, based on section 11 of the Chiefs Act, it naturally follows that it is the appointing authority to wit the Chief who can remove a Village Headman from his office if the person ceases to be entitled under customary law to hold such office or the person has lost the confidence of the majority of the people, or that such a removal is necessary in the interest of peace, order and governance".

It is noted that GVH Kandezu is under the leadership of T/A Mkumbira who has the powers under the Chiefs Act to appoint Group Village Headmen and Village Headmen to assist him in managing his area of jurisdiction. It is also noted that T/A Mkumbira is under the leadership of STA Fukamalaza. The meeting held on 14th August 2012 was held under a 2 member panel; chaired by STA Fukamalaza, with T/A Mkumbira as an *ex officio* member of the panel. Even though T/A Mkumbira is said to be an *ex officio* member of the panel, it simply means that he was part of the panel in his official capacity as T/A Mkumbira. As an *ex officio* member he had all the rights and powers that are conferred on all the other members of a panel. This means that he was part and parcel of the decision making process to remove the applicant as GVH Kandezu, and also to call upon the royal families to choose another person as chief.

The applicant argues that because T/A Mkumbira had declined to comment on the matter in paragraph 7.0 of the document marked as AS1/ML1, it meant that he was reluctant to remove him as GVH Kandezu and did therefore not make the decision to remove the applicant. I do not agree. I find that his declining to comment on the issue did not remove him from the decision making, but rather his declining to comment meant that the adjudication process had to be done independently without his making a statement that may influence STA Fukamalaza. Again it is clear from paragraph 11.0 of AS1/ML1 that T/A Mkumbira did make a statement to the effect that the people and village heads had been requesting him to remove GVH Kandezu, and that he had been advising the applicant who was GVH Kandezu to change his behaviour. He also verified that the majority of his subjects did not want him as a chief. It is not right then for the applicant to state that T/A Mkumbira did not comment on the issues under discussion. I therefore find that STA Fukamalaza who was the overseer of T/A

Mkumbira; sat together with T/A Mkumbira to hear the dispute and made a decision. He was at law entitled to make the decision as long as all the parties were heard and the appointing authority was aware of and was part of the process.

The applicant further claims that the purported grounds for dethroning him were not proved at the hearing. As stated above, section 11 of the Chiefs Act lays down specific grounds for the removal of a chief. These grounds do not need to be all present and proved at the same time. Depending on the circumstances of the matter, one ground can lead to the removal of a chief. In the present case, it is clear that the applicant was not appointed in accordance to customary law and practice, as such his appointment was not valid. It was held in the case of *Kukhaya and Others v Attorney General [1999] MLR 137* that failure to take into consideration section 4 of the Chiefs' Act would render an appointment of a chief unilateral, unprocedural, irregular and contrary to the law, and therefore null and avoid. It was further held in the case of *Group Village Headman Kakopa and others (supra)* that the appointment of a chief would then be held to be procedural and lawful as all the provisions of the Chiefs Act as well as customary procedures were fully complied with. I find that the applicant's appointment was therefore void ab initio. He was not entitled at custom to hold the office of GVH Kandezu. I find further that the removal from office was also proper as the people in his area had lost confidence in him as a leader. Since his leadership was continually being challenged, I find that his removal was essential for the interest of peace, order and good governance.

The affidavit in opposition sworn by Kaligong'a Mhone states that the applicant's claim to the chieftaincy was not based on blood lines, but rather on friendship and in acting capacity. I have not received any clear evidence of the disqualification by blood line, since the applicant belongs to the clan or royal family of Liwinga and was recognised as such at the meeting of the 14th August 2012 (see *paragraph 1.3 of the AS1/ML1*). However, as far as this court is concerned and based on the evidence before me, whether or not the applicant was of royal blood, his appointment was void ab initio for the reasons outlined above.

iii. Whether or not the DC's inquiry was properly conducted within the tenets of administrative justice and the law

Section 43 of the Constitution of the Republic of Malawi provides that;

"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".*

Any decision that is made and negatively affects a person must be done in such a manner that the person must be given a right to be heard and an opportunity to defend himself. This did happen to the applicant herein.

What was the purpose of the meeting held on 14th August 2012? From the minutes (AS1/ML1) the meeting was a hearing of Kandezu Group Village Headmanship dispute. It was attended by all the 5 royal families under the Kandezu Group Village Headmanship as well as the T/A Mkumbira who had appointed the applicant as GVH Kandezu. From his affidavit, the applicant states that he was given notice of the meeting and he attended the meeting and was able to present his case. All royal families were able to present their case. The decision was made by STA Fukamalaza in conjunction with T/A Mkumbira.

In accordance to the functions of the DC under section 7 of the Chiefs Act, this meeting was to facilitate and coordinate the functions of chiefs, in this case, STA Fukamalaza and T/A Mkumbira in resolving a dispute. The DC's office was a central office that called all the parties, provided neutrality and an independent venue and ensured that the process did proceed in a civil manner.

It is clear from affidavit evidence that the dispute had already been adjudicated on a number of occasions by T/A Mkumbira and no solution had been reached. The applicant confirmed the same in his affidavit, where he states that T/A Mkumbira had given the other family advice which the other families were not willing to follow. He however did not clarify for the court what this advice was, nor

did T/A Mkumbira elaborate at the 14th August 2012 meeting what his advice was. A clarification of the said advice would have helped the court and it was incumbent on the applicant who is alleging to prove that the advice so given was in his favour. Whether this was an appeal or not, the fact remains that the matter had escalated and had to be adjudicated by STA Fukamalaza.

I find therefore that the facilitation process at the DC's office was done within the ambit of the Constitutional provision and respect for right to be heard. I also find the dispute hearing process that led to the removal of the applicant from the position of GVH Kandezu was also done in accordance with the tenets of administrative procedures.

iv. Whether the DC had jurisdiction to resolve chieftaincy wrangles, and or remove a person from the position of GVH

As discussed above, it is only the Chief who has powers under sections 9 and 11 of the Chiefs Act to appoint and remove a GVH or Village Headman. The District Commissioner has no powers to do so. Under section 7 of the Chiefs Act, the functions of a DC include coordination of the functions of chiefs and to give directions to the Chiefs. The chiefs are not mandated under customary law to report to the DC. In the present case, the applicant claims that he was removed from his office by the DC. He also claims that the DC ordered the royal families to appoint another person as GVH Kandezu. The applicant bases his argument on the grounds that at the 14th August 2012 meeting, there were many officers from the DC's office, that the DC called the meeting after the royal families appealed against T/A Mkumbira's decision, that under paragraph 4.0 of AS1/ML1 the DC's representative Mr Chilenga exhorted the meeting to be truthful so as to guide the DC's office to reach a fair ruling; and that the DC's representative signed the minutes.

I have looked at the minutes (AS1/ML1) and, bearing in mind the evidence of the affidavits, I have conclude that that the involvement of the DC's office was limited to facilitating the process of dispute resolution which was being handled by STA Fukamalaza. The signing of the minutes by Mr Chilenga was to show that the process had been done in accordance to administrative procedures. The ruling itself under paragraph 14.0 of AS1/ML1 is clear that it was STA Fukamalaza who

made the decision. The applicant in his original affidavit in support of the originating summons recognized that it was STA Fukamalaza who made the decision that the applicant be removed from the position of GVH Kandezu, after having heard all the parties. In his amended affidavit in support of the originating summons, the applicant now states that it was the DC who removed him from his position. I find that the DC did not at any time in the process remove the applicant from his position as GVH Kandezu, as he has no power under any law to remove any chief from their position. The DC has no power to resolve chieftaincy wrangles but he has power to facilitate and coordinate the process of dispute resolution carried out by the Chiefs.

Determination

I find that customarily it was acknowledged by all that the applicant was appointed and installed wrongly and as such the appointment was void *ab initio*. I agree with the ruling of STA Fukamalaza that the best solution was for the families to sit down and follow a proper customary procedure. The discussion and ruling delivered by STA Fukamalaza did not look at or dwell at the grounds that were being advanced to have the applicant removed, but rather focused on the process of appointment of the applicant. It was not essential to prove the grounds because the appointment itself was void *ab initio*.

Order

The reliefs sought by the applicant in the originating summons are hereby dismissed in their entirety. I find that this application is baseless, frivolous and vexatious and I dismiss the originating summons with costs.

The injunction obtained by the applicant was obtained wrongly and the applicant was guilty of suppression of facts. As such the injunction is vacated with costs.

Made In Chambers at Mzuzu Registry this 6th day of April 2017


D.A. DeGabriele

JUDGE