



IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
MZUZU DISTRICT REGISTRY
JUDICIAL REVIEW CAUSE NO. 10 OF 2019

BETWEEN

JOSEPH BONGOLOLO GONDWE APPLICANT

AND

PRESIDENT OF THE REPUBLIC OF MALAWI 1ST DEFENDANT

MINISTER OF LOCAL GOVERNMENT AND RURAL DEVELOPMENT... 2ND DEFENDANT

DISTRICT COMMISSIONER FOR RUMPHI 3RD DEFENDANT

MTIMA WALTER GONDWE 4TH DEFENDANT

CORAM: Honourable Justice T.R. Ligowe

M. Goba Chipeta, Counsel for the Applicant

N. Chisiza, Counsel for the 1st, 2nd, and 3rd Defendants

W. Mwafulirwa and B Kondowe, Counsel for the 4th Defendant

F. Luwe, Court Clerk

R. Luhanga, Court Reporter

JUDGMENT

Ligowe J

1 This is a matter for judicial review of the decision by the 1st and the 2nd Defendants in conjunction with the 3rd Defendant to appoint and install the 4th Defendant as Paramount Chief Chikulamayembe. The 4th Defendant was installed Paramount Chief Chikulamayembe on 22nd October 2019.

2 The Applicant's grounds for making the application for judicial review are that: -

- (a) the decision is unlawful because it violates the dictates of section 4 (2) (a) and (b) of the Chiefs Act, in that the 4th Defendant is not entitled to hold office of Paramount Chief Chikulamayembe under customary law and the 4th Defendant does not have the support of the majority of the people in the area of jurisdiction of the office in question;
- (b) the decision in question is procedurally unfair because it violates the dictates of section 43 (a) and (b) of the Constitution in that no reasons in writing were given to the Applicant by the 1st, 2nd and 3rd Defendants for not appointing and installing the Applicant as Paramount Chief Chikulamayembe, when the majority of the royal families, prior to the installation of the 4th Defendant, and pursuant to customary law, and a High Court Order of 17th July 2019, had chosen the Applicant as the rightful heir to the chieftaincy, a choice which was duly communicated to the 1st and 2nd Defendants through the office of the 3rd Defendant; and
- (c) the decision in question is not in conformity with the Constitution of the Republic of Malawi because: it violates the Applicant's right to administrative justice in section 43 of the Constitution; and by violating section 4 (2) (a) and (b) of the Chiefs Act and section 43 of the Constitution, it violates the constitutional principle of observance and upholding, by all institutions and persons, the Constitution and rule of law as stipulated under section 12 (1) (f) of the Constitution.

3 The Applicant therefore seeks: -

- (a) a declaration that the decision in question is unconstitutional, unlawful, procedurally unfair and invalid;
- (b) an order quashing the decision;
- (c) a mandatory order directing the 1st and 2nd Defendants to recognise, appoint and install him to the office of Paramount Chief Chikulamayembe forthwith;
- (d) an order prohibiting the 4th Defendant from acting in any manner whatsoever, as paramount Chief Chikulamayembe; and
- (e) an order for costs.

In response to the application the 1st, 2nd and 3rd Defendants plead that the decision to install the 4th Defendant as Paramount Chief Chikulamayembe is not unlawful. He was endorsed and nominated by all members of the royal families including the Applicant, on 12th March 2012. They deny that the decision is procedurally unfair and offensive to section 43 of the Constitution. The 4th Defendant was nominated by all the 12 heads of the royal families who are Village Headmen, with authority to make an endorsement and not just family members. The 4th Defendant's nomination is not unusual, as his family has been reigning for 111 years and there have been three consecutive Chiefs. The decision to appoint the 4th Defendant the Paramount Chief therefore did not violate section 4 of the Chiefs Act and section 43 of the Constitution, and so they strongly oppose the reliefs sought by the Applicant.

- 5 In his defence, the 4th defendant states that he is entitled to hold the office of Paramount Chief Chikulamayembe under the same dictates of section 4 (2) (a) and (b) of the Chiefs Act. He was procedurally chosen by the majority of the royal family in 2012 to be heir to the throne, hence it is without basis to say he does not have the support of the majority of the people in the area. The Applicant was never at any point chosen as heir to the Chikulamayembe Chieftaincy by the appropriate royal family. The composition of the royal family he claims endorsed him is not correct and they were not the representative heads of the 12 families that constitute the royal family. The Applicant himself endorsed the appointment of the 4th Defendant as the rightful heir to the throne, when the royal family first met in the year 2012 to decide an heir to the throne. The High Court Order of 17th July 2019 was that the royal family should go back and normalise the nominations, and the same was done on 21st August 2019 when they reaffirmed their position of 2012 that the 4th defendant is the one to take up the position of Paramount Chief Chikulamayembe. He therefore denies that the decision in question was not in conformity with the Constitution, as all customary processes were followed and duly complied with before his name was forwarded to the appointing authority. He further pleads that the application should be dismissed on the basis that the Applicant is estopped, having both acquiesced and permitted

and in fact authorised the 4th Defendant to be the heir to the Chikulamayembe Chieftaincy. So, he prays that this case should be dismissed entirely, with costs.

Sworn statements

6 The evidence in support of the application as well as the evidence in opposition is by way of sworn statements. In support are sworn statements of the Applicant, Joseph Bongololo Gondwe, Kelvin Chawinga in his capacity as Senior Chief Katumbi, Owen Mtete, Stowell B.K. Gondwe, and Harry T. Mkandawire. In opposition are sworn statements of Fred Movete, the District Commissioner for Rumphu, Mtima Walter Gondwe, Emmanuel Bwati Gondwe, Moses William Chakanda Gondwe, Charity Cheyeka Gondwe, Gerald Gondwe, Moses Kabogodo Gondwe, Mcloud Gondwe and Westone Bamantha Gondwe. Some of the witnesses were cross examined and the others were not. On the part of the Applicant Joseph Bongololo Gondwe, Kelvin Chawinga and Owen Mtete were cross examined. On the part of the Defendants Fred Movete and Mtima Walter Gondwe were cross examined.

7 One thing I should deal with at the outset is the manner of taking oaths and affirmations in an affidavit or in other words, a sworn statement. This arose in the cross examination of Joseph Bongololo Gondwe, Kelvin Chawinga and Owen Mtete. Counsel for the 4th Defendant was suspicious that these three may not have signed for their sworn statements themselves but somebody else.

The manner of taking oaths and affirmations in a sworn statement

8 The Commissioner for Oaths Rules under the Oaths, Affirmations and Declarations Act provide for the manner in which a sworn statement has to be taken by a commissioner for oaths. In the Rules a sworn statement is referred to as an affidavit. It is important that I reproduce rules 3 to 6.

3. In taking any affidavit, the commissioner for oaths shall ask the deponent if he believes in Almighty God and, if so, whether he agrees to make the oath. If the deponent answers both questions affirmatively he shall be required by the commissioner for oaths to make the oath. In all other cases he shall be required by the commissioner for oaths to make the affirmation.

4. (1) The form of words to be used in an affidavit which is sworn on oath shall be –
- “I, of (setting out the name, address and description of the deponent) make oath and say as follows: -”
- (2) In administering the oath, the commissioner for oaths shall require the person making the oath to hold his right hand uplifted, and indicating the affidavit, utter the words - “I swear by Almighty God the contents of this, my affidavit, are true.”
- (3) The form of words to be used in an affidavit which is affirmed shall be –
- “I, of (setting out the name, address and description of the deponent) solemnly, sincerely and truly declare and affirm as follows: -”
- (4) In administering the affirmation, the commissioner for oaths shall cause the deponent to hold his right hand uplifted and, indicating the affidavit, utter the words – “I solemnly, sincerely and truly declare and affirm the contents of this, my affidavit, are true.”
- (5) The deponent shall, after making the oath or affirmation, affix his usual signature in his own handwriting on the affidavit in the presence of the commissioner for oaths.
- (6) If the deponent cannot write he shall affix his thumbprint on the affidavit in the presence of the commissioner for oaths.
- (7) The signature or print affixed by the deponent to an affidavit shall, until the contrary is proved, be deemed to have been affixed in the presence of the commissioner for oaths attesting such affidavit.
5. (1) No commissioner for oaths is required to attest an affidavit which is in a language which is not understood by him.
- (2) Before attesting an affidavit, the commissioner for oaths shall ask the deponent whether he knows and understands the contents of the affidavit and if his answer is in the affirmative the commissioner for oaths shall --

(a) certify below the deponent's signature or mark that the deponent has acknowledged that he knows and understands the contents of the affidavit;

(b) thereafter set forth, in writing, the manner, place and date of attestation of the affidavit; and

(c) sign the affidavit by affixing his usual signature in his own handwriting over his designation and shall state below his designation the office held by him if he holds his appointment ex officio:

Provided that –

(i) if the deponent is unable to read the affidavit the commissioner for oaths shall, before attesting it, cause the affidavit to be read over to the deponent and shall include in his certificate a statement that he has done so;

(ii) if the affidavit is in a language not understood by the deponent the services of an interpreter may be employed to explain the nature and contents of the affidavit and in such case the commissioner for oaths shall include in his certificate a statement of the language in which that explanation was given and the name of the person who acted as interpreter and the interpreter shall sign such certificate in addition to the signature of the commissioner for oaths.

(3) The certificate of attestation of a commissioner for oaths may be in the form in the Schedule with such variations as the circumstances require.

6. (1) If the commissioner for oaths is of opinion that the deponent does not understand the nature and contents of the affidavit by reason of infirmity of mind, intoxication or for any other cause, he shall refuse to attest it.

(2) A commissioner for oaths is not required to attest an affidavit outside business hours on business days.

(3) Subject to subrule (1) a commissioner for oaths may not arbitrarily refuse to attest an affidavit but if he has considered the matter and has good ground for considering that the oath or affirmation may be false or intended for an improper purpose, his refusal is not arbitrary.

9 These provisions clearly indicate that the deponent must personally appear before the commissioner for oaths attesting his/her sworn statement, and as can be noted, there is a whole process to be followed before the sworn statement is signed by the deponent and the commissioner for oaths.

10 There are also provisions under Order 18 of the Courts (High Court) (Civil Procedure) Rules, 2017 indicating that the deponent must personally appear before the commissioner for oaths attesting his/her sworn statement. Rules 8 to 11 state: -

8. Where it appears to the person before whom a sworn statement is sworn that the deponent is illiterate or blind, the person shall certify in, or below, the authorizing part, that –

- (a) the sworn statement was read in his presence to the deponent;
- (b) the deponent seemed to understand the sworn statement; and
- (c) the deponent signed the sworn statement in their presence.

9. Where it appears to the person before whom a sworn statement is sworn that the statement is in a language not understood by the deponent, the person shall certify in, or below, the authorizing part, that –

- (a) the sworn statement was translated to the deponent in a language the deponent understands;
- (b) the deponent confirmed to understand the translation of the statement; and
- (c) the deponent signed the sworn statement in their presence.

10. Where the deponent makes a mark or thumb impression instead of signing, the person before whom the sworn statement is made shall certify in or below the authorizing part that the deponent made the mark or thumb impression in his presence.
11. Where it appears to the person before whom a sworn statement is sworn that the deponent is by reason of physical incapacity unable to sign, make a mark or leave a thumb impression on the statement, the person shall certify in or below the authorizing part that –
 - (a) the statement was read out in his presence to the deponent;
 - (b) the deponent confirmed to understand the sworn statement; and
 - (c) the deponent signified he swore the sworn statement.

Sworn statement of Joseph Bongolo Gondwe

- 11 Joseph Bongololo Gondwe was drawn to the attention of exhibit marked “FM1” in the sworn statement of Fred Movete, which is a letter dated 12th March 2012 from the Royal Family and Chief’s Council of Paramount Chief Chikulamayembe to the then Paramount Chief, which Joseph Bongololo Gondwe along with other chiefs and family members signed, recommending Mtima Gondwe to be the successor and Acting Paramount Chief. Joseph Bongololo Gondwe confirmed that he has no other signature apart from the one he signed on that letter. He then denied the signature on his sworn statement in support of the application, calling it “fake.” He also denied having been to Blantyre at the time the document was signed. He however accepted having signed the sworn statement in support of his application for permission to apply for judicial review.
- 12 It should be noted that in his notice of application for judicial review filed on 30th October 2019, the Applicant stated that he would be moving the Court “for an order for relief in the terms, and on the grounds, set out in the *ex parte* application for permission to apply for judicial review and its accompanying documents” and that at the hearing, he would use sworn statements and exhibits, copies of which accompanied the notice, The sworn statements referred to, are the sworn statements he used in support of the *ex parte* application for permission to apply for judicial review. He however filed a trial bundle on

17th March 2020, containing among others, the *ex parte* application for permission to apply for judicial review with his sworn statement slightly changed and signed differently from the first one and a sworn statement of Kelvin Chawinga. The sworn statement of Kelvin Chawinga was not there initially, but this court allowed it at the scheduling conference. No mention of the change to Joseph Bongololo Gondwe's sworn statement was made at the scheduling conference, so what was expected is the same sworn statement used for the permission to apply for judicial review. Comparing the signatures on the initial sworn statement and the subsequent one, he said it was difficult for him to answer if they are different. He admitted he had failed to answer that question. However, the two signatures are clearly different. The initial one is his name written "Joseph B. Gondwe" and the second one, "Joseph Bongololo Gondwe" in ostensibly the same handwriting. Both statements purport to have been sworn and signed at Blantyre before Fred Clarence Chipembere, Legal Practitioner and Commissioner for Oaths, P.O. Box 2638, Blantyre but no date was indicated.

- 13 His re-examination did not really tackle the issue raised. He only confirmed that his sworn statement was signed in his name. His signature on the letter of 12th March 2012, which he said is his only signature, is written "J.B. Gondwe" and is glaringly different from the two signatures on the sworn statements. Both sworn statements indicate that he swore them at Blantyre. My finding on the point is that that Joseph Bongololo Gondwe had not, himself, signed the sworn statement, as he had not been to Blantyre in the period.

Sworn statement of Kelvin Chawinga

- 14 Kelvin Chawinga's sworn statement also purports to have been sworn and signed at Blantyre before the same Commissioner for Oaths, Fred Clarence Chipembere but no date is indicated. However, in cross examination he said he had not been to Blantyre in 2020. He had not been to Blantyre in March 2020 and had not met Counsel Clarence Chipembere. He signed for the sworn statement at home and it was a mistake that the sworn statement indicates as though he signed it at Blantyre. Later he got confused when he said he knows Counsel Fred Clarence Chipembere and at the same time he does not know him, and then, he knew him when he came to make him sign for the sworn statement. In re-examination

he said he signed the sworn statement but not at Blantyre. All this clearly indicated to me that Kelvin Chawinga had not been before Counsel Fred Clarence Chipembere signing for the sworn statement.

Sworn statement of Owen Mtete

- 15 Owen Mtete's sworn statement also purports to have been sworn and signed at Blantyre before the same Commissioner for Oaths, Fred Clarence Chipembere but no date is indicated. In cross examination Owen Mtete was caused to sign on four blank sheets of paper. He signed O. Mtete, differently from Owen Mtete on the sworn statement. The handwriting also appears starkly different and he admitted that the signature on his sworn statement is not his. He however confirmed in re-examination that the name is his and he signed for the sworn statement. With this also I find that Owen Mtete had not been before Counsel Fred Clarence Chipembere signing for the sworn statement and he did not sign it himself.

Effect of non-compliance

- 16 Counsel for the 4th Defendant submits that the sworn statements of Joseph Bongololo Gondwe and Owen Mtete should not be used at all. He relies on *Maria Kobombwe v. Evelyn Mwafongo and Lutengano Kibombwe*, Civil Cause No. 190 of 2011 (Mzuzu Registry) (unreported) where Justice Degabriele did not accept to use a witness statement which had not been signed by the witness herself.
- 17 Counsel for the Applicant submits that this is an issue of irregularity under Order 2, rule 1 of the Courts (High Court) (Civil Procedure) Rules, such that it does not render the sworn statements null but the court has power under Order 2, rule 3 to: (a) set aside all or part of the proceeding; (b) set aside a step taken in the proceeding; (c) declare a document or step taken to be ineffectual; (d) declare a document or step taken to be effectual; (e) make an order as to costs; or make any other order that the court may deem fit. And that, according to rule 4, the orders can only be made upon an application made within reasonable time and before the party making the application takes a fresh step in the proceeding after becoming aware of the irregularity. In this case, despite having been served with the

impugned sworn statements ten days before trial, the 4th Defendant did not raise any objection to them before the hearing, and took the further step to cross examine the deponents, and allowed the trial to proceed, without making any application in accordance with Order 2, rule 4. To raise the issues in closing submissions is not in tandem with Order 2, rule 4. The deponents having confirmed the sworn statements to be theirs in re-examination under oath before the court, should cure the irregularity in substance and in principle. To disregard the sworn statements at this stage would run contrary to the overriding objective of the rules of procedure, to deal with proceedings justly, stated in Order 1, rule 5. Counsel further submits that *Maria Kobombwe v. Evelyn Mwafongo and Lutengano Kibombwe* (supra) is distinguishable on the facts from the present case and is not good authority for having not considered the internal logic of Order 1, rule 5.

- 18 In addressing this issue, I should start by noting that the disputed sworn statements do not comply with the Oaths, Affirmations and Declarations Act as well as Order 18 of the Courts (High Court) Civil Procedure) Rule, 2017. The Oaths, Affirmations and Declarations Act does not provide for the effect of irregularities with respect to making oaths, affirmations and declarations in affidavits, but when the court is in session. Section 6 provides for how oaths and affirmations may be administered in court, and then section 7 provides for the effect of irregularities as follows: -

“No omission to make any oath or affirmation, no substitution for any one for any other of them, and no irregularity whatever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.”

- 19 My view is that section 7 is also applicable to irregularities with regard to sworn statements. The five Judges in *Saulos Chilima and Lazarus Chakwera v. Peter Mutharika and Electoral Commission*, Constitutional Reference no 1 of 2019, (Lilongwe Registry) (unreported)¹ accepted to apply section 7 of the Oaths, Affirmations and Declarations Act

¹ *Chilima and Another v Mutharika and Others (Ruling on App for Suspension) (Constitutional Reference No. 1 of 2019) [2020] MWHC 1 (12 February 2020); | Malawi Legal Information Institute (malawilii.org)*

to irregularities of a sworn statement, in their ruling dated 12th February 2019 on an application for suspension of a judgment. The sworn statement in issue in that case had been attested by a lawyer who had not renewed their practising licence. The court held: -

“Formal legal acts purported to be done by a legal practitioner who has not renewed his or her licence of practice are invalid. ...The act of the unlicensed legal practitioner herein, purporting to administer an oath, was therefore invalid. Without a valid oath, a purported sworn statement is no sworn statement at all.”

- 20 The question which I will consider shortly in the judgment is whether the irregularities as to the sworn statements in the present case render the oaths invalid or not.
- 21 While Order 2 of the Courts (High court) (Civil Procedure) Rules, 2017 provides for irregularities as to non-compliance with the rules generally, Order 18 has its own specific provisions.
- 22 Order 18, rule 12 provides for non-compliance with rule 8 in respect of a sworn statement of an illiterate or blind deponent, that the sworn statement may not be used in a proceeding unless the court is satisfied that the statement was read to the deponent and the deponent confirmed to understand it. Meaning, there should be other evidence to that effect than the certificate in the authorizing part of the sworn statement.
- 23 Rule 18 provides that a sworn statement may be filed despite any defects in form, unless the court orders otherwise. Rule 19 provides that a “sworn statement shall not be used in a proceeding without the leave of the court if it has not been filed or it has been filed with a defect in form.” First is that even if a sworn statement has a defect in form, it should be allowed to be filed. If not, it has to be upon an order of the court. Once filed, it can only be used in a proceeding with permission of the court.
- 24 It should be acknowledged that there are some very easily recognisable irregularities and defects which one can become aware of upon seeing the sworn statement. But there are

other subtle irregularities and defects which may require a little probing to identify. For the easily recognisable irregularities and defects, there should be prior permission of the court before the sworn statement is used. For the subtle ones, it will normally be among the issues for the court to determine after the hearing whether the sworn statement has irregularities or defects. It is after the issue has been determined that the court may or may not allow the sworn statement to be relied upon. This is the kind of irregularities in the sworn statements in issue in the present case. It required cross examination to confirm that Joseph Bongololo Gondwe and Owen Mtete had not signed the sworn statements themselves, that Kelvin Chawinga did not sign in the presence of the commissioner for oaths and that for all of them, rules 3 to 5 of the Commissioner for Oaths Rules under the Oaths, Affirmations and Declarations Act had not been complied with.

25 Now that I have made a finding as regards the non-compliance, the question is whether I should permit the sworn statements to be relied upon. Sworn statements with irregularities and defects which are curable are the ones which can be permitted to be used. These are irregularities as to form as stipulated in section 7 of the Oaths, Affirmations and Declarations Act and Order 18 rule 19 of the Courts (High Court) (Civil Procedure) Rules. For others which are as to substance, like where an unlicensed legal practitioner purports to administer an oath, it renders the oath invalid and they cannot be permitted.

26 Section 7 of the Oaths, Affirmations and Declarations Act is so instructive on irregularities which are as to form. It includes omission to make the oath or affirmation and substituting an oath for an affirmation, so long as it remains the obligation on the part of the witness to state the truth. We also see this in Order 18, rule 12 of the Courts (High Court) (Civil Procedure) Rules. The person before whom an illiterate or blind person swore a statement may not have certified in, or below, the authorizing part, that - (a) the sworn statement was read in his presence to the deponent; (b) the deponent seemed to understand the sworn statement; and (c) the deponent signed the sworn statement in their presence. The sworn statement will however, be used in a proceeding if the court is satisfied that the statement was read to the deponent and the deponent confirmed to understand it. This entails assuring the court that the deponent owns the sworn statement and that its contents are true. It means

the sworn statement will not be used if the court is not so satisfied. Rules 3 to 6 of the Commissioner for Oaths Rules are intended to achieve the same purpose. If the same have not been complied with but the court is by other means during the hearing satisfied that the deponent owns the sworn statement and that its contents are true, it should be used.

27 After Joseph Bongololo Gondwe, Kelvin Chawinga and Owen Mtete took oaths in this court before they were cross examined and after that they confirmed the sworn statements belong to them in re-examination. I am satisfied that the sworn statements are theirs and that the deponents are duly obliged to state the truth. So, I will allow their sworn statements despite the irregularities. This is however not to water down the standard that is required of commissioners for oaths in administering oaths, affirmations and declarations. The Oaths, Affirmations and Declarations Act and the Commissioner for Oaths Rules must always be adhered. In that regard, I strongly condemn the manner in which the oaths for the sworn statements were taken. It is my considered view that this case would rather proceed to be considered on its merits than fail on technicality. The lawyers can always be dealt with separately from breaching the rules of practice.

28 In *Re Estate of Ali Mahommed Aidi Phiri*, Probate Cause No. 270 of 2015 (Lilongwe Registry) (unreported), two applicants applied for letters of administration but one applicant signed the affidavit for both applicants because he was not around at the time. In view of section 21(1)(b) of the Legal Education and Legal Practitioner's Act, Justice Mwale instituted an inquiry to satisfy herself that the Legal Practitioners had not been guilty of fraudulent or improper conduct in the discharge of their professional duty. It turned out from the Commissioner for Oaths who attested the affidavits that by practice, when it is an affidavit from another legal house, lawyers simply sign and give the documents back without necessarily following the procedures laid down by the Oaths, Affirmations and Declarations Act. The Law Society representative also confirmed that the Commissioner for Oaths may indeed have found himself in the position that he did because of the practice over the years. The Law Society representative further said: -

“... it is a matter that the Law Society ought to bring to the attention of its members so that the practice should stop and all lawyers should follow the law to the letter as it is their duty.”

- 29 The Court admonished Counsel for the applicants for the manner he handled the application in that case. The Judge said: -

“Having heard the facts as they had transpired from both the applicant’s legal practitioner and the Commissioner for Oaths, there is no doubt that both were inadvertent and performed their duties negligently in as far as this matter is concerned. This is slightly less serious than their being guilty of fraudulent or improper conduct as required for the invocation of the court’s more severe disciplinary sanctions under section 21 of the Legal Education and Legal Practitioner’s Act. It is a serious breach of ethics nonetheless and undoubtedly a breach of the law. A legal practitioner, whether acting on behalf of a client or as a Commissioner for Oaths is expected to not only adhere to the law, but also to maintain the highest standards of professional conduct, etiquette and discipline in the discharge of his duties.”

I cannot agree more.

- 30 Someone having been admonished for the same five years ago in *Re Estate of Ali Mahommed Aidi Phiri (op cit)*, you would not expect the practice to continue up to now. It is now a grave misconduct. I therefore hereby request the Disciplinary Committee of the Malawi Law Society to inquire into it pursuant to its powers under section 90 of the Legal Education and Legal Practitioners Act.

- 31 Coming back to the case, let us now consider the chronology of events and facts of the case.

Chronology of events and facts

- 32 In finding the chronology of events and facts in this case I have considered arguments raised by Counsel for the Applicant on documents and letters exhibited by the District

Commissioner and the 4th Defendant in their sworn statements which they did not author. Counsel citing *Frazer Bingula v. High Tension Guard Services Ltd*, Civil Cause No. 2256 of 2008 (Principal Registry) (unreported) and *Mpungulira Trading Ltd v. Marketing Services Division* [1993] 16 MLR 346, propounds that the documents are in that regard not admissible in evidence as proof of what they state, but the fact that they were made. The letters and documents in issue are to do with the nomination the 4th Defendant as successor to the throne of Paramount chief Chikulamayembe. Counsel therefore submits that it has not been proved that the 4th Defendant was nominated or lawfully nominated to be the successor.

33 While that is true, it has to be borne in my mind that the Privy Council in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 970 said: -

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible where the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible where it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.”

In *Subramaniam v Public Prosecutor* the court held that the purpose of proving that S had been subjected to threats was to establish, not that the threats were true, but rather that, if they had been believed by S, they might have induced in him an apprehension of instant death if he failed to conform to the terrorists' wishes. It will be seen in the present case that the conduct of the District Commissioner and the 4th Defendant upon the letters and documents in issue shows that they believed in them.

The nomination of Mtima Walter Gondwe

34 The chronology of material events and facts as I find them after reading the sworn statements both in support and in opposition to the application taking into account the evidence in cross examination, is that while the then paramount Chief Chikulamayembe,

full name, Walter John Hardy Gondwe, was still alive, a letter was written to the Paramount Chief by the Royal Family and Chief's Council on 12th March 2012, with copies to the Principal Secretary for Ministry of Local Government and Rural Development and the District Commissioner for Rumphi, regarding heir to the throne. The letter stated that the Royal Family and the Chief's Advisory Council had highly considered the Chief's son, Mtima Gondwe to be his successor when the chief retires and that the Chief could then at times assign him some of the Chief's day to day duties and some of his considerable responsibilities in order to groom him up as the Acting Chief Chikulamayembe. Among the people who signed the letter was Joseph Bongololo Gondwe, the Applicant in this case. When cross examined on this point, the Applicant stated that the Council agreed that Mtima Gondwe was going to act, but the letter said he was going to succeed. He still signed, for fear of losing his position as Principal Group Village Headman. From that letter onwards, Mtima Walter Gondwe started to act as Paramount Chief Chikulamayembe.

- 35 On 30th April 2018, the then Paramount Chief Chikulamayembe, Walter John Hardy Gondwe wrote the Principal Secretary for Ministry of Local Government and Rural Development through the District Commissioner for Rumphi, requesting that his son, Mutima Walter Gondwe should be crowned the Paramount Chief but this never took place. On 12th September 2018, another letter was written, asking for the retirement of the paramount Chief on health grounds and that Mtima Walter Gondwe should take over. This also did not take place. The Paramount Chief died on 29th November 2018.
- 36 On 8th January 2019, the Royal family wrote another letter to the Principal Secretary for Ministry of Local Government and Rural Development through the District Commissioner, stating that they had all agreed that Mtima Walter Gondwe should take over, following the letters of 12th March 2012, 30th April 2016 and 12th September 2018.
- 37 On 10th January 2019, the District Commissioner wrote the Secretary for Local Government requesting for installation of Mr Mtima Walter Gondwe as next Paramount Chief per the request of the Royal Family.

38 It would appear there were disputes regarding the succession to the chieftaincy right from the death of the Paramount Chief. The 4th Respondent exhibited in his sworn statement as “MGW2,” a report of mediation, facilitated by Counsel Victor Charles Gondwe, Mr Thomas Malopa Gondwe and Mr Alfred Longwe, between the “two opposing groups” over the chieftaincy, on 2nd February 2019, 5th February 2019 and 12th February 2019. The report shows that the people unanimously resolved that: -

- i. It should be documented that from now onwards ascendancy to the throne will be rotational among the royal families as was the case previously and who takes over will be up to the Chief’s Council to decide in accordance with the guidelines to be formulated by the Chief’s Council.
- ii. The Acting Paramount (Mtima Walter Gondwe) should be installed as Paramount Themba La Mathemba Chikulamayembe in interest of unity but after him the next heir and so on will be chosen on the basis of rotation by the Chief’s Council.
- iii. A strong Chief’s Council should be established which will be the decision-making body.
- iv. All the chiefs who were dethroned arbitrarily should have their matters reviewed by the Chief’s Council and given back their authority where necessary.
- v. There should be unity in the District.

39 After this, is a letter dated 18th February 2019, from the Secretary for Local Government and Rural Development to the District Commissioner advising that the State President had approved the name of Mr Mtima Walter Gondwe as the heir to the vacant Chikulamyembe Chieftaincy with effect from 4th February 2019. Let me observe here that the President approved, instead of appointing, and it appears he did not write under his own hand, when the law requires him to do so.

40 It is the power of the President to appoint Paramount Chiefs, Senior Chiefs, Chiefs or Sub Chiefs. Section 4 of the Chiefs Act states: -

4 (1) The President may by writing under his hand appoint to the office of Paramount Chief, Senior Chief, Chief or Sub Chief such person as he shall recognize as being entitled to such office.

(2) No person shall be recognized under this section unless the President is satisfied that such person –

(a) is entitled to hold office under customary law;

(b) has the support of the majority of the people in the area of jurisdiction of the office in question; and

(c) in the case of the office of Senior Chief, is a chief and is recognized by all chiefs in his District as being entitled under customary law prevailing in that District to be appointed Senior Chief.

(3) The appointment of any person to the office of Senior Chief under subsection (1) shall not affect the status of the substantive office of Chief or in any way confer on that person additional jurisdiction to the jurisdiction which he had before being appointed Senior Chief.

41 The expectation according to the law was that upon the letter of the District Commissioner, of 10th January 2019, the President was then going to recognize Mr Mtima Walter Gondwe, and appoint him to the office of Paramount Chief Chikulamayembe by writing under his hand after being satisfied as stipulated in subsection (2). Section 90 of the Constitution puts it so clearly.

“90 (1) Decisions of the President shall be expressed in writing under his or her signature.

(2) Where law or practice so requires, the signature of the President on any instrument shall be confirmed by the Public Seal.”

There is no evidence in this case that the President wrote under his signature and the public seal.

42 A week later, on 26th February 2019, a civil action was commenced in the High Court at Mzuzu between Stowell Beckam Kalizga Gondwe, Webster Gondwe, Joseph Bongololo

Gondwe and Meston Kanyuka Gondwe on one hand, and Mtima Gondwe and Rumphi District Council on the other hand in Civil Cause No. 53 of 2019, (*Stowell Gondwe and others v. Joseph Gondwe and Rumphi District Council*) in which the Claimants claimed that the 1st Defendant had been blocking all attempts for the Gondwe's Council to meet and deliberate on the successor to the Paramount Chief. The action ended with an order of Justice DeGabriele dated 17th July 2019, on mediation, finding that the case was premature and directing the royal family to nominate a successor according to their custom to be appointed the Paramount Chief by the President. The Judge said in paragraph 4 of her ruling: -

“4 This court directs that the nomination process must be done in accordance to the Tumbuka culture; whether by all the villagers under the chiefs in the Gondwe clans or only family representatives, but the nomination must be done in accordance to culture, customs and practice in that area. If it is the 1st Defendant who has already been nominated, then let it be and the next stage of the process must be done. If there are disputes in the process of nomination, then deal with them in accordance with customary law and culture. What is needed is that a person is nominated, the name of the person is to be passed on to the Rumphi District Commissioner, who then send he name to the President, so that the President exercises his legal mandate and discretion under section 4 of the Chiefs Act. If there are issues then the aggrieved can come to court for a judicial review redress after the appointment is done.”

- 43 Mr Fred Movete admits having been served in his capacity as District Commissioner with the summons in Civil Cause No. 53 of 2019 on 27th March 2019 and forwarding it to the Attorney General to defend.
- 44 The same day, the District Commissioner also received a letter from the 12 Royal Families of Paramount Chief Chikulamayembe Chieftaincy, outlining the said 12 Royal Families and reiterating their nomination of Mtima Walter Gondwe as the successor. In the same letter they also expressed surprise that other people were opposing the nomination, stating that the said people came from families which did not qualify to the seat.

45 On 21st August 2019 the Royal Family Members wrote another letter to the District Commissioner making reference to the mediation of 5th February 2019, their letter of 26th March 2019 and the ruling of the High Court in Civil Cause No 53 of 2019 stating that they had sat down again following the ruling and chose Mtima Walter Gondwe as the rightful heir to the chieftaincy. The 4th Defendant states in his sworn statement that the Applicant had been invited twice orally and once in writing to the meeting of the royal family on 21st August 2019 but he denied.

46 Following this letter, on 22nd August 2019, the District Commissioner wrote the Secretary for Local Government and Rural Development as follows: -

“As you are aware the installation of the next Paramount Chief was put on hold following a dispute within the Royal Family.

I am pleased to inform you that the High Court sitting in Mzuzu has directed that the process for the nomination, appointment and installation of the next Paramount Chief Chikulamayembe can proceed and that any aggrieved party will be at liberty to apply for judicial review in future.

In view of the above, I recommend that Mr Mtima Walter Gondwe be installed as Paramount Chief Chikulamayembe.

....”

47 It should be noted that as of 17th July 2019 when Justice DeGabriele made the ruling in Civil Cause No. 53 of 2019, the President had purportedly already appointed Mr Mtima Walter Gondwe the Paramount Chief with effect from 4th February 2019. The District Commissioner’s understanding of the Judge’s ruling was therefore in that context when he wrote the letter of 22nd August 2019 to the Secretary for Local Government and Rural Development. Yet it appears, none of the parties new of the appointment. This is probably because the President had not written the appointee and all other relevant offices under his

hand about the appointment as required by law as earlier noted. Justice DeGabriele's direction was however that the nomination process should be done according to the Tumbuka culture and customs practiced in the area and any disputes in the process should also be dealt with according to the customary law and culture of the area. Not that the process for the nomination, appointment and installation of the next Paramount Chief Chikulamayembe could proceed.

- 48 Knowing that the President appoints Paramount Chiefs, Senior Chiefs, Chiefs or Sub Chiefs on recognition and in so doing he or she has to be satisfied that such person (a) is entitled to hold office under customary law; (b) has the support of the majority of the people in the area of jurisdiction of the office in question; and (c) in the case of the office of Senior Chief, is a chief and is recognized by all chiefs in his District as being entitled under customary law prevailing in that District to be appointed Senior Chief, the District Commissioner should have brought to the attention of the Secretary for Local Government the issue of a contender against the appointment of Mtima Walter Gondwe, so the President could then decide who between the two, meets the criteria in section 4 of the Chiefs Act.

The nomination of Joseph Bongololo Gondwe

- 49 Mr Kelvin Chawinga states in his sworn statement that he in his capacity as Senior Chief Katumbi is uncle to Paramount Chief Chikulamayembe and is as such, responsible for mediating and helping with serious misunderstandings and disputes regarding succession to the chieftaincy of Paramount Chief Chikulamayembe. He was asked by those in support of Joseph Bongololo Gondwe to mediate on the matter. On 25th September 2019 he wrote a letter of invitation to Chief Group Village Headman Bongololo with copies to Chief Group Village Headman Chilongozi, the District Commissioner, the Officer in Charge at Rumphu Police Station, Senior Chief Mwankhunikira and Traditional Authority Mwamlowe, to a meeting on 7th October 2019 at the District Council Chambers to discuss issues following the ruling of the Judge in Civil Cause No. 53 of 2019. It came out in cross examination that this letter was not properly addressed as it left out some people the Senior Chief wanted to attend the meeting. It was clear from the Senior Chief in cross examination, that he was aware of two warring camps over the chieftaincy and he wanted them to attend

the meeting. One camp was for Joseph Bongololo Gondwe, in his letter referred to as Chief Group Village Headman Bongololo, and the other camp was for Mtima Walter Gondwe, but not invited by the letter. Nevertheless, the Senior Chief's messenger, Harry Mkandawire states in his sworn statement that he delivered the invitation to the 4th Defendant, and the Senior Chief states in his sworn statement that he called the Mtima camp on the day of the meeting, but they refused to attend on the ground that they had already chosen heir to the chieftaincy. He proceeded with the meeting with the Bongololo camp, attended by Meston Gondwe of the Mkupa family, Austin Gondwe of the Chikulamasinda family, Collings Gondwe of the Juwaunini family, Kumbukani Gondwe of the Khalapamhanya family, Wellington Gondwe of the Cheyeka family, Stowel Gondwe of the Mjuma family, Wellington Gondwe of the Chiwozga family, Frackson Gondwe of the Bamantha family, Angela Gondwe of the Bwati family, Peter Gondwe of the Bongololo family and Panji Gondwe of the Mzakwacha family. They voted for Joseph Bongololo Gondwe against Meston Gondwe, 9 votes to 2.

50 Among them, only Meston Gondwe, Austin Gondwe and Collings Gondwe were heads of their families but the rest were ordinary members of their families and had attended the meeting without authority of the heads of their families. It is apparent therefore that they had no representative capacity of their families, unless proved otherwise.

51 The same day, Stowell B.K. Gondwe made a report of the meeting to the District Commissioner with copies to the Officer in Charge of Police, Senior Chief Mwankhunikira, T/A Mwamlowe, Principal Group Village Headman Chilongozi, Principal Group Village Headman Mkupa, MP for Rumphu West Yona Dada Wiza Mkandawire and Honourable Minister Jappie Mhango. Senior Chief Katumbi wrote another letter to the District Commissioner on 8th October 2019, informing him that the chieftaincy operates on rotational basis and the meeting had elected Joseph Bongolo Gondwe to the throne.

52 Before the meeting of 7th October 2019 took place, the District commissioner states in his sworn statement that on 4th October 2019, Ministry of Local government responded to his

letter of 22nd August 2019, that considering that the name submitted had already been approved by the President, the Minister of Local Government and Rural Development would proceed to install Mtima Walter Gondwe as the Paramount Chief on 22nd October 2019.

53 The Applicant states in his sworn statement that he got strong rumours of the intended installation after his name had been submitted to the District Commissioner on 8th October 2019 and was waiting for feedback. He found it so strange, as ordinarily, the District Commissioner would communicate to all concerned parties regarding the person appointed as the Paramount Chief and issue notices to all Chiefs and Village Headmen about the date and time of the installation. He therefore sent a delegation to inquire from the District Commissioner on 21st October 2019 whether he had submitted his name to the Minister of Local Government and the President as the rightful heir to the chieftaincy and whether it was true that the Minister would be installing Mtima Walter Gondwe as the Paramount Chief on 22nd October 2019. The delegation included Principal Group Village Headman Mwajenyanga (Owen Mtete), Group Village Headman Chikalamba and Taona Gondwe. Owen Mtete states in his sworn statement that the District Commissioner's response was that (1) he had discussed the choice of the Applicant's name by the royal families with the Ministry, which advised him to send the Applicant's name and that he would do so in the coming days; and (2) the alleged installation rumours were not correct because he had not received any communication from the Ministry of Justice sanctioning the alleged installation of the 4th Defendant. However, the Minister of Local Government and Rural Development installed the 4th Defendant as the Paramount Chief on the said 22nd October 2019 in a clandestine fashion at Chief Mwankhunikira's headquarters about 40 km away from the headquarters of Paramount Chief Chikulamayembe.

54 It is so unfortunate that while the Minister was presiding the installation, some people invaded the headquarters of the Paramount Chief and set it ablaze, apparently angered by the process. That is not how we resolve disputes in Malawi. It is a principle of national policy in the Constitution, section 13 (1) that we have to promote peaceful settlement of

disputes by adopting mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation and arbitration. When these fails, then the courts.

- 55 Coming back to the case, let us now consider the law on appointment of chiefs and how it plays into the facts of the present case.

The law on appointment of Chiefs

- 56 As already noted above, the law regarding the appointment of Chiefs is according to section 4 of the Chiefs Act that, the President will recognise a person about whom, he or she is satisfied (a) is entitled to hold office under customary law; (b) has the support of the majority of the people in the area of jurisdiction of the office in question; and (c) in the case of the office of Senior Chief, is a chief and is recognized by all chiefs in his District as being entitled under customary law prevailing in that District to be appointed Senior Chief. Regarding this provision the Supreme Court of Appeal in *Barton Chakumba v. Lilongwe District Commissioner, Senior Chief Mazenegla and Lucian Chasenda*, MSCA Civil Appeal No. 91 of 2013 (unreported) stated the history of the provision to its present form and gave the interpretation at page 7 that: -

“Section 4 of the Chiefs Act refines the requirement of recognition based on customary law and requires the approval or support, not of central government, but the people in the area where he chief will exercise jurisdiction. The current section 4 of the Chiefs Act, therefore, requires, concerning a chief, appointment based on dual recognition. The pretender to chief must foremost be one who is entitled to hold office of chief at customary law and must without fail, have the support of the majority of the people where the pretender will exercise jurisdiction. It is not enough, therefore, that the pretender is one who is entitled to hold office

- 57 As to the words, “entitled to hold office under customary law” the Supreme Court said; -
- “The words go to eligibility or right to hold office of chief at customary law. Consequently, those responsible for identifying who should succeed a deceased chief have to identify the pretender from many who may or can succeed in the

chieftaincy. The words refer to all such who are entitled, including the one whom ultimately or eventually is identified by those responsible as the successor.”

58 With regard to “support of the majority of the people in the area of jurisdiction” the Supreme Court said: -

“The word ‘majority’ itself can be understood in ordinary meaning which, irrespective of number of candidates, means the candidate with more than 50% of the vote. The word ‘people’ however, is broad; it includes all, irrespective of age and status. As we see shortly, this court in *Group Village Headman Kakopa and Others v. Chilozi and another* (2009) Civil Appeal Cause No. 40 (MSCA) (unreported) without determining the issue, assumed, rather obliquely, that the Village Headmen present at that particular meeting was the majority. This conclusion is not supported by section 4 (2) (b) itself. If the legislature intended only village headmen [f]or people identifying a successor constitute the people under section 4 (2) (b) it would have so provided and with better clarity in the words used. It must be, therefore, that the legislature intended that the successor has the support of the people, namely the populace in the area of jurisdiction.”

Judicial Review

59 Let me now set out the purpose of judicial review as did Mkandawire J in the case of *In re Constitution of the Republic of Malawi; In re Lunguzi* [1994] MLR 72 at 75 approved by the Justices in *State v. Electoral Commission Ex parte Bakili Muluzi and United Democratic Front*, Constitutional Civil Cause No. of 2009. The Judge said: -

“... Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is concerned with reviewing not the merits of the decision, but the decision-making process through which that decision was reached. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner. The purpose of judicial review is therefore to protect the individual against the abuse of power by a wide range of authorities.”

60 The Judge cited the case of *Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141. In this case Lord Hailsham of St. Marylebone stated at page 143: -

“But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.”

Lord Brightman also stated at page 154: -

“I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed ([1963] 2 All ER 66 at 91, [1964] AC 40 at 96). His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to—

‘a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice ... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case.’

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.”

61 The High Court in this country has this power derived from section 108 (2) of the Constitution and the provision puts it thus: -

“The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with the with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.”

62 Obviously, section 108 (2) of the Constitution allows for wider judicial review than administrative action. It allows for review of **any** law, and **any** action or decision of government for conformity with the Constitution. I am not very sure that review of any law, and any action or decision of government other than an administrative action for conformity with the Constitution would have to be confined to the decision-making process only. For an administrative action, the Constitution is actually very clear in section 43 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.”

It is easy to see in this provision that judicial review will focus on the decision-making process.

63 An administrative action is essentially “a decision taken or a failure to take a decision while exercising public functions.” See Danwood M. Chirwa *Human Rights Under the Malawian Constitution* (Juta 2011) p. 463. The power of the President to appoint chiefs is definitely a public function and thus an administrative action.

64 Merits are to do with factual or legal errors of the decision maker. In the present case therefore, this court is not concerned with whether the President and the Minister of Local Government in conjunction with the District Commissioner were right to appoint and install the 4th Defendant as Paramount Chief Chikulamayembe. Thus, the court is not concerned with whether the 4th is actually (a) entitled to hold the office under customary

law; (b) has the support of the majority of the people in Rumphi; and (c) is recognized by all chiefs in Rumphi as being entitled under customary law prevailing in that District to be appointed Paramount Chief. Rather, the court is concerned with whether in making the decision, the President had satisfied himself as to these aspects with regard to the 4th Defendant. That is, whether the President applied the law in making his decision.

Analysis and determination

65 In the sworn statements in support of his application, the Applicant has endeavoured to show that he was nominated following the custom and culture of the Chikulamayembe royal family and that he is supported by the majority of the people as compared to the 4th Defendant. The 4th Defendant also has endeavoured to do the same.

66 It is an issue of merit for this court to start to look into whether succession to the chieftaincy of Paramount Chief Chikulamayembe is indeed rotational or not and if so, which one between the list of royal families given by the Applicant and the 4th Defendant is correct and whose turn it now is. In any case that would be delving into the customary law on the matter, which according to section 64 of the Courts Act has to be treated as a question of fact for purposes of proof and for which the court has to admit evidence of experts and persons whom the court considers likely well acquainted with such law. Section 64 of the Courts Act states: -

“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.”

No expert gave evidence in this case as to the customary law followed in the succession of Paramount Chief Chikulamayembe. The parties have given contrary evidence regarding the practice and custom followed in a manner that a court would not properly determine the customary law and practice for the Chikulamayembe chieftaincy.

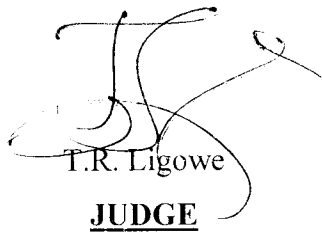
- 67 For the Applicant what comes out are the royal families for the chieftaincy, who were involved in his nomination at the meeting of 7th October 2019, presided over by Senior Chief Katumbi, without evidence of how the said families came into being and what practice they have always followed to nominate chiefs. The Applicant admitted in cross examination that the Mkupa family is with the Cheyeka family, Bongololo, Chilongozi and Juwaunini are one and the same family, and Mzakwacha is a family under Mjuma. What is so clear is that they voted between Joseph Bongololo Gondwe and Meston Gondwe. Meston Gondwe is from the Mkupa family and Joseph Bongololo Gondwe from the Bongololo family. Here, one would wonder whether the people present at the meeting indeed considered the fact of rotation in the succession of the chieftaincy for allowing candidates from different families to compete in a vote.
- 68 The 4th Defendant objects Juwaunini, Mzakwacha, Chikulamasinda and Mkupa to being royal families and includes Bwati Pyuli Gondwe, Kamphungu Nkhonjera, Mbauwo Chilongozi Gondwe, Ziwange Gondwe and Walter hardy Gondwe without giving evidence of how this has to be the case. It is doubtful however, whether Bwati Gondwe and Bwati Pyuli Gondwe are different families because he admitted in cross examination that Bwati Pyuli Gondwe was a son to Bwati Gondwe. He also admitted that Walter Hardy Gondwe was a son to Ziwange Gondwe who was a son to Mbauwo Chilongozi Gondwe. These also cannot be separate families unless explained otherwise. There is no evidence from him or the other witnesses on his side of the processes that are followed to nominate a successor to a deceased or deposed chief. All that I find from the evidence are the letters of 12th March 2012, 30th April 2016, 12th September 2018 and 8th January 2019.
- 69 It should as well be noted that neither the Applicant nor the 4th Defendant has given evidence to show that they command the support of the majority of the people in Rumphi or that they are recognized by all chiefs in Rumphi as being entitled under customary law prevailing in that District to be appointed Paramount Chief.

- 70 It is important though that it be emphasized that the power to appoint chiefs is vested in the President and so he or she is the one who has to be satisfied as to the requirements in section 4 of the Chiefs Act as he or she makes the appointment. The District Commissioner and the Ministry of Local Government and Rural Development, including the Minister are mere facilitators in the process. All they need to do is to gather information to be laid before the President for him or her to make the appointment. It is the President therefore, who is the rightful respondent to the present proceedings. It is him if anything, who has to show that he took into account section 4 of the Chiefs Act in appointing the 4th Defendant as Paramount Chief Chikulamayembe, and not necessarily the Minister of Local Government or the District Commissioner. If they have to, their duty is to demonstrate that the President considered that the 4th Defendant is indeed (a) entitled to hold the office under customary law; (b) has the support of the majority of the people in Rumphi; and (c) is recognized by all chiefs in Rumphi as being entitled under customary law prevailing in that District to be appointed Paramount Chief. The 4th Defendant is included as party for the sole reason that he will be affected by the outcome of the Judicial Review. He therefore has to be heard. His role is also to show to the court if he can, that the President did in fact consider the requirements in section 4 of the Chiefs Act in deciding to appoint him the Paramount Chief.
- 71 The facts are so clear that from the onset, after the death of the predecessor, there were two contenders to the throne. The District Commissioner was aware of this and that is why he wrote in his letter of 22nd August 2019 that “the installation of the next Paramount Chief was put on hold following a dispute within the Royal Family.” He misdirected the Secretary for Local Government in writing that the High Court sitting in Mzuzu had directed that the process for the nomination, appointment and installation of the next Paramount Chief Chikulamayembe could proceed and that it meant Mtima Walter Gondwe be installed. All the Judge meant in her ruling was that section 4 of the Chiefs Act should be followed in the appointment of the Chief.
- 72 Given the situation, the District Commissioner should have formally notified the authorities, of the existent warring factions in the royal family. Then the President would have used his powers under section 12 of the Chiefs Act to appoint persons to inquire into

who between the 4th Defendant and the Applicant satisfies the requirements of section 4 of the Chiefs Act with respect to the chieftaincy.

- 73 I am convinced by the manner in which the 4th Defendant was crowned as Paramount Chief by the Minister of Local Government, and the preparatory processes thereto, that the Minister was aware that the process was greatly being opposed. He also however, chose not to formally bring it to the attention of the President. In the end, the President had not satisfied himself that the 4th Defendant is (a) entitled to hold the office of Paramount Chief Chikulamayembe under customary law; (b) has the support of the majority of the people in Rumphu; and (c) is recognized by all chiefs in Rumphu as being entitled under customary law prevailing in that District to be appointed Paramount Chief, given that the Applicant was also claiming the same.
- 74 I therefore declare as prayed by the Applicant that the decision by the 1st and the 2nd Defendants in conjunction with the 3rd Defendant to appoint and install the 4th Defendant as Paramount Chief Chikulamayembe is unconstitutional, unlawful, procedurally unfair and invalid. Although the Applicant's name was formally submitted to the District Commissioner after the President had already approved the name of the 4th Defendant (sic), and barely three weeks before installation, but because on 21st October 2019, the District Commissioner made assurance that he had discussed the choice of the Applicant's name by the royal families with the Ministry, which advised him to send the Applicant's name and that he would do so in the coming days, the Applicant deserved to be furnished with reasons, in writing, for having not been appointed the Paramount Chief by the President.
- 75 In the circumstances, I quash the decision to appoint and install the 4th Defendant as paramount Chief Chikulamayembe. I however cannot direct the President to recognise, appoint and install the Applicant to the office of Paramount Chief Chikulamayembe. That would be usurping the power of the President as earlier discussed. After all, it has not been demonstrated sufficiently that the Applicant really qualifies under section 4 of the Chiefs Act.

- 76 For avoidance of doubt, from today onwards, the 4th Defendant is not the Paramount Chief per se. He reverts to acting position until the President properly appoints and installs Paramount Chief Chikulamayembe.
- 77 In the final analysis, this application for judicial review succeeds with costs to the applicant.
- 78 Made in open court this 13th day of April 2021.



T.R. Ligowe
JUDGE