

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 40 OF 2000

(Being High Court, Lilongwe District Registry
Civil Cause No. 733 of 1998)

BETWEEN:

GROUP VILLAGE HEADMAN KAKOPA.....1ST APPELLANT

- and -

TSAKULANI JONISI KASAMBWE.....2ND APPELLANT

- and -

GROUP VILLAGE HEADMAN THUMBA

(On their own Behalf and

on Behalf of Others).....3RD APPELLANTS

- and -

LOTANI NJERESA CHILOZI.....1ST RESPONDENT

- and -

THE ATTORNEY GENERAL.....2ND RESPONDENT

BEFORE: THE HONOURABLE THE CHIEF JUSTICE

THE HONOURABLE MR JUSTICE KALAILE, JA

THE HONOURABLE JUSTICE MRS MSOSA, JA

Makono, Counsel for the Appellants

Counsel for the Respondents, Absent

Mbekwani (Mrs), Court Interpreter

J U D G M E N T

Kalaile, JA

This appeal arises from proceedings brought by way of Originating Summons against the respondents who are Lotani Njeresu Chilozi and the Attorney General. The appellants are Kakopa, Tsakulani Jonisi Kasambwe and Group Village Headman Thumbu.

The Originating Summons were couched in the following terms:

- (a) a declaration or order that Lotani Njeresu Chilozi, enthroned Traditional Authority Kabudula on 19th September, 1998, is not entitled to the throne and therefore be dethroned;
- (b) a declaration or order that the manner in which the Minister of Local Government and District Administration and the District Commissioner for Lilongwe handled the matter of installing Lotani Njeresu Chilozi was unprocedural, irregular and therefore contrary to section 200 of the Constitution of Malawi and section 4 of the Chiefs Act;
- (c) a declaration or order that the ceremony of installing Lotani Njeresu Chilozi held on 19th September, 1998 is null and void;
- (d) an order of mandamus requiring the President, if necessary, to appoint persons to inquire into the removal from office of T/A Kabudula, Lotani Njeresu Chilozi in accordance with section 11(2) of the Chiefs Act;

(e) an order by the Court for further and other reliefs as it shall deem necessary and fair in the circumstances; and

(f) an order for costs to the appellants.

The trial Court declined to grant any of the reliefs sought after perusing the affidavit evidence given by both parties and upon hearing their written submissions in Chamber. The appellants thereafter filed the following grounds of appeal before this Court. The amended Notice of Appeal stated that:

(a) The learned Judge erred in law in holding that, in appointing Lotani Njeres Chilozi, the President never breached the provisions of section 200 of the Constitution in the circumstances where he (the Judge) wrongly refused to accept the appellants' evidence supporting their claim that in the first place the appointment of late Dickson Chilozi to the office of T/A Kabudula was not in accordance with customary law of the area of T/A Kabudula.

(b) The learned Judge erred in law in misinterpreting section 4(2) of the Chiefs Act to mean that majority support for Lotani Njeres Chilozi to the entitlement to the throne of T/A Kabudula was determined by the majority vote of Group Village Headmen.

(c) The learned Judge misdirected himself in holding that there are two parallel customs governing succession to Kabudula Chieftaincy in the absence of independent expert evidence in local Chewa customs in Kabudula area and therefore his finding for the respondents that the President had a discretion to appoint any nominees from either of the two customs was without proper basis.

(d) The learned Judge misdirected himself in disregarding the appellants' evidence to the effect that matters of chieftaincy in Kabudula area cannot be determined by a vote.

We are now going to deal with the appeal by taking each of the grounds of appeal in turn. This approach may not follow how Counsel presented his skeleton arguments. Mr Makono, who represented the appellants in this appeal, argued the first ground by stating that the late Dickson Chilozi was not appointed Traditional Authority Kabudula in accordance with customary law. It was his argument that the appointment was in breach of section 200 of the Constitution. That section states:

“Except in so far as they are inconsistent with this Constitution, all Acts of Parliament, common law and customary law in force on the appointed day shall continue to have force of law as if they had been made in accordance with and in pursuance of this Constitution:

Provided that any laws correctly in force may be amended or repealed by an Act of Parliament or be declared unconstitutional by a competent court.”

According to Counsel, the Court below ignored the long succession history of the Kabudula Chieftaincy which commenced with Kabudula Mbalame. Counsel went on to state that the succession line from the Kakopa family (to which Kabudula Mbalame belonged) was derailed by the Malawi Congress Party Government which in 1979 rejected a nephew from the Kakopa family because the said nephew belonged to the Jehovah’s Witness sect. This is how the late Dickson Chilozi became Traditional Authority Kabudula, since he was a secretary of the local Malawi Congress Party branch. The late Dickson Chilozi took over the Chieftaincy from the late Kabudula Safari.

Mr Manyungwa, who appeared for the respondents, replied by arguing that the appointment of the first respondent to the Kabudula Chieftaincy was legally conducted and in compliance

with section 200 of the Constitution as read with section 4 of the Chiefs Act. Section 4 of the Chiefs Act provides that:

“4-(1) The President may by writing under his hand appoint to the office of Paramount Chief or 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 the office under customary law; and

(b) has the support of the majority of the people in the area of jurisdiction of the office in question.”

It was Mr Manyungwa’s contention that the appointment of the first respondent was conducted in compliance with the local Chewa tradition and the appellants did not tender any evidence to prove that the appointment of the first respondent was not in accordance with the local Chewa tradition.

It is the respondents' case that when the late Kabudula Dickson died, it became necessary to appoint a successor under Chewa custom; an heir to a chieftaincy can either be a brother or a nephew of the deceased chief. The deceased Chief, the Court was informed, had no nephew who was old enough to inherit the Chieftaincy. The only successors, therefore, could only come from his brothers. The first respondent was such a brother.

Local tradition further required that women from the deceased's family should nominate a successor. The third defence witness (who was a woman) testified in the Court below that she was among the women who deliberated and nominated the first respondent to the Chieftaincy. She stated that the appointment and nomination was not influenced by any outsider, and, at no point did they consider the name of the second appellant.

As required by tradition, the first respondent's name was given to a "nkhoswe", namely, Traditional Authority Chitukula, who took the name to the District Commissioner for Lilongwe. This, therefore, demonstrates that the first respondent was appointed in accordance with customary law as required by section 4(2)(a) of the Chiefs Act. Furthermore, the provisions of section 4(2)(b), which state that the appointed chief must have the support of the majority of the people in the area of jurisdiction of the office in question, were also satisfied, in that, as the Court below observed, the Kabudula area has seventeen Group Village Headmen. Fourteen of these Group Village Headmen endorsed the nomination of the first respondent and only three out of the seventeen endorsed the name of the second appellant. It is clear, therefore, that the statutory requirements of section 4(2)(b) of the Chiefs Act were complied with in the appointment of the first respondent as Traditional Authority Kabudula.

The appellants' contention that the late Dickson Chilozi was made Traditional Authority by virtue of his position as secretary of the local Malawi Congress Party branch, is to us, irrelevant. The appellants should have challenged the late Dickson Chilozi's appointment when he was alive by invoking the provisions of section 11(2) of the Chiefs Act, instead of waiting until the provisions of section 4(2)(a) and (b) had been complied with.

Section 11(2) of the Chiefs Act stipulates:

"Where the President deems it expedient to cause an inquiry to be made into a question of the removal of any person from the office of Paramount Chief, Chief or Sub-Chief, he may by writing under his hand suspend such person from the performance of the functions of his office."

Furthermore, section 12 of the Chiefs Act provides that:

“The President may appoint persons to inquire into any question relating to the appointment to or removal from the office of Paramount Chief, Chief or Sub-Chief of any person and to report and make recommendations thereon to the President.”

As the trial Court observed, the powers provided for in sections 11 and 12 of the Chiefs act are discretionary. We further observe that, the appellants should have taken the initiative, immediately after the present Constitution was adopted, to influence the office of the President to remove late Dickson Chilozi who was installed Chief Kabudula in 1979. By waiting until after Dickson Chilozi died, and, further waiting until the first respondent was installed on 19th September 1998 in compliance with customary law as well as the provisions of section 4 of the Chiefs Act, we are unable to consider the appellants’ prayer to remove the first respondent from the Chieftaincy.

This disposes of grounds 1(a) and 1(b) of the grounds of appeal.

The next ground of appeal is 1(c), which is that the learned trial Judge misdirected himself in holding that there are two parallel customs governing succession to the Kabudula Chieftaincy in the absence of independent expert evidence in the local Chewa customs in Kabudula area, and, therefore, his finding for the respondents that the President had a discretion to appoint any nominee from either of the two customs, was without proper basis.

Upon reading the judgment of the trial Court, we are unable to agree with this finding by the Court below. Our opinion is that the custom advanced by the appellants would apply if the wrongly appointed chief is to be removed timely. But where the so-called illegally appointed chief is allowed to reign for almost twenty years and a new chief is appointed according to the local customary law, this Court will be unwilling to assist the appellants. The appellants are deemed to have acquiesced to the situation. As we observed earlier on, such an application to remove the wrongly appointed chief should have been made as soon as the opportunity to do so arose.

The final ground of appeal was that the learned Judge misdirected himself in disregarding the appellants’ evidence, to the effect that matters of chieftaincy in Kabudula area cannot be determined by a vote. This ground of appeal cannot succeed, because all what the trial Judge was stating was that the provisions of section 4(2)(b) of the Chiefs Act were complied with, especially since the local customary law on the appointment of a chief was also strictly adhered to.

This appeal fails in its entirety with costs to the respondents.

DELIVERED in Open Court this 11th day of July 2001, at Blantyre.

Sgd

R A BANDA, CJ

Sgd

J B KALAILE, JA

Sgd

A S E MSOSA, JA