



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

CIVIL CAUSE NO. 1707 OF 2005

EDWIN INGELESI GANYA APPELLANT

VERSUS

**JAMES GOODSON GANYA
KAMBEWA NKHOMA
RESPONDENTS**

**CORAM: HONOURABLE JUSTICE H.S.B. POTANI
Mr Tembo of Counsel for the Plaintiff**

**Mr Mambulasa of Counsel for the defendant
Mr Chuma Official Interpreter**

JUDGMENT

The borne of contention in this matter revolves around succession to the throne/Chieftaincy of Traditional Authority (TA) Ganya in Ntcheu District. The matter was commenced by an originating summons taken out by the plaintiff, Edwin Ingelesi Ganya, against James Goodson Ganya and Kambewa Nkhoma, the 1st and 2nd defendant respectively. The plaintiff seeks the following declarations and orders:

1. A declaration that the plaintiff is the legitimate heir to T.A. Ganya's Chieftaincy

2. A declaration that the defendants are not supposed to administer the Ganya Chieftaincy of T.A. Ganya
3. A declaration that the plaintiff is the heir to the throne of Traditional Authority Ganya after the death of late Faison Goodson Ganya
4. An order that the plaintiff is as Traditional Authority Ganya
5. An order that the defendants do pay the costs of this action

Both sides to the action filed several affidavits in support of their respective cases. In order to have a fair understanding and appreciation of the issues surrounding the controversy, the court gave the parties the leeway to lead oral evidence where necessary and also allowed the cross examination of the various deponents. A lot was presented to the court through the affidavit and oral evidence of the parties. It is not necessary to recount all that has been presented. What is most critical for the determination of the prayers sought by the plaintiff is that it is not in dispute that the plaintiff is a brother while the 1st defendant is a son to the late Faison Goodson Ganya who died while serving as Traditional Authority (TA) Ganya. Following the death of Faison Ganya, the 1st defendant's name was submitted to Paramount Chief (***Inkosi ya Makosi***) Gomani as a successor to the TA Ganya Chieftaincy. The submission got the approval of the Paramount Chief who, as required by standing procedures, made a further submission to the District Commissioner (DC) for Ntcheu who in turn was to make a submission to the Office of the President and Cabinet (OPC). It was on June 2, 2005, when the District Commissioner (DC) for Ntcheu was yet to make his submission to the OPC that the plaintiff commenced this action and obtained an injunction order stopping, among others, the submission of the name of the 1st defendant to the OPC as successor to the Ganya Chieftaincy and also restraining the 2nd defendant from parading the 1st defendant as the new Chief Ganya. Meanwhile, it is the 2nd defendant who is acting a Chief Ganya

According to the plaintiff, the dictates of Ngoni customs, practices and culture are such that it is the Ganya clan, assisted by an appropriate committee, which has the authority to nominate a successor to a demised

Chief for submission to the Paramount Chief and other higher authorities, that is, the District Commissioner and the OPC. In the case of the name of the 1st defendant, it was the evidence of the plaintiff that his name was nominated by the late Chief's counsellors led by a Mr Kachinjika such that the nomination was irregular and *ultra vires* and therefore null and void. The plaintiff's evidence further is to the effect that the Ganya clan which has the authority to nominate a successor nominated him as such but the Paramount Chief rejected his nomination as he had already approved the 1st defendant's nomination.

It is the contention of the plaintiff that the 1st defendant does not qualify to be a successor to the Ganya Chieftaincy on account of two reasons viz: Firstly that the 1st defendant was born out of a matrilineal marriage and therefore not allowed to ascend to Chieftaincy according to Ngoni custom, practice and tradition. Secondly that the 1st defendant's nomination was not done by the mandated institution, that is, the Ganya clan but the late Chief's counsellors who are not members of the Ganya clan.

The court has had the privilege and benefit of being furnished with elaborate written submissions by counsel for the parties. Due consideration has been given to the submissions of counsel. The submissions have been given the weight they deserve, of course, bearing in mind the evidence adduced and its credence. This court, on analysis of the matter in its entirety considers two questions to be central to the determination of the matter. The first issue is whether a child/son fathered by a demised Chief through a matrilineal marriage can succeed his late father as Chief in the Ngoni tradition or custom. The second issue is whether a successor to Ngoni Chieftaincy must have to be nominated by the late Chief's clan.

Let it be acknowledged, at this juncture, that the challenge this court is faced with in the determination of the matter is that it relates to issues that are largely in the domain of oral literature. There is very little written work or authority on Ngoni cultural practices, customs and traditions. This therefore calls upon the court to be cautious in its exploration of the evidence and issues at stake but at the same time take a progressive as opposed to a retrogressive approach in the resolution of the issues. Above all, the court needs to and shall take cognisance of the prevailing

constitutional order.

It serves as an appropriate point of departure in the determination of the matter to first note that from the totality of the evidence, both sides seem to be agreement that it is **normally** a son to the deceased Chief who is heir to the throne. (**emphasis added**). In some instances, however, a son to a demised Chief may not ascend to Chieftaincy if proved to be unsuitable on account of say pervasive behaviour or other justifiable reasons. In such a case, some suitable candidate from within the late Chief's clan is identified. In the present case, as earlier noted, the plaintiff is a brother while the 1st defendant is a son to the late T.A. Ganya. It therefore means that ordinarily, it is the 1st defendant who would take priority over the plaintiff in the succession to the Ganya Chieftaincy. It would only be if the 1st defendant would be found wanting for one reason or the other that the plaintiff, being a member of the Ganya clan, might be considered as a possible successor. As stated elsewhere, the first reason advanced by the plaintiff on the alleged unsuitability of the 1st defendant as successor to the Ganya Chieftaincy is that he was born out of a matrilineal marriage. In other words, the 1st defendant was born from a marriage for which his late father, the demised Chief, did not pay dowry or bride's price commonly known as **lobola**. In his book entitled **Onani Angoni** relevant extracts of which have been made available to the court by counsel for the 1st defendant, K.D. Philip whose credibility the court has no basis for doubting states on pages 40 and 41 that payment of dowry/bride's price or **lobola** is no longer strictly practiced by the Ngoni. It is now considered as a luxury and therefore has become optional. It is practiced at a very small scale and in very few cases. Thus the position at present is that for a marriage to be recognised as a valid marriage in the Ngoni tradition, it is no longer necessary that **lobola** must be paid. By a logical and necessary inference, therefore, it cannot be a valid ground to disqualify a late Chief's son from being heir to the throne simply because he was born out of a matrilineal marriage. It must be appreciated that culture and tradition are not static. They are fluid and dynamic. They change with time to suit prevailing circumstances. In any case, as submitted by counsel for the 1st defendant, to deny a person succession to Chieftaincy purely because the type of marriage he or she born out of would amount to discrimination and therefore contrary to Section 20 of the Constitution which prohibits all forms of discrimination on grounds of race, ethnic or social origin,

birth or other status, among others. (*Emphasis supplied*). Being inconsistent with the Constitution, then such a practice would be repugnant and therefore invalid. Further this court notes that Section 23(1) of the Constitution provides that all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law. It would therefore offend that constitutional provision to deny the 1st defendant, a biological son of the late Chief Ganya, succession to the Chieftaincy simply because of the circumstances of his birth. In the final analysis, this court finds that the mere fact that the 1st defendant was born out of a matrilineal marriage is not reason enough to disqualify him as heir to the Ganya Chieftaincy.

The next question to be considered is whether the nomination of the 1st defendant to succeed the late Chief Ganya was irregularly done and therefore invalid. As stated earlier, the plaintiff's case on this aspect is that the 1st defendant was nominated by the late Chief's counsellors who have no such mandate instead of the Ganya family which is the appropriate authority. From all the evidence before the court, what comes out is that the nomination of a person to take over from a departed Chief becomes necessary in instances where there is no child to the late Chief who qualifies to be Chief and such disqualification must be on justifiable reasons. The question of nomination would therefore not arise in cases where there is a qualified child of the late Chief. In the case at hand, the court having found that the fact that the 1st defendant was born out of a matrilineal marriage does not disqualify him, the issue of nomination has no place.

In view of the foregoing observations and remarks, the plaintiff's action must fail in its entirety with costs of the defendants. Effectively therefore the injunction obtained by the plaintiff stands dissolved.

(Right of Appeal Explained)

Pronounced in Open Court this day of 13th September 2006 at Blantyre.

H.S.B. POTANI
JUDGE

Tembo: I wish to seek leave to appeal.

Mambulasa: They are entitled to appeal

Court: Leave to appeal is granted.

**H.S.B. POTANI
JUDGE**