



IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NO. 1187 OF 2016  
BETWEEN:

THE REGISTERED TRUSTEES OF.....CLAIMANT  
LOCAL TRANSPORTERS ASSOCIATION

-AND-

AG NKHAMBULE.....1<sup>ST</sup> DEFENDANT  
T. THANTHWE.....2<sup>ND</sup> DEFENDANT  
BILLIAT MPHUKIRA.....3<sup>RD</sup> DEFENDANT  
Y. HASSAN.....4<sup>TH</sup> DEFENDANT  
WILLARD KALYOLYO.....5<sup>TH</sup> DEFENDANT  
MR. ZINDENI.....6<sup>TH</sup> DEFENDANT  
MR. KACHERE.....7<sup>TH</sup> DEFENDANT  
MEMBERS OF THE LOCAL TRANSPORTERS ASSOCIATION.....8<sup>TH</sup> DEFENDANT

CORUM: HONOURABLE JUSTICE R.M CHIANNNGWA

Mtupila	Claimants Counsel
Salima	Respondents Counsel
Nyirenda	Court Clerk

## **JUDGEMENT**

### **1. Introduction**

The claimants seek the following declarations and orders:

- (a) A declaration that the Defendants have no capacity to act on behalf of the claimants as they do not hold their office positions legitimately.
- (b) A declaration that the legitimate trustees of the claimants are the ones who were trustees on the incorporation of the association with the necessary changes as accepted by the Registrar General.
- (c) A Declaration that in the circumstances the said legitimate Trustees are to take charge of the affairs of the Association.
- (d) An order restraining the Defendants from acting or in any manner purporting to act on behalf of the plaintiff Association.
- (e) Other reliefs as court deems fit.
- (f) Order for costs

The claim was opposed. The evidence in chief was submitted through witness statements and witnesses were cross examined and reexamined. A total of 3 witnesses gave evidence in this matter. Below is a summary of their evidence.

### **2. The Evidence**

#### *a. Claimants Evidence*

The first witness was Michael Kadzanja. He stated that he is the Board Chairperson of the Claimant Association. The association was incorporated on the 27<sup>th</sup> Day of October, 1998. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> and 4<sup>th</sup> defendants are the current members of the claimants executive committee. He added that on the 27<sup>th</sup> day of December, 2016 he received information that the Executive Committee called and held a meeting on the 16<sup>th</sup> day of December, 2016. At this meeting they agreed to hold an Annual General Meeting for the Association on Saturday the 31<sup>st</sup> of December, 2016 and they appointed the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendant as Taskforce to handle the elections during the annual general meeting. The Executive Committee did not give a 21day written notice as required by law and all the trustees were not communicated to regarding the purported meeting.

Regarding the question as to who are the lawful trustees, it is argued the lawful trustees are the ones that existed upon the incorporation of the Association in 1999.

The second witness was Mr Chifwayi Chirambo, the Principal Assistant Registrar General. He stated that on the 11<sup>th</sup> day of August, 2014, he received a letter from Mr. M.M Kadzanja, the Chairperson of the Registered Trustees of Local Transporters Association seeking guidance on two issues. First, which version of the constitution of Local Transporters Association is valid, in light of the various amendments effected to it by different parties; and second, who are the rightful and legally recognized members of the Board of Trustees of the Association. In response, through a letter dated 15<sup>th</sup> day of August 2014, the LTA Chairperson was advised that the 2002 constitution is a valid one and the lawful Board of Trustees of LTA is that which existed as at 18<sup>th</sup> December, 2002 and those members are as follows: E. Chadewa; M.M. Kadzanja; H.S. Mukhuna; MS Mwamadi; J. Jafali; B. Kabichi; Patrick S. Kundayi; S. Wasi; K.M Phiri; John Katanda and Elliot M. Bulahim. However, on the 17<sup>th</sup> day of January, 2017, in response to a letter from the Chairman requesting for confirmation on the status of LTA, after further search and study of the records, the Chairman, was advised that the only valid constitution was the 1998 Constitution. Further, through the same letter, it was confirmed that the lawful Board of Trustees is the one that existed as on the 18<sup>th</sup> day of December, 2002 and whose members were as those listed above.

*b) The Defendants Evidence*

The defence witness was Abel Nkhambule, the 1<sup>st</sup> defendant and the Executive Director of Local Transporters Association since December 2013. He stated that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendant used to be executive members of LTA but their term expired on the 31<sup>st</sup> December 2016. He added that Michael Kadzanja, is not the Board Chairperson of LTA and neither is he a member of LTA, having ceased holding his position as Trustee in the year 2003 together with all other trustees at that time. He explained that at its inception, LTA had a constitution of 28<sup>th</sup> April 1998 which legally guided trustees and other employees on the conduct of its affairs. Crucial to this case is section 8 of the Constitution which amongst others, stipulates that the term of office for trustees shall be 5 years, after a 5 year term, a new board will be elected and not appointed. This has also been confirmed by letter from the Registrar General Office dated 15<sup>th</sup> August 2014 paragraph B. Michael Kadzanja's term of office as Chairman expired in 2003 after his election in the year

1998 and after the expiry of his term of office i.e. 5 years and based on the first constitution of 1998 article 8 which gave a 5 year term limit for trustees and furthermore, the deponent stood for re-election in 2003 and was elected as vice-chairman but later resigned in his position as Vice Chairman and chose to become an advisor. In this regard it will not be appropriate for the Registrar General to recognize those trustees. From that date, Michael Kadzanja has never been re-elected to any position in LTA. He further explained that, in 2002, Michael Kadzanja amended the 1998 constitution despite the 1998 constitution having no provisions for amendment and he would not explain what empowered him to amend the constitution and what legal powers were used. At the design of 1998 constitution, the provision for amendment of the constitution was not included. The Registrar General confirms this as shown in his letters. This was purely as a control to avoid abuse of amendments for personal benefits by elected officials as has been the case with the 2002 Constitution. The 2002 Constitution had the following provisions which transporters felt were not acceptable as an association: Article 21(5) which stated that trustees shall hold office for life unless they resign, retire or removed from office for any reason by the executive in consultation with the remaining trustees and Article 21(7) which stated that in the case of death of any of the trustees, the remaining trustees shall choose a person representative of the deceased to become a trustee. Such personal representative will be the one managing the affairs of the deceased. He argued that it was the view of the transporters that these amendments to the 1998 constitution had no legal basis as it was a forged Constitution intended to give Mr. Kadzanja and the other trustees life trusteeship with the sole purpose of still clinging to power beyond 2003 when their term of office would expire. This forged Constitution was found by the transporters themselves and they objected to it and this gave rise to a Constitutional conference in 2007 and a new Constitution was formulated. The 2002 Constitution and this clause in particular are now being regarded as not acceptable by the Registrar General. The office of the Registrar General has said it has no legal force or effect because it was not submitted in line with Section 9(3) of the Trustees Incorporation Act and was not approved by the Minister. Furthermore, the phrase "office for life" (as the Registrar General puts it) purports to create trusteeships in perpetuity which is in contravention of principles of good governance and norms of democracy. Therefore, any recognition of appointments from the 2002 constitution by the Registrar General are erroneous. It was stated that Mr. Kadzanja regards the association as his personal property to the extent that he with his followers unlawfully threw out the elected

officials from office in April 2008 and who were only reinstated through the intervention of the High Court in the year 2010. LTA has a new Constitution adopted and approved at our Constitutional conference in 2007 were the former trustees, the executive and transporters attended including Michael Kadzanja and his colleagues and witnessed by the association's lawyers. The 2007 Constitution is the aspiration and wish of all transporters at the time and it's not correct for the Registrar General not to accept it, and based on this 2007 Constitution, new trustees were appointed as submitted to the Registrar General and the same was acknowledged in receipt. In December 2016, an Annual General Meeting was called for and this was done in accordance with the Constitution of LTA since a notification was made to all existing trustees and members at least 21 days before the scheduled date. Mr. Kadzanja was not invited to the meeting because he and his followers are no longer members of LTA. In order to cater for all necessary expenses for this meeting, funds were drawn from the Association's bank account. The term of office for the current executive committee members expired and hence an Annual General Meeting was called upon in order for the members to elect new office bearers. The true current trustees of LTA are the 4<sup>th</sup> Defendant, Mr. J.D.M Phiri, Mr. Malizani, Mr. Manong'a, Mr. Nkhondoyachepa, Mr. Chambwe, Mr. Chindozi, and Mr. Hassan all of whom attended the Annual General Meeting following the 2007 Constitution. The return of trustees was submitted to the Registrar General and was duly acknowledged and they were not advised of any omissions in the submission. Mr. Kadzanja does not have any locus standi in this matter since he holds no position in LTA and neither is he a member of LTA and there is no evidence to support his membership in LTA.

In response to the two letters from the Registrar General mentioned above the first defence witness stated that and below are my comments the two letters were written and signed by the same officer but do contradict each other to a large extent, in that one indirectly seeks to validate the 2002 amended constitution which has been source of problems in the association, whereas the other expressly invalidates the 2002 Constitution and seeks to restore the original 1998 Constitution for reasons expressed above. He added that if the 1998 Constitution was applied as the one in force as suggested in the 2017 letter, Michael Kadzanja is not a member of LTA board of trustees, and therefore his assertions as Chairman of the board are wrong and erroneous. He further argued that it would be erroneous for the office of the Registrar General to decline to recognize the existence of subsequent appointment of new trustees when they acknowledged

receipt of the return and any constitutional amendments simply for lack of proper form without first enquiring as to whether and how the said trustees were appointed and how the amendments were carried out. It must be noted that the appointment of new trustees in 2011 and the 2007 Constitution were passed at a duly convened Annual General Meeting and therefore cannot be invalidated simply because the registration of the same was not done properly.

## **2. Issues for Determination**

This court has to determine whether

- a) the Defendants have capacity to act on behalf of the claimants?
- b) the legitimate trustees of the plaintiff are the ones who were trustees on the incorporation of the association with the necessary changes as accepted by the Registrar General.
- c) in the circumstances the said legitimate Trustees are to take charge of the affairs of the Association.
- d) the Defendants should be restrained from acting or in any manner purporting to act on behalf of the plaintiff Association.

The claimants have presented the above issues for the court to determine. In summary the central question being asked by the claimants which this court has to determine is who are the legitimate trustees of the claimant association?

## **3. Analysis of Law and Evidence**

In **Sosten Chikandira & 5 others v S.B Zakaria & 5 Others Civil Cause No.9 of 2012** in a case concerning the governance of the claimant association, Justice Dr Kachale observed that *'Whilst much time was devoted on hearing oral testimonies from both sides of the case it is the strong opinion of my court that the answer to the dispositive issues lies within the documentary evidence adduced at trial. In that vein it is fair to suggest that the main crux of the matter herein revolves around the application of the LTA Constitution in the running of its affairs'*. It should be noted the captioned matter was a matter involving the governance issues of the claimants herein. This court is aligned to the approach that was taken in the **Sosten Chikandira** case cited above. As observed the central question is who are the legitimate trustees of Local Transporters Association? This can only be proved with documentary evidence, as associations duly

registered are a creature of statute. The documentary search starts with the Certificate of Incorporation of the claimant's association dated 27<sup>th</sup> October 1998 'Exhibit AN 11' also presented as 'Exhibit MK1' and the 1998 Constitution of the claimant's association 'Exhibit AN1'. There is no clearly marked document showing the names of the trustees of the claimant organization at the inception date. Be that as it may, the second question would be, what was the term of office for the trustees and how would a change of trustees be effected? In the 1998 Constitution, clause 8 provided that *'a term of office for the trustee shall be 5 years. After a five year term, a new Board will be elected'*. What is surprising is that none of the witnesses produced documentary evidence of a meeting that was held to elect new office bearers after the five years. The claimant witness M.M Kadzanja produced a 2008 Constitution of the claimant association 'Exhibit MK2' which in clause 21(5) provides that *'trustees shall hold office for life unless they resign, retire or removed from office for any reason by the remaining Trustees'*. The court was not shown relevant documents of how the 1998 Constitution was amended to reflect the changes made in the 2008 Constitution, and all other constitutions which were before the court, in accordance with **section 9 of the Trustees Incorporation Act**. It is this courts view that without the necessary supporting documents which gave birth to the 2008 Constitution, the said Constitution would have no legal effect. The claimant witness also presented to the court a document attached to the 2008 Constitution titled 'Notice of Appointment of New Trustees' and also present by the defence witness 'exhibit AN3'. Through this document one is being informed that John Katanda, Elliot Bulahim, Billiat Kabichi and Kassim Phiri are new trustees having been appointed by the claimant association on 15<sup>th</sup> November 2002. One is also advised that Wasi Sawasawa and H. S Mukhuna ceased to be trustees of the claimant association by reason of death while N. K Galangombe retired on 1<sup>st</sup> October 2002. At the bottom of the page, it reads signed by Trustees: M Galan Gombe Kadzanja, M.S Mwamadi, Patrick Kundayi and James Jafali. Again, this court notes that, **section 7(2) of the Trustees Incorporation Act** which states that *'within one month after the expiration of each year after the grant of a certificate of incorporation, and whenever required by the Registrar, a return shall be made in the prescribed manner by the trustees of the charity or association of the names of the trustees thereof together with their addresses'*. Now there were no returns present in evidence of the trustees in the years 1999, 2000 and 2001. What we have is a return for the year 2002 and others sporadically and not sequentially as required by law. As such there is no way of tracing the changes made through the

years regarding trustees. Secondly the said document is not dated and being a copy, it was not certified as a true copy of the original. The question is what effect does this document have before the court in evidence. The court will attach no evidential weight to this document. This court appreciates the evidence given by the second claimants witness. However, being an expert witness, there was need to back up his statements with documentary evidence. The court had no recourse to the institutional file which had the documents the second claimants witness was referring to. These should have been brought to court for courts and defendants' perusal and verification to back the second claimant's viva voce evidence. It is unfortunate that this was overlooked by the claimants. To this end this court finds that the 1998 constitution is the valid Constitution. Regarding the trustees, it would seem common sense having in mind the courts view aforementioned to state that the valid trustees are those that were appointed in 1998. However, in evidence is a letter dated 11 November 2010, the text of the letter reads as follows:

WITHDRAWING CASE BETWEEN MR S B ZAKALIA and M M KADZANJA  
LOCAL TRANSPORTER ASSOCIATION

*Today on 11<sup>th</sup> November 2010 we had a conversation between mentioned above topic that the Executive and Trustees should work together according to their positions.*

*During our conversation we have agreed that MR M M KADZANJA and others they will be working as Trustees and MR S B ZAKALIA and his group they will work as Executive according to the Constitution of Local Transporters Association and both parties has agreed to withdraw all the cases, the executive will continue for the next two years up to 2013 December.*

TRUSTEES SIGN MM KADZAKUMANJA

MS MWAMADI

EXECUTIVE CHAIRMAN SB ZAKALIA

VICE A NKHAMBULE

On file is a letter dated 4<sup>th</sup> April 2002 in which the claimant witness resigned from the Post of Vice Chairman of the Executive Committee of the Claimant Association. This court would quote

the decision of the High Court in the Sostan Chikandira case cited above. The court stated at page 7 that, *'In the course of hearing this case it has been established that at the time the agreement of 11<sup>th</sup> November 2010 the Trustees were competently represented by Mr Wapona Kita of Ralph and Arnold as well as their present lawyer on file in this action, Mr Andy Kaonga. Mr Salima acted for the defendnats. Mr Kadzanja (PW2) conceded under cross examination that the parties took the document to their lawyers before appending their signatures on 11<sup>th</sup> November 2010. The legal import of such a process, in the conclusion of this court, is to vouch for the legal propriety of the document executed by the disputing parties; in other words, this court finds as a matter of fact that the agreement of 11<sup>th</sup> November 2010 (contrary to the assertions of the plaintiffs) was entered between persons acting on competent legal advice and with undiminished freewill. The terms of that agreement therefore bound all the parties to the same.*

*Thus, my court concludes that at the time Mr Kadzanja purported to call a meeting on 23<sup>rd</sup> August 2011 there were in place both a full set of Trustees as well as a functioning Executive Committee. Accordingly, the terms of the LTA Constitution did not permit him to circumvent its laid down procedures even as Trustee. In this respect the court has reached the conclusion that by operation of the same 11<sup>th</sup> November 2010 agreement any purported removal of Mr Kadzanja as trustee had been rendered void'.*

Now, having the letter dated 11<sup>th</sup> November 2010, the letter of resignation from M M Kadzanja and the decision of the court in the Sostan Chakandira case quoted in part above, this court is of the view that M M Kadzanja is still a trustee of the claimant association as the same was already adjudicated by the court and for this court to adjudicate on the same would be a matter rendered *res judicata*. His removal would have to follow a lawful procedure within the Constitution of the claimant association and Trustees Incorporation Act. In the absence of the said documentation to show that due process was followed court finds that the lawful trustees of the claimant association are MM Kadzanja and others who were operating at the time of the signing of 11<sup>th</sup> November 2010 agreement. In addition, their term was to end in December 2013 as the court in Sostan Chakandira Case cited above held in conclusion that, *'on the foregoing premises this court finds that the plaintiffs have failed to prove their case in these proceedings. Instead, it is hereby found as a matter of fact that by virtue of the agreement of 11<sup>th</sup> November 2010 the*

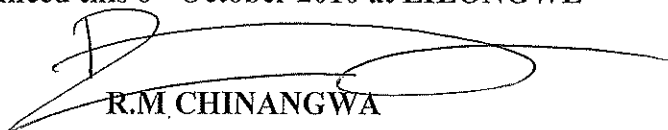
*defendants are the lawful executive committee of the LTA until December 2013'. Now after 2013 there was need for all processes to be followed to enable this court appreciate that the changes in the leadership were lawfully done. The court has not satisfactorily been provided with the same. It is unfortunate for the defence to depone that, 'It must be noted that the appointment of new trustees in 2011 and the 2007 Constitution were passed at a duly convened Annual General Meeting and therefore cannot be invalidated simply because the registration of the same was not done properly' because the rules in the Trustees Incorporation Act regarding changes to the constitution; changes to trustees are substantive law and have to be followed and applied to the letter. An administrative act cannot vitiate the law.*

To say the least, the governance of the claimant's association has been run grossly in breach of the Trustees Incorporation Act and hence a plethora of actions in the courts. This court cannot resist think of greed and power being the root cause of the mess in the claimant's association. It is this courts view that this was a suitable case in which the Minister should have invoked section 9(5) of the Trustees Incorporation Act to revoke the certificate of incorporation for the sheer lapses in the governance and administration of the claimant's association.

#### **4. Finding**

The 1998 Constitution of the Local Transporters Association is the valid Constitution. The trustees of the Local Transporters Association are as those available at 11 November 2010 to December 2013 as decided in the Sosten Chikandira Case cited above. Any other trustees appointed after 2013 cannot be recognized as they did not follow the due process of the law under the Trustees Incorporation Act. The defendants claim fail. It is trite that costs are awarded in the discretion of the court. The costs of this action are to be borne by the claimant because if they had duly and legally exercised their role under the 1998 Constitution and followed the procedures in the Trustees Incorporation Act this and all matters involving the governance of the claimant association would have been avoided.

**Pronounced this 6<sup>th</sup> October 2010 at LILONGWE**

  
**R.M. CHINANGWA**

**JUDGE**