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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRTY

CIVIL DIVISION

JUDICIAL REVIEW NO. 92 OF 2016

BETWEEN

THE STATE.....1st RESPONDENT

CHIRADZULU DISTRICT COMMISSIONER.....2ND RESPONDENT

WILLIAM LAISAN.....3RD RESPONDENT

EX PARTE: JOSEPH MAKWITI (on his own behalf and on behalf of Lupando Clan) AND ZIONE LAISAN.....APPLICANTS

CORAM: **THE HON. MR. JUSTICE D. MADISE**
Mr. K. Phokoso Counsel for the Applicants
Mr. Mchilima Counsel for Respondents
Mr. Michael Mike Mbekeani Official Interpreter

Madise, J

JUDGMENT

1.0 Introduction

1.1 The applicants commenced this matter by way of notice of originating summons on 5th April, 2019 seeking several declaration and orders against the State and the District Commissioner for Chiradzulu and William Laisan being respondents. The summons is supported by a sworn statement of Joseph Makwiti on his own behalf and on behalf of the Lupando clan and Zione Laisan. The order granting leave to apply for Judicial Review was granted by a Judge in Chambers on 24th October, 2018. There was a further application to amend Form 86A which was also granted on 24th October, 2018. The applicants also filed their Skelton argument in support of the summons on 15th February, 2019.

1.2 The 2nd respondent filed a sworn statement in opposition to the granting of leave to apply for Judicial Review which he has adopted as his main sworn statement in opposition to the sworn statement in support of the summons. The 2nd respondent has also filed Skelton argument in opposition.

2.0 The Relief Sought in Form 86A

1. A declaration that the decision by the 1st respondent dismissing the applicants claim that they are the rightful heirs to the Tawakali Chieftainship is unreasonable in the wednesbury sense and improper.

2. A declaration that the 1st respondent took into account irrelevant consideration when he arrived at his decision to dismiss the applicant's claim.

3. A like order to certiorari quashing the decision of the 1st respondent dismissing the applicants Claim to be the rightful heirs to Tawakali Chieftainship.

4. A like order to mandamus directing the respondent to recognise the applicant's right to the Tawakali Chieftainship.

a. An order for costs.

b. Further or other relief which the court shall deem just and proper

3.0 **The Facts**

3.1 According to Joseph Makwiti the applicant herein on his own behalf and on behalf of the other applicants he told the Court that the Tawakali throne was founded in 1915 by Nyimbiri Tawakali who was the first Village Headman Tawakali. He ruled from 1915 to 1961 when he died.

3.2 Nyimbiri Tawakali married a lady from the Kunchanjira Clan and gave birth to Luwesi. When Nyimbiri died in 1961 Luwesi went to TA Kadewere to report his father's death. According to the deponent this was irregular. Due to misunderstandings Luwesi was accepted to rule on condition that upon his death someone from Lupando Clan would succeed him.

3.3 He stated that Luwesi was not originally eligible because he was a son to the dead Village Headman. Luwesi died in 1984 and Mr. Labana being a Clan leader suggested that William Laisan should succeed as he was a nephew to Luwesi.

3.4 In 1998, William Laisan started destroying graveyard trees, castigating, mocking and disrespecting clan members. The matter was reported to Traditional Authority Kadewere who asked the clan to give Laisan another chance and this settled the matter.

3.5 In 2012 William Laisan divided the village into two one ruled by himself (Tawakali Village) and another (Lupando Village) which was ruled by some unknown subject. This did not go well with the clan members. The matter was once again referred to Traditional Authority Kadewere.

3.6 On 2nd June, 2013, William Laisan was removed as Village Headman. Thereafter the clan appointed Zione Laisan as Village Headman Tawakali.

3.7 William Laisan then appealed against the decision of the Traditional Authority and the District Commissioner ordered, Zione Laisan to stop acting as Village Headman. A meeting of the Chief Council was called on 19th October, 2016 and present were Senior Chief Chitera, Sub Traditional Authority Onga and Mrs. Shaba, Mrs. Soko and Mr. Msowa.

3.8 The applicant stated that the 1st respondent had no power under the Chiefs Act to appoint an appellate Tribunal of Chiefs to hear the appeal. In this regard the decisions that were made were null and void.

3.9 In Opposition William Laisan told the Court that his forefathers migrated from Mozambique and settled in Mangochi. They then moved to Zomba and finally settled in Chiradzulu. There they found a Village called Kumano. When the village became too big Kumano told his sister Kunchanjila to relocate to the other side of the mountain. That became Tawakali Village.

3.10 When Kunchanjila was heavy with Child the clan appointed Chenyimbi from Kumano village to assist in the discharge of Chieftaincy duties. When the child was born he was named Cheluwesi. When Cheluwesi became of age his mother handed over the throne to him. He ruled Tawakali village until his death in 1986. Thereafter William Laisan was promoted to be Group Village Headman Tawakali. In 2013 he was ordered by Traditional Authority Mpunga to demarcate his Village into two. That is how the Lipendo village was created.

3.11 Some clan members were not happy and they went to Traditional Authority Kadewere to complain. T/A Kadewere called for a meeting and at the hearing the applicant was suspended from duties pending further investigations. Being unhappy with the suspension he went to T/A Likoswe who referred him to the District Commissioner for Chiradzulu. The District

Commissioner then summoned neutral people to wit Senior Chief Chitera and Sub Traditional Authority Onga to preside over the dispute. Hearing took place on 19th December, 2016 and the 3rd Respondent was told to resume his duties.

4.0 The Issues

4.1 There is one main issue for determination before me. The main question is whether the 1st Respondent had the legal authority to constitute a Chief Council to hear an appeal in this matter and whether such a decision was a total nullity.

5.0 **The Law**

5.1 The Law The burden and standard of proof in civil matters is this: He/she who alleges must prove and the standard required by the civil law is on a balance of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than a positive.
As Denning J, stated in *Miller vs. Minister of Pensions* [1947] 2 A II E.R. 372.

> *If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not*

5.2 Similarly the degree of probabilities will depend upon the subject matter. When a civil court is deciding on a charge of fraud, it naturally follows that a higher degree of probability is required than when deciding an issue of negligence. However the standard does not reach as high as that required in a criminal court which is beyond a reasonable doubt. The general principle is that the court must require a degree of probability which suits the occasion and is commensurate with the law and facts.

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 or threatened if those interests are known.*

5.6 Judicial review is a supervisory jurisdiction which reviews administrative actions by public bodies rather than being an appellate jurisdiction. For judicial review proceedings to be entertained by courts the following preliminary issues must be satisfied.

5.7 Public Law

Only decisions or actions which are made in a constitutional or public law context are amenable to judicial review. This therefore means that even if a body is susceptible to judicial review not every decision will be reviewable if it is outside the ambit of public law. A clearer example will be matters of employment which are generally regulated by contract within the ambit of private law. On the issue of public law and judicial review Lord Diplock stated in *O'Reilly* vs. *Mackman* [1983] 2 AC 237.

> *It would in my view as a general rule be contrary to public policy and as such an abuse of process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions (governing judicial review) for the protection of such authority.*

5.8 The Parties

Judicial review can and must not be brought by or at the instance of the government. In general, judicial review only lies against anybody charged with the performance of a public duty in a public law context.

5.9 Locus Standi

An applicant in a judicial review proceeding must have *"sufficient interest"* in the matter. The purpose is to exclude busy bodies. There must be a direct or personal interest. Whether a general interest qualifies within the meaning of *locus standi* is a question of law and fact. However courts have in recent times adopted a much broader and flexible approach. The more important the issue and the stronger the merits, the more readily will a court grant leave to move for judicial review notwithstanding the limited personal involvement of the applicant.

5.10 The Grounds

Judicial review proceedings must not issue merely because the decision maker has made a mistake. The applicant must show that there has been a departure from accepted norms. That the decision making process has been characterized by illegality, procedural impropriety and irrationality. This is called the tripartite distinction. Based on the above this Court is convinced that this is a suitable case for judicial review.

5.11 The Wednesbury principle

In *Associated Provincial Picture Houses Ltd* vs. *Wednesbury Corporation* [1947] All ER 680, Lord Green MR stated as follows

> *Decisions of persons or bodies performing public duties or function will be liable to be quashed or otherwise dealt with by an appropriate order in Judicial Review proceedings where the court concludes that the decision is such that no such person or body properly*

directing itself on the relevant law and acting reasonably could have reached that decision.

5.12 A court when reviewing a decision making process will not simply quash a decision because it does not agree with it, but that it was unreasonable regard being had to the circumstances of the case and the dictates of administrative law. The court must be satisfied that no decision maker properly directing his mind to the law and facts before him could have made such an absurd decision. Once the decision is adjudged to be unreasonable it must be declared null and void within the Wednesbury test and must be quashed.

6.0 The Finding

6.1 Matters of Chieftaincy in Malawi are governed by the Chiefs Act and the Local Government Act. I have searched the two pieces of legislation and nowhere is a District Commissioner given power expressly or impliedly to constitute an appellate tribunal to hear chieftaincy disputes. The question before me is whether the District Commissioner for Chiradzulu was exercising administrative or legal functions. In my view matters of chieftaincy are quasi legal issues as they are governed by the Chiefs Act.

6.2 The fact remains that Traditional Authority Kadewere suspended the 2nd Respondent due to allegedly poor public rapport. In my view the Traditional Authority had power to discipline his Village Headman. When that decision was taken Zione Laisan was appointed to act in his stead. It is only a Traditional Authority who can appoint a village headman. Before the issues were resolved as to why the 3rd respondent was suspended he rushed to the District Commissioner to lodge an appeal.

6.3 In my considered view the District Commissioner had no legal authority to constitute this Appellate Tribunal. I have searched the two relevant legislation and I see no provision which gives power to 1st Respondent to perform such a function.

6.4 I therefore find the decision of the 1st Respondent to have been unlawful and unreasonable within the wednesbury sense and therefore ultravires. That decision to reinstate William Laisan has no legal effect whatsoever and I make an order of certiorari quashing the same.

6.5 The status quo therefore remains that Zione Laisan is the acting Village Headman Tawakali. Traditional Authority Kadewere is hereby given 21 days to summon the clan members to make a final decision on this matter by performing the following functions.

1) Make a final decision on the fate of William Laisan or,

2) Make a final decision on the fate of Zione Laisan or,

3) Appoint another Village Headman/woman.

6.6 On a balance of probabilities this application for Judicial Review must succeed with costs.

I so order.

Made in Chambers at Blantyre in the Republic of Malawi on 30th July, 2019 July, 2019.

Dingiswayo Madise

Judge.