



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
JUDICIAL REVIEW CAUSE NO. 49 OF 2020
(Before Honourable Justice Mambulasa)

BETWEEN:

**THE STATE [ON THE APPLICATION OF BASITOLE DALISON
MAKWALU]CLAIMANT**

-AND-

PRESIDENT OF THE REPUBLIC OF MALAWI.....1ST DEFENDANT

-AND-

NOAH DALASI CHISAFALI NGABU.....2ND DEFENDANT

CORAM: HON. JUSTICE MR. MANDALA D. MAMBULASA

Mr. Michael Goba Chipeta, Advocate for the Claimant

Hon. Attorney General Mr. Thabo Chakaka Nyirenda, SC; Advocate
for the 1ST Defendant

Mr. Neverson Chisiza, Advocate for the 1ST Defendant

Mr. Aubrey Ulemu Maseko, Advocate for the 1st Defendant

Mr. Wester Peter Kosamu, Advocate for the 2nd Defendant

Mr. Bright Chibamahara Msyale, Advocate for the 2nd Defendant

Mr. Frank Farook Mbeta, Advocate for the 2nd Defendant

Mr. Obet Chitatu, Court Clerk/Official Interpreter

Mrs. Elizabeth Banda, Recording Officer/Court Reporter

JUDGMENT

MAMBULASA, J

Introduction

- [1] By a communication dated 8th June, 2020 from the Secretary for Local Government and Rural Development to the District Commissioner, Chikwawa District Council, the 1st defendant allegedly appointed the claimant as Chief Ngabu with effect from 29th May, 2020.
- [2] The alleged appointment of the claimant as Chief Ngabu was as a result of the findings of an inquiry dated 15th August, 2019 which recommended the removal of the 2nd defendant as Senior Chief Ngabu. The claimant alleges that he was also duly nominated by the royal family.

- [3] Immediately after the alleged appointment of the claimant as Chief Ngabu, the District Commissioner for Chikwawa communicated the fact to all group village headmen (GVHs) in his area of jurisdiction.
- [4] In a surprising turn of events, in late September, 2020 the claimant was informed that the 1st defendant had appointed or reinstated the 2nd defendant as Senior Chief Ngabu with effect from 9th September, 2020.
- [5] No reasons in writing were given to the claimant by the 1st defendant for his removal from office as Chief Ngabu and why he then proceeded to appoint or reinstate the 2nd defendant to his original position of Senior Chief Ngabu.
- [6] The claimant states that the decision by the 1st defendant to appoint or reinstate the 2nd defendant as Senior Chief Ngabu is in the circumstances unlawful, procedurally unfair and not in conformity with the Constitution.¹
- [7] The decision 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 claimant by the 1st defendant for removing him from the said office and appointing or reinstating the 2nd defendant in his stead.
- [8] The decision in question is not in conformity with the Constitution because: (1) it violates his right to administrative justice in section 43 of the Constitution; and (2) by violating section 43 of the Constitution, it violates the constitutional principle of observance and upholding, by all institutions and

¹ The Republic of Malawi (Constitution) Act.

persons, the Constitution and the rule of law as stipulated in section 12 (1) (f) of the Constitution.

[9] The claimant is therefore seeking three reliefs as follows:

9.1 A declaration that the decision in question by the 1st defendant to appoint or reinstate the 2nd defendant as Senior Chief Ngabu is unconstitutional, unlawful, procedurally unfair and invalid;

9.2 A like order to *certiorari* quashing the 1st defendant's decision to appoint or reinstate the 2nd defendant as Senior Chief Ngabu; and

9.3 An order for costs.

[10] The defendants oppose the application for judicial review by the claimant contending that the reinstatement of the 2nd defendant as Senior Chief Ngabu followed another inquiry which recommended his reinstatement and also gave the royal family members the right to be heard.

[11] The defendants also contend that the claimant was not entitled at customary law to hold the office of Chief Ngabu as he was not from the Ngabu clan but Ngowe clan and that his purported appointment therefore breached the dictates of section 4 of the Chiefs Act² and was therefore unlawful and void *ab initio*.

² Cap. 22:03 of the Laws of Malawi.

Issues for Determination

[12] During the scheduling conference, the Court and the parties agreed that there were three issues falling for determination by the Court. These are:

12.1 Whether or not the decision by the 1st defendant to appoint or reinstate the 2nd defendant to his original position as Senior Chief Ngabu 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 claimant by the 1st defendant for removing him from the said office and appointing or reinstating the 2nd defendant in his stead?

12.2 Whether or not the decision in question is not in conformity with the Constitution because it violates the claimant's right to administrative justice in section 43 of the Constitution and, by violating section 43 of the Constitution, it violates the constitutional principle of observance and upholding, by all institutions and persons, the Constitution and the rule of law as stipulated in section 12 (1)(f) of the Constitution and any other law?

12.3 Whether or not the claimant is entitled to an order for costs?

The Claimant's Case

[13] In his sworn statement in support of the application for judicial review, the claimant depones that by a communication dated 8th June, 2020 from the Secretary for Local Government and Rural Development to the District Commissioner for Chikwawa, the 1st defendant appointed him as Chief Ngabu

with effect from 29th May, 2020. A copy of the communication was exhibited and marked as, “BDM1”.

- [14] The claimant further depones that his appointment was as a result of the findings and recommendations of an inquiry dated 15th August, 2019 which recommended the removal of the 2nd defendant as Senior Chief Ngabu. The claimant stated that he was also chosen by the royal family. Copies of the inquiry findings, recommendations and the submission of his name to the 1st defendant by the District Commissioner for Chikwawa were exhibited and marked as, “BDM2” and “BDM3” respectively.
- [15] Immediately after his appointment as Chief Ngabu, the District Commissioner for Chikwawa communicated the fact to all group village headmen (GVHs) in his area of jurisdiction. A copy of the communication was exhibited and marked as, “BDM4”.
- [16] In a surprising turn of events, in late September 2020, the claimant was informed that the 1st defendant had appointed or reinstated the 2nd defendant as Senior Chief Ngabu with effect from 9th September, 2020 by communication dated 14th September, 2020. A copy of the communication was exhibited and marked as, “BDM5”.
- [17] No reasons in writing were given to the claimant by the 1st defendant for his removal from office as Chief Ngabu and why he then appointed or reinstated the 2nd defendant in his place.

- [18] The claimant contends that the decision to appoint or reinstate the 2nd defendant to his original position as Senior Chief Ngabu is unlawful, procedurally unfair and not in conformity with the Constitution.
- [19] The decision 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 claimant by the 1st defendant for removing him from the said office and appointing or reinstating the 2nd defendant in his stead.
- [20] The decision in question is not in conformity with the Constitution because: (1) it violates his right to administrative justice in section 43 of the Constitution; and (2) by violating section 43 of the Constitution, it violates the constitutional principle of observance and upholding, by all institutions and persons, the Constitution and the rule of law as stipulated under section 12 (1) (f) of the Constitution.
- [21] The claimant therefore seeks reliefs particularized in paragraph [9] above.

Cross Examination of the Claimant

- [22] The claimant was cross examined by the Honourable Attorney General, Mr. Thabo Chakaka Nyirenda, SC.
- [23] Asked whether the claimant saw exhibit marked as “BDM1” for the first time in court, he told the Court that he already saw it at the District Commissioner’s office way before the commencement of these proceedings.

- [24] Quizzed further whether the communication was addressed to him as a person, he testified that it was not addressed to him.
- [25] Interrogated whether the communication was perhaps copied to him as an appointee, the claimant told the Court that it was not copied to him.
- [26] Asked whether the claimant had ever seen any letter or instrument in writing from the President of the Republic of Malawi under his hand that he had been appointed as Chief Ngabu, he said he had never seen one other than exhibit “BDM1”.
- [27] The claimant confirmed to the Court that for any person to be appointed as Chief, there is always written communication under his hand from the President of the Republic of Malawi to that effect.
- [28] He also confirmed to the Court that after a person has been appointed as Chief, the next step that follows is an installation ceremony.
- [29] The claimant testified that installation ceremony is either conducted by the President of the Republic of Malawi or the Minister responsible for local government and rural development matters.
- [30] He testified that village headmen or group village headmen are installed by the District Commissioner.

[31] Asked whether he himself was installed as Chief Ngabu by the President of the Republic of Malawi or the Minister responsible for local government and rural development matters, he testified that he was not installed.

[32] There was no re-examination of the claimant by Advocate Mr. Michael Goba Chipeta. This marked the end of the claimant's case.

The 1st Defendant's Case

[33] The 1st defendant filed its defence to the application for judicial review by the claimant supported by a sworn statement. This requirement is pursuant to Order 19, rule 24 of the Courts (High Court) (Civil Procedure) Rules.

[34] He contends that the reinstatement of the 2nd defendant followed the findings of an inquiry which gave the royal family members the right to be heard. They were interviewed and were allowed to express their views throughout the exercise.

[35] It is thus, the position of the 1st defendant that the claimant was given the right to be heard as the royal family members that nominated him was fully heard through an inquiry.

[36] Further, the 1st defendant contends that the claimant is not entitled at customary law to hold the office of Chief Ngabu. His purported appointment therefore breached section 4 of the Chiefs Act and was unlawful and therefore, void *ab initio*.

[37] The 1st defendant did not file any sworn statement in opposition to the application for judicial review. He filed a notice to the effect that he was going to rely on documents filed by the 2nd defendant.

The 2nd Defendant's Case

[38] The 2nd defendant also filed his defence supported by a sworn statement and a sworn statement in opposition to the application for judicial review by the claimant.

[39] He denies the contents of the application and states as follows:

[40] The first Traditional Authority Ngabu was one, Butawo. The second was Sesemani.

[41] Following the demise of Sesemani, the third Traditional Authority Ngabu was Elias Chapinga. The fourth Traditional Authority Ngabu was Dyson Dallas Chisafali Ngabu. He was the father to the 2nd defendant.

[42] In 1989, the said Dyson Dallas Chisafali Ngabu was unlawfully deposed as Traditional Authority Ngabu by Wangison Chinkono from Ngowe clan. As a result, a dispute erupted.

[43] In 1999, following the said dispute, the territory of Ngabu was sub-divided by the then President of the Republic of Malawi, Dr. Bakili Muluzi into two parts, namely, north of Mwananjobvu stream and south of Mwananjobvu stream. A copy of the letter subdividing the territory of Ngabu was exhibited and marked as, "NN2".

- [44] Dyson Dallas Chasafali Ngabu from Ngabu clan retained the north of Mwananjobvu stream and Wangison Chinkono from Ngowe clan retained the south of Mwananjobvu stream and that marked the end of the dispute.
- [45] Ngowe clan retained the name of and called their leaders as Traditional Authority Ngowe up to date. Ngabu clan maintained the name of and called their leaders as Traditional Authority Ngabu up to date.
- [46] The 2nd defendant was crowned as Senior Chief Ngabu in the year 1999.
- [47] On 12th December, 2019 former President of the Republic of Malawi, Professor Arthur Peter Mutharika [as at the time of hearing the proceedings] removed the 2nd defendant as Senior Chief Ngabu on allegations of misconduct.
- [48] On 14th September, 2020 the 1st defendant, under the administration of Dr. Lazarus McCarthy Chakwera, reinstated the 2nd defendant as Senior Chief Ngabu following the findings and recommendations of another inquiry which among others, found that the claimant was not from the royal family of Ngabu chieftaincy and did not have a claim over Ngabu chieftaincy. A copy of the report of the inquiry was exhibited and marked as, “NN3”.
- [49] Even in the event of death of the 2nd defendant, the claimant cannot be the next Senior Chief Ngabu as he is not from the royal family.
- [50] The decision of the 1st defendant was to reinstate the 2nd defendant to his original position of Senior Chief Ngabu and not to appoint the 2nd defendant

as Senior Chief Ngabu as particularized by the claimant. A copy of a letter reinstating the 2nd defendant to his former position was exhibited and marked as, “NN4”.

[51] The decision of the 1st defendant to reinstate the 2nd defendant to his original position of Senior Chief Ngabu is procedurally fair as it is within the confines of the law especially section 11 of the Chiefs Act.

[52] Specifically, the law gives power to the 1st defendant by writing under his hand, to remove any person from the office of Paramount Chief, Senior Chief, Chief or Sub-Chief if after due inquiry he is satisfied that the person has ceased to be entitled under customary law to hold such office among other reasons.

[53] The decision of the 1st defendant to reinstate the 2nd defendant to his original position of Senior Chief Ngabu was procedurally fair on account that the 1st defendant discharged his statutory duty imposed on him under section 12 of the Chiefs Act.

[54] On 5th August, 2020 the 1st defendant appointed an inquiry to inquire into the removal of the 2nd defendant as Senior Chief Ngabu.

[55] On 27th August, 2020 the inquiry reported its findings and recommendations to the 1st defendant one of which was that there was no blood relationship between the chiefs, the claimant and the 2nd defendant.

- [56] The decision of the 1st defendant to reinstate the 2nd defendant to his original position of Senior Chief Ngabu was constitutional as the 1st defendant exercised his powers conferred on him under section 89 (1) (d) and (g) of the Constitution.
- [57] The 1st defendant reinstated the 2nd defendant to his original position of Senior Chief Ngabu in accordance with the dictates of the Chiefs Act after due inquiry.
- [58] The claimant is not entitled to the reliefs sought herein as he is not from the Ngabu clan, a qualifying factor whose lack immediately invalidates him for the position. Consequently, the 2nd defendant prays that the matter be dismissed with costs.

Cross Examination of the 2nd Defendant

- [59] The 2nd defendant was cross examined by the Honourable Attorney General, Mr. Thabo Chakaka Nyirenda, SC.
- [60] Asked whether the claimant herein was installed as Traditional Authority Ngabu, he told the Court that he was not installed.
- [61] Referred to exhibit marked as, “NN1” which was an instrument in writing by the 1st defendant removing him as Senior Chief Ngabu as to whether the 1st defendant called him for hearing before he was removed, he testified that he was not heard.

- [62] Referred to exhibit marked as, “BDM2” which was a report of the inquiry which recommended that the 2nd defendant should go for a disciplinary hearing, the 2nd defendant told the Court that he was not called to a disciplinary hearing.
- [63] Quizzed whether the findings of the inquiry were communicated to him, he testified that they were never communicated to him.
- [64] The 2nd defendant confirmed to the Court that he commenced legal proceedings challenging his removal from the office of Senior Chief Ngabu but that the proceedings were withdrawn after he was reinstated.
- [65] The basis of the legal proceedings was that he was not personally told of the misconduct that he was alleged to have committed.
- [66] The witness testified that he petitioned the Office of the President and Cabinet after his removal from the office of Senior Chief Ngabu.
- [67] The essence of his petition was that his removal was irregular as he had not been heard and that the grounds for his removal were not valid.
- [68] The witness told the Court that there was a second inquiry which exonerated him from any wrong doing and recommended his reinstatement and that the President of the Republic of Malawi acted on that recommendation.

Further Cross-Examination of the 2nd Defendant

- [69] The 2nd defendant was also cross examined by Advocate Mr. Michael Goba Chipeta.
- [70] He confirmed to the Court that he was removed as Senior Chief Ngabu by the President of the Republic of Malawi on 12th December, 2019.
- [71] The 2nd defendant told the Court that he was not aware that the President of the Republic of Malawi appointed the claimant as Chief Ngabu.
- [72] The witness testified that he was invited by the second inquiry team to hear his side of the story.
- [73] However, the 2nd defendant told the Court that the claimant was not invited to the second inquiry to make any representations and was not at all involved in the processes.

Re Examination of the 2nd Defendant

- [74] The 2nd defendant was re-examined by Advocate Mr. Frank Farook Mbeta.
- [75] He explained to the Court that he was not invited to any disciplinary hearing before any authority.
- [76] The 2nd defendant told the Court that he petitioned the Office of the President and Cabinet against his removal as Senior Chief Ngabu because he had not been given the right to be heard and reasons in writing before the decision was taken by the President of the Republic of Malawi.

- [77] The witness testified that the procedure for removing a Chief had not been followed properly and that is why he instituted legal proceedings in the first place.
- [78] The 2nd defendant told the Court that a vacancy in the Senior Chief Ngabu chieftaincy would only have arisen on three grounds namely: (a) death, (b) incapacity, and (c) removal for misconduct.
- [79] He told the Court that in his case, misconduct was not proved against him as he was never called to any disciplinary hearing to answer any charges for any misconduct.
- [80] There was a supplementary sworn statement in opposition to the application for judicial review made by Ms Damalesi Khola, who is a biological sister to the 2nd defendant.
- [81] She depones that the 2nd defendant was duly nominated by the Ngabu clan, and became Chief Ngabu in the place of her late father, who had held the position, but had to relinquish it owing to old age.
- [82] She averred that Ngabu chieftaincy can only be held by persons from the Ngabu clan.
- [83] Some persons from the Ngowe clan lodged a complaint against the 2nd defendant's conduct in the exercise of his duties as Senior Chief Ngabu, and acting on those complaints, the 1st defendant removed him from his position.

- [84] Contrary to established tradition and protocols, the 1st defendant ratified the nomination of the claimant as Chief Ngabu and yet he is from the Ngowe clan.
- [85] She states that all the persons who nominated the claimant herein were from the Ngowe clan and that, that automatically invalidated the nomination. A copy of the minutes of the meeting that nominated the claimant was exhibited and marked as, “DN2”.
- [86] The witness further deponed that the claimant was therefore ineligible for nomination to the position of Chief Ngabu.
- [87] She states that even if the 2nd defendant was removed as Senior Chief Ngabu, the 1st defendant could not appoint anyone to the position without consulting the royal family of Ngabu for possible replacement.
- [88] Thus, she too prayed to the Court that the application for judicial review by the claimant be dismissed as the claimant is not part of Ngabu chieftaincy.
- [89] There was also another supplementary sworn statement in opposition to the application for judicial review by the claimant made by one, Aaron Banda.
- [90] The contents thereof were substantially similar to the sworn statement made by Ms. Damalesi Khola and so it will not be reproduced in this judgment for reasons of brevity. This marked the end of the 2nd defendant’s case.

The Law

[91] The High Court has original jurisdiction to review any law and any action or decision of the Government, for conformity with the Constitution. This is provided for in no lesser a law than section 108 (2) of the Constitution, which is the supreme law of the land.³

[92] In terms of section 4 of the Constitution, the Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of the Constitution and all laws made under it.

[93] Section 43 of the Constitution is on administrative justice. It provides as follows:

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.

[94] Section 43 of the Constitution has been interpreted by both the High Court and the Supreme Court of Appeal. In *In re Constitution of the Republic of*

³ See for instance, sections 5, 11 (1), 88 (1) of the Constitution.

*Malawi; In re Lunguzi*⁴ Mkandawire, J observed that this section does nothing more than restate the principles of natural justice.

[95] The *Lunguzi* case went on appeal to the Supreme Court of Appeal.⁵ The Supreme Court of Appeal affirmed the observation that was made by Mkandawire, J with regard to section 43 of the Constitution.

[96] Four years later, in *Chawani –vs- Attorney General*⁶ the Supreme Court of Appeal reiterated the above position as follows:

In our view, section 43 of the Constitution is simply an entrenchment of the principle of natural justice which requires that no person shall be condemned without being heard. The section has of course, stretched the principle a bit to include the requirement to give reasons which must support an administrative action...

[97] Section 46 (3) of the Constitution is on enforcement of rights and freedoms. It is to the effect that where a court referred to in subsection (2) (a) finds that rights or freedoms conferred by the Constitution have been unlawfully denied or violated, it shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a court finds that a threat exists to such rights or freedoms, it shall have the

⁴ [1994] MLR 72, 79 (HC).

⁵ *Attorney General –vs- Lunguzi et al* [1996] MLR 11 (SCA).

⁶ MSCA Civil Appeal No. 18 of 2000 (Unreported).

power to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated.

[98] Section 90 of the Constitution is on confirmation of decisions of the President of the Republic of Malawi. It stipulates as follows:

- (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.

[99] Section 4 (1) of the Chiefs Act is on the appointment of a person to the office of Paramount Chief, Senior Chief and Chief. It provides as follows:

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

[100] Section 11 (1) and (2) of the Chiefs Act is on the removal and suspension of persons holding the office of Paramount Chief, Senior Chief, Chief and Sub-Chief. It stipulates as follows:

- (1) The President may by writing under his hand remove any person from the office of Paramount Chief, Senior Chief, Chief or Sub-Chief if after due inquiry he is satisfied that-

- (a) the person has ceased to be entitled under customary law to hold such office;
- (b) the person has lost the confidence of the majority of the people residing in his area; or
- (c) such removal is necessary in the interests of peace, order and good governance.

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

[101] Section 12 of the Chiefs Act is on inquiries. It provides as follows:

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

[102] In *Kaweche and Kaunda -vs- District Commissioner (Nkhata Bay) et al*⁷ the High Court (Ligowe, J sitting) observed as follows:

Judicial review is a process under which any law, and any action or decision of the Government is subjected before the High Court for conformity with the Constitution. *See* s. 108 (2) of the Constitution. At common law, judicial review lies against any person or bodies which perform public duties or functions. In

⁷ Civil Cause No. 62 of 2013 (High Court of Malawi) (Mzuzu District Registry) (Unreported).

Malawi, this is so because of the underlying principles upon which our Constitution is founded. That is:

- (i) all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;
- (ii) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;
- (iii) the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice;
- (iv) the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote;
- (v) as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and
- (vi) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law. *See* s.12 of the Constitution.

[103] Order 19, rule 20 of the Courts (High Court) (Civil Procedure) Rules provides as follows:

(1) Judicial review shall cover the review of-

- (a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or
- (b) a decision, action or failure to act in relation to the exercise of a public function in order to determine-
 - (i) its lawfulness;
 - (ii) its procedural fairness;
 - (iii) its justification of the reasons provided, if any; or
 - (iv) bad faith, if any,

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

[104] Judicial review is concerned with reviewing, not the merits of the decision in respect of which the application was made, but the decision making process. There are a plethora of authorities on this point including *State, ex-parte P. Kamwaza; Traditional Authority Dambe and others*.⁸

⁸ [2007] MLR 378 (HC).

[105] The High Court will only interfere with the decision where the authority acted without jurisdiction, or failed to comply with rules of natural justice, or abused its powers.⁹

Application of the Law to the Facts, Analysis and Determination

[106] Ordinarily, judicial review hearings are conducted on the basis of written material and submissions made to the court. However, there are instances, though rare, where the court will order witnesses to attend the hearing for cross-examination.¹⁰

[107] In our context, Order 18, rule 23 of the Courts (High Court) (Civil Procedure) Rules permits cross examination of a person who made a sworn statement. In fact, this Court has allowed cross examination of a deponent in judicial review proceedings in the recent past based on this rule.¹¹

[108] In these proceedings, each party had filed notices to cross-examine deponents based on the same rule. It is for that reason that the Court allowed cross-examination of the deponents in this matter. The Court will now proceed to deal with the first issue for determination.

⁹ See for instance, *Anti- Corruption Bureau; ex-parte David Ernest Kadwa* [2007] MLR 26 (HC).

¹⁰ See for instance, *R (Wilkinson) -vs- Responsible Medical Officer Broadmoor Hospital* [2002] 1 WLR 419.

¹¹ See for instance, *The State [On the application of the Registered Trustees of the Seventh-Day Adventist Association (Malawi)] –and- Minister of Justice*, Judicial Review Case No. 55 of 2021 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

[109] The first issue that the Court has to grapple with is whether or not the decision by the 1st defendant to appoint or reinstate the 2nd defendant to his original position as Senior Chief Ngabu 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 claimant by the 1st defendant for removing him from the said office and appointing or reinstating the 2nd defendant in his stead?

[110] It is not in question that the President of the Republic of Malawi has the power to make such appointments as may be necessary in accordance with powers conferred upon him or her by the Constitution or an Act of Parliament.¹²

[111] Any appointments that the President of the Republic of Malawi may make where no power has been conferred on him or her by the Constitution or an Act of Parliament may be amenable to challenge through an application for judicial review by any person who has sufficient interest in the matter and may be quashed by the High Court.

[112] One of the Acts of Parliament that confers power on the President of the Republic of Malawi to make appointments is the Chiefs Act. He or she may appoint any person to the offices of Paramount Chief, Senior Chief, Chief or Sub-Chief. That power and authority is well spelt out under sections 4 (1), 5 and 12 of the Chiefs Act.

¹² See Section 89 (1) (d) of the Constitution.

- [113] The procedure for the appointment of any person by the President of the Republic of Malawi to the offices of Paramount Chief, Senior Chief, Chief or Sub-Chief is also laid out under sections 4 (2), 5 as read with 12 of the Chiefs Act.
- [114] Section 11 as read with section 12 of the Chiefs Act also empowers the 1st defendant to remove any person from the offices of Paramount Chief, Senior Chief, Chief or Sub-Chief.
- [115] Appointments of any person to the offices of Paramount Chief, Senior Chief, Chief, or Sub-Chief or indeed their removal from those offices are decisions that are within the province of the President of the Republic of Malawi in terms of the provisions of the Chiefs Act.
- [116] According to section 90 of the Constitution which is the supreme law of the land, and binds all executive, legislative and judicial organs of the State at all levels of Government and under sections 4 and 11 of the Chiefs Act, decisions of the President of the Republic of Malawi shall be expressed in writing under his or her signature or hand.
- [117] The questions is: in these proceedings are there decisions of the President of the Republic of Malawi appointing the claimant as Chief Ngabu and reinstating the 2nd defendant to his original position of Senior Chief Ngabu as alleged by the claimant?
- [118] In his sworn statement in support of the application for judicial review, the claimant deponed that by a communication dated 8th June, 2020 from the

Secretary for Local Government and Rural Development to the District Commissioner for Chikwawa, the 1st defendant appointed him as Chief Ngabu with effect from 29th May, 2020.¹³

[119] The appointment of the claimant as Chief Ngabu followed the removal of the 2nd defendant as Senior Chief Ngabu on 12th December, 2019. The 2nd defendant also confirmed to the Court that he was removed as Senior Chief Ngabu by the 1st defendant through an instrument in writing under his signature or hand which was exhibited and marked as, “NN1”.¹⁴

[120] The claimant further deponed that the 1st defendant reinstated the 2nd defendant as Senior Chief Ngabu with effect from 9th September, 2020 by another communication from the Secretary for Local Government and Rural Development dated 14th September, 2020.¹⁵

[121] The allegation that the 1st defendant reinstated the 2nd defendant to his original position as Senior Chief Ngabu was also confirmed by the 1st defendant himself in his defence to the application for judicial review by the claimant.¹⁶

[122] The Court has considered all the evidence submitted by both the claimant and the defendants and has not found any decision of the 1st defendant expressed

¹³ See Paragraph 13 above.

¹⁴ See Paragraph 70 above.

¹⁵ See Paragraph 16 above.

¹⁶ See Paragraphs 48 and 57 above.

in writing under his signature or hand as required by both the Constitution and the Chiefs Act appointing the claimant as Chief Ngabu.

[123] In fact, during cross examination by the Honourable Attorney General, Mr. Thabo Chakaka Nyirenda, SC the claimant told the Court that indeed, he had never seen any instrument in writing under the signature or hand of the 1st defendant appointing him as Chief Ngabu.¹⁷

[124] Again during cross examination, the claimant confirmed to the Court that appointment of any person to the office of Chief by the 1st defendant is always done through written communication under the signature or hand of the 1st defendant.¹⁸

[125] Similarly, the Court having considered all the evidence submitted in these proceedings by both the claimant and the defendants, did not find any evidence of any decision by the 1st defendant expressed in writing under his signature or hand as required by the Constitution and the Chiefs Act reinstating the 2nd defendant to his original position as Senior Chief Ngabu.

[126] All the communications from the Secretary for Local Government and Rural Development relied upon by the parties in these proceedings did not enclose any decision of the 1st defendant expressed in writing under his signature or hand. They could not in themselves constitute the decisions of the 1st

¹⁷ See Paragraph 26 above.

¹⁸ See Paragraph 27 above.

defendant as they were obviously not under his signature or hand as required by law as we have seen. Those communications were an exercise in futility.

[127] The only evidence of a decision by the 1st defendant expressed in writing under his signature or hand as required by both the Constitution and the Chiefs Act which the Court found in these proceedings is that of the removal of the 2nd defendant as Senior Chief Ngabu dated 12th December, 2019.

[128] The decision by the 1st defendant to remove the 2nd defendant as Senior Chief Ngabu is not a live issue for determination before this Court.

[129] In view of all the foregoing, the Court finds and holds that there was no decision of the 1st defendant known to the law appointing the claimant as Chief Ngabu.

[130] The Court also finds and holds that there was no decision by the 1st defendant known to the law that reinstated the 2nd defendant to his original position as Senior Chief Ngabu.

[131] Consequently, based on the finding that the only decision that the Court has found which was made by the 1st defendant is that of the removal of the 2nd defendant as Senior Chief Ngabu, that decision still stands to date as there were no other subsequent decisions made known to the law.

[132] For the avoidance of doubt, the office of Senior Chief Ngabu was and remains vacant following the removal of the 2nd defendant by the 1st defendant on 12th December, 2019 until such time that the 1st defendant will appoint another person or reinstate the 2nd defendant, as the case may be to that office.

[133] As such, the reliefs sought by the claimant cannot therefore be granted by the Court as the 1st defendant made no decisions known to the law that breached sections 43 and 12 (1) (f) of the Constitution. The application for judicial review by the claimant must suffer one fate. It is hereby dismissed.

[134] Costs are awarded in the discretion of the Court as is provided by law.¹⁹

[135] When the Court decides to make an order about costs, then, the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party. This is clear from Order 31, rule 3 (2) of the Courts (High Court) (Civil Procedure) Rules.

[136] These proceedings have clarified the position of the law on how decisions of the 1st defendant are to be confirmed. This judgment may be of benefit to the public. It may not therefore be right to condemn the claimant in costs. The Court orders that each party shall bear its own costs.

[137] Any party that is dissatisfied with this judgment is at liberty to appeal to the Supreme Court of Appeal within the time prescribed in the law.

[138] Made in open Court this 29th day of May, 2026 in Blantyre, Malawi.



M. D. MAMBULASA
JUDGE

¹⁹ See Section 30 of the Courts Act, Cap. 3:02 of the Laws of Malawi.