

Attorney
General



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1467 OF 2010

BETWEEN:

AGNES DEMULA

PLAINTIFF

AND

ATTORNEY GENERAL

1ST DEFENDANT

AND

DIRECTOR OF CHIEFS

2ND DEFENDANT

JUDGMENT

The plaintiff commenced this action by way of originating summons on 8th July, 2010 seeking determination and declaration of whether the plaintiff was properly recommended by certain clans to be appointed to take over the throne of Chief Kapeni and succeed the late Kennedy Phulusa; whether the defendants were wrong at law in confirming the appointment Benson Mtuwa under the prevailing custom and traditions and whether the appointee is entitled to the same in the alleged absence of a recommendation from certain three family clans.

The originating summons relies on the affidavit of Agnes Demula, the plaintiff herself, which was filed on 30th January, 2014 after the court had on 14th January 2014 granted leave to the plaintiff to amend the summons. In her affidavit the plaintiff avers that she is Group Village Headman Misesa and a member of the Chembenusya clan of the Kapeni family. She provides some historical background knowledge in regard to what she thinks are the two royal families with succession rights under Kapeni chieftaincy which are those of Che mbenusya and Che Ndogolo families. She alleges that the Che Chitutala family is not part of the royal families as they are only related to the royal families through marriage. It is her view that under Yao custom, practice and traditions only a maternal nephew or niece from the two royal families of the late chief ascends to the throne. She states

that after the demise of Kennedy Phulusa of the Che Ndogolo family in 2008, a member of the Che Mbenusya family was the appropriate successor since succession is on a rotational basis. According to the plaintiff, the royal families nominated her to succeed the said demised Chief and she attempts to prove this through exhibit marked AD1. The plaintiff makes a serious alleges but does not prove that despite the letter that was written by members of the royal families informing the District Commissioner of the appointment of the plaintiff Mrs Nellie Mwadiwa of the Che Chitutala clan used her husband's influence and position as a top government official to influence the Che Ndogolo clan and office of the district Commissioner to conduct a vote in favour of Mr Benson Mtuwa, a brother of Mrs Nellie Mwadiwa. The plaintiff alleges that she complained to the Minister of Local Government as well the Minister of Justice, the Director of Chiefs and the office of President and cabinet of the procedure that was followed on 5th March 2010. in appointing Benson Mtuwa as Traditional Authority Kapeni in a letter of 5th March, 2010 which appears as exhibit marked AD2. A perusal of exhibits marked AD1 and AD2 reveals that these are unstamped and unsigned letters that seem to have been written by a group of people and that the plaintiff is not necessarily the single author of exhibit marked AD2. The plaintiff asserts that she is the rightful heir to the throne despite the Secretary for Local Government and Rural Development installing Benson Mtuwa without resolving the dispute.

In support of the application the plaintiff also filed four supplementary affidavits that were sworn by the following clan members: Mr Stanlely Wesley Makwinja from the Che Ndogolo royal family, Norman Kapeni Banda the grandson of Kennedy Phulusa, and of the Che Mbenusya royal family; Salubeni Mdyanyama from Che Ndogolo family. All the four deponent support the case of the plaintiff and allege that Mr. Mtuwa is a not nephew of the demised chief.

In a supplementary affidavit that was sworn by Mr Nickson Demula of the Chembusya family he states that the confidential file from the DC contains wrong information on the Kapeni chieftaincy as the source of information is undisclosed and that the family tree, exhibit CEM1 is incorrect false and misleading. It is surprising that Mr. Demula is stating this when the minutes of the mediation meetings show that the clan members did not challenge the information. The deponent relies on oral history preserved by royal families of the Kapeni chieftaincy and his personal knowledge, since he was born in January 1947 to come up with his own family tree and in regard to Rodrick he avers that he "was

imposed by the colonial government as T/A Kapeni replacing Mpoza.” Unfortunately the deponent merely alleges and there are no supporting documents for his assertions.

The plaintiff filed skeleton arguments in which she argues that the appointment of Mr. Mtuwa was not lawful since it was not done accordance with customary law and its procedures were not followed. The plaintiff argues that the Che Chitutala clan has no right to ascend to the chieftaincy which is traced through the matrilineal line. That the choice of Benson Mtuwa was wrong since he was a brother to the demised chief. It is also asserted that it was also wrong for the defendant to hold a vote as any disagreements on matters are supposed to be resolved in accordance with customary law and the Chief Acts. The plaintiff relies on the cases of *Thomas Chindebvu v Attorney General*, Civil cause No. 2552 of 2003 to argue that presidential appointments are subject to customary procedures. The plaintiff has also referred to the case of *Kukhaya and others v Attorney General* (1999) MLR 137 which stresses the same point. The plaintiff has also cited the cases of *GVH Kakopa and others v. Chilozi and others* (2000 -2001) MLR 140 and *Samuel Simeon Chisambo Zapinga v Luciano Chitsende and Attorney General*, High Court, Lilongwe District Registry Misc. civil cause No. 2 of 2012 in arguing the need to promptly challenge the legitimacy of illegally appointed chiefs.

The Attorney General opposes the originating summons and filed five affidavits in response, these are those sworn by: Mr. Charles Makanga, the then District Commissioner for Blantyre, Mr. Benson Mtuwa, the alleged heir to the throne from the Achitutala family; Mrs. Doris Chokotho, from the Che Ndogolo family; Mr. Charles Edwin Mpempho, the Assistant Human Resources Management officer at Blantyre District Council, and that of Mrs. Nellie Mwadiwa, a member of the Achitutala family.

The affidavit of Mrs. Nellie Mwadiwa shows that the Kapeni chieftaincy traditionally rotates among the three families of Achitutala, Chembenusya and Chendogolo as determined by elders. She states that at some stage of Chemposa the chieftaincy did not rotate. She avers that Aleka, an Aunt of the plaintiff, called for a meeting where she imposed the plaintiff to take over despite objections. The deponent also describes the process of deciding on a chief and states that it was not traditional for people to sign for chieftaincy, therefore it was un-procedural for the plaintiff to seek signatures for her to act as Chief. She notes that the DC does not

elect chiefs but advised the clan members to discuss the matter and that since three meetings ended up in chaos, traditional chiefs from Blantyre were invited to assist on the issue. She asserts that Chief Mkhumba, not being a member of the family and being a Lomwe, could not decide on the matters in dispute. The deponent states that when a brother of the plaintiff told the gathering that the Achitutala family was not legally supposed to take over because of its ancestry the DC's office produced documented evidence from 1927 and 1935 confirming that the uncles of the deponent by the names of Chegunda and Rodrick Kika were chiefs and that the chieftaincy rotates and that it was wrong for the plaintiff to start amassing signatures. She narrates that since the plaintiff's family continued to object they called for a voting process of the two names from the three families by showing of arms.

In his affidavit Mr. Benson Mtuwa states that he is a nephew of TA Kapeni Lodi Kika. The deponent also disputes the assertions by the plaintiff that there was a consensus amongst the families that Agnes Demula should be chief as shown in the mediation attempts to settle the issue. Mr. Mtuwa avers that the signatures were obtained by fraud and misrepresentation as culturally the families agree on whom should ascend on a rotational basis and not through signatures. He states that voting was only done during the process of mediation when senior chiefs failed to resolve the matter and the Chembenusya family was also represented. The deponent avers that although the plaintiff insisted that the Achitutala family were slaves but a review of the history established that they were part of the Kapeni Chieftaincy. Mr Mtuwa contends that AD2 cannot be referred to as a determination since Chief Mkhumba is a lomwe and cannot decide on a Yao chieftaincy whose paramount Chief is Chikowi and he was only invited by the plaintiff and Chief Mkhumba never called all the parties involved to deliberate on the matter before making a determination.

The affidavit Mrs. Doris Chikhoto shows that although there were disagreements in regard to the plaintiff succeeding to the throne she was presented with papers which she signed supporting appointment of the plaintiff as chief. She states that during the mediation process files were retrieved at the DC's office which showed that the family of Benson Mtuwa were a legitimate part of the chieftaincy as evidenced by Chengunda and Che Lodi Kaka being chiefs and that the chieftaincy was rotational.

The defendants argue that all three families have ascended to the throne of Traditional Authority Kapeni but that when T/A Kapeni Phulusa died there were wrangles and that the DC called all three families for mediation as is explained in the affidavit of DC Makanga and the supporting documents exhibited thereto, which are marked exhibit CN1 to CN9. The minutes of the meeting, which is exhibit marked CN8 and the records from the DC's office show that Che Chitulala family were part of the royal family. Since the three families failed to agree names were nominated and voting took place where Ben Mtuwa emerged successful and commanded majority support in terms of section 4 of the Chiefs Act. The defendant's contend that the families of the plaintiff walked out, although they had earlier on recognized the family of the Chechitulala as part of the royal family as they participated in the voting process.

On the plaintiff's classification of the Achitulala family as slaves the defendant refer to the evidence of Mr Mphepo and exhibit of CEM1 which shows a family tree of Chief Kapeni where the first lineage confirms that there were three females named: Achitutala, Che Mbenusya and Che Ndogolo and one male name Che Walani. This defence evidence contradicts the plaintiffs' allegations that Achitutala were cousins to the royal family or that they were slaves.

The defendants argue that the elevation of B. Mtuwa to T/A Kapeni was in line with the Chiefs Act. The defendant contends that the plaintiff has failed to show how she is entitled to the Chieftaincy in line with the prevalent custom. The defendants contend that their affidavits show that the Kapeni Chieftaincy is rotational between three families and that the plaintiff belongs to the Che mbenusya family whose turn to sit on the throne had already passed and the turn of the Achitutala family from which Benson Mtuwa comes is what remains to ascend to the throne. Therefore the claim of the plaintiff cannot be sustained.

The defendants contend that the signatures obtained by the plaintiff were by fraud and that there was no consultation of the other family members in the process of choosing Chief Kapeni. The defendanta argue that the inconsistencies in the evidence of the plaintiff in regard to the Achitutala clan reinforce the argument that the plaintiff is rejecting a clan for the purposes of selfishly desiring to ascend to the throne. The defendants assert that the plaintiff suppressed material facts in failing to disclose in her affidavits that there were disagreements between the Achitutala and the Chembenusya families on who should ascend to the throne until the DC's Office found a solution and also that there were extensive deliberations as to who

is entitled to the chieftaincy. Further the defendants contend that the applicant has not shown how Bennson Mtuwa is not linked to the Kapeni clan. Further, that the plaintiff has failed to disclose that the issue of Chief Mkhumba, who is a paramount chief for the Lomwe was discussed at various meetings involving the families and it was resolved that he did not have jurisdiction over a Yao chieftaincy, as shown in exhibit marked CN7.

The defendants pray that the whole matter should be dismissed for lack of evidence and for failure to demonstrate how the plaintiff is entitled to the chieftaincy. The defendants rely on the case of *Jailosi Masache v Charles Chibisa and Attorney General* civil cause No. 2543 of 2008 in support of the position that they have taken. The defendants rely on the cases of *Angu v Attah* (1916) Privy Council Appeal 1874-1924, 43; *Kinyajui Kimani v Miruiri Gikanga and Another* Court of Appeal of East Africa, Civil Appeal no. 17 of 1965 and *Mwale v Kaliu* 1 ALR Mal 213 to argue under the common law there is no judicial notice of customary law, the principle is that customary law must be proved as a question of fact and not law in the first instances by witnesses called by the party in relying of that particular law in support of his case.

After reading the documents that were filed by the parties in regard to the process of choosing Chief Kapeni, as well as considering the arguments that have been advanced by them this Court is inclined to agree with the defendants that although the plaintiff asserts that she should ascend to the throne and makes serious allegations of misconduct on the part of the defendants and members of the cheChitutala family she does not have the supporting evidence. This court finds that Mr. Makanga is very thorough in his evidence in regard to the events that occurred after the death of T/A Kapeni Phulusa. It is clear from his evidence that there were wrangles as to whom should succeed to the throne and his office facilitated the process of mediation session and that the procedures followed by the chiefs was necessitated by the strong disagreements. According to Mr. Makanga the DC's the records and the outcome of the meetings indicated that there are three families in the Kapeni chieftaincy and that it was the turn of the Achitutala to reign. According to the DC the only reason the plaintiff wants to be chief is because the one who reigned during her clan's turn did not reign for long. As observed by the defendants, the plaintiff in the affidavits in support of her case fails to make frank and full disclosure of some material facts about the history of the Kapeni chieftaincy such as the documentary evidence that the DC's office has

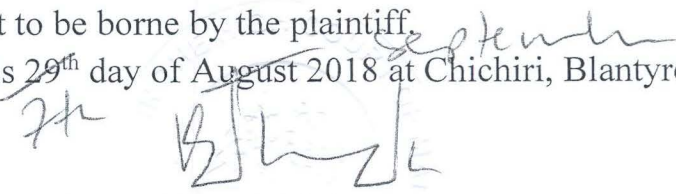
and which was made known to her and clan members and read out during the mediation meetings as well as the process of choosing an heir to the Kapeni throne. The defendants are right that the plaintiff suppressed material facts in failing to disclose in her affidavits that there were disagreements between the clans of Achitutala and the Chembenusya on whom should ascend to the throne until the DC's Office found a solution and in regard to extensive deliberations to identify a successor as to the chieftaincy.

The plaintiff's allegations that the Achitutala family never ascended to the Kapeni chieftaincy are mere allegations that were not proved. The evidence disclosed by the defendants lend support to the arguments that there was a rotational based system for the three clans to ascend to the Kapeni Chieftaincy and that the Achitutala family is among the royal families to be considered for ascending to the chieftaincy. This court agrees with the defendants that plaintiff's claims in regard to the Kapeni chieftaincy cannot be sustained as the defendants complied with the requisite procedures and is dismissed.

It is also noted that the plaintiff has not made it clear on whether or not the Director of Chiefs has the capacity to be sued as such. Further, commencing this action by way of originating summons was not an appropriate mode as customary law, which the plaintiff heavily relies on and is contested by the defendants, must be proved as a question of fact through oral evidence: *Mwale v Kaliu* 1 ALR Mal 213.

Having dismissed the originating summons it follows that the order of injunction that was obtained in this matter cannot be sustained and is set aside as it was obtained through non-disclosure of material facts. The costs of this action are awarded to the 1st defendant to be borne by the plaintiff.

Delivered this 29th day of August 2018 at Chichiri, Blantyre.


Dorothy nyaKaunda Kamanga
JUDGE

Case Information:

Mr. Chibwana,
Mr. Kausi,
Mrs. Ndunya,
Mr. Ng'ambi/ Ms Million,

Counsel for the Plaintiff
Counsel for the 1st Defendant
Senior Personal Secretary
Court Clerks