

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 198 OF 2020

HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N:

OSWELL ZIMBA

SMART SONKHANI PHIRI

AND

SAINANI PHIRI

NEBART MUZENGA PHIRI



1ST APPELLANT

2ND APPELLANT

1ST RESPONDENT

2ND RESPONDENT

CORAM: Chashi, Chishimba and Siavwapa, JJA

ON: 23rd August and 8th September 2022

For the 1st and 2nd Appellants: S. Kalima Banda (Ms), Messrs J&M Advocates

For the 1st Respondent: In Person

For the 2nd Respondent: D. Banda, Messrs JMP Associates

JUDGMENT

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. ***Andrew Boti v Robert Zulu (2011/HK/300)- Unreported***

Legislation referred to:

1. ***The Constitution of Zambia, Act No. 2 of 2016***
2. ***The Chiefs Act, Chapter 287 of the Laws of Zambia***
3. ***The Supreme Court Act, Chapter 25 of the Laws of Zambia***

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of Honourable Justice E.P Mwikisa which was delivered on 15th May 2020, in favour of the Respondents, who were the claimants in the court below.

2.0 BACKGROUND

2.1 On 1st April 2015, Robert Zulu who was then Chief Jumbe died. The 1st Appellant was then on 19th August 2017 installed by the 2nd Appellant (*Chief Nsefu*)

2.2 Prior to the aforestated installation, the 1st Respondent, as plaintiff in the court below filed, a writ of summons on 15th August 2017 against the 1st and 2nd Appellants, challenging the selection and installation of the 1st Appellant as Chief Jumbe. The reliefs being sought were as follows:

- (i) A declaration that the 1st Appellant was not the rightful heir to the throne of Chief Jumbe.**
- (ii) An Order directing the Appellants to comply with the customs and traditions of the Kunda people in appointing or selecting the next Chief Jumbe.**

- 2.3 According to the 1st Respondent, the next Chief Jumbe is supposed to be selected by the royal family from the Mchacha family or clan. That the Mchacha royal family sat on 1st August 2017 and chose him as the rightful heir to the throne. That however, on 8th August 2017, when the Mchacha family met Chief Nsefu to inform him of their choice, Chief Nsefu departed from the tradition by refusing to accept the royal family's choice.
- 2.4 That contrary to the custom, Chief Nsefu handpicked the 1st Appellant as Chief Jumbe and indicated that he would not recognize anyone from the Mchacha family as they had a hand in the death of the late Chief Jumbe.
- 2.5 In their defence, the Appellants, who were defendants in the court below, averred that the Mchacha family has never produced a Chief Jumbe nor are they currently eligible to be considered for the throne. That the Kunda succession follows the matrilineal line and the only members who are eligible to ascend are those who come from the same direct great grandmother as the immediate past Chief Jumbe

2.6 According to the Appellants, the 1st Respondent was never proposed or selected by anyone as Chief Jumbe. That at the time of selecting the new Chief, wrangles arose among the various clans amid accusations relating to the death of the late Chief. That Chief Nsefu sent Chief Malama to meet the Chulu family and after three family meetings the 1st Appellant was selected by a majority of the family members. That in accordance with the wishes of the majority of the Chulu royal family, Chief Nsefu installed the 1st Appellant as Chief Jumbe. According to the Appellants, the Kunda custom was followed in the selection of the Chief.

2.7 The now 2nd Respondent was on 8th June 2018 added to the proceedings as a third defendant and he filed a counter claim. According to the 2nd Respondent, both the 1st Appellant and the 1st Respondent are not entitled to the throne as they are not part of the Jumbe Royal Family. That he takes from Chief Jumbe Kopakopa and he was selected to succeed on 4th November 2017 by the female members of the Mchacha family called Mbumba who constitute the Electoral College under Kunda custom.

According to the 2nd Respondent, he is entitled to ascend to the throne following the matrilineal system of succession under the Kunda custom and tradition.

3.0 DECISION OF THE COURT BELOW

3.1 At the trial, the 1st Respondent called two witnesses, the Appellants called five and the 2nd Respondent four. After considering the evidence and submissions, the learned Judge in the court below formulated the main issue for determination as follows:

“Whether the 1st Appellant was the rightful and duly installed Chief and who amongst the 1st Respondent, 1st Appellant and 2nd Respondent is the rightful heir to the throne of Chief Jumbe according to the Kunda custom and traditions.”

3.2 The learned Judge, in accordance with Article 165 (1) of **The Constitution of Zambia**¹ opined that it was imperative in the determination of the main issue, to consider the Kunda custom and ascertain whether it was followed in the selection of Chief Jumbe so as to legitimize the installation of the 1st Appellant as Chief Jumbe

3.3 According to the learned Judge, the facts not in dispute are firstly that the royal family is made up of three families namely, the Jumbe, Mchacha and Chikwanda. Secondly, that the Kunda custom follows the matrilineal line of succession and that ideally, it is a nephew or niece that should ascend to the throne, though history shows that other family members who were neither nephews nor nieces from the matrilineal side succeeded to the throne.

3.4 The learned Judge, from the evidence, found that both Respondents qualified to be selected as Chief Jumbe as they both belonged to the royal family. As to whether the Kunda custom was followed in the selection, the learned Judge found that according to the Kunda custom, it's the Mbumba (mainly a group of females) who sit to select a Chief. That when they sit, there should be representatives from each of the three families: the Jumbe, Mchacha and Chikwanda. According to the learned Judge the evidence on record suggested that there was no representation of all the three families at the selection stage, which was vital as the decision made, is a representation of all the three families that form the royal family. On that basis, the

learned Judge found that the Kunda custom was not followed at the selection stage.

- 3.5 Consequently, the learned Judge took the view that the installation of the 1st Appellant as Chief Jumbe was invalid as the selection process was not followed as the 1st Appellant was not chosen by the entire royal family as indicated by his own witnesses. The learned Judge then ordered that the electoral college, representative of the three families that make up the royal family, must sit together and select the person from the Mchacha clan who will be the next Chief Jumbe and ensure that the Kunda custom is followed by book.

4.0 THE APPEAL

- 4.1 Dissatisfied with the Judgment, the Appellants have appealed to this Court, advancing seven grounds of appeal couched as follows:

- (1) The learned lower court erred in law and fact when it, despite holding that Kunda culture ought to be followed in the selection of a Chief, held that the selection should be from the Mchacha family which is just one of three families that make up the Jumbe

royal family; the court prescribing which family the chief should be selected from was a grave error and had no foundation or basis as it amounts to imposing candidates on the Kunda Royal Establishment

- (2) The lower court erred in law and fact when it held that selection process was not properly conducted because the three families that make up the Jumbe royal establishment had not met in one place to select the Chief when the evidence of all the witnesses was that the entire selection process culminated in a meeting at Nsefu royal palace where all the families met and a fresh selection was conducted with all families presented including the 1st and 2nd Respondent and the selection was re-done on this occasion and the 1st Appellant was selected in the presence of all the families.
- (3) The learned trial Judge erred in law and fact when she nullified the installation of the 1st Appellant by the 2nd Appellant as Chief Jumbe of the Kunda people
- (4) The learned trial Judge erred in law and fact when she glossed over the fact that the 1st and 2nd

Respondents' own witnesses testified that their purported selection was a fabrication. The 2nd Respondent's Chief witness, his mother, told the court that he was not in charge of his mental faculties and that his claims were a fabrication; and

- (5) The learned trial Judge erred in law and fact when she glossed over the concessions and fabrications in the 1st and 2nd Respondents' own testimonies and that of their witnesses.
- (6) The learned trial Judge erred in law and fact when she failed to take into account the fact that both the 1st and 2nd Respondents' witnesses conceded that the reason they had brought the claim against the 1st Appellant was that they wanted a Chief from their own family because of their belief that it was now their turn to take the throne.
- (7) The learned trial Judge erred in law and fact when she failed to take into account the fact that the High Court in cause number 2011/HK/300 had already confirmed that the previous Chief Jumbe and his family were rightful holders of the Jumbe chieftaincy.

5.0 ARGUMENTS IN SUPPORT

5.1 At the hearing of the appeal, Ms Kalima Banda, Counsel for the Appellants, relied on the heads of argument filed into Court on 21st October 2020. However, before arguing the appeal, Counsel brought to our attention a Ruling by the court below dated 27th October 2020 which was delivered post Judgment being impugned. We shall address the effect of the said Ruling at the time of considering the appeal.

5.2 The first, second, third and seventh grounds were argued together. It was submitted that the learned Judge in the court below contradicted herself by giving direction that the three families that make up the royal family must sit together and select a person from the Mchacha clan, who will be the next Chief Jumbe. It was submitted that the role of the courts is simply to give effect to the traditions and custom of the traditional groups as enshrined under article 165 (1) of **The Constitution of Zambia**¹ which provides as follows:

“The Institution of Chieftaincy and traditional Institutions are guaranteed and shall exist in

accordance with the culture, custom and traditions of the people to whom they apply.”

5.3 According to Counsel, the lower court holding that a new selection process should be undertaken because the three clans forming the royal family had never met was perverse and contrary to the evidence on record. It was submitted that from the evidence of the 1st and 2nd Appellants' witnesses, a meeting was called at Chief Nsefu's palace where all the three clans were asked to put forward their contenders to enable the Mbumba to sit and select someone with finality from the named candidates

5.4 That it was at the said meeting that the 1st Respondent and Kaindula Mchacha were banned from participating further in the selection proceedings and the Mbumba selected the 1st Appellant as Chief Jumbe. It was Counsel's contention that therefore, the court below fell into grave error, when it held that no proper selection was done where all families were present. That therefore, the court below erred in law and fact when it set aside the appointment and installation of the 1st Appellant as Chief Jumbe.

5.5 Grounds 4, 5 and 6 were also argued together. It was submitted that no matter how many times the selection process is undertaken, the Respondents and their witnesses made it very clear that the only result they would accept is if someone from their family was selected, which conduct should have been castigated by the court below, but the court went on to add salt to injury by limiting the candidate who can be selected to the Mchacha clan

5.6 It was contended that the Judgment in the court below was in total error and has no basis in Kunda custom or on the evidence tendered. That it offends the constitution by indirectly imposing a Chief by limiting the candidates to one family which does not qualify to hold the throne at the moment.

5.7 We were urged to reverse the Judgment of the court below and uphold the selection of the 1st Appellant as Chief Jumbe.

6.0 ARGUMENTS IN OPPOSITION BY THE 1ST RESPONDENT

6.1 The 1st Respondent who appeared in person, in responding to the first, second, and third grounds of appeal, drew our

attention to article 127 of The Constitution and Section 3 of **The Chiefs Act**² and submitted that the law provides that the Institution of Chief shall exist in accordance with the culture, customs and traditions of the people to whom they apply.

6.2 According to the 1st Respondent, the Chief is selected from the female side of the royal clan called Mchacha which comprises of three families being the Chikwanda, Jumbe and Mchacha families. That therefore the court below did not err in law and fact when it held that the royal family should sit together and select the person from the Mchacha clan who must be Chief Jumbe.

6.3 It was submitted that the action by the 2nd Appellant of deciding that the next Chief should be appointed by the family of the late Chief was contrary to the custom of the Kunda people which did not allow for the succession of a cousin of the late to the throne. It was further submitted that the installation of the 1st Appellant was in breach of the customs as he was not eligible. Further that the royal family did not meet to choose him and therefore the court below was on firm ground to hold that the Chief must be

selected from the Mchacha family and in the process nullifying the installation of the 1st Appellant as the selection process was not properly conducted.

6.4 In arguing the fourth, fifth and sixth grounds, it was contended that the grounds are misplaced and lack merit as the court below considered all the evidence before determining whether all procedures were followed.

6.5 As regards the seventh ground, our attention was drawn to the High Court case of **Andrew Boti v Robert Zulu**¹ and submitted that it can be distinguished from this case as the defendant in that case was selected by the royal family and minutes to that effect were produced. That however in the case at hand, the selection procedure was not followed. We were urged to uphold the Judgment.

7.0 ARGUMENTS IN OPPOSITION BY THE 2ND RESPONDENT

7.1 Mr. Banda, Counsel for the 2nd Respondent, in responding to the first, second, third and seventh grounds submitted that the court below properly took into account all the facts and evidence adduced before the court and correctly applied the law and therefore did not err or misdirect itself.

- 7.2 Our attention was drawn to Article 165 of the Constitution which provides for the Institution of Chiefs. It was submitted that the Kunda people follow the matrilineal line of succession. That the 2nd Appellant did not allow the electoral college to gather and that the grouping which selected the 1st Appellant fell short of the electoral college required by custom.
- 7.3 That it was a flagrant breach and disregard of Kunda custom in terms of procedure and eligibility to choose the 1st Appellant who was a cousin and not a nephew or niece. It was further submitted that the 1st Appellant's installation was based on or significantly influenced by the wishes or desires and directives of the late Chief Jumbe who had suggested the person to take over after his demise. That the late Chief had no right to dictate who should succeed him.
- 7.4 In response to grounds four, five and six, it was submitted that they are misplaced. It was submitted that the 2nd Respondent acted within his rights and is entitled to enforce his rights through legal means as he did. It was further submitted that the court below did not gloss over

the evidence. According to Counsel, the electoral college as required by custom did not sit to select the Chief. That the selection of the 1st Appellant was influenced by the 2nd Appellant. We were urged to uphold the Judgment and dismiss the appeal.

8.0 OUR CONSIDERATION AND DECISION

8.1 We have considered the arguments and the Judgment being impugned. As earlier alluded to, Counsel for the Appellants, at the hearing, brought to our attention the Ruling by the court below dated 27th October 2022. We note from the said Ruling, that the application which was before the court below was for stay of execution of the Judgment, which was granted.

8.2 We further note that the court below in its consideration of the application, on its own motion attempted to correct its own Judgment as regards from which clan the next Chief Jumbe should hail from. In doing so, the court inadvertently used Rule 78 of **The Supreme Court Rules**³, which provision is not applicable to High Court proceedings. In that respect, we are of the view that the correction was incompetently done and was of no effect

and therefore the grounds of appeal and in particular, the first ground of appeal subsists.

8.3 However, that despite, we note that the words family and clan have been interchangeably used. This in our view is what led to the confusion, which the learned Judge attempted to correct. In Order to avoid that confusion, we shall in our decision proceed on the basis as found by the learned Judge that the Kunda royal family is made up of three families, namely, the Jumbe, Mchacha and Chikwanda. We shall in that respect avoid the use of the word clan.

8.4 As regards the seven grounds of appeal, we are of the view that they are entwined and can be dealt with under two limbs as follows:

- (i) Whether the learned Judge in the court below was correct in her finding that the Kunda custom was not followed as there was no meeting of the three families which make up the Kunda royal family for the purpose of selecting the Chief.

- (ii) Whether the learned Judge was right in ordering that the selection of Chief Jumbe should be restricted to the Mchacha family.

8.5 It is clear from the evidence on record that the Mbumba from the Mchacha family met alone, without the Jumbe and Chikwanda families and made their own choice of whom they wanted to be selected as Chief Jumbe. Equally there is evidence on the record that the Mbumba from the Jumbe families also met without the Mchacha and Chikwanda families. There is however no evidence of the Mbumba from the Chikwanda family having met. There is also no evidence of the Mbumba from all the three families having met together at the same time for the purpose of selecting the Chief as required under the Kunda custom.

8.6 It is evident from the testimony of the 2nd Appellant (Chief Nsefu) that the gathering at his palace on 8th August 2017 was not a meeting for the purpose of selecting a Chief as envisaged under the Kunda custom. That gathering was for the purpose of the Kunda royal family announcing to Chief Nsefu, whom they had selected and agreed as the next Chief Jumbe. The Mbumba from the three families,

having not met as earlier alluded to, we find no basis on which to fault the learned Judge. We are in agreement with the learned Judge that the Kunda custom was not followed.

8.7 As regards the Order to restrict the selection, by ordering that the next Chief Jumbe must come from the Mchacha family, we have observed that, that goes against the learned Judge's finding of facts not in dispute that *"The Kunda custom follows the matrilineal line of succession and that ideally, it is a nephew or niece that should succeed to the throne, though history shows that other family members who were neither nieces nor nephews from the matrilineal side succeeded the throne"*

8.8 Having made the aforestated finding of fact, it is startling how the learned Judge could then Order that the Chief should be selected from the Mchacha family, leaving out the Jumbe family, as the deceased Chief Jumbe hailed from the Jumbe family.

8.9 In any case, we are of the view that the Order was perverse as there is no evidence on record to show that the next Chief Jumbe should solely come from the Mchacha family.

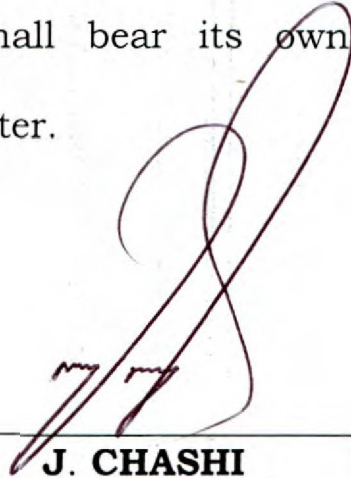
There was in our view misapprehension of facts and evidence on the part of the learned Judge. In the view that we have taken, the Order that the next Chief Jumbe should come from the Mchacha family is accordingly set aside.

8.10 In order to add clarity and have finality in this matter and facilitate for a smooth and efficient selection of the Chief in accordance with the Kunda custom, we hereby make the following Orders.

- (i) That Chief Malama shall convene a meeting of the Mbumba at his palace, consisting of the three families; the Jumbe, Mchacha and Chikwanda in equal numbers within ninety (90) days of this Judgment for the selection of the next Chief Jumbe.
- (ii) That the selection shall be strictly in accordance with the Kunda custom and tradition and there shall be minutes taken of the meeting of the selection process aforestated.
- (iii) That when the selection process is concluded, Chief Nsefu shall promptly be informed at his palace of the

name selected and agreed upon as Chief Jumbe and
Chief Nsefu shall accordingly arrange for installation.

8.11 Each party shall bear its own costs, this being a
succession matter.



J. CHASHI
COURT OF APPEAL JUDGE



F.M CHISHIMBA
COURT OF APPEAL JUDGE



M.J. SIAVWAPA
COURT OF APPEAL JUDGE