

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(CIVIL JURISDICTION)**

APPEAL NO. 210/2015

BETWEEN:

KILOLO NG'AMBI

AND

OPA KAPIJIMPANGA



APPELLANT

RESPONDENT

**CORAM: MAMBILIMA CJ, MALILA AND MUSONDA JJS;
on 7th August, 2018 and 9th October, 2018**

For the Appellant	:	Mr. E. C. Mwansa and Mr. J. Theu of Mwansa Phiri Shilimi and Theu Legal Practitioners
For the Respondent	:	Mr. L. Linyama of Eric Silwamba Jalasi and Linyama Legal Practitioners

JUDGMENT

MAMBILIMA CJ delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. THE ATTORNEY GENERAL V MARCUS KAMPUMBA ACHIUME (1981) ZR 1**
- 2. ZAMBIA REVENUE AUTHORITY V HITECH TRADING COMPANY (2001) ZR 17**
- 3. CHIEF MPEPO (Also known as Ackson Chilufya Mwamba) V SENIOR CHIEF MWAMBA (Also known as Paison Chilekwa Yamba Yamba) SCZ JUDGMENT NO. 25 OF 2008**

LEGISLATION REFERRED TO:

- a. SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA.**

WORKS REFERRED TO:

- i. RULES OF THE SUPREME COURT (RSC) WHITEBOOK 1999 EDITION
- ii. LAW DICTIONARY, LAWDICTIONARY.ORG
- iii. HALSBURY'S LAWS OF ENGLAND VOLUME 37 4TH EDITION PARA 1228

This is an appeal from a decision of the High Court, delivered on 8th October, 2015. The Judgment followed an action commenced by the Respondent by way of a Writ of Summons filed on 11th November, 2010. The Writ was accompanied by a Statement of Claim endorsed with the following reliefs –

1. A declaration that the process followed for the installation of the new Chief Kapijimpanga of the Kaonde speaking people of the North-Western Province of the Republic of Zambia was flawed in that the traditional procedure was not followed and as such is not binding and is void *ab initio*.
2. A declaration that the Plaintiff herein is the rightful heir to the throne of Chief Kapijimpanga as he was the next in the lineage of descendants of Inamusale and was appointed through the right traditional procedure.
3. A declaration that Chief Mujimanzovu acted *ultra vires* the customary practice and had no authority to install the current Chief Kapijimpanga as he lacked the necessary mandate and jurisdiction to do so.
4. A declaration that the 1st Defendant is not entitled under African Customary Law to be recognised as Chief pursuant to the provisions of the CHIEFS ACT Chapter 287, Volume 15 of the Laws of Zambia.
5. Alternatively, a mandatory order that the entrenched traditional process of installing a Chief of the Kaonde speaking people in the Kapijimpanga Chiefdom be effected and the process initiated *de novo*.
6. Any further relief the Court deems fit.
7. Costs

In support of his case, the Respondent gave evidence on his own behalf and called two witnesses, Steven Mwekesha, known as Senior Sub-chief Sandangombe, and Milambo Richard Severino Kachimbe, who testified as PW1 and PW2 respectively.

The Respondent's case was that he was the rightful heir to the throne of Chief Kapijimpanga of the Kaonde people of North-Western Province. He contended that the Appellant, who was purporting to be the current Chief Kapijimpanga, was not properly appointed and installed through the normal traditional process, alleging that his (Appellant's) installation was *ultra vires* customary practice.

The Respondent averred that he was a descendant of Inamusale, while the Appellant was a descendant of Mukunta, who were both daughters of Kafitwe, a niece of Chief Mpanga, the first Chief Kapijimpanga. He asserted that since the Kapijimpanga lineage was matrilineal, both him and the Appellant were eligible to ascend to the throne.

According to the Respondent, the traditional process of selecting and installing a new chief is done by consensus of all contending families. That once chosen, the name is submitted to

Sandangombe the “kingmaker” who then makes the final decision. That on the appropriate day, the chosen successor is “**caught**” and installed on the instruction of Sandangombe. That this process has been followed since Chief Mpanga, Chief Kapijimpanga I.

It was the Respondent’s further testimony that when Ostralia Katuka, Chief Kapijimpanga IV, passed away in December 2008, tradition required that a period of one year had to pass before installing a new chief. That in the intervening period, various family groups engaged Sandangombe and declared interest in who they thought should succeed the late Chief.

The Respondent averred that at about 18:00 hours on 24th September, 2010, Sandangombe invoked the traditional process by sending his men to “**catch**” him as new chief. That he was caught and confined in the traditional shelter called ‘kamboro’ where he spent the night expecting the traditional process to follow through, only to be brought out the next morning on the instructions of Senior Chief Mujimanzovu. He told the Court that confusion and violence erupted, and according to him, it was orchestrated by the Mukunta family who threatened Sandangombe. The Respondent alleged that despite being chosen as successor, Senior Chief

Mujimanzovu entered into an agreement with some people indemnifying him from court proceedings and proceeded to appoint the Appellant as the new Chief Kapijimpanga.

The Respondent asserted that Senior Chief Mujimanzovu did not possess the necessary mandate to install a chief and was not a member of the royal electoral college. That according to the minutes of the previous installation, Senior Chief Mujimanzovu was merely master of ceremonies. The Respondent stated that the role of the other chiefs in the installation ceremony is simply to observe the process and to instruct the new chief. The Respondent claimed that Sandangombe was right to appoint him because the Kapijimpanga chieftaincy had been dominated by the Mukunta family for generations and it was felt that the Inamusales should also be given a chance to reign.

PW1 described himself as Senior Sub Chief Sandangombe. The gist of his testimony was that at the installation ceremony of September, 2011 his duty, as Sandangombe, was to install the new chief of the Kapijimpanga chiefdom, like he had done for Chief Kapijimpanga IV. According to PW1, the traditional procedure for choosing a new Chief was that family members, group leaders and

Chief Indunas meet to choose a suitable person and that he, as Sandangombe, gives instructions for the chosen person to be apprehended and confined to a shelter, called 'kavoto', until the following day when he is installed as chief.

He averred that when the time came to choose a new chief after Katuka's death, only one name, that of the Respondent was selected. That he then directed that the Respondent should be captured and put in a 'kavoto'. That simultaneously, Chief Mujimanzovu gave instructions for the capture of other people who were also claiming to be entitled to the throne and they were all placed in the same 'kavoto'. That fighting erupted and he was threatened while the Respondent was chased from the 'kavoto' by State Police. He testified that the names of the other people, including that of the Appellant, emerged outside the meeting which he had called. According to PW1, nine gunshots were fired that day signifying that there were nine contestants who had been 'captured' and confined. He told the Court that it was the first time that they were having such a high number of 'captured' persons at an installation.

PW2 echoed the evidence of PW1. He told the Court that once a name is suggested, Chief Indunas look at the person's family tree to ensure that chiefs are not selected from the same family. That under Kaonde tradition, Chief Indunas and Sandangombe have powers to reject a candidate.

The Appellant filed a defence and counterclaim, in which he denied the Respondent's claim. He also called two witnesses to support his case. He counterclaimed that Inamusale, from who the Respondent descended, was not a member of the Royal family but a maid who was helping Kafitwe with her daily chores. The Appellant averred that the Sandangombe's order to capture and declare the Respondent as Chief Kapijimpanga was contrary to Kaonde custom and tradition.

The Appellant further testified that historically, the process of selecting a successor to the Kapijimpanga throne is done in two ways. The first involves the incumbent chief directly choosing a successor and giving him a 'Lukomo' (a bracelet). According to the Appellant, this is what happened when Kapiji Kasongo Mujimanzovu installed his son, Mpanga, as Chief Kapijimpanga I and also when Njamba, Chief Kapijimpanga II installed his nephew

Kilolo Njamba as Chief Kapijimpanga III. The second way is by the chief nominating a successor from among his nephews and confiding in members of the royal family of his decision before he dies.

He explained that members of the royal family meet with sub Chiefs known as Mwepu wa Mfumu to confirm the name left by the late Chief on the first day of the installation ceremony. According to the Appellant, the electoral college to choose the Chief comprises the Council of Chiefs chaired by Senior Chief Mujimanzovu, Elders or bena Kyulu and the royal family. The successor is then proclaimed by Senior Chief Mujimanzovu, who is 'caught' and confined by the Bamungwe, the traditional cousins, on the second day. The actual installation takes places on the third day.

The Appellant testified that in 2010, his name was proclaimed on the second day. He was 'caught' by members of the Bamungwe clan and confined overnight. He stated that when he emerged on the third day, he was greeted with a tense atmosphere. He told the Court that there were six candidates, namely Rodgers Mashuta Kazumba, of the Kazumba family; Simon Kyanguba, of the Kimbwi family; Ephraim Mateyo, of the Kimbwi family; Jack Lwisala

Kamocha, from the Mpanga family, Opa Kapijimpanga, of Inamusale family and himself, Kilolo Ng'ambi of the Mukunta family.

The Appellant further testified that each family was called to explain their family tree and lineage. The Appellant averred that the Council of Chiefs, through the chairperson, decided to allow the royal families to choose one person from among the six candidates but the families failed to come to an agreement. That each family was tasked to select three representatives, making a total of 18 people, to decide on a candidate but that the representatives also failed to reach a consensus. According to the Appellant, the six royal families then mandated Senior Chief Mujimanzovu and the other chiefs to announce a chief from the six candidates.

The Appellant stated that the families also executed a document, drafted by senior lawyer Dr Ludwig Sondashi by which each family accepted to be bound by Senior Chief Mujimanzovu's announcement. That Senior Chief Mujimanzovu and the other chiefs unanimously confirmed him as the next Chief Kapijimpanga. He averred that he was declared and installed by Senior Chief

Mujimanzovu as successor of his late maternal uncle according to the Kaonde traditional process.

The Appellant denied that Sandangombe was a kingmaker, stating that he was just one of the seven sub-chiefs under Chief Kapijimpanga. He accused Sandangombe of causing commotion and trying to hijack the Kapijimpanga chieftaincy.

The Appellant, in his counterclaim in the Court below, sought among others, the following reliefs:-

- 1. A declaration that under the Kaonde custom and tradition he is entitled to succeed as Chief Kapijimpanga, being a matrilineal nephew of the late Chief Kapijimpanga Katuka, in the direct lineage of Mukunta family.**
- 2. A declaration that his (The Appellant's) selection and installation as Chief Kapijimpanga on 25th September, 2010 was in accordance with Kaonde custom and tradition.**
- 3. A declaration that the Plaintiff is not a member of the Kapijimpanga Royal Family; that he is not entitled to succeed as Chief under Kaonde custom and tradition.**

The Appellant's first witness was DW4 Mwepu wa Mfumu, Abisa Moses Mukando. He echoed, to a large extent, the Appellant's testimony.

DW5 was Senior Chief Mujimanzovu who testified that the relationship between Kapijimpanga and Mujimanzovu was that of father and son, and that his role as Chairperson of the Council of chiefs was to install the Chief. He told the Court that installation

begins with a sitting chief nominating a successor and confiding in people he trusts. He listed the confidants as Senior Chief Mujimanzovu, members of the royal family, and selected chiefs. DW5 told the learned trial Judge that the royal family who form part of the electoral college, bring the name of the chosen Chief to the Chairperson who announces the successor.

He testified that events leading to the installation of Chief Kapijimpanga V in 2010 did not occur in the normal way because there were six contestants. He stated that the families later came to him as the 'father' of the Kapijimpanga chieftaincy, to appoint a chief because their representatives had failed to agree on one name among the six contestants. That he advised the families to put their request in writing and thereafter, he proceeded to announce the name of the Appellant as the new Chief Kapijimpanga.

The record shows that Mr. James Lwaisha joined the proceedings as 3rd Defendant. He was also interested to succeed to the Kapijimpanga throne. The Court below allowed him to file a defence and counterclaim and to testify. He told the Court that he belonged to the Mpanga family and that he was a direct descendant of Nganga Shakumbila, the first wife of Kapiji Kasongo

Mujimanzovu. He contended that from 1916 up to date, the Kapijimpanga chieftaincy has been held by one family; that he wanted to reclaim the throne.

Commenting on the procedure for installing a chief, the 3rd Defendant stated that a meeting is convened by members of the royal family, sub chiefs and group leaders to constitute an administrative committee and to decide, among others, which chiefs are to be the kingmakers. It was his further testimony that members of the royal family present the name of the proposed successor to the kingmakers who then cross check the information with the Town Clerk's official register and the family tree. That after the assessment, the right candidate is picked and taken to the Kambilo. The 3rd Defendant testified that if there is more than one candidate, the candidates are made to show their leadership qualities. He also concurred with other testimonies that the Sandangombe had no role to play in the installation of a chief.

The 3rd Defendant's only witness was his sister, Justina Lwaisha (DW2). She testified that although she was present during the installation of the Appellant, she was not part of the electoral college. In her view, the Appellant was not properly installed.

According to her, the 3rd Defendant was the rightful heir to the throne.

The Respondent, in reply, repeated the claim that he was the rightful heir to the throne. He denied claims that Inamusale was a slave. He maintained that Senior Chief Mujimanzovu had no mandate to choose a fellow chief.

Upon considering the evidence on record and the submissions of Counsel, the learned trial Judge in the Court below decided that the main issue for her determination was whether the Appellant was properly installed as the new Chief Kapijimpanga. And that depending on the findings on the main issue, she would consider the eligibility of each of the candidates to ascend to the Kapijimpanga throne.

On the main issue, the learned trial Judge concluded from the evidence, that the responsibility of selecting a chief was that of the members of the royal family. That these members were the kingmakers, and not Sandangombe.

The learned trial Judge also found that for the first time in the history of the Kapijimpanga Chiefdom, members of the royal family failed to agree on a person who was to be crowned as the fifth Chief

Kapijimpanga. That this stalemate triggered confusion and violence on the day of installation and that as a result of the impasse, a tradition which had evolved over time failed to address the novel problem that arose and confronted the chiefdom. In her view, resolving this novel problem could not be left to one person but needed all stakeholders, including subjects of the chiefdom, to be given an opportunity to participate in coming up with the solution which would be broadly accepted. That such solution should not only address the present circumstances, but also set a precedent for future eventualities.

Against the backdrop of these findings, the learned trial Judge held that in appointing and installing the Appellant, Senior Chief Mujimanzovu acted in contravention of the established Kaonde tradition and custom for selecting a successor to the Kapijimpanga throne. On the issue of eligibility, the learned trial Judge found that according to the family tree, the Appellant was eligible to ascend to the Kapijimpanga throne. That tradition had well-defined eligibility criteria under which only matrilineal nephews, brothers and maternal grandsons of the royal family qualified. Further, that where there was more than one candidate, tradition provided an

entrenched sieving process in that each candidate was required to present, orally, his family tree and identify his lineage to the electoral college.

This notwithstanding, the learned trial Judge nullified the Appellant's selection as one which was marred by wrangles, confusion and done in circumstances generally not conducive for the selection and installation of a successor, and one in which a solution was arbitrarily imposed. She directed that a fresh selection and installation be undertaken on the following terms:-

1. Stakeholders in the chieftaincy such as indunas and other group leaders, as interested parties and subjects of the chieftom without whom there would be no chief, be fairly represented in coming up with a formula, criteria or solution which will assist in resolving any stalemate in the selection process for the Kapijimpanga throne;
2. All eligible candidates be accorded an opportunity to offer themselves as possible successors;
3. The candidates be assessed on presentation of their family trees supported by the official registers of matrilineal lineage and any other recognised books of historical literature such as Witch Bound Africa and the 1978 (installation) minutes;
4. The whole process be concluded within 90 days of the date of this Judgment; and
5. In default of taking all the required necessary steps, any of the parties is hereby granted liberty to apply.

It is against the above determination by the Court below that the Appellant has now appealed to this Court advancing the following five grounds of appeal:-

1. That the learned trial Judge erred both in law and in fact by holding, contrary to the evidence before the Court that the choice of the

Appellant as Chief was unilaterally done by one person, being Senior Chief Mujimanzovu.

2. That the learned trial Judge erred both in law and in fact by holding that tradition had failed to address a novel problem when in fact it was the Honourable Court which ignored the evidence before it showing that the system of choosing the chief in the extraordinary circumstances that faced the community was in fact evolved by the community itself and as such it is wrong to ask the community to evolve a new system.
3. That the learned trial Judge erred both in law and in fact by not stating in its Judgment directives how many family members are to be chosen.
4. That the learned trial Judge erred both in law and in fact in her holding by not creating finality to the proceedings in that her judgment invited any and all aggrieved individuals not party to the dispute to go to court, thereby opening a Pandora's Box of litigation.
5. That the learned trial Judge erred both in law and in fact by directing that the stakeholders and subjects of Chief Kapijimpanga Chieftaindom should be fairly represented in coming up with a formula to select a new chief, as subject directive goes against the traditions of the Kaonde people in Chief Kapijimpanga's chieftaincy.

At this stage, we wish to note that the memorandum of appeal which was filed on 20th October, 2015 contained a sixth ground appeal to the effect that ***"the Appellant shall, if necessary, add more grounds upon perusal of the entire record"***. Subsequent to this, Counsel filed written heads of argument on 18th December, 2015 containing two additional grounds of appeal for which no leave of Court was obtained.

We remind Counsel, yet again, that any ground of appeal formulated in that manner is not a ground at all and will not be entertained. Similarly, any additional grounds that are introduced without leave of Court, contrary to Rule 58(3) of the **SUPREME COURT RULES**^(a), are incompetent before us. The two additional grounds of appeal in the memorandum of appeal, accordingly, stand dismissed.

In his submissions on the first ground of appeal, Mr. Mwansa faulted the lower Court, for distancing Senior Chief Mujimanzovu from the Kapijimpanga royal family and the electoral college in the face of overwhelming evidence that the Kapijimpanga Chieftaincy descended from Kapiji-Kasongo Mujimanzovu, who ceded his power and land to his son, Mpanga. He became Chief Kapijimpanga 1.

According to Mr. Mwansa, apart from the installation of Njamba (Chief Kapijimpanga II), Senior Chief Mujimanzovu presided over all the installation ceremonies of Chief Kapijimpanga. Further, that by virtue of chairing the Council of chiefs, Senior Chief Mujimanzovu enjoyed the power of a 'kingmaker' both by tradition and by presiding over the electoral college.

Mr. Mwansa submitted that the role of Senior Chief Mujimanzovu was, therefore, paramount and instrumental in that he created the Kapijimpanga Chieftaincy. Counsel submitted further, that Senior Chief Mujimanzovu enjoyed respect in the Kapijimpanga chiefdom, and this explains why none of the contestants objected to his chairmanship during the 2010 installation ceremony.

With regard to the second ground of appeal, Mr. Mwansa submitted that the Court below misdirected itself by holding that Senior Chief Mujimanzovu acted unilaterally, in contravention of established Kaonde custom and imposed himself when he chose the Appellant to succeed the late Chief Kapijimpanga IV. He argued that after the stalemate, it was the family representatives themselves who mandated Senior Chief Mujimanzovu to appoint a successor.

Counsel further submitted that there was a document which empowered Senior Chief Mujimanzovu to act on behalf of the families and it was arrived at and signed freely by the families without any coercion or duress. That consequently, resort to Senior Chief Mujimanzovu to appoint the Chief was devised by the

electoral college itself, to address an extraordinary circumstance. That it was, therefore, wrong for the Court below to challenge this arrangement and impose its own system.

Counsel further submitted that the purported wrangles and confusion referred to in the judgment of the lower Court were not peculiar to the Kapijimpanga chiefdom but that they were the order of the day during installation of chiefs in Zambia. That in any event, calm had returned to the Kapijimpanga chiefdom by the time that the Appellant was chosen.

Coming to the third ground of appeal, Mr. Mwansa submitted that the Court below did not state how the re-installation it ordered would be conducted and who would be present since the directive by the Court opened the process to all stakeholders who included indunas, interested parties and subjects. According to Mr. Mwansa, the directive by the Court left a lot of questions unanswered, like who was to convene and chair the meeting, or, which families should be present. In his view, the directive was contrary to the evidence on record which showed that all past chiefs had descended from the Mukunta family and that it was only the electoral college which had the sole preserve of selecting a chief.

On the fourth ground of appeal, Counsel contended that the Court below failed to resolve the dispute by directing that a fresh selection and installation be undertaken on its own terms and that in default, the parties be granted liberty to apply. Mr. Mwansa argued that the Court, having rendered its Judgment, was prevented from re-opening the matter on the principle of *functus officio*, a branch of the doctrine of *res judicata*. He contended that granting liberty to apply had the potential of opening the litigation to non-parties since the Court did not define all eligible candidates.

The kernel of Mr. Mwansa's submissions on the fifth ground of appeal was that the Court below was wrong to substitute an evolved traditional way of resolving the dispute, of inviting Senior Chief Mujimanzovu to intervene, with its own opinion of what it considered fair, in the absence of evidence that the traditional method was repugnant to natural justice or morality. He echoed his earlier submission that Kaonde tradition restricts the selection process of a chief to the royal families. He stated that the selection process in this case took three days and that by the third day, there were no wrangles or confusion which had characterised the first day.

In response, Mr Linyama, the learned Counsel for the Respondent, filed written heads of argument. He argued the first, second and third grounds of appeal together. According to Counsel, the three grounds of appeal raise the following issues:-

- a) **That Chief Mujimanzovu did not unilaterally take over the process that led to the Appellant being installed as chief;**
- b) **The traditional establishment had not failed to resolve the novel challenge that arose;**
- c) **The trial Court ought to have stated how the Chief must be chosen;**

He submitted that Chief Mujimanzovu himself testified that he found it fit to choose the Chief notwithstanding the fact that this was against the tradition. That in doing so, the Chief exceeded his jurisdiction. He argued that the learned trial Judge could not be faulted because her findings of fact were not perverse but premised on uncontroverted evidence. To support this proposition, Counsel cited a host of authorities, among them, the case of **THE ATTORNEY GENERAL V MARCUS KAMPUMBA ACHIUME**¹ in which we held, inter alia, that an appellate Court will not reverse findings of fact made by a trial Judge unless the said findings are perverse or made in the absence of relevant evidence.

According to Mr. Linyama, the trial Court was on firm ground when it held that Senior Chief Mujimanzovu played a role in excess

of his historical function in the installation process. He invited us to review the minutes of the installation process of Chief Kapijimpanga IV, held in 1978, which showed that Senior Chief Mujimanzovu was a mere master of ceremonies.

In responding to the arguments in support of the second ground of appeal; that wrangles and confusion are the order of the day during installation of chiefs in Zambia; Counsel submitted that this statement was not supported by evidence. He contended that it was incorrect and misleading to argue that it is normal for installations of chiefs to be conducted in a volatile atmosphere when the evidence on record shows that the Kapijimpanga chiefdom was experiencing such wrangles and confusion for the first time. He was of the view that through this submission, Counsel for the Appellant was, at best, eliciting evidence at the bar and should not be entertained. He relied on, among others, the case of **ZAMBIA REVENUE AUTHORITY V HITECH TRADING COMPANY²** in which we held:—

“It is trite law that arguments and submissions at the bar, spirited as they may be, cannot be a substitute for sworn evidence.”

Mr. Linyama further submitted that the trial Court was on firm ground when it held that the conduct of Senior Chief Mujimanzovu was contrary to established norms of the Kaonde people. He cited the involvement of lawyer, Dr Ludwig Sondashi, as alien to the entrenched culture of the Kaonde people. He contended that while traditional norms evolve, the evolution must be tested and not done hurriedly. Further, that the lower Court merely directed the parties to consult more widely in order to achieve an agreed position that would address a novel problem.

In respect to the Appellant's arguments on the third ground of appeal, Counsel submitted that the trial Court could not state how the new Chief should be chosen as doing so would be asking the Court to delve into traditional matters. He contended that this would be contrary to the principle established in the case of **CHIEF MPEPO (Also known as Ackson Chilufya Mwamba) V SENIOR CHIEF MWAMBA (Also known as Paison Chilekwa Yamba Yamba)**³ where we stated that:-

"We have no difficulty in accepting the argument of Mr. Zulu, SC and Prof Mvunga, SC for the defendant that a Chief is elected or appointed as such by the people of the community the Chief is to superintend over in accordance with the customs and traditions of the community. It is not the duty of the Court, as the learned trial

Judge seemed to imply, to choose or impose a Chief on a community."

Mr. Linyama argued that in this respect, the jurisdiction of the Court was limited to an inquiry into whether what transpired at the Appellant's installation was in accordance with historical events and tradition of the Kaonde people. The answer, Counsel submitted, would be negative because the Kaonde people had an established way of choosing a chief.

Counsel's response to the fourth ground of appeal was that the trial Court was within its jurisdiction to open its doors to parties to litigation to seek assistance in enforcing a directive of the Court and could not, in this respect, be said to be *functus officio*. To support this argument, Counsel invited us to look at the provisions of Order 45/6 of the **WHITE BOOK**¹ which states, in part, that:-

"45/66. Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which an act is to be done, the Court shall, without prejudice to Order 3, rule 5, have power to release an order requiring the act to be done within another time, being such time after service of that order such other time, as may be specified therein."

With regard to the Appellant's arguments on the fifth ground of appeal; that the trial Court was substituting its own opinion for the long evolved tradition of inviting Senior Chief Mujimanzovu to

resolve disputes, Mr. Linyama echoed his submissions on the first ground of appeal that historically Chief Kapijimpanga was chosen by the Sandangombe, and not by any Chief.

Counsel also repeated his submissions in support of the second ground of appeal that the Kapijimpanga chieftdom was, for the first time, witnessing confusion of that nature at an installation. In his view, it was, therefore, a total misdirection for the Appellant to dismiss the findings of the Court on the confusion that marred the installation, as an exaggeration. He ended by urging us to dismiss this appeal with costs, for lack of merit.

When the appeal came up for hearing, Mr Mwansa relied on his written heads of argument and applied to reply to the submissions filed by the Respondent *viva voce*. We allowed the application.

The gist of Mr. Mwansa's oral arguments in response, was that the learned trial Judge's finding, that Senior Chief Mujimanzovu acted unilaterally, can only be faulted or reversed if it is, *inter alia*, made on a misapprehension of the facts or is such that it could not reasonably be made by a trial Court on a proper view of the evidence. He submitted that from the facts before the lower Court,

it is clear that that all candidates were found eligible to be appointed as Chief Kapijimpanga. That it was only when a stalemate arose, that the royal families requested Senior Chief Mujimanzovu, as the father of the chiefdom, to help them resolve the stalemate. He contended that Senior Chief Mujimanzovu did not make a unilateral decision to appoint Chief Kapijimpanga V but that he first requested the families to settle the matter amongst themselves and it was only when they failed to do so that they asked him to choose the chief. That even then, the Senior Chief requested for witnesses so that what transpired could be documented.

It was Mr. Mwansa's further submission that a situation where more than one candidate emerged and the families failed to nominate a successor from among themselves had never happened before. He argued that the Kaonde people of the Kapijimpanga chiefdom had, in a sense, evolved their tradition by consulting Senior Chief Mujimanzovu, the one who gave them the chiefdom, to break the deadlock. Asked if this was a one-off solution or the emergence of a new custom, Mr. Mwansa took the position that in future, if a similar situation arose, the Kaonde people may resolve it

in the same way or if the circumstances so warranted, in a different way.

In relation to the fifth ground of appeal, Mr. Mwansa submitted that since there was more than one candidate, Sandangombe ought to have left the issue to be resolved by the royal families and wait to announce the final choice made by the electoral college.

In reply to Mr. Mwansa's oral submissions, Mr. Linyama, submitted that an impression had been created that Senior Chief Mujimanzovu had always chaired the installation process. He stated that according to the minutes of 6th October, 1978, on the installation of Chief Kapijimpanga IV, Senior Chief Mujimanzovu was a mere master of ceremonies and that the selection process is chaired by a headman. He maintained that Senior Chief Mujimanzovu made a unilateral decision to appoint the Appellant. In answer to a question from the Court as to whether Senior Chief Mujimanzovu was not acting pursuant to authority delegated by those who had authority to decide, Mr. Linyama responded:- ***"that issue was not properly done by the Court below to show that there was actual delegation by the correct people."***

Mr. Linyama conceded that it was the first time that the electoral college had failed to choose a successor. He, however, supported the learned trial Judge's view to refer the stalemate to a wider consultative process instead of leaving it to one individual. According to Mr. Linyama, if a new custom had to evolve, the process had to be consultative. To support his argument, he also referred us to the case of **CHIEF MPEPO (Also known as Ackson Chilufya Mwamba) V SENIOR CHIEF MWAMBA (Also known as Paison Chilekwa Yamba Yamba)**³ (referred to above). According to Counsel, the people should have sat to evolve their own tradition or custom as opposed to leaving it to one person. He prayed that the directives of the Court below should not be disturbed because they were made in the interest of justice.

In response, Mr. Mwansa reiterated that the families asked Senior Chief Mujimanzovu to help them choose one person from among the six candidates, and that the only difference was that the Senior Chief selected the Appellant, and not the Respondent.

On the aspect of delegated authority earlier put by the Court to Mr. Linyama, Counsel submitted that delegated authority was not individual authority, but was exercised on behalf of those who

had delegated that authority. According to Mr. Mwansa, it was interesting that a person who had been delegated to act would, at the end of the day, find himself alone, having made that decision. He ended by praying that we allow the appeal and order costs for the Appellant.

We have carefully considered the evidence on record, the Judgment appealed against and the issues raised in this appeal. At the core of the appeal is the issue as to whether the Appellant was properly selected and installed as Chief Kapijimpanga V by Senior Chief Mujimanzovu.

The first ground of appeal assails the position taken by the lower Court that the choice of the Appellant, as Chief Kapijimpanga, was unilaterally done by Senior Chief Mujimanzovu. Mr. Mwansa has spiritedly argued that Senior Chief Mujimanzovu did not act unilaterally or arbitrarily when he chose the Appellant but rather, that he was asked, as the father of the Kapijimpanga chieftaincy, to assist after the royal families reached a stalemate and failed to name a successor from the six contestants who emerged eligible take over the throne.

Mr. Linyama, on the other hand, argued that Senior Chief Mujimanzovu exceeded his jurisdiction and took over the process by installing the Appellant as chief. That traditionally and in accordance with the 1978 minutes on the installation of Chief Kapijimpanga IV, the role of Senior Chief Mujimanzovu was that of master of ceremonies.

We have perused the record and in particular the 1978 minutes on the installation of Ostralia Katuka as Kapijimpanga IV. According to these minutes, the installation ceremony was chaired by Headman Kamongo and Senior Chief Mujimanzovu was indeed the master of ceremonies. Other than the 1978 minutes, there is no other evidence to establish a pattern that Senior Chief Mujimanzovu has always been a master of ceremonies during the installation of a chief.

It is apparent from the evidence of the witnesses and the minutes of the installation of Chief Kapijimpanga IV, that the Kapijimpanga Chieftaincy was established by Chief Kapiji-Kasongo Mujimanzovu of the Kaonde people. He gave his son, Mpanga, the 'lukomo' and he became the first Chief Kapijimpanga. Mpanga was succeeded by Kapijimpanga Njamba, who in turn was also

succeeded by Kapijimpanga Kilolo Mulundu; Kapijimpanga III. Upon the demise of Kilolo Mulundu, the electoral college assembled on 6th October 1978, to choose Kapijimpanga IV and Ostralia Katuka was chosen. After the passing of Katuka in 2008, the electoral college assembled on 24th September, 2010 to choose a new chief who was going to be installed as Kapijimpanga V. The process took three days. What transpired during those days is the genesis of this dispute.

It is not in dispute that ultimately, six candidates emerged as contenders likely to ascend to the throne of Kapijimpanga. They were all found to be eligible. The record shows that all the six contestants were captured and confined in the traditional hut called 'kamboro'. The six candidates were each represented by three family members. They comprised the electoral college which was supposed to agree and come up with one candidate. It is common cause that the families failed to settle on one person. It is on record that this was the first time ever, in the history of the Chieftdom, that such a stalemate had arisen.

According to the minutes of the installation prepared by Solwezi Council Town Clerk, Mr. Jim Zya, a copy of which appears

from page 153 to page 158 of the record of appeal, Senior Chief Mujimanzovu was the Chairperson. The minutes show that he was mandated by the royal families to select a chief from among the six candidates. The minutes, in the relevant portion, state as follows:-

“CA/03/09/10 Advice by the Chairman

Arising from the fact that all the six contestants were related and eligible for the throne, the chairperson advised each family to appoint three members who would discuss the matter in detail and agree among themselves as to who would be installed as Chief Kapijimpanga of the Kaonde people. The group was accompanied by the Town Clerk and the Director of Administration who acted as observers.

CA/04/09/10 Resolution of the Group of Eighteen

Members present learnt that the six families through the eighteen representatives had failed to reach a compromise and agree who among them who would be approved to be installed Chief Kapijimpanga.

The group of eighteen **RESOLVED:**

That the chairperson Senior Chief Mujimanzovu be allowed to select a chief from among the six contestants as they all qualified to be chief Kapijimpanga.

CA/05/09/10 Mode of Selection

Having been mandated to select a Chief from the six, the Chairperson called for unity from amongst the families contesting the chieftaincy. He further cautioned those who would not be selected to provide the necessary support to the new Chief. It was further agreed and **RESOLVED:**

That the decision of the Chairperson in selecting Chief Kapijimpanga shall be final and respected by all contestants and their families

That the decision of the Chairperson shall not be subject to any appeal and agreement made to that effect

That all the contestants shall subscribe to the agreement referred to in (ii) above and that their Royal Highnesses present to sign as witnesses thereto.”

The minutes also show that thereafter, Senior Chief Mujimanzovu declared the Appellant, Kilolo Ngambi from the Mukunta family as Chief Kapijimpanga.

From these minutes, it is clear that Senior Chief Mujimanzovu did not act unilaterally nor did he take over the process when he declared the Appellant as Chief Kapijimpanga. It is evident that the group of eighteen, representing the six eligible candidates 'resolved' to allow Senior Chief Mujimanzovu to select a chief. Further, it is also apparent from the evidence, that Senior Chief Mujimanzovu did not outrightly pick a successor. He first gave the families a chance to choose a chief from amongst themselves but they failed to reach a consensus. According to the minutes, each of the contestants was supposed to sign a document allowing the Chief to choose a new Chief and to accept that his decision will be final. It is on record that the document in question, was prepared by a lawyer, Dr. Ludwig Sondashi and according to the Appellant, the families signed the document allowing the Senior Chief Mujimanzovu to choose a chief and they included the Inamusale family representing the Respondent. It would appear, therefore, that the families

delegated their function to choose a chief to Senior Chief Mujimanzovu.

In common parlance, delegated authority is the entrusting some of one's work/function to others. According to the **LAW DICTIONARY**ⁱⁱ, delegated authority means the transfer of authority from one person to another. It implies acting on behalf of another for another's benefit. It is apparent, in this case, that the royal families of the Kapijimpanga chiefdom delegated their function to choose a chief to Senior Chief Mujimanzovu after they had reached a deadlock.

Against this background, it cannot seriously be argued that Senior Chief Mujimanzovu acted unilaterally and imposed himself on the selection process of Chief Kapijimpanga. As the situation of failure to choose a chief was happening for the first time, it can safely be concluded that there was no existing custom or tradition at the time, to inform the procedure that would be adopted to remedy such a situation.

It is our considered view, therefore, that the learned trial Judge's finding that Senior Chief Mujimanzovu acted in contravention of the Kaonde custom and tradition, in the absence of

such a custom or tradition, was a misdirection. We are satisfied that the learned trial Judge's finding was not supported by the evidence before her and as a consequence, it is our view that this is a proper case to interfere with her findings of fact in keeping with the principles we have enunciated in a plethora of authorities including that of the **ATTORNEY GENERAL V MARCUS KAMPUMBA ACHIEME**¹ to which we will revert later. We find that the first ground of appeal has merit.

Coming to the second ground of appeal, Mr. Mwansa argued that the royal families devised a formula by resorting to Senior Chief Mujimanzovu to help resolve the impasse, and, therefore, it was wrong for the Court below to impose its own system. Mr. Linyama, on the other hand, charged that Senior Chief Mujimanzovu's conduct was contrary to established norms and further, that the Court merely asked for wider consultation to achieve consensus on a novel problem.

Having found that Senior Chief Mujimanzovu was mandated by the families to choose a chief from among the candidates, we come to the inescapable conclusion that the royal families, who were the kingmakers, did find a solution for themselves to the break

the impasse to meet the peculiar circumstances in which they found themselves. Consequently, we find that the learned trial Judge erred when she issued the directive that the parties should revert to all stakeholders including subjects to come up with a criteria for choosing the next chief.

The minutes of the meeting which sat to select the new Chief show that apart from the six candidates and their 18 representatives, seven Chiefs, together with their delegations of headmen were present. The families represented the electoral college while the community of chiefs and headmen were present to witness the occasion. We did state in the case of **CHIEF MPEPO (Also known as Ackson Chilufya Mwamba) V SENIOR CHIEF MWAMBA (Also known as Paison Chilekwa Yamba Yamba)**³ that:-

"A Chief is elected or appointed as such by the people of the community the Chief is to superintend over in accordance with the customs and traditions of the community. It is not the duty of the Court, as the learned trial Judge seemed to imply, to choose or impose a Chief on a community."

Now, the evidence in this case conclusively established that according to Kaonde custom and tradition, the duty to choose a chief does not lie with every subject or the entire chiefdom but with the electoral college. In the case in *casu*, the electoral college

comprises the royal families who act in the presence of indunas/elders and the Counsel of chiefs. It is this same electoral college which decided to delegate its power to select a chief to Senior Chief Mujimanzovu. In our view, it was a misdirection for the learned trial Judge to hold that in order to remedy the novel situation that arose, indunas, group leaders and the subjects of the chieftdom should come up with a formula or criteria to resolve the impasse. Subjects are not part of the electoral college. It was incumbent upon those present to come up with a solution. Whether or not such a solution would be a 'one off' solution or evolve into a new custom or tradition to address similar situations is for the electoral college to decide. We, therefore, also find merit in the second ground of appeal.

As regards the third ground of appeal, Mr. Mwansa argued that there were no guidelines from the trial Court as to how the re-installation of the new Chief was to be conducted. Mr. Linyama, in response, submitted that seeking guidance would be tantamount to asking the Court to determine traditional matters. Our simple response is that the learned trial Judge was right not to have prescribed any procedure on the ground that it is not the duty of

the Court to choose a chief. As we have stated above, the royal families devised a formula to break the impasse. In view of the foregoing, the third ground of appeal also succeeds.

The fourth ground of appeal is that the trial Judge erred by not creating finality to litigation but instead, opened a 'ponderous' box of litigation by inviting aggrieved individuals, who may not even have been parties to the case, to go to court. Mr. Mwansa's argument on this ground of appeal, is that the learned trial Judge failed to resolve the dispute by directing the holding of fresh elections. Further, that granting each party liberty to apply could open litigation to non-parties. Mr. Linyama, on the other hand, submitted that the court was in order to open its doors to parties to litigation to apply in order to enforce its directives. We agree with Mr. Linyama to the extent that orders granting liberty to apply are directed to parties to the litigation. The learned authors of **HALSBURY'S LAWS OF ENGLAND**ⁱⁱⁱ pronounced themselves as follows on the expression "*liberty to apply*" :-

"All orders of the court carry with them an inherent liberty to apply to the court... where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to court...The judgment is not rendered any the less final; the only effect of the declaration is to permit persons having an interest

under the judgment to apply to court touching their interest in a summary way without again setting the case down. It does not enable the court to deal with matters which do not arise in the course of working out the judgment."

From this passage, it was well within the learned trial Judge's discretion to insert the words "*liberty to apply*" to allow '*persons having an interest under the judgment to apply to court touching their interest.*' We therefore find no merit in the fourth ground of appeal.

In the fifth and last ground of appeal, the Appellant argues that it was wrong for the Court to direct that the stakeholders and subjects of Chief Kapijimpanga chiefdom should be fairly represented in coming up with a formula to select a new Chief. According to Mr. Mwansa, the Court below substituted the evolved traditional way of resolving disputes with its own opinion of what it considered fair. He contended that subjecting the selection of the Chief to all the subjects of the chiefdom was contrary to Kaonde tradition which restricts the selection to the royal families. Further, that contrary to the Court's view, that the selection of the Chief was marred by wrangles and confusion, the violence had ended by the third day, and all the contestants were caught and placed in the 'kamboro'. In reply Mr. Linyama submitted that historically, the

Sandangombe was the one who chose the chief and not another chief. That the evidence of PW1 and Chief Mujimanzovu shows that there was confusion and wrangles at the installation of the Chief. He submitted that it was a total misdirection for the Appellant to fault the findings of the trial Court that there was confusion and wrangles when the evidence on record clearly confirms these facts. He urged us not to disturb these findings of fact.

We have considered the submissions of Counsel on the fifth ground of appeal. The Court below found that Sandangombe had no role to play in choosing a new chief. The only chief that Sandangombe installed was Njamba, Chief Kapijimpanga II. The submission by Mr. Linyama, that historically Sandangombe chose the Chief Kapijimpanga is not, therefore, correct. As we have stated above when dealing with the second ground of appeal, the evidence on record conclusively established that according to Kaonde custom, the electoral college comprises the royal families and not the entire community or subjects. It was, therefore, a misdirection for the Court to direct that stakeholders and subjects should be represented in coming up with a formula to come up with a new chief. We accordingly find merit in the fifth ground of appeal.

Arising from our consideration of the five grounds of appeal, we find that this a proper case in which to interfere with the findings of fact made by the trial Judge on the basis of the principles that we have outlined in many cases including that of **THE ATTORNEY GENERAL V MARCUS KAMPUMBA ACHIUME²**

where we held that—

“The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make.”

We have found, in the main, that the Court below erred when it decided that in appointing and installing the Respondent as Chief Kapijipanga, Senior Chief Mujimanzovu acted in contravention of Kaonde tradition for selecting a successor to the throne when it was conclusively established that there was no custom or tradition that governed the novel situation which arose at the time. Further that the Court erred by directing that stakeholders, including subjects of Chief Kapijimpanga Chiefdom should be ‘fairly represented’ in coming up with a criteria for selection of a Chief in the event of a stalemate when the community at large and the subjects do not even form part of the electoral college.

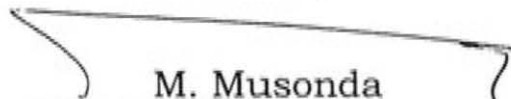
Four of the five grounds having succeeded, this appeal is allowed. We accordingly order that the Judgment and directives of the learned trial Judge be set aside. In their place we declare that the Appellant was properly appointed and installed as Chief Kapijimpanga V. We order costs for the Appellant both here and in the Court below.



I.C. Mambilima
CHIEF JUSTICE



M. Malila
SUPREME COURT JUDGE



M. Musonda
SUPREME COURT JUDGE