

MIKA KATYAVAZUNGU
versus
PETER MUCHABETA
And
DISTRICT DEVELOPMENT CO-ORDINATOR,
GOKWE SOUTH (N.O)

And
MINISTER OF LOCAL GOVERNMENT & PUBLIC WORKS N.O
And
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE (N.O)
And
ZIMBABWE COUNCIL OF CHIEFS

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO,

**A.Mutatu, for both Applicant
C. Chuma, for the Respondent**

OPPOSED APPLICATION

ZISENGWE J: The late Chief Nemangwe of Gokwe district of the Midlands province, Peter Muchabeta (the 1st respondent) died on 20 July 2023. He died of natural causes. Before his demise, however, he was locked in this present legal battle with the applicant with the latter claiming that he had been improperly and unprocedural appointed to that position.

The applicant seeks an order setting aside his recommendation by the relevant statutory functionaries for appointment to that position leading to fresh selection process for the Nemangwe Chieftainship.

The applicant's main gripe with the process leading up to the appointment of the 1st respondent appears to be that it apparently side-lined him (i.e. applicant) when in his view he is the rightful heir to the throne.

The Parties

The 2nd to 5th respondents are all key government functionaries each with a role to play in the appointment of chiefs in terms of proviso (i)... to (ii) S238 (a) of the Constitution, which reads,

But (i) the appointment, removal and suspension of chiefs must be done by the President on the recommendation of the Provincial assembly of Chiefs and the Minister responsible for traditional leaders and in accordance with the traditional practice and traditions of the communities concerned.

(ii) Disputes concerning the appointment, suspension and removal of traditional leaders must be resolved by the President on the recommendation of the provincial assembly of Chiefs through the Minister responsible for traditional leaders.

It is common cause that presently the Minister responsible for traditional leaders is the 3rd respondent (i.e. the Minister of Local Government and Public works).

The background

The 1st respondent succeeded the late Elijah Masvingo Katyavazungu who died in 2009. The applicant is the latter's eldest surviving son and was up until the appointment of the 1st respondent acting Chief Nemangwe. The applicant claims that he was nominated at a meeting held on the 30th of January 2009 after the demise of the then chief Elijah Katyavazungu on the basis of him being the eldest surviving son and on the basis of the rotational succession matrix of the Nemangwe Chieftainship. These houses according to the applicant are the Nemananga and Manjoro houses.

The applicant avers that the succession custom through the rotational system provides that after the death of an incumbent chief his son is selected and consequently substantive appointed chief before it moves to the next house in line and that it was on that basis and pursuant to the meeting held on 19 February 2014 that the 2nd respondent recommended to the 3rd respondent as the Substantive Chief Nemangwe. He claims however that some disgruntled persons sought to scuffle his appointment leading to a series of meetings aimed at resolving the impasse. To this dismay he received a letter from the 2nd respondent indicating that the 1st Respondent had been appointed Chief Nemangwe on the 29th of March 2023.

In a word therefore he asserts to that some Chiefs who he identified as Chief Ntabeni and chief Nenyunga were instrumental on scuffling his appointment by imposing the 1st respondent as a candidate for the Nemangwe chieftainship. He therefore claims that the appointment of the 1st

Respondent was irregular and incompetent with the customs and traditions of the Nemangwe community and that the 1st respondent was not in line to succeed the late Elijah Katyavazungu. He also avers that there was no selection process undertaken.

He gave a rather elaborate account on the history of succession to the Nemangwe Chieftainship going back decades culminating it moving to the Mangaro home after circulating on the Nemananga house a times. After believes that he was legitimately entitled to succeed his late father- when ultimately did not happen.

He therefore claims the decision by the 2nd respondent in recommending the 1st respondent for appointment as chief despite him not being nominated by the Nemangwe clan was illegal, irrational and unprocedural as it flouted the relevant provision of the Traditional leaders Act.

He therefore implores the court to invoke its review powers and set aside the recommendation.

The relief he seeks is captured in the draft order attached to the application. It reads,

IT IS ORDERED THAT:

- (i) The application for review be and is hereby granted.
- (ii) The decision by the 2nd and 3rd respondent in recommending the 1st respondent as a candidate for appointment as Chief Nemangwe to the 4th Respondent be and is hereby set aside.
- (iii) The 3rd respondent be and is hereby directed to act in terms of the law, at the earliest available opportunity in ensuring that the Chieftainship dispute is resolved and a rightful candidate is recommended to the 4th Respondent for appointment to the Nemangwe Chieftainship.
- (iv) The respondent bear costs of suit jointly and severally one paying the others to be absolved.

Before his death, the 1st respondent deposed to and filed an opposing affidavit disputing all the applicants' material averments.

In it he averred that after the appointment of applicant was only on an interim basis following the demise of his (i.e. applicant's father) According to him applicants' incumbency was only meant to subsist for the two year mourning period.

He gave his son narration of the events which played out from 2012, which events I need not enumerate here as what is at stake presently is the propriety of the confirmation of the current application on the wake of the demise of the 1st respondent.

Be that as it may, the chronology of events as recounted by the 1st respondent startle constructed that of the applicants. It however suffices to say that the 1st respondent refuted the applicant's contention that when an incumbent Chief dies, his son is set aside to succeed him.

He also averred that the applicant's family left the country for Zambia before Zimbabwe's independence and that therefore they could not possibly have enjoyed the throne during their hiatus to Zambia.

Most importantly however, he denied that the recommendation for appointment was irregular. He claims on this regard that he was nominated for the contested position on meetings held on 21 January 2013 and the other held in August 2017 the latter which culminated in his appointment. He therefore urged the court to dismiss the application for lack of merit. The rest of the respondents did not file any opposing papers.

The applicant filed an answering affidavit basically disputing the chronology of events as narrated by the 1st respondent in his opposing papers.

The 1st respondent, however, as earlier stated passed away on 13 July 2023 before oral arguments were heard in court. The matter was nonetheless set down for hearing on which occasion counsel for 1st respondent urged the court to find that the matter was now moot in light of the demise of the 1st respondent.

Per contra, applicants' counsel persisted with the application and invited the court to find that the matter was not moot as what was impugned by the applicant was not the appointment of the 1st respondent per se but the recommendation leading to his appointment. It was argued with this regard.

The applicant chiefly relies on rule 32(7) of the High Court rules, 2021 which provides that:

"no proceedings shall terminate solely as a result of the death marriage or other change of status of any person, unless the proceedings are thereby extinguished"

A matter becomes moot.....

A perusal of the documents filed by the applicant vis-à-vis those filed by the 1st respondent reveals that what is fiercely disputed as between them is the regularity of the appointment of the latter to the position of Chief Nemangwe. Both traced back not only the history of the meetings culminating on the one hand to the ascension of the 1st respondent to the throne and the failure of the applicant to do so but also the history of the part holders to the throne.

It is therefore highly misleading on the part of the applicant to suggest as he does that the dispute is other than the question of the very appointment of the 1st respondent to the position of Chief Nemangwe.

It is axiomatic that with the demise of the 1st respondent, the selection process based on the traditions and customs of the Nemangwe clan resumes afresh. This much is clear from the contents of the applicants very own affidavits.

The applicant unwittingly contradicts himself by averring on the one hand that succession to the Nemangwe throne unquestionably devolves from father to son, yet in the same breath he lists countless meetings all held with the sole purpose in mind; namely the selection of a new chief. The very fact that innumerable meetings were held, some successful, some abortive and yet some disputed is testament to the fact that succession is not as linear as he wants everyone to believe.

Furthermore, the fact that several important functionaries are involved as provided in proviso (i) to S283 which functionaries include the 2nd to 5th respondents in general and the 3rd and 5th respondents in particular ipso facto shows that the succession matrix is far from the linear progression he suggests.

All that is being conveyed here is that should the applicant still contend that he is the rightful heir to the now vacant throne, his name should find itself in the hat so to speak. The issue of the ascension of the 1st respondent to the throne has now been overtaken by his (i.e. 1st respondent's) very death.

If applicant's contention is to be taken to its logical conclusion then it would mean the untenable interrogation of the propriety of the succession of each preceding Chief to the throne dating back to the very inception of that chieftainship.

Although the applicant purportedly sought to impugn the recommendation of the 1st respondent by the 2nd and 3rd respondents for the chieftainship position, the indisputable conclusion that is drawn from their respective papers is that it is basically a dispute between the applicant and 1st respondent *inter se*.

Furthermore, whether a civil suit against a person can be carried forward notwithstanding the death of that person depends on whether the rights at stake are rights in *rem* or rights in *personam*. In his supplementary heads of argument the applicant concedes that the appointment of Chief is personal in nature. That is indeed so. A perusal of all the provisions relating to the position of chief reveals not only that the appointment of Chief is personal but also that the rights, duties, obligations and benefits that accrue to that person by virtue of that position are personal. See for example S281, 282 and 284 of the Constitution and S5 of the Traditional Leaders Act [Chapter 29:17].

The death of the 1st respondent therefore effectively extinguished any dispute as between him and the applicant regarding his appointment. Investigating the correctness of the recommendations leading to 1st respondent's appointment would be merely an academic pursuit. Given that the applicant can still partake on the selection process should he be eligible, such an investigation will yield nothing of practical significance. Might I add that his eligibility to participate in the inevitable new selection process is not dependant on his status as the son of the late Elijah Katyavazungu but on his basis as a member of one of the eligible houses to the throne.

Consequently therefore, this is one of the exceptions to rule 32(7) of the High Court rules wherein the death of a party (in this case the 1st respondent) effectively extinguishes the dispute. The matter is therefore moot and the application is hereby dismissed with costs.

ZISENGWE J

Mutatu and Partners; Applicants Legal Practitioners

Chima, Gurajena and Partners; 1st respondents Legal Practitioners.