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**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

Appeal No.11/2019

BETWEEN:

**MATTHEWS MUSONA
LINGSON PATAMA
JACKSON SHALUKYA NYANGU
HEADMAN MUSANSHIKA
AMON CHIKWELETI
ACTING HEADMAN KABANDI
KENNETH CHIPUNGU
FICKSON CHIKWELETI**

**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT
5TH APPELLANT
6TH APPELLANT
7TH APPELLANT
8TH APPELLANT**

AND

**KAUSA MACHINDALO
FELIX KANDOLO**

**1ST RESPONDENT
2ND RESPONDENT**

Coram: Makungu, Chishimba and Ngulube JJA
On 11th November, 2019 and 22nd April, 2020

*For the 1st to 3rd Appellants: Mr. Moonga of Tembo Ngulube & Associates
For the 1st to 5th Appellants: Mr. F. Besa of Friday Besa & Associates
For the 1st & 2nd Respondents: Mr. K Musabandesu of M.M & Associates*

JUDGMENT

Makungu, J.A delivered the judgment of the court.

Cases referred to:

1. *Roland Leon Norton v. Nicholas Laston* (2010) Vol. 2 ZR 358
2. *Kojo v. Bonsie* (1975) WLR 1223
3. *Attorney General v. Marcus Kampamba Achiume* (1983) ZR 1
4. *Nkhata and Four others v. The Attorney General* (1966) ZR 124
5. *Bell v. Lever Brother* (1932) AC 161
6. *Mususu Kalenga Building Limited & Another v. Richmans Money Lenders Enterprises SCZ No. 4 of 1999*

7. *Rodgers Chama Ponde and 4 Others v. Zambia State Insurance Corporation Limited (2004) Z.R. 151*

1.0 INTRODUCTION

1.1 This appeal is against the judgment dated 5th July, 2018 passed by Mrs. Justice M.S. Mulenga as she then was concerning the Chieftainship wrangle amongst the Soli Shamwifwi clan of Rufunsa District of Zambia. Initially, the 1st to 3rd appellants who were plaintiffs in the court below lodged an appeal under CAZ/08/172/2018. The 1st to 5th defendants also appealed under CAZ/08/181/2018. The appeals have since been consolidated as they relate to the same judgment of the High Court. The 6th and 7th defendants are now the 1st and 2nd respondents respectively as they were cited in both appeals.

2.0 THE PLAINTIFFS' CASE

2.1 The plaintiffs' case rested on the evidence of 7 witnesses. PW1 was Matthews Musona the contender to the throne, PW2 was Patson Mwachikota the village headman of Shatubi Village, PW3 was Daniel Mwape the Deputy Village Headman of Shatubi Village, PW4 was Jim Kaliwa a Village Headman of Mwamulondo, PW5 was Judge Edward Luputa Musona a

member of the Kashimbi Royal Family, PW6 was David Musona from the Kashimbi family and PW7 was Chikondi Banda, the Chief Profiler. In brief, their evidence was as follows: The chieftainship of Bundabunda originated from the Nyangu clan which came from the Kola farm of Luba- Lunda Kingdom. The matriarch of the clan was Mukunkutiwa the woman who bore a daughter named Lutangu. Lutangu had three daughters; Firstly, Tubi the ancestral mother of the Tubi/Kalifu royal family; Secondly, Nyemba, the ancestral mother to the Kashimbi royal family and thirdly Nsungwe, the ancestral mother to the Mulonga royal family. These are the three royal families that are entitled to inherit the Bundabunda chieftaincy because under the Soli custom the matrilineal lineage inherits the chieftaincy. There was a rotation of succession to the throne amongst the three lineages. Where the family which was supposed to take over had no suitable candidate, they would ask the other families to proffer a candidate. All the plaintiffs in this case are from the Kashimbi royal family.

2.2 They stated that the order of succession was as follows:

1. Mboshi of the Mulonga family.

2. Chimapepe of the Kashimbi family.
3. Shakanda of the Mulonga Family.
4. Mubamba of the Tubi/Kalifu family.
5. Kacheta of the Tubi/Kalifu family.
6. Selemani of the Mulonga family.
7. 1951 Lufwaneti Mutukutuku of the Mulonga family.
8. 1973 Jackson Chipungu of the Mulonga family.
9. 1980 Bernard Chipungu of the Mulonga family.
10. 1999 Patrick Mambo Chakalashi of the Mulonga family.

2.3 Following the death of Chief Chakalashi in 2013, the chieftaincy was supposed to go to the Kashimbi royal family. However, the Mulonga family insists that the chieftainship belongs only to them. This has brought about the current succession dispute.

2.4 The plaintiffs' further evidence was that Chief Bundabunda is supposed to be selected by the family which is taking over the throne. The installation of the successor to the throne is done in the presence of neighboring Chiefs, Senior Chieftainess Nkomesha and government officials.

2.5 When the three clans reached a deadlock as to who should be the next chief, the Mulonga family went ahead to install

Fickson Chikweleti as Chief Bundabunda. When installing him, the traditional procedure was not followed, instead a voting system was introduced and the purported Chief was not placed in the shrine. In addition, the Chamakamba Clan that installs chiefs, did not install him and the government officials were not there, which made it irregular.

2.6 Further evidence was that there are two shrines: One is open and only has a roof and is taken as a grave. It currently contains twelve (12) clay pots signifying the chiefs who had reigned before. The other is enclosed and has a bow and ten (10) arrows signifying chiefs who had been on the throne. There is a discrepancy in the total number of clay pots and arrows because two chiefs, Chibuye and Malambo, had died while acting as chiefs (caretaker chiefs). Therefore, they both had graves in the shrine but no arrows as they were neither confirmed nor installed as Chiefs.

2.7 On 29th August, 2013 the Tubi Kalifu and Kashimbi royal families entered into a memorandum of understanding to which the 5th defendant (Kausa Machindalo) on behalf of Tubi Kalifu family appended his signature. The purpose of the memorandum was to show that the principle of rotation

should continue among the Mulonga, Kashimbi and Tubi Kalifu.

2.8 On 30th August, 2013, Senior Chieftainess Nkomeshya and Chieftainess Shikabeta sat to hear the respective claims of the three families and it was confirmed that the three families were eligible to the throne. In the meeting, the Mulonga family did not dispute that the other two families qualify, but they refused to rotate the chieftaincy. The two Chiefs: Nkomesha and Shikabeta; then decided that the deadlock should be settled by having an electoral college of headmen to decide who would ascend to the throne as was done in the past by the Mulonga family.

3.0 On 31st August, 2013 the three families selected their preferred candidates. The Kashimbis selected David Musona (PW6), the Tubi Kalifu selected Kausa Muchindalo (5th defendant) and the Mulonga selected Fickson Chikweleti (7th defendant). However, the elections were not held because as soon as the meeting was convened, individuals from the Mulonga family disrupted the process by threatening violence. The Mulonga family on their own, later purported to install the 7th defendant and flouted the tradition requiring that the

installation be done in the presence of senior Chieftainess Nkomeshya, other senior Chiefs and all the families.

3.1 The Kashimbi family selected David Musona to ascend the throne in line with the traditions and customs which require that he must be a matrilineal member of the royal family selected by the family itself. The plaintiffs prayed that since the Kashimbi royal family had been on the throne for the least number of times, the Court should declare David Musona as the only eligible individual to ascend to the throne.

4.0 THE 1st to 4th and 7th DEFENDANT'S CASE

4.1 The 1st to 4th and 7th defendants represented the Mulonga royal family. Their case rested on the evidence of two witnesses: DW1 Kenneth Chipungu and DW2 William Ngeleni.

4.2 In summary, their evidence was that only the Mulonga royal family is entitled to ascend the throne following the matrilineal lineage. That the origin of their lineage can be traced from Mukunkutiwa who gave birth to the first Chief Bundabunda, Mboshi who had other siblings namely, Shakanda, Mubamba and Nkobama. Mboshi's sister, Lutangu had two daughters, Nyemba and Nsungwe. Chief Selemani was the son of Nyemba.

Nsungwe produced the Mulonga family which included Chiefs Lufwaneti, Jackson Chipungu, Benard Chipungu, Patrick Chakalashi and Chief Fickson Chikweleti. The defendants listed the names of the past nine (9) successive chiefs as Mboshi, Shakanda, Mubamba, Nkobama, Selemani, Lufwaneti, Jackson Chipungu, Benard Chipungu and Patrick Chakalashi. They disputed that Chimapepe was a chief and that Mubamba was from the Tubi Kalifu family.

4.3 During the installation of a chief, the Kashimbi and Tubi Kalifu families are not supposed to be present, and they do not play any role in the installation of a chief. That is why the defendants refused to heed the advice of Senior Chietainess Nkomesha that the three families negotiate the succession issue.

4.4 It was further stated that Fickson Chikweleti was chosen by the Mulonga royal family as he is a Mulonga. His installation was in accordance with the laid down procedures and traditions. It was not necessary for Senior Chieftainess Nkomesha to attend the installation ceremony. The government officials were invited but decided to stay away from the ceremony.

4.5 The shrine has ten clay pots representing the past chiefs. There had been nine (9) Chiefs excluding Chimapepe and all of them hailed from the Mulonga family.

5.0 THE 5th and 6th DEFENDANT'S CASE

5.1 The 5th and 6th Defendants represented the Tubi/Kalifu royal family. They called four witnesses: DW3 Kausa Mwachindalo Senior Headman Shagobeka (also the 5th defendant herein), DW4 Grace Namukoko Kanyanta Acting Director Human and Administration at Chongwe Municipal Council, DW5 Chiteu Elina Shatubi and DW6 Felix Welek Kandolo from Tubi Royal Family Establishment.

5.2 DW3's testimony was that he hails from the Tubi Kalifu lineage of the Shamifwi Royal Establishment and he belongs to the Nyangu clan. The family tree began with a woman named Chitambo who had three daughters, namely, Malunga, Tubi and Nyasenga. These three comprise the royal families that ascend to the Bundabunda throne. Malunga was the mother of the first Chief, namely Mboshi. Malunga had one child, a son. As a result, there were no other people to ascend to the throne from this lineage as the Shamifwi succession is

matrilineal. Mubamba who was the 3rd Chief Bundabunda, also known as Nkobama or Shikamilonga was Tubi's son. Tubi- had two other children, a daughter Chantola and a son Kacheta who later became the fourth Chief. Chantola had two daughters, Mayuka and Chiteo. Chiteo was the mother of Nyemba who was the mother of the fifth Chief Bundabunda Selemani. Mayuka was the mother of Lumina, the first headman of Shangobeka village and a daughter named Kalifu, thus the Tubi-Kalifu lineage. Nyasenga gave birth to Shakanda the second Chief Bundabunda. Nyasenga's other child was a daughter by the name of Sungwe who gave birth to Nyamalao, Mulonga, Kaluba and Mwanambo. Nyamalao's son was Lufwaneti the sixth chief and Mulonga had a daughter named Sambwa who was the mother of Jackson Chipungu, the seventh Chief Bundabunda. Mwanambo was the mother of Bernard Chipungu the eighth Chief Bundabunda as well as a daughter named Mafuluza Muchepele whose daughter was Mwanamusa Rabecca, the mother to Patrick Chakalashi the ninth Chief Bundabunda.

5.3 DW3 stated that the Kashimbi lineage falls within the Tubi family and are children from the male lineage. Lumina had a

son by the name of Ngobeka and hence was called Shangobeka. Lumina's first grandson, Chipungu, married Musowe and had a daughter by the name of Kashimbi Lashemwa from whom the Kashimbi family hails.

5.4 DW3's further evidence was that under Soli custom, the Chiefs are supposed to hail from Kalifu the sister of Lumina because inheritance is matrilineal. Therefore, the Kashimbis' are not eligible to ascend to the throne and Chimapepe was never Chief Bundabunda. The Chiefs from Tubi Kalifu family were Mubamba, Kacheta and Selemani. The sixth to ninth Chief Bundabunda all came from the Mulonga lineage because when Lufwaneti died, the Mulongas decided to reign again without having proper discussions with the other members of the royal families.

5.5 DW3 admitted having signed the joint report by the Tubi-Kalifu and Kashimbi families despite it being contrary to his evidence. He stated that he endorsed it in order to prevent the installation of the new chief by the Mulonga family and to ensure that there was rotation of the chiefs. Initially, the Kashimbis' were on the same side as the Tubi Kalifu in

fighting the Mulongas for the throne. However, it turned out that the Kashimbis had reneged on the agreement and had put forward a person of their own as successor to the throne.

5.6 DW3 stated that he did not recognize Fickson Chikweleti as Chief Bundabunda because the installation procedure was not followed.

5.7 DW4 the representative from the council stated that as custodian of records, the Council is required to be present at the succession meetings. Upon selection of a Chief, the Council Secretary submits to the Permanent Secretary, the following documents; five copies of the family tree, minutes of the meeting and the vital statistics for the selected chief. The Permanent Secretary then makes a recommendation to the Republican President to have the Chief recognized. A statutory instrument is issued to signify the recognition.

5.8 DW4's further evidence was that the first family tree was filed in 1972 and was verified and stamped by the council while the second was filed in January, 2017 but has not yet been verified with the families according to laid down procedure. The family tree filed in 1972 does not reflect the Kashimbi

family nor does it show that there was a Chief Chimapepe as the second chief is indicated as Shakanda and not Chimapepe.

5.9 Further evidence by DW4 was that there was a rotational system of succession amongst the Mulonga and the Tubi lineages as evidenced by the chiefs listed in the 1972 family tree. Currently, only the Nyasenga/Mulonga and Tubi lineages are eligible to ascend to the throne which is matrilineal. The Kashimbi's were not part of the Bundabunda royal establishment as they hail from the paternal side within the Tubi lineage, while the royal family comes from the maternal side.

5.10 It was the 5th and 6th defendants evidence that there had been nine past chiefs and therefore the clay pots in the shrine were supposed to be nine and not ten.

6.0 DECISION OF THE COURT BELOW

6.1 The findings of the court below were as follows;

- a) That the Bundabunda family tree dated 17th April, 1972 was validated and a true depiction of what it communicates. The family tree does not specifically state the ancestral matriarch

of the Bundabunda family but tabulates the mothers of the first three chiefs Malunga, Nyasenga and Tubi.

- b) A thorough scrutiny of the family tree indicates that it agrees materially with the version advanced by the 5th and 6th defendants in that the names they allege to be the ancestral matriarchs of each lineage are akin to the names stated in the family tree. This is contrary to the versions advanced by the Kashimbis' and Mulongas' in that some of the matriachs stated by the plaintiffs witnesses (Kashimbi) and those given by the 1st to 4th and 7th defendants (Mulongas) do not appear on the family tree produced by DW4, but they appear as mothers to later chiefs.
- c) The family tree filed in 1972 shows the first three chiefs Mboshi, Shakanda and Mbamba as being from Malunga, Nyansenga and Tubi. This supports the claim by the plaintiffs and 5th and 6th defendants that the Soli Shamifwi tradition of ascendancy to the throne of Chief Bundabunda has in the past been on rotational basis among the three eligible families.
- d) The family tree shows the 4th and 5th chief as Kacheta and Selemani Chanyabweya separately on the side but below Tubi without indicating which of the three lineages they were from.

The mother of Selemani was Nyemba. The document also separately outlines in detail the children Nyamao, Kaluba and Mwanamsao who are referred to as the 1st, 2nd and 3rd house respectively.

- e) The sixth chief Musona, the son of Nyamao only had sons and no daughters and it follows that there would be no successors to the throne from this line of the 1st house after the demise of the 6th chief because the chieftainship is matrilineal.
- f) Musona chose Thomo Maluku and Chimota as his 1st and 2nd choice successors. The mother of both Thomo Maluku and Chimota was Kaluba as the matriarch. Kaluba had six children including two daughters Manyenga and Nankole.
- g) Mwanamsao the mother of the 3rd house is shown to have five children out of whom one was a daughter called Mukoka, it is not clear from the family tree where the Mulonga, Nyasenga and Tubi families belong in terms of the 2nd and 3rd house.
- h) The first six successive chiefs were Mboshi, Shakanda, Mubamba, Kacheta, Selemani Chanyabweya and Musona who was on the throne in 1972 when the family tree was verified and stamped by the District council.

- i) From 1973/1974 to date, the chiefs who were on the throne were Jackson Chipungu, Bernard Chipungu and Chakalashi. Jackson took over from Lufwaneti. There is no mention of Musona who is indicated as chief who was on the throne during the period when the 1972 family tree was lodged. Nevertheless it is clear that out of the three original lineages, the first one expired due to the fact that at some point, there were no female children to continue the lineage. This means that there are currently two lineages that are eligible to ascend to the throne of chief Bundabunda.
- j) If Musona is acknowledged, the total number of chiefs who have ascended to the throne of Chief Bundabunda are 10 instead of the 9 mentioned in the family tree.
- k) The assertion by the 1st to 4th defendants that the 10th clay pot and spear represent the 7th defendant is untenable in light of the general evidence that the clay pots and spears in the shrine represent deceased chiefs.
- l) With regard to the claim that the Kashimbi family is one of the three royal families that are eligible to ascend to the chieftainship and that Chimapepe as one of their own was a second chief Bundabunda, the trial judge found that in line

with the outlined chiefs, the plaintiffs did not prove to the required standard that Chimapepe was ever a chief or that he ascended to the throne from the Kashimbi family.

- m) The lower court found that the claim that all chiefs hailed from the Mulonga lineage was at variance with the family tree dated 12th April, 1972 which indicates that the 1st, 2nd and 3rd chiefs hailed from three different matriarchs which points to the fact that there was rotation amongst the three lineages.
- n) The trial judge did not accept the 1st to 4th and 7th defendant's assertion of intra Mulonga family rotation.
- o) The trial judge ordered that succession be rotational between the two remaining lineages that are eligible to ascend to the throne.
- p) The trial judge further found that the evidence showed that Chakalashi and at least three successive chiefs before him hailed from the Mulonga lineage and the system of rotational succession dictates that the successor ought to now hail from the Tubi kalifu lineage.
- q) The plaintiffs claim that the new chief Bundabunda must come from kashimbi family was dismissed.

r) The 5th and 6th defendants counterclaim succeeded and the court ordered that the Bundabunda chieftainship be on rotational basis between the Mulonga and Tubi Kalifu lineages. The installation of Fickson Chikweleti by the Mulonga lineage was annulled. It was ordered that the next chief should come from the Tubi-Kalifu lineage who should convene to choose the successor to the throne in line with the Soli Shamifwi tradition and custom of the Bundabunda chiefdom.

7.0 THE 1st TO 3RD APPELLANT'S GROUNDS OF APPEAL AND ARGUMENTS

7.1 The 1st to 3rd appellants appeal is based on the following grounds:

- 1. The learned trial judge misdirected herself in law and fact, when she disposed of the appellants entire claim in the suit, by wholly relying on the contents of the Bundabunda family tree dated 17th April, 1972 as full and complete historical lineage of Chief Bundabunda when the same contained contradictory statements and its authenticity was discredited at trial.*

2. *The learned trial judge misdirected herself in law and fact, when she failed, refused and or neglected to take into account the appellants evidence relating to the historical origins of the Chief Bundabunda matriarch but instead conveniently opted to entirely rely on the Chief Bundabunda family tree dated 17th April, 1972 which document was questioned and impugned at trial.*
3. *The learned trial judge misdirected herself in law and in fact, when she found that the appellants family lineage was patrilineal and they consequently could not ascend to the throne of Chief Bundabunda, contrary to the ample evidence at trial proving such entitlement.*
4. *The learned trial judge completely misdirected and misapplied the undisputed facts before her, when upon finding it correctly that the ten (10) clay pots in the shrine represented the past ten (10) dead chiefs, she proceeded to make a wrong conclusion by double counting Musona and Chief Lufwaneti as separate and distinct persons, when in fact it was one and the same person.*
5. *Having made a wrong conclusion that Musona and Chief Lufwaneti were separate and distinct persons, the learned trial judge fell into a complete grave error by finding that chief*

Chimapepe did not exist and consequently could not have been the second Chief Bundabunda.

7.2 On ground one, the appellants argued that the family tree dated 17th April, 1972 which the trial judge relied on contained contradictory statements and its authenticity was discredited in the following ways;

1. The Verification Report which validates Chief Bundabunda's Family Tree dated 17th April, 1972 was not produced before the trial Court to prove that indeed the said family tree underwent a validation process prior to the stamping of the said document.
2. The Minutes taken during the verification of the 1972 family tree were not produced in Court to show that there were consultative meetings with traditional authorities to come up with the said family tree as per the standard requirements and norm.
3. DW4 could not recall the name of the relevant officer who prepared the verification report despite telling the Court that she went through the said report.
4. The 1972 family tree indicated that Chief Musona who was allegedly Chief at the time, had nominated one Thomo Maluku

and Chimoto as his first and second choice of successor contrary to the common evidence by the parties that a sitting chief in the Bundabunda Chiefdom does not nominate his successor.

7.3 In view of the above, counsel submitted that the finding made by the trial court that the Bundabunda family tree dated 17th April, 1972 was validated and a true depiction of what it communicates and the subsequent reliance on the same by the trial judge in arriving at her decision, was made in the absence of relevant evidence; as aptly demonstrated and that on a proper view of the said evidence no trial court could have reasonably arrived at the said finding.

7.4 In support of grounds two and three, counsel submitted that the oral and documentary evidence led on behalf of the 1st to 3rd appellants relating to the historical origins of the Chief Bundabunda's matriarch was not discredited by the defendants'. The appellants also led evidence to the effect that the Tubi kalifu family had a memorandum of understanding signed with the Kashimbi family where they acknowledged that the Kashimbi family was part of the three royal families.

7.5 Evidence in rebuttal of the same was not only lacking credibility but was also contradictory in that the person who signed the said document admitted to be a liar before court. Counsel relied on the case of **Roland Leon Norton v. Nicholas Laston** ⁽¹⁾ where it was held that;

“It is trite that a party to a contract is bound by it even though it may not have been in the interest of the party entering into the contract. Even a bad contract, if it is valid, is binding.”

7.6 It was further submitted that the memorandum of understanding signed by the Kashimbi and Tubi-Kalifu families constitutes a legally binding agreement between the parties irrespective of the fact that it may not have been in favour of the Tubi-Kalifu family. Therefore, the court was duty bound to enforce the agreement.

7.7 Counsel for the appellants pointed out that PW5 led evidence at trial in form of a chart which appears at page 238 of the record of appeal depicting how the Kashimbi, Tubi Kalifu and Mulonga families inherit names of their dead relatives. The trial judge ignored this vital piece of evidence which shows that members of the Kashimbi family are not patrilineal as

claimed by the respondents but matrilineal and this evidence was not discredited at trial. Since members of the Kashimbi can inherit names of dead relatives from the Mulonga family and vice versa, based on the matrilineal factor, they should not be denied the right to ascend to the throne of Chief Bundabunda.

7.8 Counsel further submitted that according to the case of **Kojo v. Bonsie** ⁽²⁾ the judge should have endeavored to demonstrate and justify why she opted to rely on the respondent's family tree as opposed to the 1st to 3rd appellants evidence. Especially that the said family tree was heavily discredited at trial as demonstrated in ground one. Counsel therefore urged us to interfere with the trial court's finding of fact to the effect that the Kashimbi family were not part of the royal family and therefore not entitled to the Bundabunda chieftaincy. Reliance was placed on the authority of **Attorney General v. Marcus Kampamba Achiume** ⁽³⁾ where it was held that:

“An unbalanced evaluation of the evidence where only the flaws of one side but not of the other are considered is a misdirection which no trial Court should reasonably make and entitles the appeal Court to interfere.”

7.9 In support of ground four, it was submitted that the lower court correctly observed that the ten arrows and clay pots in the shrine represented the total number of chiefs who had ascended to the throne of Chief Bundabunda. However, the 1972 family tree indicates a contrary position: nine instead of ten Chiefs. Musona who appears in the 1972 family tree as Chief Bundabunda number 6 was never mentioned by the respondents. Instead, the common evidence was that Chief Bundabunda number 6 was Lufwaneti and that Jackson Chipungu who was chief Bundabunda number 7 took over from Lufwaneti. The above proposition does not only call into question the authenticity of the 1972 family tree but also leads to the conclusion that Musona and Lufwaneti are one and the same person but were counted as distinct persons. This confirms DW6's evidence that Musona was Chief in 1972. If Musona and Lufwaneti are one and the same person, then the number of chiefs reduces from ten to nine which gives credence to the 1st to 3rd appellant's evidence and contention that the extra arrow and clay pot in the shrine belonged to Chimapepe from whom the 1st or 3rd appellants claim their entitlement to the throne of Chief Bundabunda.

7.10 In view of the foregoing, it was submitted that the lower court's findings should be interfered with as they were based on a misapprehension of facts. Counsel also submitted that since the Kashimbi family has held the throne only once through Chimapepe and the other families have held it more than once, based on the principle of rotation, the next Chief Bundabunda must come from the Kashimbi family.

8.0 THE 4TH TO 8TH APPELLANT'S GROUNDS OF APPEAL AND ARGUMENTS

8.1 The 4th to 8th appellant's appeal is based on the following grounds:

- 1. The learned trial Judge erred in law and in fact when she held that the Bundabunda chieftancy is held on rotational basis between the Mulonga family and the Tubi Kalifu in the face of undisputed evidence showing that the last four consecutive chiefs, namely Lufwaneti, Jackson Chipungu, Bernard Chipungu and Patrick Chakalashi were all from the Mulonga family.*
- 2. The learned trial Judge erred in law and fact when she held that one of the clay pots at the shrine represented a purported Chief Musona and not Chief Bundabunda, Fickson Chikweleti*

when the undisputed common evidence of all the parties is that there has never been a Chief Musona on the Bundabunda throne.

8.2 In support of ground one, it was submitted that the respondents needed to prove that the ascendancy to the Bundabunda throne was on rotational basis. In proving this assertion, they were duty bound to show that in this case where traditional history is passed on orally, the latest trend supported their claims. Counsel relied on the case of **Kojo v. Bonsie** ⁽²⁾ where it was held that:

“Where there is a conflict in traditional history, which has been handed down by word of mouth, one side or the other must be mistaken, yet both may be honest in their belief. In such a case, demeanor of witnesses is of little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence, and by seeing which of the two competing histories is more probable.”

8.3 Counsel contended that, reference to recent facts in this case clearly established that there has not been any rotation in the

recent past. All the witnesses before court testified that it has only been the Mulongas' who have ascended to the throne in the time that they have all been alive. The trial court therefore erred in referring to the 1972 family tree when it contradicted the testimonies of all the parties and other available evidence.

8.4 Counsel also relied on case of **A. G v. Marcus Kapamba Achiume** ⁽³⁾ it was held that:

“An 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 can reasonably make.”

8.5 Counsel submitted further that contrary to the trial judge's comments about DW4's evidence, DW4's evidence was challenged by the appellants and the Chief Bundabunda family tree dated 17th April, 1972 was exposed as containing contradictory statements and its authenticity discredited in the way stated by the 1st to 3rd appellants.

8.6 In support of ground two, it was argued that none of the witnesses testified that there was ever a Chief Musona on the throne even though the trial court in eliminating Fickson Chikweleti from the traditional clay pots stated that one of the clay pots represented Chief Musona. He therefore, urged us to uphold this ground of appeal and hold that the last clay pot represents Fickson Chikweleti who was duly installed as Chief Bundabunda.

8.7 It was further submitted that annulling the installation of Fickson Chikweleti as Chief Bundabunda despite the evidence that there was no rotation in the ascendancy to the throne was erroneous. The prayer was that Fickson Chikweleti be reinstated as Chief Bundabunda.

9.0 RESPONDENT'S HEADS OF ARGUMENT IN RESPONSE TO THE 1ST TO 3RD APPELLANTS ARGUMENTS

9.1 In response to ground one, it was submitted that the trial court was on firm ground when it held that the Bundabunda family tree dated 17th April, 1972 was validated. DW4 stood her ground during cross examination and the 1972 family tree was not successfully discredited.

9.2 The appellants did not produce any evidence to suggest that the report was never prepared or does not exist. Failure by the respondents to produce it, does not entail that it is non-existent. DW4 testified that the minutes of the verification meeting existed.

9.3 Counsel submitted that the fact that DW4 could not recall the name of the officer who verified the 1972 family tree, does not entail that such an officer does not exist.

9.4 The three parties to the action gave different versions of the lineage of the Bundabunda chiefdom. It is highly probable that the evidence may not contain the complete history of the Bundabunda chiefdom. The appellants have failed to establish that this case warrants the reversal of the findings of fact. Reference was made to the case of **Nkhata and Four others v. The Attorney General** ⁽⁴⁾ where the principles on which findings of fact can be reversed were outlined as follows:

“A trial Judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated that:-

- a) *By reason of some non-direction or mix-direction or otherwise the Judge erred in accepting the evidence which he did accept;*
- b) *In assessing and evaluating the evidence, the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account, some matter which he ought to have taken into account; or*
- c) *It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the Judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witness; or*
- d) *In so far as the Judge has relied on manner and demeanor, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter given an untrue answer.”*

9.5 It was contended that none of the conditions outlined above apply to this case.

9.6 On grounds two and three, counsel submitted that the court was faced with the task of determining which of the three

versions of history was probably true on a balance of probabilities and it warned itself of the problems related to such evidence. The 1st to 3rd appellants' want the court to believe their version on the basis of a handwritten chart which they submitted which could have been written by anyone. The evidence on the chart was not corroborated by any other independent party.

9.7 The 1st to 3rd appellants' further submitted that the court below should have considered the memorandum of understanding but at trial, DW3 who signed it renounced it saying its contents were a lie and that he merely endorsed it as a strategy to defeat the 5th to 6th appellants. The memorandum of understanding executed in 2013 cannot alter a historical fact. It has been determined by the court below that the 1st to 3rd appellants are not eligible to ascend to the throne and DW3's execution of the documents cannot alter that fact.

9.8 In the alternative, counsel submitted that the memorandum of understanding was executed under a common mistaken belief by the parties that the 1st to 3rd appellants were heirs to the throne.

9.9 He referred to the case of **Bell v. Lever Brothers** ⁽⁵⁾ on the definition of a mutual mistake, thus:

“A mutual mistake as to some fact which, by the common intention of the parties to a contract, whether expressed or implied, constitutes the underlying assumption without which the parties would not have made the contract they did, and which, therefore, affects the substance of the whole consideration, is sufficient to render the contract void.”

9.10 Counsel further submitted that the 1972 family tree was produced by Chongwe Municipal Council, an independent party. The family tree was prepared and verified in 1972 well before the current dispute arose. Therefore, going by the authority of **Kojo v. Bonsie** ⁽²⁾ the traditional history should have been tested by comparing the competing histories to see which one is more probable.

9.11 The lineage that dates back as far as the 17th century was tested against the 1972 family tree and the court correctly determined that the respondent’s version was more probable.

9.12 In countering grounds four and five, it was submitted that the 1st to 3rd appellant's submission that Chiefs Musona and Lufwaneti were one and the same person was not supported by any evidence on record. The clay pots referred to cannot prove the existence of the alleged Chief Chimapepe because the evidence on record did not indicate that the names of the Chiefs were written on the pots.

10.0 RESPONDENT'S HEADS OF ARGUMENT IN RESPONSE TO THE 4th TO 8th APPELLANTS ARGUMENTS

10.1 To counter the first and second grounds of appeal, counsel submitted that the 4th to 8th appellants lamentably failed to prove their claims.

10.2 The 4th to 8th appellant's submission that since the last four chiefs came from the Mulonga lineage, there has never been rotation, ignores the fact that the Bundabunda lineage goes as far back as the 17th century and there was evidence to establish that there was rotation of chiefs among the eligible families.

10.3 The 4th to 8th appellant's submissions that none of the witnesses presented any evidence on the existence of Chief

Musona was not correct, as the 1972 family tree clearly indicates Musona as the 6th Chief.

11.0 THE 1ST TO 3RD APPELLANT'S REPLY

11.1 Counsel reiterated that all the three families, Mulonga, Kashimbi and Tubi-Kalifu are related and follow the matrilineal system as can be seen from inheriting (succession) of names from each other's family before and after the disputed Bundabunda family tree of 1972. Succession to the throne is also matrilineal and the rules of inheritance among the Solis are the same, whether it relates to inheritance of an ordinary name or ascendance to the throne. Therefore it was a misconception on the part of the court below to find that the Kashimbi family follows the patrilineal system contrary to the evidence.

11.2 The memorandum of understanding signed by PW1 on behalf of the Kashimbi family and DW3 on behalf of the Tubi-Kalifu family was confirmation of the historical fact that the Kashimbi are matrilineal and entitled to ascend to the throne of Chief Bundabunda.

11.3 The argument by the respondents' that the memorandum of understanding was executed under a common mistake is purely an afterthought as they did not raise this argument in the court below and they are prohibited from doing so on appeal. To fortify this argument, counsel made reference to the case of **Mususu Kalenga Building Limited & Another v. Richmans money Lenders Enterprises** ⁽⁶⁾ where the Supreme Court stated *inter alia* that:

“Where an issue is not raised in the Court below, it is not competent for any party to raise it in this Court.”

11.4 Further, the fact that the 1972 family tree was produced by an independent party, should not have been the basis upon which the court below relied on it. The court's finding that the 1972 family tree was not challenged is not correct because it was challenged during cross examination. Moreover, the stamping of the family tree does not in itself prove that it was verified. The verification report and the minutes to show that all the interested families were consulted before the said document was stamped were crucial to the determination of the matter.

11.5 Counsel reiterated that before settling for the 1972 family tree as the more probable of the competing family trees produced before court, the court should have at least endeavored to show why the oral evidence of the various witnesses who testified on behalf of the 1st to 3rd appellants' coupled with other documentary evidence which was not challenged at trial, was not more probable as compared to the 1972 report which quite apart from being discredited also contained contradictory statements.

11.6 He therefore prayed that the appeal be allowed with costs to the 1st to 3rd appellants.

12.0 DECISION OF THIS COURT

12.1 Having considered the record of appeal and counsels written and oral submissions, the issues as we see them are as follows:

- 1) *Whether or not the Bundabunda Chieftainship system of succession is rotational?*
- 2) *Whether the Kashimbi family are heirs to the Bundabunda throne?*
- 3) *Which family lineage should ascend to the throne?*

12.2 We shall deal with these questions together as they are related.

12.3 All the families in this case presented divergent histories. The Kashimbi and the Tubi-Kalifu families claim that succession to the Bundabunda throne is rotational, while the Mulongas' claim that it is not rotational as they are the only heirs to the throne.

12.4 The Tubi-Kalifu family claim that the chiefs who have been on the Bundabunda throne from their lineage were Mubamba, Kacheta and Selamani. The Mulongas' claim that Mubamba and Selemani hailed from the Mulonga family and not Tubi-Kalifu family, while the Kashimbis' stated that Mubamba was from the Tubi-Kalifu family while Selemani was a Mulonga. The Kashimbis' claim inheritance to the throne through Chimapepe whom they say was the second Chief Bundabunda. However, both the Mulongas' and the Tubi-Kalifu disputed that there was ever a Chief Chimapepe on the Bundabunda throne. Hence, the claim by the Tubi-Kalifu family that the throne should rotate between them and the Mulongas'. The Tubi-Kalifu also allege that the Kashimbis' are not matrilineal but patrilineal.

12.5 The joint report dated 29th August, 2013 signed by David Musona (PW6) on behalf of the Kashimbi's and Kausa Machindalo (DW3) on behalf of the Tubi-Kalifu family shows that the system of succession was rotational among the three families and both the Tubi-Kalifu and the Kashimbis' want the system of rotation to continue. This report also expressly recognized the Kashimbis' as eligible heirs to the throne of Bundabunda. Even the meeting held on 30th August, 2013 involving the three lineages confirmed that heirs to the throne hailed from the three lineages. The dispute arose when the Mulonga's were averse to rotation of chiefs amongst the three lineages.

12.6 We take note that DW3 in his evidence disputed the eligibility of the Kashimbis' as heirs to the throne and stated that he only endorsed the joint report because he wanted to fight against the Mulongas'. It is trite law that parol evidence cannot alter the contents of a written document. We are fortified by the case of **Rodgers Chama Ponde and 4 Others v. Zambia State Insurance Corporation Limited**, ⁽⁷⁾ where it was held that:

“Parol evidence is inadmissible because it tends to add, vary or contradict the terms of a written agreement validly concluded by the parties.”

12.7 We therefore, uphold the High Court’s finding that the Bundabunda system of succession is rotational. However, we set aside the holding that it is only rotational between the Tubi-Kalifu and Mulonga families and hold that it is rotational among all the three eligible royal families being the Mulonga, Tubi-Kalifu and Kashimbi families.

12.8 The issue of whether the Kashimbi’s are heirs to the throne can also be resolved by the evidence of the clay pots. According to the evidence from the Kashimbi family, there are two shrines, one is open and only has a roof and is taken as a grave. It contains 12 clay pots signifying chiefs who have reigned before. The other is enclosed and has a bow and 10 arrows signifying chiefs who have been on the throne. There is a discrepancy in the total number of clay pots and arrows because two Chiefs; Chibuye and Malambo had died while acting as chiefs. Although, the Mulongas’ claim that the 10th clay pot represents Fickson Chikweleti, our position is that this argument is untenable because there was a consensus

amongst all the families that these clay pots represent the deceased chiefs. Therefore, the 10th clay pot cannot belong to a person who is alive and we uphold the lower court's finding that the 10th clay pot does not represent Fickson Chikweleti as he is still alive.

12.9 Furthermore, the Tubi-Kalifu and the Mulongas' arguments that there should only be 9 clay pots in the shrine instead of 10 as there have only been 9 chiefs is contrary to the evidence that there are 10 clays pots. Our position therefore is that one of the 10 clay pots signifies Chief Chimapepe as the history given by the Kashimbi family that there were 10 past Chiefs is more probable than that of the Tubi-Kalifu and the Mulonga's: The case of **Kojo v. Bonsie** ⁽²⁾ applies.

12.10 We do not agree with the trial Judges finding that there was a Chief Musona as the 6th Chief based on the family tree dated 17th April, 1972, due to the fact that she did not take into consideration the following inconsistencies:

1) The family tree shows that Musona was the sixth chief, succeeded by Jackson Chipungu. However, evidence from the parties shows that the 6th chief was Lufwaneti who was

succeeded by Jackson Chipungu and none of the parties mentioned Chief Musona in their oral evidence.

- 2) The verification report and the minutes of the meeting to prove that all the interested parties were consulted before the said document was stamped was not produced in court.
- 3) The officer who prepared the verification report (if any) was not mentioned by name or called as a witness.

12.11 Due to the aforementioned inconsistencies, we find it necessary to tamper with the findings of the court below as it has been demonstrated that in evaluating the evidence, the trial judge misapprehended the facts, see the case of **Nkhata and Four others v. Attorney General.** ⁽⁴⁾

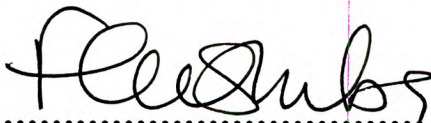
12.12 We now turn to address the issue of which lineage should rule. The evidence shows that the Mulongas' have ruled six times. The Tubi-Kalifu have ruled twice while the Kashimbis' have only ruled once. There was no evidence that the three lineages ever agreed to stop the rotation system. It is clear that the Mulonga's had held on to the throne against the will of the others. For these reasons we cannot fault the lower court for nullifying the installation of Fickson Chikweleti as Chief Bundabunda as the tradition of rotation must be revived in the interest of preserving the soli custom and in the interest of justice.

13.0 CONCLUSION

- 13.1 In closing, we set aside the lower court's decision that the successor to the throne should come from the Tubi-Kalifu family and hold that the Bundabunda chieftaincy should rotate to the Kashimbi royal family who have duly selected the 1st appellant as the successor.
- 13.2 Since this is a matter of public interest, we hold that each party should bear its own costs.



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C.K. MAKUNGU
COURT OF APPEAL JUDGE



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F. M. CHISHIMBA
COURT OF APPEAL JUDGE



.....
P.C.M. NGULUBE
COURT OF APPEAL JUDGE