

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

Appeal No. 173 of 2020



BETWEEN:

ALFRED BANDA (Senior Chief Kopa)

1ST APPELLANT

RICHARD CHILUFYA

2ND APPELLANT

CHRISPIN MUMBI CHIUNDAPONDE

3RD APPELLANT

AND

LAGERN KUNDA

RESPONDENT

Coram: Sichinga, Ngulube, Banda-Bobo, JJA

On 21st April, 2022 and 16th August, 2022

For the Appellants: Mr. K. Kombe and Ms. K. Parshotam of Messrs Andrew and Partners

For the Respondent: Mr. L.E. Eyaa of Messrs Linus E. Eyaa and Partners

JUDGMENT

Sichinga, JA delivered the Judgment of the Court.

Cases referred to:

1. *Nkhata & Others v. The Attorney General* (1966) Z.R 124
2. *Mohamed v The Attorney-General* (1982) ZR 49
3. *Zulu v. Avondale Housing Project Limited* (1982) ZR 172
4. *Chief Mpepo v. Senior Chief Mwamba* SCZ Judgment No. 25 of 2008
5. *Ted Chisavya Muwowo Alias and another v. Abraham Muwowo alias Temwanani and another* SCZ/8/50/2014
6. *Nkhata & Others vs. The Attorney General* (1966) Z.R. 124
7. *Attorney-General v Kakoma* (1975) ZR 216
8. *Attorney-General v Marcus Kampumba Achiume* (1983) ZR 1

Other Authorities referred to:

1. *Phipson on Evidence, seventeenth edition (London, Thomson Reuters (Legal) Limited, 2010)*

1.0 Introduction

- 1.1 This appeal is against the Judgment of the High Court at Kabwe (C. Zulu J) delivered on 29th June, 2020 concerning the chieftaincy of Chiundaponde of the Bisa people in the Mpika District of Muchinga Province of Zambia.
- 1.2 The respondent, Lagern Kunda was the plaintiff in the court below. He took out an action by way of writ against the appellants and Bangweulu Wetlands Management Board (not party in this appeal) seeking the following reliefs:
 - i. An order that he was lawfully chosen as Chief Chiundaponde by a competent selection college on 20th December, 2014 in accordance with Bisa customs and tradition;
 - ii. An order for interim injunction to restrain Alfred Banda and his agents from carrying on a meeting on 28th February, 2017 to undermine the plaintiff's authority;
 - iii. An order to Bangweulu Wetlands Management Board to pay his quarterly allowances or entitlement from his selection to date;
 - iv. Damages against the defendants for inconvenience, mental and emotional distress;
 - v. Any other reliefs; and
 - vi. Costs

2.0 Background

- 2.1 A summary of the factual background was that upon the demise of the 'caretaker chief,' Nathan Kabamba Mpempa (the 9th Chief Chiundaponde), the plaintiff was selected allegedly in accordance with customs and traditions of the Bisa people. He assumed the throne as Mando Chileya Kantu. He was selected as the 10th Chief Chiundaponde at a meeting held on 20th December, 2014.
- 2.2 The plaintiff alleged that by not recognizing him as the 10th Chiundaponde, the defendants had created tension amongst his subjects and caused him to suffer damage. He claimed that Senior Chief Kopa attempted to hold a meeting on 28th February, 2017 and conspired to dethrone him and have installed the 2nd defendant, Richard Malambo Chilufya, as the Chief, with support from the 3rd defendant, Chrispin Mumbi Chiundaponde and the 4th defendant, Bangweulu Wetlands Management Board. He further alleged that the 4th defendant had refused to pay him his quarterly allowances.
- 2.3 In the defence settled by the 1st, 2nd and 3rd defendants, it was alleged that the purported selection of the plaintiff as Chief Chiundaponde was not done in conformity with Bisa customs and traditions.
- 2.4 The 4th defendant, a non-governmental organization managing the community park and ecological system in six (6) chiefdoms including Chiundaponde, in its defence, denied that it had refused to recognise the plaintiff as Chief Chiundaponde, but

that it had resolved to remain neutral in the dispute and to withhold payment of the quarterly allowances to the plaintiff until the wrangles were resolved.

3.0 The decision of the court below

- 3.1 Upon trial of the matter, the learned trial Judge noted from the outset that the evidence was largely based on folklore, which is traditional beliefs, customs, stories and myths passed on from one generation to the next by word of mouth.
- 3.2 The learned Judge was mindful that his role was not to choose or impose the 10th Chief Chiundaponde, but that his role was a fact finding process based on evidence confirming established customs and traditions. He found that there was no dispute as to the genealogy of Chiundaponde chiefs from the 1st Chief, Ponde Uutamfya to the 8th Chief, Mando Chileya, also known as Kantu.
- 3.3 He found that there was evidence that Senior Chief Kopa was at the centre of a scheme to dethrone the plaintiff, by way of a meeting he organized on 28th February, 2017, under the guise of the Bisa Supreme Council or Bisa Royal Establishment, which are not recognised under Bisa Customs or traditions or even by way of a binding agreement to form an association or organization of all Bisa Chiefs.
- 3.4 The learned Judge found that the people of Chiundaponde are matrilineal, tracing their decent through a female ancestor. That when it came to succession, a chief is succeeded by his

brothers, or nephews born from the Chief's sisters or grandsons, born from the Chief's maternal nieces. The learned Judge found that the duty to select a chief was the responsibility of the deceased chief's relatives, particularly the queen mothers, Bana Mfumu. That once the royal electoral college has settled on an individual, upon being satisfied as to his eligibility and suitability, a gathering is convened at which the person selected to be Chief Chiundaponde is unveiled.

- 3.5 He found the Bisa Chiefdoms, by custom and traditions, did not have a central authority. That they were independent of one another in terms of exercising territorial jurisdiction in the respective chiefly offices. He also found that the Bisa Chiefdoms were interdependent on each other to co-exist as a tribe because they share the same customs, culture and traditions. Therefore, the absence of Senior Chief Kopa or his nominated representative at the installation of a Bisa Chief did not render the installation a nullity according to Bisa custom.
- 3.6 The learned Judge found that following the demise of the 9th Chief, one Newton Ng'uni was chosen as an interim caretaker chief to oversee the transition period. The lower court found that Ng'uni was duly selected by two warring camps in accordance with Bisa customs and traditions. In his capacity as interim Chief, Ng'uni convened a meeting on 20th December, 2014 to select the 10th Chief Chiundaponde at which the plaintiff was chosen. The plaintiff was unveiled by his counterpart, Chief Nabwalya.

- 3.7 There was, central to this dispute, the question whether or not the 9th Chief, Nathan Kabamba Mpempa was a caretaker chief. The lower court found that even though he had ruled from 1951 to 2013, he was considered a caretaker and that was one of the reasons he failed to name a successor.
- 3.8 The learned Judge held that the 10th Chief Chiundaponde was selected in accordance with Bisa customs and traditions at the meeting convened on 20th December, 2014 by the acting chief.

4.0 The appeal

- 4.1 Dissatisfied by the Judgment of the lower court, the 1st, 2nd and 3rd defendants appealed, raising eight (8) grounds of appeal as follows:

- 1. That the learned trial Judge erred in law and in fact when he held that there was no dispute as to the genealogy of Chiundaponde Chiefs from the 1st Chief, Ponde Uutamfya, to the 8th Chief, Mando Chileya alias Kantu without taking into account the 9th Chief, Nathan Kabamba Mpempa;**
- 2. That the learned trial Judge erred in both law and fact when it held that the evidence on the record was unambiguous that the 1st appellant, Senior Chief Kopa was at the centre of the scheme to dethrone the respondent without properly considering the evidence before it thereby prejudicing the appellants' case;**
- 3. That the learned trial Judge erred in law and fact when it held that it is for this reason that, a meeting held on November 20, 2014, in an attempt to find a successor, the 1st appellant, was chased from Chiundaponde with stones, when the gathering at Chiundaponde found his continued presence at the said meeting to be inimical to the chieftaincy in particular. Otherwise, if he was supreme, he would have stamped his supremacy;**
- 4. That the learned trial Judge erred in law and fact when it held that the status of Senior Chief Kopa, the 1st appellant, in the**

context of Bisa customs and traditions is to be understood to mean, he is at par with other Bisa chiefs;

- 5. That the learned trial Judge erred in law and fact when it held that a caretaker chief or indeed an acting chief as discerned from the evidence, in particular to the testimonies of PW2 and PW6, the term falls into two categories and that the 9th Chief Chiundaponde was a caretaker chief with personal honours;*
- 6. That the learned trial Judge erred in law and fact when it held that it was satisfied that the acting Chief had authority to convene the meeting held on December 20, 2014 to select the 10th Chief Chiundaponde, at which the respondent was selected, unveiled or presented to the chiefdom by his counterpart, Chief Nabwalya;*
- 7. That the learned Judge erred in law and fact when it held that the prior to the demise of the 9th Chief Chiundaponde, Nathan Kabamba Mpempa, was sincerely forthright, that the throne was non-inheritable by his direct nephews, or grandnephews etc. because the throne did not belong to him, but the royal family of Mr. Lambalika (PW6); and*
- 8. That the learned trial Judge erred in law and fact when it held that the selection of the respondent as the 10th Chief Chiundaponde was done in accordance with Bisa custom and traditions.*

5.0 The appellants' submissions

- 5.1 Mr. Kombe, learned counsel for the appellants, relied on the appellants' heads of argument filed on 25th September, 2020 and a list of authorities of even date. The submissions begun with a preface of the claim in the lower court, which we have captured in the background in this judgment.
- 5.2 In support of ground one it was submitted that the learned trial Judge's findings that there was no dispute as to the genealogy of Chiundaponde Chiefs from the 1st Chief, Ponde Uutamfya, to the 8th Chief, Mando Chileya alias Kantu, flew in the teeth of the evidence of Richard Malambo Chilufya (DW2)

who traced the family from the 5th Chiundaponde known as Kapotwe Musanda. It was submitted that the 1st to 4th Chiefs and their families were not well known in so far as chieftainship was concerned. Further, that Richard Malambo Chilufya (DW2) disputed the family tree that had been presented before court by Lagern Kunda (PW1) to the extent that he had neither had knowledge of the name of the sister to the 8th Chief Mando Chileya Kantu nor who her daughter was.

5.3 It was submitted that the learned trial Judge erred when he stated that there was no dispute as to the genealogy of the Chiundaponde chiefs from the 1st chief to the 8th chief. That the evidence which the learned trial Judge based his decision on was not supported by evidence on record as such he erred in assessing and evaluating the evidence. Reliance was placed on the case of ***Nkhata & Others v. The Attorney General***¹ wherein the Supreme Court set out when an appellate court will interfere with findings of fact by a lower court.

5.4 In respect of ground two, Counsel contended that it is trite law that he who alleges must prove. That the law on who bears the burden of proof and how it ought to be discharged in civil matters is a well settled principle. It was submitted that the general rule relating to the burden of proof in civil cases is stated as follows by learned author of ***Phipson on Evidence***¹, at page 151 paragraph 6-06:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially

asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."

- 5.4 That this general rule was acknowledged in the case of ***Mohamed v The Attorney-General***² where the Supreme Court stated that he who alleges certain facts must prove those facts alleged.
- 5.5 It was contended that the meeting organized by the 1st appellant on 28th February, 2017 was not for all intents and purposes convened to dethrone the respondent as alleged. It was submitted that the 1st appellant convened the meeting to resolve the wrangles in the chiefdom.
- 5.6 Counsel contended that the learned trial Judge erred when he held that the 1st appellant was at the centre of the scheme to dethrone the respondent as no evidence whatsoever was led to substantiate the allegations levelled against him.
- 5.7 On ground three, it was submitted that it is not in dispute that a meeting was held on 20th November, 2014. That the lower court held that the 1st appellant was chased from Chiundaponde with stones, and his presence at the meeting was inimical to the chiefdom. Yet the evidence on record was such that Charles Mubanga (PW3) clarified that at the time of the meeting, the 1st appellant was annoyed over the allegations that he had stolen money donated towards the funeral of the

deceased chief. That PW3 said people were agitated because he did not address the issue the 1st appellant went for, as such the meeting ended abruptly.

5.8 Reference was made to the case of **Zulu v. Avondale Housing Project Limited**³ in which the Supreme Court held that as an appellate court would not reverse the findings of a trial court unless it was satisfied that:

- a) the findings in question were either perverse or made in the absence of any relevant evidence; or
- b) the findings are based on a misapprehension of the facts; or
- c) the findings are such that on a proper view of evidence, no trial court acting correctly can reasonably make.

5.9 It was submitted that the court's conclusion as to the reasons why the 1st appellant left the meeting was made in the absence of evidence or under the misapprehension of facts, as the issue that was at play was that of stolen money relating to the funeral of the late chief. Further, it was argued that the issue of the 1st appellant being supreme cannot be brought in issue as his title suggests that he is the senior chief of the Bisa people. It was contended that the 1st appellant did not present himself as the supreme leader of the Bisa people, but was only the senior chief of the Bisa people. Therefore, an unruly crowd cannot be used as a basis to demean the 1st appellant. That the yardstick used by the trial court was devoid of any proper

evidence to show that the unruly crowd had no respect for the 1st appellant.

5.10 In ground four, it was submitted that the status of the 1st appellant, in the context of Bisa customs and tradition cannot be at par with other Bisa chiefs. Reliance was placed on the draft constitution of the proposed Bisa Supreme Council referred to by the court which showed therein that the 1st appellant was the representative of Bisa chiefs in various issues, including coordinating from time to time with the government and chiefdoms. Further, that his authority over the other Bisa chiefs could be seen in the evidence of Newton Ng'uni (PW2) who stated that according to the Bisa custom, the 1st appellant facilitated his appointment as the acting chief. That Ng'uni further stated that his selection as acting chief, was blessed by the 1st appellant.

5.11 It was submitted that the lower court erred to equate the 1st appellant's status with other chiefs.

5.12 With regard to the fifth ground, we were referred to a portion of the impugned judgment at page J57 where the learned Judge said the following:

“Therefore, the manner of his burial was not solely sufficient to give him the title of caretaker chief. I do not think that the manner of his burial was conclusive evidence that he was a caretaker chief when the 8th chief was largely buried in a similar fashion.”

5.13 It was submitted that the above holding shows that the 9th Chief Chiundaponde was not considered as a caretaker chief because of the manner in which he was treated at the time he died. In support of this submission, counsel cited the case of **Chief Mpepo v. Senior Chief Mwamba⁴** in which the Supreme Court stated that:

“We have no difficulty in accepting the argument...that a chief is selected or appointed by the people of the community. The chief is to superintend over in accordance with the customs and tradition of that community. It is not the duty of the court as learned trial judge seemed to imply to choose or impose a chief on a community.”

5.14 Counsel submitted that, the court having found that the 9th chief was not a caretaker chief, ought not to have held that he was a caretaker with personal honour, because the treatment which the 9th chief was accorded was similar, if not the same as that of the 8th chief, making him the chief.

5.15 On ground six, it was submitted that the record showed that there was an agreement by both the respondent and the 2nd appellant to meet on 20th December, 2014 for purposes of selecting a chief. That the 2nd appellant clearly stated that the selection meeting held on the said date was not in conformity with the Bisa custom and tradition. That Charles Mubanga (PW3) clarified that it was only an acting chief, according to the Bisa custom, who has the power to convene a meeting to

choose a chief. It was argued that Newton Ng'uni (PW2) was removed from the position of acting chief due to the fact that he turned to be more powerful than the people and this caused the family of the 2nd appellant to withdraw him from the said position as per the evidence of 3rd appellant.

5.16 It was submitted that since the acting chief's authority was withdrawn, he had no authority to convene a meeting on 20th December, 2014 to select the 10th Chiundaponde, as such any meeting that was convened for purposes of selecting the chief was a nullity.

5.17 In ground seven, it was submitted that the respondent testified that according to the Bisa custom, the person to succeed the throne first is the family of the late chief, in the absence of the brothers, nephews or grandchildren. That the 2nd appellant was the person who was to take up the throne after the death of the 9th chief as he came from the deceased's family. The case of ***Ted Chisavya Muwowo and another v. Abraham Muwowo alias Temwanani and another***⁵ was cited where the Supreme Court held as follows:

"We wish to add that where the tradition and custom of a group of people has a process that is to be followed for the selection of a chief, that tradition and custom ought to be followed."

5.18 On the final ground of appeal, reliance was place on submission made in ground six. It was submitted the 10th

Chief Chiundaponde's selection cannot stand as the whole process on the 20th December, 2014 was tainted with illegality as the acting Chief was wanting in authority.

- 5.19 We were urged to allow the appeal, and to send back the matter to the families for selection of a new Chiundaponde after following the customs and traditions of the Bisa people as was outlined in the court below.

6.0 The respondent's submissions

- 6.1 The respondent filed a supplementary record of appeal on 3rd May, 2021 and heads of argument on 3rd June, 2021. Reliance was placed on the same. Grounds two, three and four are argued together, and grounds six and eight are equally argued together. Grounds one, five and seven are argued separately.
- 6.2 In response to ground one, counsel submitted that there were two family trees presented before the trial court. The first one had all the names of the chiefs of Chiundaponde Chieftaincy from the respondent appearing on page 84 and 160 of the record of appeal, and the other one which was an extract from the PhD thesis of Dr. Kingsley with no names at all, and the names to the said extract were inserted by the 2nd appellant. That the family tree presented by the respondent, showed the genealogy which was clear and undisputed. That the PhD thesis appearing on page 181 of the record of appeal, where the appellants extracted their family tree, originally had no names as the 2nd appellant admitted in his evidence on page

283 paragraph 5 of the record of appeal. It was submitted that the said thesis had a question mark on the genealogy which the 2nd appellant could not explain, and that left the court with one family tree with undisputed genealogy which family tree is appearing on pages 84 and 160 of the record of appeal.

- 6.3 It was submitted that the finding of fact that there was no dispute on the genealogy of the Chiundaponde chiefs from the 1st chief, Ponde Uutamfya to the 8th Chief, Mando Chileya *alias* Kantu by the trial court was purely based on the evidence as alluded to above.
- 6.4 It was also argued that the 9th Chief, Nathan Kabamba Mpempa, who was a caretaker chief did not hail from the genealogy of the Chiundaponde chiefs where the 1st Chief, Ponde Uutamfya to the 8th Chief, Mando Chileya *alias* Kantu, the substantive chiefs came/come from. Reliance was placed on the document on pages 84 and 160 of the record of appeal.
- 6.5 Counsel submitted that the findings of the court were properly made based on the evidence before it. Citing the case of ***Nkhata & Others vs. The Attorney General***⁶, we were urged not to interfere with the findings of facts by the trial court as such findings were aptly supported by evidence as demonstrated above.
- 6.6 Responding to grounds two, three and four, counsel supported the position of the trial court that 1st appellant was at the centre of the scheme to dethrone the respondent and enthrone

2nd appellant, and was chased from Chiundaponde with stones, when the gathering at Chiundaponde found the 1st appellant's presence at the said meeting to be inimical to the chieftaincy in particular. That these findings of fact by the trial court were correct, and were also purely based on the following evidence on record.

- 6.7 That the record of appeal reveals on page 14 paragraph 25 that on the 25th October, 2013, the 1st appellant outlined the procedures for selecting a person to act as a chief under Bisa customs and traditions, and the qualifications. On the 16th November, 2013, Newton Isaiah Ng'uni (PW2) was duly selected as the acting chief after the demise of the 9th Chief, at a meeting chaired by the 1st appellant. Page 116, paragraph 30 of the record of appeal refers.
- 6.8 We were referred to the testimony of Pastor Charles Mubanga (PW3) appearing on pages 249 to 258, where he recounted the encounter he had with the 1st appellant. The first encounter is that despite having an acting chief who should come up with a meeting to choose the chief according to the Bisa customs and traditions, the 1st appellant came up with the 20th November, 2014 in which he attempted to choose the chief, which meeting was aborted as explained by PW3 in his evidence at page 253, paragraphs 10 and 15 of the record of appeal. The second encounter was that after 20th November, 2014, the 1st

appellant said the chief would be chosen from his palace as evidenced on page 253, paragraph 10 of the record of appeal.

6.9 It was submitted that the acting chief called for the meeting on the 20th December, 2014 to choose Chief Chiundaponde, and duly invited all concerned people including the 1st appellant. That the 1st appellant decided not to attend on the pretext that he did not know how the meeting was organized. However, the meeting went ahead, and the respondent was duly chosen as the 10th Chief Chiundaponde as evidenced on pages 253 and 254 of the record of appeal.

6.10 We were also referred to the evidence appearing on page 255 of the record of appeal. That PW3 gave an account of the meeting called by the 1st appellant on the 28th February, 2017 under the name of Supreme Council, which body, according to PW3 does not exist at all. He told the court that there was a scheme to dethrone the 10th Chief Chiundaponde. It was submitted that in that meeting, PW3 used the words 'to dethrone the chief because the 2nd appellant's camp went with drums. That they were also celebrating, and PW3 saw a white cloth with one of the chiefs. All the Bisa Chiefs were in attendance except Chief Nabwalya. In that meeting PW3 was accorded an opportunity to speak, and he asked the 1st appellant if he had a person he wanted to enthrone as Chief Chiundaponde. That the 1st appellant did not deny it. That

PW3 further informed the meeting that the 1st appellant was the one bringing confusion in the Bisa land.

6.11 It was submitted that the trial judge was on firm ground when he held that the 1st appellant was at the centre of the scheme to dethrone the respondent, which finding of fact was based on the outlined activities.

6.12 In response to ground five, we were referred to the 1st appellant's evidence on page 277, paragraph 30 of the record of appeal. He told the trial court that a caretaker and acting chief in Bisa customs is one and same person.

6.13 It was submitted that the trial Judge accepted the 1st appellant's evidence. However, the learned Judge found, as discerned from the testimonies of PW1 and PW6, that the term *caretaker* fell into two categories: first, an interim caretaker to oversee the transition period for a period of one year or so whose role is to hand over the mantle of leadership to a substantive chief; and second, a caretaker chief with all the traits of a substantive chief and can rule for life, save upon his demise, he cannot pass his inheritance to his direct blood relations such as his brothers, maternal nephews or grandnephews from his nieces.

6.14 It was submitted that the trial Judge did not err in his analysis of the evidence at all, in this particular issue, as his analysis was supported by evidence which evidence included that adduced by the 1st appellant.

- 6.15 Responding to the sixth and eighth grounds, it was submitted that the trial court was on firm ground when it held that the selection of the respondent as the 10th Chiundaponde was done in accordance with Bisa Customs and traditions.
- 6.16 We were referred to the evidence on record that Newton Ng'uni gave to the effect that he was chosen as acting chief on the 16th November, 2013 by both royal family members in the presence of 1st appellant, and Chief Mukungule, as per Bisa customs and traditions. However, that his purported removal was only done by the family of the 2nd appellant.
- 6.17 That in view of the forestated, the trial Judge held at page 63 of the record of appeal that:

“...the purported removal of the Acting Chief by the Nathan Kabamba Mpempa camp to the exclusion of the Mando Chileya Kantu camp, was untenable; not only not supported by custom or tradition, it was also repugnant to natural justice. I am, therefore, satisfied that the Acting Chief, had authority to convene the meeting held on the 20th December, 2014 to select the 10th Chief Chiundaponde, at which the Plaintiff was selected, unveiled or presented to the chiefdom by his counterpart, Chief Nabwalya.”

- 6.18 It was submitted that the analysis by the trial judge was based on the evidence before court, and therefore, he was on firm ground when he held that PW2 had authority to convene a meeting on 20th December, 2014 to select the respondent as

the 10th Chief Chiundaponde. That the selection was done in accordance with Bisa customs and traditions.

6.19 Turning to the seventh ground, we were referred to the evidence of PW2 on pages 239; PW3 on pages 252 and 253 of the record of appeal; and PW5 on page 262 of the record of appeal. The evidence refers to conversations the late chief had with each of these persons regarding his successor.

6.20 It was submitted that the trial judge was on firm ground when he held that prior to the demise of the 9th Chief Chiundaponde, Nathan Kabamba Mpempa, was sincerely forthright that the throne was non-inheritable by his direct nephews, or grandnephews etc., because the throne did not belong to him, but the royal family of Mr. Lambalika (PW6). Counsel contended that the 9th Chief Chiundaponde, Nathan Kabamba Mpempa did not only tell the 1st appellant about his succession, but he told others as well as demonstrated above. That thereafter, the 1st appellant told PW2, and PW3 about what he was told by 9th Chief Chiundaponde, regarding the throne.

6.21 In conclusion, it was submitted that the trial Judge's findings of facts were based on the evidence on record. We were urged to dismiss the appeal in its entirety with costs to the respondent.

7.0 Decision of this Court

- 7.1 We have carefully considered the record together with submissions of counsel for the parties. As we see it, the appeal is premised largely on challenging findings of fact made by the lower court. The ultimate finding being that the 10th Chief Chiundaponde was selected in accordance with Bisa customs and traditions at the meeting duly convened on 20th December, 2014 by the acting Chief, was clearly a factual finding. The respondent's counsel responded to some of the grounds in clusters. We are of the view that that was indeed the correct approach as some grounds are interrelated. We shall therefore deal with grounds two, three and four together. Grounds six and eight will equally be dealt with in concert, and the rest will be dealt with separately.
- 7.2 The appellants' complaint in the first ground of appeal is that the learned Judge erred when he found and held that *"the chieftdom was founded by Ponde Uutamfya, inarguably recognised as the 1st Chief Chiundaponde. There is no dispute as to the genealogy of Chiundaponde Chiefs from 1st Chief Ponde Uutamfya to 8th Chief, Mando Chileyia alias Kantu."*
- 7.3 We have carefully perused through the record of appeal, and in particular, the evidence presented by the respondent appearing at pages 229 – 234, and the evidence presented by the 2nd appellant appearing at pages 278 to 285. The dispute in this matter begins with the designation of the 9th Chief

Chiundaponde, Nathan Kabamba Mpempa as an acting chief. Whilst the 2nd appellant's knowledge of the 1st to 4th chiefs was uncertain, he did not in his testimony dispute that they reigned as such. In a sense this ground of appeal is defeated by the fifth ground of appeal which clearly questions whether the 9th chief was a caretaker or acting chief. Therein lies the dispute.

7.4 We are of the view that the learned Judge's finding was based on the evidence as presented. There is no basis for this Court to interfere with this finding of fact as it is not perverse or based on a misapprehension of the facts. The case of ***Wilson Masauso Zulu v Avondale Housing Project*** *supra* refers. Ground one is bound to fail for lack of merit.

7.5 The contention by the appellants in the second, third and fourth grounds relate to the 1st appellant's role at the meeting of 28th February, 2017, the reason he left the meeting, and his status in relation to Chiundaponde. The starting point in considering these grounds is the lower court's finding at page 61 of the record of appeal (page J54 of the Judgment). The learned Judge found as follows:

"It is evident from the evidence adduced that Bisa chiefdoms and traditions do not have a central authority, that is to say, Bisa Chiefs are distinctively independent of one another in terms of exercising territorial jurisdiction in their respective chiefly offices, but also interdependent on each and one another to co-exist as a tribe, because they share the same culture, customs and traditions. In fact, Senior Chief Kopa was

magnanimous to admit that under Bisa traditions and customs, there is no paramount chief. To me this also implies that Senior Chief Kopa cannot exercise authority over other chiefdoms ruled by his peers, Bisa Chiefs, unless otherwise so permitted to perform certain traditional acts especially if there was a vacancy to a chiefly office in one of the chiefdoms. It is for this reason that, at a meeting held on November 20, 2014, in an attempt to find a successor, Senior Chief Kopa, was chased from Chiundaponde with stones, when the gathering at Chiundaponde found his continued presence at the said meeting to be inimical to the chiefdom and the chieftaincy in particular. Otherwise if he was supreme, he would have stamped his supremacy."

- 7.6 Firstly, the learned Judge took into account the 1st appellant's (DW1) own evidence that he played the role of being a coordinator in the chief's selection, and that his role was not to choose a chief. He stated that his role was merely to present a successor to the people once one had been chosen by the royal family's electoral college. His testimony from pages 273 to 274 refers.
- 7.7 Secondly, there was evidence on record from Pastor Charles Mubanga (PW3) to the effect that the 1st appellant organized a meeting in Mpika where all the Bisa chiefs were invited under the name of the Supreme Council, which according to him, did not exist. He told the court that a scheme was hatched to dethrone the 10th Chief Chiundaponde. He explained his use of the word 'dethrone' because at the meeting he witnessed celebrations in favour of what he termed the 'Kabamba Mpempa camp.' During the said meeting, PW3 confronted the

1st appellant for causing confusion by promising both camps the throne. The 1st appellant never denied the accusations. Under cross-examination, PW3 repeated the encounters he had with the 1st appellant, who said he was dishonest.

- 7.8 From the evidence on record, the findings of the learned trial Judge were not farfetched. We are guided by the Supreme Court in the case of ***Attorney-General v Kakoma***⁷ where it held as follows:

“A court is entitled to make a finding of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it, having seen and heard the witnesses giving that evidence.”

- 8.9 In the instant case, the trial Judge having heard the witnesses was persuaded, on a balance of probabilities that the respondent had proved his case to the effect that the 1st appellant was at the centre of the storm against his ascendancy to the throne of Chiundaponde. Grounds two, three and four are bound to fail for lack of merit.
- 8.10 In ground five, the appellants’ contention is the learned Judge’s holding that the 9th Chief Chiundaponde was a caretaker chief with personal honours. The learned Judge in coming to his conclusion accepted the testimony of the 1st appellant when he stated at page 62 of the record of appeal (page J55) as follows:

“I agree with Senior Chief Kopa that, the nomenclature, “caretaker chief” or “acting chief” are synonymous. However, a caretaker chief or indeed an acting chief as

discerned from the evidence, in particular to the testimonies of PW2 and PW6, the term falls into two categories, first, an interim caretaker to oversee the transition period for a period of one year or so and pass on the mantle of leadership to a substantive chief. Second, a caretaker chief with all the traits of a substantive chief and can rule for life, save upon his demise, he cannot pass his inheritance to his direct blood relations such as his brothers, maternal nephews or grandnephews from his nieces."

8.11 The lower court's finding that the 9th Chiundaponde was a caretaker chief was not a term that it coined. It was based on the evidence of witnesses including PW2, who himself was an acting chief. He told the court that he met the 1st appellant at Mama Kankasa's home where he found the succession disputes in Chibesakunda and Chiundaponde chiefdoms being discussed. He said he learnt from the 1st appellant that he was informed by the ailing 9th Chiundaponde that the chieftaincy at Chiundaponde did not belong to him but to the family of Lambalika (PW6).

8.12 PW6 equally narrated to the court that the 9th Chief Chiundaponde was a caretaker and gave a historical account of why he was termed so.

8.13 From the testimony on record, the learned trial Judge opined that the caretaker chief and/or the acting chief is one and the same thing though it falls into two categories. One is for a short period as in the case of PW2, who facilitated the selection of the substantive chief, and thereafter ceased to be a caretaker chief. The other is as in the circumstances that

befell the 9th Chiundaponde, who was given to reign his lifetime as there was neither a suitable nor available individual at the time the previous chief died.

8.14 We uphold the lower court's findings. We refer to the case of ***Attorney-General v Marcus Kampumba Achiume***⁸ where the Supreme Court held that an appellate court cannot reverse findings of fact unless they were made in the absence of any relevant evidence or upon a misapprehension of facts or if the said findings were made without any evidence. Ground five is bound to fail.

8.15 The sixth and eight grounds of appeal amount to questioning whether PW2 as the acting chief had the authority to convene the meeting and whether the selection of the respondent was done in accordance with Bisa customs and traditions. There is ample evidence on record which we find not in dispute on the custom to be followed on the selection of a chief. What we find vexing in this appeal, is not that Bisa custom or traditions were not followed, but that the rightful heir did not ascend to the throne.

8.16 We begin with the 1st appellant's own evidence. In his testimony he told the lower court that following the demise of the 9th Chief Chiundaponde, a time came to select the caretaker chief. He narrated that the ones with the authority to choose a caretaker chief were the family of the deceased Chief. The electoral college comprising the female relatives of the deceased chief informed him that they had picked Newton

Ng'uni (PW2). His evidence is at page 273 of the record of appeal.

8.17 PW2 told the lower court that he was chosen as the acting chief on 16th November, 2013 at a meeting convened by the 1st appellant, at which members of the royal family comprised the electoral college.

8.18 In essence there is no dispute that Bisa custom was adhered to in the selection of the acting chief. The dispute arose when the 2nd appellant purported to remove PW2 from the position of acting chief. The learned Judge had this to say:

“The purported removal of the Acting Chief by the Nathan Kabamba Mpempa camp to the exclusion of the Mando Chileya Kantu camp, was untenable: not only not supported by custom or tradition, it was also repugnant to natural justice. I am therefore, satisfied that the Acting Chief had the authority to convene the meeting held on December 20, 2014 to select the 10th Chief Chiundaponde, at which the plaintiff was selected, unveiled or presented to the chiefdom by his counterpart, Chief Nabwalya.”

8.19 We have elsewhere in this judgment discussed the role as found to be fulfilled by a caretaker chief. In this case, PW2's role was said to be one that was interim. It is a fact that once the electoral college had made their choice, the caretaker's role ceased, as a substantive chief had ascended to the throne.

8.20 We take the view that the learned trial Judge's findings were based on the evidence on record that PW2 had the authority to convene the meeting held on 20th December, 2014 and that the selection of the 10th Chief Chiundaponde was done in

conformity with Bisa customs and traditions. We find no merit in grounds six and eight. They are dismissed.

8.21 Under ground five, we dealt with PW2's evidence that he learned that the 9th Chief Chiundaponde had informed the 1st appellant when the latter visited him in hospital that the chieftaincy of Chiundaponde did not belong to his family but to that of Lambalika.

8.22 PW2's testimony was corroborated by that of PW3 who narrated to the trial court that he received a call from the 1st appellant who was staying at Nsimbi Yanga Lodge. He informed him he had something important to tell him. When he subsequently met the 1st appellant, he told PW3 that the 9th Chief Chiundaponde informed him that if the throne was his, he would leave it to Mupeta Muwowo, but it belonged to Lambalika.

8.23 Further, PW5, for all intents and purposes was the deceased's assistant. He told the court he was the 9th Chief's representative. His duties included assisting the chief at meetings and other activities or anything incidental to the chief's duties. He said when the chief was unwell, he would preside over disputes brought to the chief's palace.

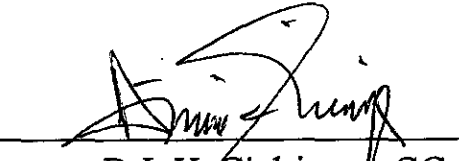
8.24 His evidence was that he struggled to find the courage to ask the ailing chief about the succession. When he found the courage, he asked the chief, in the presence of his wife, Bana Kabila, what his last words to him were. He said the chief informed him that if the chieftaincy was his he would have left it

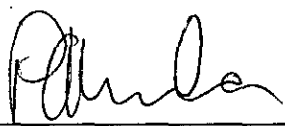
to his grandson, Mupeta Muwowo, born from his niece. He said the chief said the chieftdom should revert to the owners. Page 262 of the record of appeal refers.


8.25 Given the testimony of the 1st appellant, PW2, PW3 and PW5 on the succession of the Chiundaponde chieftdom or and what they learnt from the ailing chief regarding his successor, we cannot fault the learned trial Judge on the holding that the 9th Chief Chiundaponde, Nathan Kabamba Mpempa, was sincerely forthright that the throne was non-inheritable by his direct nephews, or grandnephews because the throne did not belong to him but to the family of Lambalika (PW6). Ground seven must equally fail.

9.0 Conclusion

9.1 In the net result, we find no merit in this appeal. We uphold the judgment of the lower court. The appeal is dismissed with costs to the respondent to be taxed, in default of agreement.


D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE


P.C.M. Ngulube
COURT OF APPEAL JUDGE


A.M. Banda-Bobo
COURT OF APPEAL JUDGE