

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 4149/09
In the matter
between:

**CH
IEF
MK**

**HUDLAMINI
M APPLICANT
BI
AND**

JUDGMENT

[1] The Applicant who deposes to the founding affidavit in these proceedings alleges to be a Chief of a place called Nkiliji. He approaches this court seeking the following orders:-

1.1 Dispensing with the form, time limits and manner of service provided for in the Rules of this Honourable Court and granting leave for this application to be made as one of urgency.

1.2 Condoning the Applicant for non-compliance with the Rules.

1.3 Granting a rule nisi calling upon the Respondents to show cause on a date to be determined by this Honourable Court why an order in the following terms should not be made final.

1.3.1 Interdicting and restraining the 1st Respondent and any other person acting on the authority of 1st Respondent from burying the deceased Sikelela Clement Dlamini at any other place instead of the cemetery demarcated by the community being "Emathuneni KaZwane";

1.3.2 Ordering and authorising the 2nd Respondent or

any member of the Royal Swaziland Police to ensure that the Order is effectively complied with and assist in the service of the said Order and application.

That the Applicant be granted leave to announce through the Swaziland Broadcasting and Information the granting of this Order.

37.4 Paragraph 3.1 to 3.3 to operate with immediate effect pending the finalization of this application.

37.5 Costs of this application.

37.6 Further and alternative relief.

The applicant's case as revealed by the papers before Court is that he is the lawful Chief of Nkiliji a position he claims to have assumed in 1991 when he says he was appointed as such in accordance with Swazi Law and Custom. He says he assumed this position as a Successor to his late father Sigujana who was chief of the area. As proof of such appointment he attaches to his founding affidavit a letter of such appointment, Annexure AG1, signed by the Ingwenyama.

He claims that in exercise of his powers drawn from the Swazi

Administration Act of 1950, which he claims are to administer and maintain order and good governance among Swazis residing in his Chiefdom, it was decided sometime around year 2000 that all burials in the said chiefdom be carried out at a demarcated area called "Emathuneni KaZwane" or KaZwane burial site. He goes on to say that whereas this Order has been complied with by all the members of his chiefdom, the Respondent, who he claims to be also one of such subjects, has continuously defied the said Order with contempt from

inception and continues to conduct burials at different areas within his chiefdom.

[4] On or about the 18th November 2009, he avers that he learnt through an advert appearing on the Death Notices Section of the Times of Swaziland that one of the residents of his chiefdom had died on the 17th November 2009 and was to be buried on the 22nd November 2009, not at "Emathuneni KaZwane" (KaZwane Burial site) but at a place identified as Ebutfongweni homestead or Umphakatsi. A caption of the said Times of Swaziland newspaper is annexed to his founding affidavit as annexure AG4. He argues that there is no umphakatsi known as Ebutfongweni in the area concerned and avers that the only umphakatsi in the said area is the Nkiliji one of which Ebutfongweni is a part of and of which he is the lawful chief.

[5] In fact to quote his exact words in paragraphs 6 and 6.1 of the founding affidavit he says:-

"I am the lawful chief of Nkiliji having been appointed as such in 1991 according to Swazi Law and Custom. I beg leave to annex "AG1" being a copy of such appointment.

6.2 There is no dispute over my authority as chief of Nkiliji and Ebutfongweni as in the 1990's the Liqoqo, then known as the Swazi National Council delineated the boundaries of Nkiliji, and neighbouring chiefdoms. Liqoqo ruled that all people whose homesteads are on the other side of Ndlelakayomi are within Nkiliji and are subjects of Nkiliji chiefdom. I beg leave to (sic) annexed "AG2" and "AG3" being the ruling of the Liqoqo and an affidavit of Samuel Mkhombe the then Secretary.

I comment in passing that in her opposing affidavit 1st Respondent did not deal specifically and in depth with this factual contention of the Applicant, contenting herself with a general denial that Ebutfongweni is not a part of eNjiliji. She for instance does not say why the order "AG2" and the contents of the affidavit of Samuel Mkhombe do not apply to Ebutfongweni including setting out the boundaries of Ebutfongweni and being its exempt from the Ingwenyama's order or decision.

Otherwise the Ingwenyama's decision (contained in the letter heads from the Kings office) as allegedly communicated by the then Swazi National Council Standing Committee provided as folio ws:-

4th November 1999.

To: The Princes of

Nyakeni,

Nkiliji

Bhekinkhosi

KING'S RULING ON THE STATUS OF NGWAZINI I have been commanded to confirm to you all, in writing, that His Majesty King Mswati III ruled in the matter of the status of the area known as Ngwazini. The said King's ruling was made and delivered to all parties concerned in the year, 1997.

In his judgment, the King - in - Council ruled that Ngwazini has always been and so remains a part of Nyakeni. The long established and well known boundaries between the areas concerned are as follows :-

37.7 between Nyakeni and Bhekinkhosi the boundary is the river Mahosha

37.8 between Nkiliji and Nyakeni and Bhekinkhosi

the boundary is Ndlelakayomi.

His Majesty King Mswati III, in his ruling confirmed the above boundaries.

Yours truly,

Signed:

PRINCE _____ TFQHLQNGWANA

CHAIRMAN - SNSC

Paragraphs 3.3 and 3.4 of the affidavit of the then Secretary to the Swazi National Council Standing Committee (SNSC) Samuel Mkhombe, who states the following:-

"3.3. Relevant to the present issue, the essence of the decision was that the lands immediately situated and the (Swazi) persons residing on the one side of Ndlekayomi belong to the chiefdom of Nkiliji under the jurisdiction of Mkhumbi.

3.4 I am informed and verily believe that this is true that the

area known as Ebutfongweni falls on the side of Ndlelakayomi which was determined to be under the Chiefdom of Nkiliji."

It is important to note that these paragraphs do not only clarify the extent of the ruling but also clarify that Ebutfongweni is one of the lands immediately situate on the one side of Ndlelakayomi (which) "belong to the Chiefdom of Nkiliji under the jurisdiction of Mkhumbi." It is further important that the contrary does not appear to have been asserted anywhere in the opposing papers.

The Applicant claims that the person responsible for the defiance of his instructions or resolutions of his chiefdom vis-a-vis the burial in one common cemetery, is the 1st Respondent and those who act at her behest or in cahoots with her. He avers that by so doing the 1st Respondent is undermining or defying his authority in the area.

He claims that his community is outraged and shocked at the Respondent's continuous defiance of his authority and that such defiance is only brewing communal hatred which will culminate in the disturbance of peace something he is

understood to be saying he is duty-bound to guard against.

He contends that if the 1st Respondent proceeds with the burial as planned he stands to suffer an irreparable harm in that a bad precedent will be created and a culture of defiance which will result in serious disorder in the community will ensue. He further alleges that if the intended burial proceeds as planned by the 1st Respondent there might be serious disorder as some members of his community have threatened to stop it. He avers that he has no other alternative but to approach this court for the orders prayed for.

It is significant for me to state at this stage that in trying to bolster his argument that there is no umphakatsi known as Ebutfongweni umphakatsi, the applicant claims that the said area is a part of Nkiliji because it falls on what way back in 1999 was demarcated by the Ingwenyama through the then Swazi National Council Standing Committee as part of Nkiliji; which is to say it is on the Nkiliji side of the boundary set as Ndlelakayomi river. In this regard he is confirming what was stated by Mr. Samuel Mkhombe in his affidavit as quoted above.

As I understand him, he avers that although this decision was

not deciding a dispute between Ebutfongweni and Nkiliji, but one between Nkiliji, Nyakeni and Bhekinkosi areas its effect was that all land and persons on the Nkiliji side of Ndlelakayomi river belong to the Chiefdom of Nkiliji. He is again supported in this contention by Samuel Mkhombe in terms of the paragraphs of his affidavit referred to above.

I must say at this stage that I find the assertions by Mr. Mkhombe in his affidavit to be depicting the true meaning and effect of the decision recorded in annexure AG2 to the founding affidavit.

[13] The Applicant's application is opposed by the 1st Respondent who has deposed to the Answering Affidavit. Her case as discerned from the papers is to allege in *limine* that the Applicant's application does not disclose a cause of action against her as it was not alleged therein that she was the person responsible for the burial of the deceased or that she was head of the family to which the deceased belonged. She contended that as a mere sister to the deceased she was advised that the application has not met the requirements of a final interdict and therefore the matter ought to be dismissed with costs.

[14] In the merits of the application she does not dispute that Applicant is a Chief of Nkiliji. She however disputes that Ebutfongweni is part of Nkiliji through making a bald and bare assertion without dealing specifically with the contrary averments by the applicant and Mr. Mkhombe, particularly on where this Ebutfongweni is situate vis-a-vis Ndlelakayomi, and where she contends the boundary between the said area and Nkiliji is particularly in light that of the contention it is one of the lands immediately situated on the Nkiliji side of Ndlelakayomi river. She also disputes that the said Ebutfongweni area is under the chieftainship of the applicant as she avers that the said Ebutfongweni is an area under Chief Nkosini Dlamini.

[15] She contends that Applicant has always been aware of this dispute which she claims has formed part of several cases that came before this court. She says that at present the same dispute is currently pending before the Ingwenyama's Advisory Council, Liqoqo which according to her did not make a final decision on the dispute between Ebutfongweni and Nkiliji areas. She does not however clarify what was happening in 1997 or 1999, that made the boundaries between Ebutfongweni and Nkiliji not be detailed together with the other boundaries when

considering her contention such a dispute is also long standing. It must be recorded tht there exists a dispute as to whether or not the Liqoqo did not determine the dispute, given the contention by applicant in his Replying Affidavit that Liqoqo decided the matter by confirming the position as expressed in the annexure AG2, the written ruling on the boundary disputes concerned.

She contends or claims further that the letter/decision relied upon by the applicant, annexure AG2 to the founding affidavit does not support the Applicant's case as it does not say *ex facie* itself that the land and persons on the Nkiliji side of Ndlelakayomi river belong to Nkiliji chiefdom.

[17] She does not dispute that a decision was taken by the Nkiliji umphakatsi on where burials in the Nkiliji area ought to be conducted. She says such a decision does not bind Ebutfongweni area.

[18] She claims that her late brother Sikelela Dlamini was not a resident of Nkiliji but Ebutfongweni and as I understand her, she is saying they had no duty reporting his death to the Nkiliji umphakatsi as according to her all the appropriate authorities were reported to and all approved the decision. She does not disclose however, who such

authorities are.

She therefore claims that the Applicant's application be dismissed with costs.

[19] At the commencement of the hearing it was agreed that the point in *limine* be argued jointly with the merits of the matter and that whether the court eventually decides the matter in the merits or on the points in *limine* be left to it.

[20] I find it apposite at this stage to deal with the point in *limine* as I understood it and as it was argued before me. The said point was, as stated above, that the Applicant's papers do not disclose a cause of action as according to the allegations, the 1st Respondent has not been said to be the person responsible for the burial of the deceased or that she was head of the family.

The caption of the Times of Swaziland annexed to the founding affidavit as annexure AG4 states that the said notice or announcement was made by the 1st Respondent. I therefore fail to find merit in the point concerned particularly when considering that the 1st Respondent does not dissociate herself from the issuing of the notice or announcement nor even from the decision to

continue with the burial of the deceased, whom she says is her brother, at Ebutfongweni which the application is aimed at stopping. For this reason I dismiss the point in *limine* raised as in my view the papers clearly establish why she has had to be cited including the interest she has in the matter.

As concerns the merits of the matter I have noted the following common course or indisputable issues between the parties:

37.9 That the Applicant is the Chief of Nkiliji area.

37.10 That there now exist a policy at Nkiliji area that all burials be conducted at a centralized cemetery known as "Emathuneni KaZwane" (KaZwane Burial site).

37.11 That Ebutfongweni is on the Nkiliji side of Ndlelakayomi river and is one of the lands said to be immediately situated at or on the Nkiliji side of Ndlelakayomi river.

37.12 That sometime back (that is in 1997 or 1999) the Ingwenyama decided that the boundary between Nkiliji on the one side and Bhekinkhosi and Nyakeni on the other was Ndlelakayomi river.

21.5 The decision on the boundary if any or if there is need for one, between Nkiliji and Ebutfongweni, has not been availed to the court in these proceedings and no allegations have been made that any such known boundary exists.

During the hearing of the matter I directed a question to both counsel on whether or not this court does have jurisdiction to hear this matter in view of the provisions of Section 151 (8) read together with Sections (11) and 228 (2) of the Constitution which provides as follows:-

"Section 151 provides as follows:- (8)

"Notwithstanding Subsection (1), the High Court has no original or appellate jurisdiction in matters relating to the office of Ingwenyama; the office of Indvovukazi (the Queen Mother); the authorization of a person to perform the functions of Regent in terms of Section 8; the appointment, revocation and suspension of a chief; the composition of the Swazi National Council, the appointment and revocation of appointment of the Council and the procedure of the council; and the Libutfo (regimental) system, which matters shall continue to be

governed by Swazi Law and Custom."

Section 11 provides as follows:- "The King and Ingwenyama shall be immune from -

37.13 suit or legal process in any cause in respect of all things done or omitted to be done by him; and

37.14 being summoned to appear as a witness in any civil or criminal proceeding."

Section 228 (2) provides as follows:- "Ingwenyama enjoys the same legal protection and immunity from legal suit or process as the King."

Counsels' reaction differed on the question. Applicant's Counsel submitted that this court does have such jurisdiction. He sought to distinguish this case from that where a decision of the Ingwenyama was being challenged as opposed to this one where a right that ensued from such a decision was being enforced at the instance of the person benefiting from such a decision. He contended it was in a case where the decision of the Ingwenyama was being challenged that this court would not have such jurisdiction as it can neither review nor sit on an appellate position over such a decision. He contended that in

the circumstances of this matter this Court does have jurisdiction.

On the other hand Counsel for the Respondent submitted that this court does not have jurisdiction in light of the said sections and submitted that the application ought to be dismissed for lack of such jurisdiction.

I have no doubt that if for instance this court was being asked to review or correct or amend the Ingwenyama's decision or even to comment on its propriety or to even sit on an appellate position, to such a decision, this Court would have no jurisdiction.

[25] The question becomes, is a beneficiary of a right created by the Ingwenyama's decision to be prevented from enforcing such a right before this Court? I think not. I believe that if the Ingwenyama's decision or order bestows a right on a person, this court should be in a position to protect such a right like any other right, provided it does not go beyond accepting the existence of such a right.

[26] It seems to me that there is no reason why the applicant

should not be allowed to approach this court for an interdict where in his view; a right arising from the Ingwenyama's decision is being unlawfully eroded.

[27] I am convinced that as this application does not seek to question or challenge the decision of the Ingwenyama, but merely to protect what the applicant claims is a right ensuing from the said decision, this court does have jurisdiction, to entertain such an application and this is my ruling on that point.

[28] Having come to this conclusion, the next consideration is whether this court can accede to the applicant's request to grant the interdict prayed for; put differently has a case been made for the interdict sought?

[29] The position is now settled that for a party to successfully apply for a final interdict, such a party ought to establish a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy. See in this regard Van Winsen and others; The Civil Practice of the Supreme Court of South Africa; 4th Edition, at page 1064 - 1065.

[30] I note that the scope of the interdict sought in terms of the Notice of Motion is in my view cast rather too wide when considering that the applicant seeks an order of this court that interdicts or restrains the 1st Respondent or any other person acting at her behest from burying the late Sikelela Clement Dlamini at any other place instead of the cemetery demarcated as "Emathuneni KaZwane".

It has not been shown why it is of interest to the applicant that the deceased be not buried anywhere else in Swaziland except at Emathuneni kaZwane. Put differently what prejudice does he suffer or even what interest does he have if the deceased is buried anywhere else in the country and not at the Nkiliji burial site. It seems to me from the averments in the applicant's papers that a proper prayer is to seek to interdict the first Respondent from burying the deceased anywhere else within what will be termed as the Nkiliji area from the applicant's view point as opposed to doing so at "Emathuneni KaZwane." If the burial is meant to happen elsewhere in Swaziland than at what Applicant calls Nkiliji area, there are no averments made to justify an order by this Court stopping such burial and I clarify that this Court would not grant such an order on these papers. The casting of the

prayer, in such wide terms has been ruled by the Supreme Court in a similar matter to be a basis for the refusal to award costs in a matter where a party had succeeded but for such a widely stated prayer. See in this regard:- The Editor Times Sunday and others vs Sean Myzoe Magagula Civil Appeal Case No. 31/05.

It must be clarified that in terms of the Constitution, this court would have no power to determine chiefdom boundaries, just as it will have no power to determine who the chief of what area is as these are matters best left for the appropriate structures empowered in the country's laws to do so. Consequently, this court will not attempt to determine the question whether or not there is an umphakatsi called Ebutfongweni nor will it attempt to determine whether or not that area has a separate chief to the one in charge of Nkiliji area. All these matters have appropriate structures to decide them and they are best left to them.

As stated above I am only required to decide whether a case has been made for the reliefs sought, that is the interdiction of the burial of the late Sikelela Clement Dlamini at the place the First Respondent contends is called Ebutfongweni as opposed to the Nkiliji Burial site at KaZwane, where it is alleged members of the Nkiliji community are buried.

As indicated above it is common course that there currently exists a decision of the Ingwenyama to the effect that all the land on the Nkiliji side of Ndlekayomi river is under the Nkiliji umphakatsi which is under the jurisdiction of the Applicant as chief. As this decision still stands, this court will have no basis for the refusal to grant applicant the interdict prayed for, when considering the right he has asserted ensuing from the Ingwenyama's decision, the harm he stands to suffer if this order is not granted and the absence of another remedy.

Whereas it was argued on behalf of the Respondent that an interdict cannot be granted where there is a dispute of fact it is my considered view that it cannot be seriously contended that there is such a dispute in light of the Ingwenyama's decision referred to above, which does not equivocal on the point in issue.

It is for the Respondent to pursue the issue of the chieftaincy boundaries with the appropriate authorities for a different decision to be reached by the appropriate structures. This court is can only decide a matter on the material placed before it.

Consequently I make the following order:-

37.1 The Respondent and those acting at her behest be and are hereby interdicted from burying the deceased Sikelela Clement Dlamini at any other place within the Nkiliji area as determined in the Ingwenyama's decision expressed in annexure "AG2", read together with the affidavit of Samuel Mkhombe, other than at the cemetery demarcated as "Emathuneni KaZwane."

37.15 The Respondent and those acting at her behest are however at liberty to bury the deceased at any other place where they can lawfully do so in Swaziland.

37.16 The Royal Swaziland Police be and are hereby directed to ensure that this order is given effect to and is complied with.

37.17 The prayer authorising the applicant to announce the burial of the deceased through the Swaziland Broadcasting and Information be and is hereby refused.

37.18 Each party is to bear its own costs.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE
22 DAY OF DECEMBER, 2009.**